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**GUIDELINES ON INTERNATIONAL PROTECTION:  
Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or  
1967 Protocol relating to the Status of Refugees**

UNHCR issues these Guidelines pursuant to its mandate, as contained in the *Statute of the Office of the United Nations High Commissioner for Refugees*, in conjunction with Article 35 of the *1951 Convention relating to the Status of Refugees* and Article II of its *1967 Protocol*. These Guidelines complement the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (Reedited, Geneva, January 1992)*.

These Guidelines are intended to provide legal interpretative guidance for governments, legal practitioners, decision makers and the judiciary, as well as UNHCR staff carrying out refugee status determination in the field.

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# Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees

## I. INTRODUCTION

1. These Guidelines offer substantive and procedural guidance on carrying out refugee status determination in a child-sensitive manner. They highlight the specific rights and protection needs of children in asylum procedures. Although the definition of a refugee contained in Article 1(A)2 of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (hereafter “1951 Convention” and “1967 Protocol”) applies to all individuals regardless of their age, it has traditionally been interpreted in light of adult experiences. This has meant that many refugee claims made by children have been assessed incorrectly or overlooked altogether.<sup>1</sup>

2. The specific circumstances facing child asylum-seekers as individuals with independent claims to refugee status are not generally well understood. Children may be perceived as part of a family unit rather than as individuals with their own rights and interests. This is explained partly by the subordinate roles, positions and status children still hold in many societies worldwide. The accounts of children are more likely to be examined individually when the children are unaccompanied than when they are accompanied by their families. Even so, their unique experiences of persecution, due to factors such as their age, their level of maturity and development and their dependency on adults have not always been taken into account. Children may not be able to articulate their claims to refugee status in the same way as adults and, therefore, may require special assistance to do so.

3. Global awareness about violence, abuse and discrimination experienced by children is growing,<sup>2</sup> as is reflected in the development of international and regional human rights standards. While these developments have yet to be fully incorporated into refugee status determination processes, many national asylum authorities are increasingly acknowledging that children may have refugee claims in their own right. In *Conclusion on Children at Risk* (2007), UNHCR’s Executive Committee underlines the need for children to be recognized as “active subjects of rights” consistent with international law. The Executive Committee also recognized that children may experience child-specific forms and manifestations of persecution.<sup>3</sup>

4. Adopting a child-sensitive interpretation of the 1951 Convention does not mean, of course, that child asylum-seekers are automatically entitled to refugee status. The

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<sup>1</sup> UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, Geneva, 1997 (hereafter “UNHCR, *Guidelines on Unaccompanied Children Seeking Asylum*”), <http://www.unhcr.org/refworld/docid/3ae6b3360.html>, in particular Part 8.

<sup>2</sup> See, for instance, UN General Assembly, Rights of the Child: Note by the Secretary-General, A/61/299, 29 Aug. 2006 (hereafter “UN study on violence against children”) <http://www.unhcr.org/refworld/docid/453780fe0.html>; UN Commission on the Status of Women, The elimination of all forms of discrimination and violence against the girl child, E/CN.6/2007/2, 12 Dec. 2006, <http://www.unhcr.org/refworld/docid/46c5b30c0.html>; UN General Assembly, Impact of armed conflict on children: Note by the Secretary-General (the “Machel Study”), A/51/306, 26 Aug. 1996, <http://www.unhcr.org/refworld/docid/3b00f2d30.html>, and the strategic review marking the 10 year anniversary of the Machel Study, UN General Assembly, Report of the Special Representative of the Secretary-General for Children and Armed Conflict, A/62/228, 13 Aug. 2007, <http://www.unhcr.org/refworld/docid/47316f602.html>.

<sup>3</sup> ExCom, *Conclusion on Children at Risk*, 5 Oct. 2007, No. 107 (LVIII) - 2007, (hereafter “ExCom, *Conclusion No. 107*”), <http://www.unhcr.org/refworld/docid/471897232.html>, para. (b)(x)(viii).

child applicant must establish that s/he has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. As with gender, age is relevant to the entire refugee definition.<sup>4</sup> As noted by the UN Committee on the Rights of the Child, the refugee definition:

*... must be interpreted in an age and gender-sensitive manner, taking into account the particular motives for, and forms and manifestations of, persecution experienced by children. Persecution of kin; under-age recruitment; trafficking of children for prostitution; and sexual exploitation or subjection to female genital mutilation, are some of the child-specific forms and manifestations of persecution which may justify the granting of refugee status if such acts are related to one of the 1951 Refugee Convention grounds. States should, therefore, give utmost attention to such child-specific forms and manifestations of persecution as well as gender-based violence in national refugee status-determination procedures.*<sup>5</sup>

Alongside age, factors such as rights specific to children, a child's stage of development, knowledge and/or memory of conditions in the country of origin, and vulnerability, also need to be considered to ensure an appropriate application of the eligibility criteria for refugee status.<sup>6</sup>

5. A child-sensitive application of the refugee definition would be consistent with the 1989 Convention on the Rights of the Child (hereafter "the CRC").<sup>7</sup> The Committee on the Rights of the Child has identified the following four Articles of the CRC as general principles for its implementation:<sup>8</sup> *Article 2*: the obligation of States to respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind;<sup>9</sup> *Article 3 (1)*: the best interests of the child as a primary consideration in all actions concerning children;<sup>10</sup> *Article 6*: the child's inherent right to life and States parties' obligation to ensure to the maximum extent possible the survival and development of the child;<sup>11</sup> and *Article 12*: the child's right to express his/her views freely regarding "all matters affecting the child", and that those views be given due weight.<sup>12</sup> These principles inform both the substantive and the procedural

<sup>4</sup> UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002 (hereafter "UNHCR, *Guidelines on Gender-Related Persecution*"), <http://www.unhcr.org/refworld/docid/3d36f1c64.html>, paras. 2, 4.

<sup>5</sup> UN Committee on the Rights of the Child, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, CRC/GC/2005/6, Sep. 2005 (hereafter "CRC, *General Comment No. 6*"), <http://www.unhcr.org/refworld/docid/42dd174b4.html>, para. 74.

<sup>6</sup> UNHCR, *Guidelines on Unaccompanied Children Seeking Asylum*, *op cit.*, page 10.

<sup>7</sup> With a near universal ratification, the CRC is the most widely ratified human rights treaty, available at <http://www.unhcr.org/refworld/docid/3ae6b38f0.html>. The rights contained therein apply to all children within the jurisdiction of the State. For a detailed analysis of the provisions of the CRC, see UNICEF, *Implementation Handbook for the Convention on the Rights of the Child*, fully revised third edition, Sep. 2007 (hereafter "UNICEF, *Implementation Handbook*"). It can be ordered at [http://www.unicef.org/publications/index\\_43110.html](http://www.unicef.org/publications/index_43110.html).

<sup>8</sup> CRC, *General Comment No. 5 (2003): General Measures of Implementation for the Convention on the Rights of the Child (Arts. 4, 42 and 44, Para. 6)*, CRC/GC/2003/5, 3 Oct. 2003 (hereafter "CRC, *General Comment No. 5*"), <http://www.unhcr.org/refworld/docid/4538834f11.html>, para. 12.

<sup>9</sup> CRC, *General Comment No. 6*, para. 18.

<sup>10</sup> *Ibid*, paras. 19–22. See also ExCom *Conclusion No. 107*, para. (b)(5), and, on how to conduct "best interests" assessments and determinations, UNHCR, *Guidelines on Determining the Best Interests of the Child*, Geneva, May 2008, <http://www.unhcr.org/refworld/docid/48480c342.html>.

<sup>11</sup> CRC, *General Comment No. 6*, paras. 23–24.

<sup>12</sup> *Ibid*, para. 25. See also CRC, *General Comment No. 12 (2009): The right of the child to be heard*, CRC/GC/12, 20 July 2009 (hereafter "CRC, *General Comment No. 12*"), <http://www.unhcr.org/refworld/docid/4ae562c52.html>.

aspects of the determination of a child's application for refugee status.

## II. DEFINITIONAL ISSUES

6. These guidelines cover all child asylum-seekers, including accompanied, unaccompanied and separated children, who may have individual claims to refugee status. Each child has the right to make an independent refugee claim, regardless of whether s/he is accompanied or unaccompanied. "Separated children" are children separated from both their parents or from their previous legal or customary primary caregivers but not necessarily from other relatives. In contrast, "unaccompanied children" are children who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.<sup>13</sup>

7. For the purposes of these Guidelines, "children" are defined as all persons below the age of 18 years.<sup>14</sup> Every person under 18 years who is the principal asylum applicant is entitled to child-sensitive procedural safeguards. Lowering the age of childhood or applying restrictive age assessment approaches in order to treat children as adults in asylum procedures may result in violations of their rights under international human rights law. Being young and vulnerable may make a person especially susceptible to persecution. Thus, there may be exceptional cases for which these guidelines are relevant even if the applicant is 18 years of age or slightly older. This may be particularly the case where persecution has hindered the applicant's development and his/her psychological maturity remains comparable to that of a child.<sup>15</sup>

8. Even at a young age, a child may still be considered the principal asylum applicant.<sup>16</sup> The parent, caregiver or other person representing the child will have to assume a greater role in making sure that all relevant aspects of the child's claim are presented.<sup>17</sup> However, the right of children to express their views in all matters

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<sup>13</sup> CRC, *General Comment No. 6*, paras. 7–8. See also, UNHCR, *Guidelines on Unaccompanied Children Seeking Asylum*, *op cit.*, p. 5, paras. 3.1-3.2. See also, UNHCR, UNICEF et al, *Inter-agency Guiding Principles on Unaccompanied and Separated Children*, Geneva, 2004 (hereafter "*Inter-Agency Guiding Principles*"), <http://www.unhcr.org/refworld/docid/4113abc14.html>, p. 13.

<sup>14</sup> CRC, Art. 1 provides that "a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier." In addition, the EU Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, 19 May 2004, 2004/83/EC, <http://www.unhcr.org/refworld/docid/4157e75e4.html>, provides that "'unaccompanied minors' means third-country nationals or stateless persons below the age of 18, who arrive on the territory of the Member States unaccompanied by an adult responsible for them whether by law or custom, and for as long as they are not effectively taken into the care of such a person; it includes minors who are left unaccompanied after they have entered the territory of the Member States", Art. 2 (i).

<sup>15</sup> The United Kingdom Immigration Appeals Tribunal (now the Asylum and Immigration Tribunal) has held that "[t]o adopt a rigidity however in this respect is in our view to fail to recognize that in many areas of the world even today exact ages and dates of birth are imprecise. It is better to err on the side of generosity"; *Sarjoy Jakitay v. Secretary of State for the Home Department*, Appeal No. 12658 (unreported), U.K. IAT, 15 Nov. 1995. See also, *Decision VA0-02635, VA0-02635*, Canada, Immigration and Refugee Board (hereafter "IRB"), 22 March 2001, <http://www.unhcr.org/refworld/docid/4b18dec82.html>.

<sup>16</sup> See, for instance, *Chen Shi Hai v. The Minister for Immigration and Multicultural Affairs*, [2000] HCA 19, Australia, High Court, 13 April 2000, <http://www.unhcr.org/refworld/docid/3ae6b6df4.html>. In this case, which concerned a 3 ½ year-old boy, it was found that "under Australian law, the child was entitled to have his own rights determined as that law provides. He is not for all purposes subsumed to the identity and legal rights of his parents", para. 78.

<sup>17</sup> See also UNHCR, *Refugee Children: Guidelines on Protection and Care*, Geneva, 1994, <http://www.unhcr.org/refworld/docid/3ae6b3470.html>, pp. 97–103.

affecting them, including to be heard in all judicial and administrative proceedings, also needs to be taken into account.<sup>18</sup> A child claimant, where accompanied by parents, members of an extended family or of the community who by law or custom are responsible for the child, is entitled to appropriate direction and guidance from them in the exercise of his/her rights, in a manner consistent with the evolving capacities of the child.<sup>19</sup> Where the child is the principal asylum-seeker, his/her age and, by implication, level of maturity, psychological development, and ability to articulate certain views or opinions will be an important factor in a decision maker's assessment.

9. Where the parents or the caregiver seek asylum based on a fear of persecution for their child, the child normally will be the principal applicant even when accompanied by his/her parents. In such cases, just as a child can derive refugee status from the recognition of a parent as a refugee, a parent can, *mutatis mutandis*, be granted derivative status based on his/her child's refugee status.<sup>20</sup> In situations where both the parent(s) and the child have their own claims to refugee status, it is preferable that each claim be assessed separately. The introduction of many of the procedural and evidentiary measures enumerated below in Part IV will enhance the visibility of children who perhaps ought to be the principal applicants within their families. Where the child's experiences, nevertheless, are considered part of the parent's claim rather than independently, it is important to consider the claim also from the child's point of view.<sup>21</sup>

### III. SUBSTANTIVE ANALYSIS

#### a) Well-founded fear of persecution

10. The term "persecution", though not expressly defined in the 1951 Convention, can be considered to involve serious human rights violations, including a threat to life or freedom, as well as other kinds of serious harm or intolerable situations as assessed with regard to the age, opinions, feelings and psychological make-up of the applicant.<sup>22</sup> Discrimination may amount to persecution in certain situations where the treatment feared or suffered leads to consequences of a substantially prejudicial nature for the child concerned.<sup>23</sup> The principle of the best interests of the child requires that the harm be assessed from the child's perspective. This may include an analysis as to how the child's rights or interests are, or will be, affected by the harm. Ill-treatment which may not rise to the level of persecution in the case of an adult may do so in the case of a

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<sup>18</sup> CRC, Art. 12(2); CRC, *General Comment No. 12*, paras. 32, 67, 123.

<sup>19</sup> CRC, Art. 5.

<sup>20</sup> UNHCR, *Guidance Note on Refugee Claims relating to Female Genital Mutilation*, May 2009 (hereafter "UNHCR, *Guidance Note on FGM*"), <http://www.unhcr.org/refworld/docid/4a0c28492.html>, para. 11. See also UNHCR, ExCom Conclusion on the Protection of the Refugee's Family, No. 88 (L), 1999, <http://www.unhcr.org/refworld/docid/3ae68c4340.html>, para. (b)(iii).

<sup>21</sup> See, for instance, *EM (Lebanon) (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)*, U.K. House of Lords, 22 Oct. 2008, <http://www.unhcr.org/refworld/docid/490058699.html>; *Refugee Appeal Nos. 76250 & 76251*, Nos. 76250 & 76251, New Zealand, Refugee Status Appeals Authority (hereafter "RSAA"), 1 Dec. 2008, <http://www.unhcr.org/refworld/docid/494f64952.html>.

<sup>22</sup> See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1979, re-edited, Geneva, Jan. 1992 (hereafter "UNHCR, *Handbook*") <http://www.unhcr.org/refworld/docid/3ae6b3314.html>, paras. 51–52; UNHCR, *Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked*, 7 Apr. 2006 (hereafter "UNHCR, *Guidelines on Victims of Trafficking*"), <http://www.unhcr.org/refworld/docid/443679fa4.html>, para. 14.

<sup>23</sup> UNHCR, *Handbook*, paras. 54–55.

child.<sup>24</sup>

11. Both objective and subjective factors are relevant to establish whether or not a child applicant has a well-founded fear of persecution.<sup>25</sup> An accurate assessment requires both an up-to-date analysis and knowledge of child-specific circumstances in the country of origin, including of existing child protection services. Dismissing a child's claim based on the assumption that perpetrators would not take a child's views seriously or consider them a real threat could be erroneous. It may be the case that a child is unable to express fear when this would be expected or, conversely, exaggerates the fear. In such circumstances, decision makers must make an objective assessment of the risk that the child would face, regardless of that child's fear.<sup>26</sup> This would require consideration of evidence from a wide array of sources, including child-specific country of origin information. When the parent or caregiver of a child has a well-founded fear of persecution for their child, it may be assumed that the child has such a fear, even if s/he does not express or feel that fear.<sup>27</sup>

12. Alongside age, other identity-based, economic and social characteristics of the child, such as family background, class, caste, health, education and income level, may increase the risk of harm, influence the type of persecutory conduct inflicted on the child and exacerbate the effect of the harm on the child. For example, children who are homeless, abandoned or otherwise without parental care may be at increased risk of sexual abuse and exploitation or of being recruited or used by an armed force/group or criminal gang. Street children, in particular, may be rounded up and detained in degrading conditions or be subjected to other forms of violence, including murder for the purpose of "social cleansing".<sup>28</sup> Children with disabilities may be denied specialist or routine medical treatment or be ostracized by their family or community. Children in what may be viewed as unconventional family situations including, for instance, those born out of wedlock, in violation of coercive family policies,<sup>29</sup> or through rape, may face abuse and severe discrimination. Pregnant girls may be rejected by their families and

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<sup>24</sup> See, for instance, United States Bureau of Citizenship and Immigration Services, *Guidelines For Children's Asylum Claims*, 10 Dec. 1998 (hereafter the "U.S. Guidelines for Children's Asylum Claims"), <http://www.unhcr.org/refworld/docid/3f8ec0574.html>, noting that "the harm a child fears or has suffered, however, may be relatively less than that of an adult and still qualify as persecution." See also, *Chen Shi Hai*, *op. cit.*, where the Court found that "what may possibly be viewed as acceptable enforcement of laws and programmes of general application in the case of the parents may nonetheless be persecution in the case of the child", para. 79.

<sup>25</sup> UNHCR, *Handbook*, paras. 40–43.

<sup>26</sup> See UNHCR, *Handbook*, paras. 217–219. See also *Yusuf v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 629; F.C.J. 1049, Canada, Federal Court, 24 Oct. 1991, <http://www.unhcr.org/refworld/docid/403e24e84.html>. The Court concluded that "I am loath to believe that a refugee status claim could be dismissed solely on the ground that as the claimant is a young child or a person suffering from a mental disability, s/he was incapable of experiencing fear the reasons for which clearly exist in objective terms.", at 5.

<sup>27</sup> See, for instance, *Canada (Minister of Citizenship and Immigration) v. Patel*, 2008 FC 747, [2009] 2 F.C.R. 196, Canada, Federal Court, 17 June 2008, <http://www.unhcr.org/refworld/docid/4a6438952.html>, at 32–33.

<sup>28</sup> "Social cleansing" refers to the process of removing an undesirable group from an area and may involve murder, disappearances, violence and other ill-treatment. See, UNICEF, *Implementation Handbook*, pp. 89, 91, 287. See also *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*, Inter-American Court of Human Rights (hereafter "IACtHR"), Judgment of 19 Nov. 1999, <http://www.unhcr.org/refworld/docid/4b17bc442.html>, paras. 190–191. The Court found that there was a prevailing pattern of violence against street children in Guatemala. Relying on the CRC to interpret Art. 19 of the 1969 American Convention on Human Rights, "Pact of San Jose", Costa Rica (hereafter "ACHR"), <http://www.unhcr.org/refworld/docid/3ae6b36510.html>, the Court noted that the State had violated their physical, mental, and moral integrity as well as their right to life and also failed to take any measures to prevent them from living in misery, thereby denying them of the minimum conditions for a dignified life.

<sup>29</sup> See further, UNHCR, *Note on Refugee Claims Based on Coercive Family Planning Laws or Policies*, Aug. 2005, <http://www.unhcr.org/refworld/docid/4301a9184.html>.

subject to harassment, violence, forced prostitution or other demeaning work.<sup>30</sup>

### **Child-specific rights**

13. A contemporary and child-sensitive understanding of persecution encompasses many types of human rights violations, including violations of child-specific rights. In determining the persecutory character of an act inflicted against a child, it is essential to analyse the standards of the CRC and other relevant international human rights instruments applicable to children.<sup>31</sup> Children are entitled to a range of child-specific rights set forth in the CRC which recognize their young age and dependency and are fundamental to their protection, development and survival. These rights include, but are not limited to, the following: the right not to be separated from parents (Article 9); protection from all forms of physical and mental violence, abuse, neglect, and exploitation (Article 19); protection from traditional practices prejudicial to the health of children (Article 24); a standard of living adequate for the child's development (Article 27); the right not to be detained or imprisoned unless as a measure of last resort (Article 37); and protection from under-age recruitment (Article 38). The CRC also recognizes the right of refugee children and children seeking refugee status to appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the CRC and in other international human rights or humanitarian instruments (Article 22).

14. Children's socio-economic needs are often more compelling than those of adults, particularly due to their dependency on adults and unique developmental needs. Deprivation of economic, social and cultural rights, thus, may be as relevant to the assessment of a child's claim as that of civil and political rights. It is important not to automatically attribute greater significance to certain violations than to others but to assess the overall impact of the harm on the individual child. The violation of one right often may expose the child to other abuses; for example, a denial of the right to education or an adequate standard of living may lead to a heightened risk of other forms of harm, including violence and abuse.<sup>32</sup> Moreover, there may be political, racial, gender or religious aims or intentions against a particular group of children or their parents underlying discriminatory measures in the access and enjoyment of ESC rights. As noted by the UN Committee on Economic, Social and Cultural Rights:

*The lack of educational opportunities for children often reinforces their subjection to various other human rights violations. For instance, children who may live in abject poverty and not lead healthy lives are particularly vulnerable to forced labour and other forms of exploitation. Moreover, there is a direct correlation between, for example, primary school enrolment levels for girls and major reductions in child marriages.<sup>33</sup>*

### **Child-related manifestations of persecution**

15. While children may face similar or identical forms of harm as adults, they may experience them differently. Actions or threats that might not reach the threshold of

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<sup>30</sup> UNHCR, *Guidelines on Gender-Related Persecution, op cit.*, para. 18.

<sup>31</sup> In the context of Africa, the African Charter on the Rights and Welfare of the Child should also be considered (hereafter "African Charter"), <http://www.unhcr.org/refworld/docid/3ae6b38c18.html>.

<sup>32</sup> CRC, *General Comment No. 5, op cit.*, paras. 6–7. See further below at v. Violations of economic, social and cultural rights.

<sup>33</sup> UN Committee on Economic, Social and Cultural Rights (hereafter "CESCR"), *General Comment No. 11: Plans of Action for Primary Education (Art. 14 of the Covenant)*, E/1992/23, 10 May 1999, <http://www.unhcr.org/refworld/docid/4538838c0.html>, para. 4.

persecution in the case of an adult may amount to persecution in the case of a child because of the mere fact that s/he is a child. Immaturity, vulnerability, undeveloped coping mechanisms and dependency as well as the differing stages of development and hindered capacities may be directly related to how a child experiences or fears harm.<sup>34</sup> Particularly in claims where the harm suffered or feared is more severe than mere harassment but less severe than a threat to life or freedom, the individual circumstances of the child, including his/her age, may be important factors in deciding whether the harm amounts to persecution. To assess accurately the severity of the acts and their impact on a child, it is necessary to examine the details of each case and to adapt the threshold for persecution to that particular child.

16. In the case of a child applicant, psychological harm may be a particularly relevant factor to consider. Children are more likely to be distressed by hostile situations, to believe improbable threats, or to be emotionally affected by unfamiliar circumstances. Memories of traumatic events may linger in a child and put him/her at heightened risk of future harm.

17. Children are also more sensitive to acts that target close relatives. Harm inflicted against members of the child's family can support a well-founded fear in the child. For example, a child who has witnessed violence against, or experienced the disappearance or killing of a parent or other person on whom the child depends, may have a well-founded fear of persecution even if the act was not targeted directly against him/her.<sup>35</sup> Under certain circumstances, for example, the forced separation of a child from his/her parents, due to discriminatory custody laws or the detention of the child's parent(s) could amount to persecution.<sup>36</sup>

### ***Child-specific forms of persecution***

18. Children may also be subjected to specific forms of persecution that are influenced by their age, lack of maturity or vulnerability. The fact that the refugee claimant is a child may be a central factor in the harm inflicted or feared. This may be because the alleged persecution only applies to, or disproportionately affects, children or because specific child rights may be infringed. UNHCR's Executive Committee has recognized that child-specific forms of persecution may include under-age recruitment, child trafficking and female genital mutilation (hereafter "FGM").<sup>37</sup> Other examples include, but are not limited to, family and domestic violence, forced or underage marriage,<sup>38</sup> bonded or hazardous child labour, forced labour,<sup>39</sup> forced prostitution and

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<sup>34</sup> See further Save the Children and UNICEF, *The evolving capacities of the child*, 2005, <http://www.unicef-irc.org/publications/pdf/evolving-eng.pdf>.

<sup>35</sup> See, for instance, *Cicek v. Turkey*, Application No. 67124/01, European Court of Human Rights (hereafter "ECtHR"), 18 Jan. 2005, <http://www.unhcr.org/refworld/docid/42d3e7ea4.html>, paras. 173–174; *Bazorkina v. Russia*, Application No. 69481/01, ECtHR, 27 July 2006, <http://www.unhcr.org/refworld/docid/44cdf4ef4.html>, paras. 140–141.

<sup>36</sup> See *EM (Lebanon) (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)*, op. cit., *Refugee Appeal Nos. 76226 and 76227*, Nos. 76226 and 76227, New Zealand, RSAA, 12 Jan. 2009, <http://www.unhcr.org/refworld/docid/49a6ac0e2.html>, paras. 112–113.

<sup>37</sup> ExCom, *Conclusion No. 107*, para. (g)(viii).

<sup>38</sup> CRC, Art. 24(3); International Covenant on Civil and Political Rights (hereafter "ICCPR"), <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html>, Art. 23; International Covenant on Economic, Social and Cultural Rights, <http://www.unhcr.org/refworld/docid/3ae6b36c0.html>, Art. 10; Convention on the Elimination of All Forms of Discrimination Against Women, <http://www.unhcr.org/refworld/docid/3ae6b3970.html>, Art. 16.

<sup>39</sup> CRC, Arts. 32–36; International Labour Organization, *Worst Forms of Child Labour Convention*, C182 (hereafter "ILO Convention on the Worst Forms of Child Labour"), <http://www.unhcr.org/refworld/docid/3ddb6e0c4.html>; *Minimum Age Convention*, C138, (hereafter "ILO Minimum Age Convention"), <http://www.unhcr.org/refworld/docid/421216a34.html>, Arts. 2 (3), 2(4).

child pornography.<sup>40</sup> Such forms of persecution also encompass violations of survival and development rights as well as severe discrimination of children born outside strict family planning rules<sup>41</sup> and of stateless children as a result of loss of nationality and attendant rights. Some of the most common forms of child-specific persecution arising in the context of asylum claims are outlined in greater detail below.

i. Under-age recruitment

19. There is a growing consensus regarding the ban on the recruitment and use of children below 18 years in armed conflict.<sup>42</sup> International humanitarian law prohibits the recruitment and participation in the hostilities of children under the age of 15 years whether in international<sup>43</sup> or non-international armed conflict.<sup>44</sup> Article 38 of the CRC reiterates State Parties' obligations under international humanitarian law. The Rome Statute of the International Criminal Court classifies as war crimes the enlistment and use of children under the age of 15 years into the armed forces at a time of armed conflict.<sup>45</sup> The Special Court for Sierra Leone has concluded that the recruitment of children under the age of 15 years into the armed forces constitutes a crime under general international law.<sup>46</sup>

20. The Optional Protocol to the CRC on the Involvement of Children in Armed Conflict provides that States parties shall take all feasible measures to ensure that members of their armed forces under the age of 18 years do not take part in hostilities, and ensure that persons under the age of 18 years are not compulsorily recruited into their armed forces.<sup>47</sup> The Optional Protocol contains an absolute prohibition against the recruitment or use, under any circumstances, of children who are less than 18 years old by armed groups that are distinct from the armed forces of a State.<sup>48</sup> It also amends

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<sup>40</sup> CRC, Art. 34; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, <http://www.unhcr.org/refworld/docid/3ae6b38bc.html>.

<sup>41</sup> See, for instance, *Xue Yun Zhang v. Gonzales*, No. 01-71623, U.S. Court of Appeals for the 9<sup>th</sup> Circuit, 26 May 2005, <http://www.unhcr.org/refworld/docid/4b17c7082.html>; *Chen Shi Hai*, *op. cit.*

<sup>42</sup> See UNICEF, *The Paris Principles and Guidelines on Children Associated With Armed Forces or Armed Groups*, Feb. 2007 (hereafter "The Paris Principles"). While not binding, they reflect a strong trend for a complete ban on under-age recruitment. See also UN Security Council resolution 1612 (2005) (on children in armed conflict), 26 July 2005, S/RES/1612, <http://www.unhcr.org/refworld/docid/43f308d6c.html>, para. 1; 1539 on the protection of children affected by armed conflict, S/RES/1539, 22 Apr. 2004, <http://www.unhcr.org/refworld/docid/411236fd4.html>.

<sup>43</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), <http://www.unhcr.org/refworld/docid/3ae6b36b4.html>, Art. 77(2).

<sup>44</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), <http://www.unhcr.org/refworld/docid/3ae6b37f40.html>, Art. 4(3).

<sup>45</sup> UN General Assembly, *Rome Statute of the International Criminal Court*, A/CONF. 183/9, 17 July 1998 (hereafter "ICC Statute"), <http://www.unhcr.org/refworld/docid/3ae6b3a84.html>, Art. 8 (2) (b) [xxvi] and (e)[vii].

<sup>46</sup> See *Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, paras. 52–53; UN Security Council, Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 Oct. 2000, S/2000/915, <http://www.unhcr.org/refworld/docid/3ae6afb4.html>, para. 17, which recognized the customary character of the prohibition of child recruitment.

<sup>47</sup> The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, <http://www.unhcr.org/refworld/docid/47fd4b180.html>, Arts. 1–2. There are currently 127 States Parties to the Optional Protocol. See also the African Charter, which establishes 18 years as the minimum age for all compulsory recruitment, Arts. 2 and 22.2, and the ILO Convention on the Worst Forms of Child Labour, which includes the forced recruitment of children under the age of 18, Arts. 2 and 3(a) in its definition of worst forms of child labor.

<sup>48</sup> Optional Protocol to the CRC on the Involvement of Children in Armed Conflict, Art. 4.

Article 38 of the CRC by raising the minimum age of voluntary recruitment.<sup>49</sup> States also commit to use all feasible measures to prohibit and criminalize under-age recruitment and use of child soldiers by non-State armed groups.<sup>50</sup> The Committee on the Rights of the Child emphasizes that

*... under-age recruitment (including of girls for sexual services or forced marriage with the military) and direct or indirect participation in hostilities constitutes a serious human rights violation and thereby persecution, and should lead to the granting of refugee status where the well-founded fear of such recruitment or participation in hostilities is based on "reasons of race, religion, nationality, membership of a particular social group or political opinion" (article 1A (2), 1951 Refugee Convention).*<sup>51</sup>

21. In UNHCR's view, forced recruitment and recruitment for direct participation in hostilities of a child below the age of 18 years into the armed forces of the State would amount to persecution. The same would apply in situations where a child is at risk of forced re-recruitment or would be punished for having evaded forced recruitment or deserted the State's armed forces. Similarly, the recruitment by a non-State armed group of any child below the age of 18 years would be considered persecution.

22. Voluntary recruitment of children above the age of 16 years by States is permissible under the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict.<sup>52</sup> However, the recruiting State authorities have to put in place safeguards to ensure that the recruitment is voluntary, that it is undertaken with the informed consent of the parents and that the children who are so recruited are requested to produce satisfactory proof of age prior to their recruitment. In such cases, it is important to assess whether the recruitment was genuinely voluntary, bearing in mind that children are particularly susceptible to abduction, manipulation and force and may be less likely to resist recruitment. They may enlist under duress, in self-defence, to avoid harm to their families, to seek protection against unwanted marriages or sexual abuse within their homes, or to access basic means of survival, such as food and shelter. The families of children may also encourage them to participate in armed conflict, despite the risks and dangers.

23. In addition, children may have a well-founded fear of persecution arising from the treatment they are subjected to, and/or conduct they are required to engage in, by the armed forces or armed group. Boys and girls associated with armed forces or armed groups may be required to serve as cooks, porters, messengers, spies as well as to take direct part in the hostilities. Girls, in particular, may be forced into sexual relations with members of the military.<sup>53</sup> It is also important to bear in mind that children who have been released from the armed forces or group and return to their countries and communities of origin may be in danger of harassment, re-recruitment or retribution, including imprisonment or extra-judicial execution.

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<sup>49</sup> *Ibid.*, Art. 3.

<sup>50</sup> *Ibid.*, Art. 4.

<sup>51</sup> CRC, *General Comment*, No. 6, para. 59. See also para. 58.

<sup>52</sup> Optional Protocol to the CRC on the Involvement of Children in Armed Conflict, Art. 3. States Parties are required to raise in years the minimum age for the voluntary recruitment from the age set out in Art. 38, para. 3 of the CRC, hence, from 15 to 16 years.

<sup>53</sup> The Paris Principles define children associated with an armed force or group as follows: "A child associated with an armed force or armed group refers to any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities." Art. 2.1.

## ii. Child trafficking and labour

24. As recognized by several jurisdictions, trafficked children or children who fear being trafficked may have valid claims to refugee status.<sup>54</sup> UNHCR's Guidelines on Victims of Trafficking and Persons at Risk of Being Trafficked are equally applicable to an asylum claim submitted by a child. The particular impact of a trafficking experience on a child and the violations of child-specific rights that may be entailed also need to be taken into account.<sup>55</sup>

25. The trafficking of children occurs for a variety of reasons but all with the same overarching aim to gain profit through the exploitation of human beings.<sup>56</sup> In this context, it is important to bear in mind that any recruitment, transportation, transfer, harbouring or receipt of children for the purpose of exploitation is a form of trafficking regardless of the means used. Whether the child consented to the act or not is, therefore, irrelevant.<sup>57</sup>

26. The trafficking of a child is a serious violation of a range of fundamental rights and, therefore, constitutes persecution. These rights include the right to life, survival and development, the right to protection from all forms of violence, including sexual exploitation and abuse, and the right to protection from child labour and abduction, sale and trafficking, as specifically provided for by Article 35 of the CRC.<sup>58</sup>

27. The impact of reprisals by members of the trafficking network, social exclusion, ostracism and/or discrimination<sup>59</sup> against a child victim of trafficking who is returned to his/her home country needs to be assessed in a child-sensitive manner. For example, a girl who has been trafficked for sexual exploitation may end up being rejected by her family and become a social outcast in her community if returned. A boy, who has been sent away by his parents in the hope and expectation that he will study, work abroad and send remittances back to his family likewise may become excluded from his family if they learn that he has been trafficked into forced labour. Such child victims of trafficking may have very limited possibilities of accessing and enjoying their human rights, including survival rights, if returned to their homes.

28. In asylum cases involving child victims of trafficking, decision makers will need to pay particular attention to indications of possible complicity of the child's parents, other family members or caregivers in arranging the trafficking or consenting to it. In such cases, the State's ability and willingness to protect the child must be assessed

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<sup>54</sup> See, for instance, *Ogbeide v. Secretary of State for the Home Department*, No. HX/08391/2002, U.K. IAT, 10 May 2002 (unreported); *Li and Others v. Minister of Citizenship and Immigration*, IMM-932-00, Canada, Federal Court, 11 Dec. 2000, <http://www.unhcr.org/refworld/docid/4b18d3682.html>.

<sup>55</sup> See UNHCR, *Guidelines on Victims of Trafficking*. See also UNICEF, *Guidelines on the Protection of Child Victims of Trafficking*, Oct. 2006, [http://www.unicef.org/ceecis/0610-Unicef\\_Victims\\_Guidelines\\_en.pdf](http://www.unicef.org/ceecis/0610-Unicef_Victims_Guidelines_en.pdf), which make reference to refugee status for children who have been trafficked.

<sup>56</sup> These reasons include, but are not limited to, bonded child labour, debt repayment, sexual exploitation, recruitment by armed forces and groups, and irregular adoption. Girls, in particular, may be trafficked for the purpose of sexual exploitation or arranged marriage while boys may be particularly at risk of being trafficked for various forms of forced labour.

<sup>57</sup> For a definition of the scope of "trafficking", see the following international and regional instruments: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention against Transnational Organized Crime, 15 Nov. 2000, <http://www.unhcr.org/refworld/docid/4720706c0.html>, in particular Art. 3; Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, 3 May 2005 <http://www.unhcr.org/refworld/docid/43fded544.html>.

<sup>58</sup> For a detailed analysis of the human rights framework relating to the trafficking of children, see UNICEF, *Implementation Handbook*, *op cit.*, in particular pp. 531–542.

<sup>59</sup> UNHCR, *Guidelines on Victims of Trafficking*, *op cit.*, paras. 17–18.

carefully. Children at risk of being (re-)trafficked or of serious reprisals should be considered as having a well-founded fear of persecution within the meaning of the refugee definition.

29. In addition to trafficking, other worst forms of labour, such as slavery, debt bondage and other forms of forced labour, as well as the use of children in prostitution, pornography and illicit activities (for example, the drug trade) are prohibited by international law.<sup>60</sup> Such practices represent serious human rights violations and, therefore, would be considered persecution, whether perpetrated independently or as part of a trafficking experience.

30. International law also proscribes labour likely to harm the health, safety or morals of a child, also known as “hazardous work”.<sup>61</sup> In determining whether labour is hazardous, the following working conditions need to be considered: work that exposes children to physical or mental violence; work that takes place underground, under water, at dangerous heights or in confined spaces; work that involves dangerous equipment or manual handling of heavy loads; long working hours and unhealthy environments.<sup>62</sup> Labour performed by a child under the minimum age designated for the particular kind of work and deemed likely to inhibit the child’s education and full development is also prohibited according to international standards.<sup>63</sup> Such forms of labour could amount to persecution, as assessed according to the particular child’s experience, his/her age and other circumstances. Persecution, for example, may arise where a young child is compelled to perform harmful labour that jeopardizes his/her physical and/or mental health and development.

### iii. Female genital mutilation

31. All forms of FGM<sup>64</sup> are considered harmful and violate a range of human rights,<sup>65</sup> as affirmed by international and national jurisprudence and legal doctrine. Many jurisdictions have recognized that FGM involves the infliction of grave harm amounting to persecution.<sup>66</sup> As the practice disproportionately affects the girl child,<sup>67</sup> it can be considered a child-specific form of persecution. For further information about FGM in the context of refugee status determination, see UNHCR Guidance Note on Refugee Claims relating to Female Genital Mutilation.<sup>68</sup>

### iv. Domestic violence against children

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<sup>60</sup> ILO Convention on the Worst Forms of Child Labour, Art. 3 (a–c).

<sup>61</sup> *Ibid.*, Art. 3(d).

<sup>62</sup> *Ibid.*, Art. 4 in conjunction with ILO Worst Forms of Child Labour Recommendation, 1999, R190, <http://www.unhcr.org/refworld/docid/3ddb6ef34.html>, at 3 and 4.

<sup>63</sup> ILO Minimum Age Convention, Art. 2.

<sup>64</sup> FGM comprises all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons. See further, OHCHR, UNAIDS et al., *Eliminating Female Genital Mutilation: An Interagency Statement*, Feb. 2008, <http://www.unhcr.org/refworld/docid/47c6aa6e2.html>.

<sup>65</sup> These include the right to life, to protection from torture, and cruel, inhuman or degrading treatment, to protection from physical and mental violence and the right to the highest attainable standard of health.

<sup>66</sup> See, for instance, *Mlle Diop Aminata*, 164078, Commission des Recours des Réfugiés (hereafter “CRR”), France, 17 July 1991, <http://www.unhcr.org/refworld/docid/3ae6b7294.html>; *Khadra Hassan Farah, Mahad Dahir Buraleh, Hodan Dahir Buraleh*, Canada, IRB, 10 May 1994, <http://www.unhcr.org/refworld/docid/3ae6b70618.html>; *In re Fauziya Kasinga*, 3278, U.S. Board of Immigration Appeals (hereafter “BIA”), 13 June 1996, <http://www.unhcr.org/refworld/docid/47bb00782.html>.

<sup>67</sup> FGM is mostly carried out on girls up to 15 years of age, although older girls and women may also be subjected to the practice.

<sup>68</sup> UNHCR, *Guidance Note on FGM*, *op cit*.

32. All violence against children, including physical, psychological and sexual violence, while in the care of parents or others, is prohibited by the CRC.<sup>69</sup> Violence against children may be perpetrated in the private sphere by those who are related to them through blood, intimacy or law.<sup>70</sup> Although it frequently takes place in the name of discipline, it is important to bear in mind that parenting and caring for children, which often demand physical actions and interventions to protect the child, is quite distinct from the deliberate and punitive use of force to cause pain or humiliation.<sup>71</sup> Certain forms of violence, in particular against very young children, may cause permanent harm and even death, although perpetrators may not aim to cause such harm.<sup>72</sup> Violence in the home may have a particularly significant impact on children because they often have no alternative means of support.<sup>73</sup>

33. Some jurisdictions have recognized that certain acts of physical, sexual and mental forms of domestic violence may be considered persecution.<sup>74</sup> Examples of such acts include battering, sexual abuse in the household, incest, harmful traditional practices, crimes committed in the name of honour, early and forced marriages, rape and violence related to commercial sexual exploitation.<sup>75</sup> In some cases, mental violence may be as detrimental to the victim as physical harm and could amount to persecution. Such violence may include serious forms of humiliation, harassment, abuse, the effects of isolation and other practices that cause or may result in psychological harm.<sup>76</sup> Domestic violence may also come within the scope of torture and other cruel, inhuman and degrading treatment or punishment.<sup>77</sup> A minimum level of severity is required for it to constitute persecution. When assessing the level of severity of the harm, a number of factors such as the frequency, patterns, duration and impact on the particular child need to be taken into account. The child's age and dependency on the perpetrator as well as the long-term effects on the physical and psychological development and well-being of the child also need to be considered.

#### v. Violations of economic, social and cultural rights

34. The enjoyment of economic, social and cultural rights is central to the child's survival and development.<sup>78</sup> The UN Committee on the Rights of the Child has stated that

*... the right to survival and development can only be implemented in a holistic*

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<sup>69</sup> CRC, Arts. 19, 37.

<sup>70</sup> Declaration on the Elimination of Violence Against Women, <http://www.unhcr.org/refworld/docid/3b00f25d2c.html>, Art. 2(a).

<sup>71</sup> See CRC, *General Comment No. 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts. 19; 28, Para. 2; and 37, inter alia)*, CRC/C/GC/8, 2 Mar. 2007 (hereafter "CRC, *General Comment No. 8*"), <http://www.unhcr.org/refworld/docid/460bc7772.html>, paras. 13–14, 26.

<sup>72</sup> UN study on violence against children, *op. cit.*, para. 40.

<sup>73</sup> See further UNICEF, *Domestic Violence Against Women and Girls*, Innocenti Digest No. 6, 2000, <http://www.unicef-irc.org/publications/pdf/digest6e.pdf>.

<sup>74</sup> See UNHCR, *Handbook for the Protection of Women and Girls*, Feb. 2008, <http://www.unhcr.org/refworld/docid/47cfc2962.html>, pp. 142–144. See also, for instance, *Rosalba Aguirre-Cervantes a.k.a. Maria Esperanza Castillo v. Immigration and Naturalization Service*, U.S. Court of Appeals for the 9<sup>th</sup> Circuit, 21 Mar. 2001, <http://www.unhcr.org/refworld/docid/3f37adc24.html>.

<sup>75</sup> UN Commission on Human Rights, Human Rights Resolution 2005/41: Elimination of violence against women, E/CN.4/RES/2005/41, 19 Apr. 2005, <http://www.unhcr.org/refworld/docid/45377c59c.html>, para. 5.

<sup>76</sup> CRC, *General Comment No. 8, op. cit.*, para. 11. See also UN study on violence against children, *op. cit.*, para. 42; UNICEF, *Domestic Violence Against Women and Girls, op. cit.*, pp. 2–4.

<sup>77</sup> CRC, *General Comment No. 8, op. cit.*, para. 12; Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/7/3, 15 Jan. 2008, <http://www.unhcr.org/refworld/docid/47c2c5452.html>, paras. 45–49.

<sup>78</sup> CRC, Art. 6.2.

*manner, through the enforcement of all the other provisions of the Convention, including rights to health, adequate nutrition, social security, an adequate standard of living, a healthy and safe environment, education and play.*<sup>79</sup>

While the CRC and the 1966 Covenant on Economic, Social and Cultural Rights contemplate the progressive realization of economic, social and cultural rights, these instruments impose various obligations on States Parties which are of immediate effect.<sup>80</sup> These obligations include avoiding taking retrogressive measures, satisfying minimum core elements of each right and ensuring non-discrimination in the enjoyment of these rights.<sup>81</sup>

35. A violation of an economic, social or cultural right may amount to persecution where minimum core elements of that right are not realized. For instance, the denial of a street child's right to an adequate standard of living (including access to food, water and housing) could lead to an intolerable predicament which threatens the development and survival of that child. Similarly, a denial of medical treatment, particularly where the child concerned suffers from a life-threatening illness, may amount to persecution.<sup>82</sup> Persecution may also be established through an accumulation of a number of less serious violations.<sup>83</sup> This could, for instance, be the case where children with disabilities or stateless children lack access to birth registration and, as a result, are excluded from education, health care and other services.<sup>84</sup>

36. Measures of discrimination may amount to persecution when they lead to consequences of a substantially prejudicial nature for the child concerned.<sup>85</sup> Children who lack adult care and support, are orphaned, abandoned or rejected by their parents, and are escaping violence in their homes may be particularly affected by such forms of discrimination. While it is clear that not all discriminatory acts leading to the deprivation of economic, social and cultural rights necessarily equate to persecution, it is important to assess the consequences of such acts for each child concerned, now and in the future. For example, bearing in mind the fundamental importance of education and the significant impact a denial of this right may have for the future of a child, serious harm

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<sup>79</sup> CRC, *General Comment No. 7: Implementing Child Rights in Early Childhood*, CRC/C/GC/7/Rev.1, 20 Sep. 2006 (hereafter "CRC, General Comment No. 7") <http://www.unhcr.org/refworld/docid/460bc5a62.html>, para. 10.

<sup>80</sup> See CESCR, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, E/1991/23, 14 Dec. 1990, <http://www.unhcr.org/refworld/docid/4538838e10.html>, para. 1; CRC, *General Comment No. 5*, para. 6.

<sup>81</sup> See UN Commission on Human Rights, Note verbale dated 86/12/05 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ("Limburg Principles"), 8 Jan. 1987, E/CN.4/1987/17 at B.16, 21–22, <http://www.unhcr.org/refworld/docid/48abd5790.html>; International Commission of Jurists, Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 26 Jan. 1997, <http://www.unhcr.org/refworld/docid/48abd5730.html>, at II.9 and 11.

<sup>82</sup> See, for instance, *RRT Case No. N94/04178*, N94/04178, Australia, Refugee Review Tribunal (hereafter "RRT"), 10 June 1994, <http://www.unhcr.org/refworld/docid/3ae6b6300.html>.

<sup>83</sup> UNHCR, *Handbook*, para. 53. See also *Canada (Citizenship and Immigration) v. Oh*, 2009 FC 506, Canada, Federal Court, 22 May 2009, <http://www.unhcr.org/refworld/docid/4a897a1c2.html>, at 10.

<sup>84</sup> See *Case of the Yean and Bosico Children v. The Dominican Republic*, IACtHR, 8 Sep. 2005, <http://www.unhcr.org/refworld/docid/44e497d94.html>. Two girls of Haitian origin were denied the right to nationality and education because, among other matters, they did not have a birth certificate; *Case of the "Juvenile Reeducation Institute" v. Paraguay*, IACtHR, 2 Sep. 2004, <http://www.unhcr.org/refworld/docid/4b17bab62.html>. The Court found that failure to provide severely marginalized groups with access to basic health-care services constitutes a violation of the right to life of the ACHR. See also, CRC, *General Comment No. 7*, para. 25; CRC, *General Comment No. 9 (2006): The Rights of children with disabilities*, CRC/C/GC/9, 27 Feb. 2007 (hereafter "CRC, General Comment No. 9"), <http://www.unhcr.org/refworld/docid/461b93f72.html>, paras. 35–36.

<sup>85</sup> UNHCR, *Handbook*, para. 54.

could arise if a child is denied access to education on a systematic basis.<sup>86</sup> Education for girls may not be tolerated by society,<sup>87</sup> or school attendance may become unbearable for the child due to harm experienced on racial or ethnic grounds.<sup>88</sup>

## b) Agents of persecution

37. In child asylum claims, the agent of persecution is frequently a non-State actor. This may include militarized groups, criminal gangs, parents and other caregivers, community and religious leaders. In such situations, the assessment of the well-foundedness of the fear has to include considerations as to whether or not the State is unable or unwilling to protect the victim.<sup>89</sup> Whether or not the State or its agents have taken sufficient action to protect the child will need to be assessed on a case-by-case basis.

38. The assessment will depend not only on the existence of a legal system that criminalizes and provides sanctions for the persecutory conduct. It also depends on whether or not the authorities ensure that such incidents are effectively investigated and that those responsible are identified and appropriately punished.<sup>90</sup> Hence, the enactment of legislation prohibiting or denouncing a particular persecutory practice against children, in itself, is not sufficient evidence to reject a child's claim to refugee status.<sup>91</sup>

39. The child's access to State protection also depends on the ability and willingness of the child's parents, other primary caregiver or guardian to exercise rights and obtain protection on behalf of the child. This may include filing a complaint with the police, administrative authorities or public service institutions. However, not all children will have an adult who can represent them as is the case, for example, where the child is unaccompanied or orphaned, or where a parent, other primary caregiver or guardian is the agent of persecution. It is important to remember that, due to their young age, children may not be able to approach law enforcement officials or articulate their fear or

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<sup>86</sup> See *RRT Case No. V95/03256*, [1995] RRTA 2263, Australia, RRT, 9 Oct. 1995, <http://www.unhcr.org/refworld/docid/4b17c13a2.html>, where the Tribunal found that "discriminatory denial of access to primary education is such a denial of a fundamental human right that it amounts to persecution." at 47.

<sup>87</sup> See *Ali v. Minister of Citizenship and Immigration*, IMM-3404-95, Canada, IRB, 23 Sep. 1996, <http://www.unhcr.org/refworld/docid/4b18e21b2.html>, which concerned a 9 year-old girl from Afghanistan. The Court concluded that "Education is a basic human right and I direct the Board to find that she should be found to be a Convention refugee."

<sup>88</sup> Decisions in both Canada and Australia have accepted that bullying and harassment of school children may amount to persecution. See, for instance, *Decision VA1-02828*, *VA1-02826*, *VA1-02827* and *VA1-02829*, *VA1-02828*, *VA1-02826*, *VA1-02827* and *VA1-02829*, Canada, IRB, 27 Feb. 2003, <http://www.unhcr.org/refworld/docid/4b18e03d2.html>, para. 36; *RRT Case No. N03/46534*, [2003] RRTA 670, Australia, RRT, 17 July 2003, <http://www.unhcr.org/refworld/docid/4b17bfd62.html>.

<sup>89</sup> See CRC, Art. 3, which imposes a duty on States Parties to ensure the protection and care of children in respect of actions by both State and private actors; ACHR, Arts. 17 and 19; African Charter, Arts. 1(3), 81. See also UNHCR, *Handbook*, para. 65; UNHCR, *Guidelines on Gender-Related Persecution*, para. 19; *Advisory Opinion on Juridical Condition and Human Rights of the Child*, No. OC-17/02, IACtHR, 28 Aug. 2002, <http://www.unhcr.org/refworld/docid/4268c57c4.html>.

<sup>90</sup> See, for instance, *Velásquez Rodríguez Case*, Series C, No. 4, IACtHR, 29 July 1988, para. 174 <http://www.unhcr.org/refworld/docid/40279a9e4.html>; *M.C. v. Bulgaria*, Application No. 39272/98, ECtHR, 3 Dec. 2003, <http://www.unhcr.org/refworld/docid/47b19f492.html>. See also UN Committee on the Elimination of Discrimination Against Women, General Recommendations Nos. 19 and 20, adopted at the Eleventh Session, 1992 (contained in Document A/47/38), A/47/38, 1992, <http://www.unhcr.org/refworld/docid/453882a422.html>, para. 9; UN Commission on Human Rights, The due diligence standard as a tool for the elimination of violence against women: Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Yakin Ertürk, E/CN.4/2006/61, 20 Jan. 2006, <http://www.unhcr.org/refworld/docid/45377afb0.html>.

<sup>91</sup> UNHCR, *Guidelines on Gender-Related Persecution*, para. 11.

complaint in the same way as adults. Children may be more easily dismissed or not taken seriously by the officials concerned, and the officials themselves may lack the skills necessary to interview and listen to children.

### **c) The 1951 Convention grounds**

40. As with adult claims to refugee status, it is necessary to establish whether or not the child's well-founded fear of persecution is linked to one or more of the five grounds listed in Article 1A(2) of the 1951 Convention. It is sufficient that the Convention ground be a factor relevant to the persecution, but it is not necessary that it be the sole, or even dominant, cause.

#### ***Race and nationality or ethnicity***

41. Race and nationality or ethnicity is at the source of child asylum claims in many contexts. Policies that deny children of a particular race or ethnicity the right to a nationality or to be registered at birth,<sup>92</sup> or that deny children from particular ethnic groups their right to education or to health services would fall into this category. This Convention ground would apply similarly to policies that aim to remove children from their parents on the basis of particular racial, ethnic or indigenous backgrounds. Systematic targeting of girls belonging to ethnic minorities for rape, trafficking, or recruitment into armed forces or groups also may be analysed within this Convention ground.

#### ***Religion***

42. As with an adult, the religious beliefs of a child or refusal to hold such beliefs may put him/her at risk of persecution. For a Convention ground to be established, it is not necessary that the child be an active practitioner. It is sufficient that the child simply be perceived as holding a certain religious belief or belonging to a sect or religious group, for example, because of the religious beliefs of his/her parents.<sup>93</sup>

43. Children have limited, if any, influence over which religion they belong to or observe, and belonging to a religion can be virtually as innate as one's ethnicity or race. In some countries, religion assigns particular roles or behaviour to children. As a consequence, if a child does not fulfil his/her assigned role or refuses to abide by the religious code and is punished as a consequence, s/he may have a well-founded fear of persecution on the basis of religion.

44. The reasons for persecution related to a child's refusal to adhere to prescribed gender roles may also be analysed under this ground. Girls, in particular, may be affected by persecution on the basis of religion. Adolescent girls may be required to perform traditional slave duties or to provide sexual services. They also may be required to undergo FGM or to be punished for honour crimes in the name of religion.<sup>94</sup> In other contexts, children - both boys and girls - may be specifically targeted to join armed groups or the armed forces of a State in pursuit of religious or related ideologies.

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<sup>92</sup> Universal Declaration of Human Rights, <http://www.unhcr.org/refworld/docid/3ae6b3712c.html>, Art. 15; ICCPR, Arts 24(2) and (3); CRC, Art. 7.

<sup>93</sup> UNHCR, *Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, HCR/GIP/04/06, 28 Apr. 2004 (hereafter, "UNHCR, *Guidelines on Religion-Based Persecution*"), <http://www.unhcr.org/refworld/docid/4090f9794.html>.

<sup>94</sup> *Ibid.*, para. 24.

## **Political opinion**

45. The application of the Convention ground of “political opinion” is not limited to adult claims. A claim based on political opinion presupposes that the applicant holds, or is assumed to hold, opinions not tolerated by the authorities or society and that are critical of generally accepted policies, traditions or methods. Whether or not a child is capable of holding a political opinion is a question of fact and is to be determined by assessing the child’s level of maturity and development, level of education, and his/her ability to articulate those views. It is important to acknowledge that children can be politically active and hold particular political opinions independently of adults and for which they may fear being persecuted. Many national liberation or protest movements are driven by student activists, including schoolchildren. For example, children may be involved in distributing pamphlets, participating in demonstrations, acting as couriers or engaging in subversive activities.

46. In addition, the views or opinions of adults, such as the parents, may be imputed to their children by the authorities or by non-State actors.<sup>95</sup> This may be the case even if a child is unable to articulate the political views or activities of the parent, including where the parent deliberately withholds such information from the child to protect him/her. In such circumstances, these cases should be analysed not only according to the political opinion ground but also in terms of the ground pertaining to membership of a particular social group (in this case, the “family”).

47. The grounds of (imputed) political opinion and religion may frequently overlap in child asylum claims. In certain societies, the role ascribed to women and girls may be attributable to the requirements of the State or official religion. The authorities or other agents of persecution may perceive the failure of a girl to conform to this role as a failure to practice or to hold certain religious beliefs. At the same time, failure to conform could be interpreted as holding an unacceptable political opinion that threatens fundamental power structures. This may be the case particularly in societies where there is little separation between religious and State institutions, laws and doctrines.<sup>96</sup>

## **Membership of a particular social group**

48. Children’s claims to refugee status most often have been analysed in the context of the Convention ground of “membership of a particular social group”, although any of the Convention grounds may be applicable. As stated in UNHCR’s Guidelines

*[a] particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.*<sup>97</sup>

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<sup>95</sup> See *Matter of Timnit Daniel and Simret Daniel*, A70 483 789 & A70 483 774, U.S. BIA, 31 Jan. 2002 (unpublished, non-precedent setting decision). The Court found that the notion “that the respondents were too young to have an actual political opinion is irrelevant; it is enough that the officials believed that they supported the EPLF.”

<sup>96</sup> UNHCR, *Guidelines on Gender-Related Persecution*, op. cit. para. 26.

<sup>97</sup> UNHCR, *Guidelines on International Protection No. 2: ‘Membership of a Particular Social Group’ within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, HCR/GIP/02/02, 7 May 2002, <http://www.unhcr.org/refworld/docid/3d36f23f4.html>, para. 11.

49. Although age, in strict terms, is neither innate nor permanent as it changes continuously, being a child is in effect an immutable characteristic at any given point in time. A child is clearly unable to disassociate him/herself from his/her age in order to avoid the persecution feared.<sup>98</sup> The fact that the child eventually will grow older is irrelevant to the identification of a particular social group, as this is based on the facts as presented in the asylum claim. Being a child is directly relevant to one's identity, both in the eyes of society and from the perspective of the individual child. Many government policies are age-driven or age-related, such as the age for military conscription, the age for sexual consent, the age of marriage, or the age for starting and leaving school. Children also share many general characteristics, such as innocence, relative immaturity, impressionability and evolving capacities. In most societies, children are set apart from adults as they are understood to require special attention or care, and they are referred to by a range of descriptors used to identify or label them, such as "young", "infant", "child", "boy", "girl" or "adolescent". The identification of social groups also may be assisted by the fact that the children share a common socially-constructed experience, such as being abused, abandoned, impoverished or internally displaced.

50. A range of child groupings, thus, can be the basis of a claim to refugee status under the "membership of a particular social group" ground. Just as "women" have been recognized as a particular social group in several jurisdictions, "children" or a smaller subset of children may also constitute a particular social group.<sup>99</sup> Age and other characteristics may give rise to groups such as "abandoned children",<sup>100</sup> "children with disabilities", "orphans", or children born outside coercive family planning policies or of unauthorized marriages, also referred to as "black children".<sup>101</sup> The applicant's family may also constitute a relevant social group.<sup>102</sup>

51. The applicant's membership in a child-based social group does not necessarily cease to exist merely because his/her childhood ends. The consequences of having previously belonged to such a social group might not end even if the key factor of that

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<sup>98</sup> See *Matter of S-E-G-, et al.*, 24 I&N Dec. 579 (BIA 2008), U.S. BIA, 30 July 2008, <http://www.unhcr.org/refworld/docid/4891da5b2.html>, which noted that "we acknowledge that the mutability of age is not within one's control, and that if an individual has been persecuted in the past on account of an age-described particular social group, or faces such persecution at a time when that individual's age places him within the group, a claim for asylum may still be cognizable." (p. 583); *LQ (Age: Immutable Characteristic) Afghanistan v. Secretary of State for the Home Department*, [2008] U.K. AIT 00005, 15 Mar. 2007, <http://www.unhcr.org/refworld/docid/47a04ac32.html>, finding that the applicant, "although, assuming he survives, he will in due course cease to be a child, he is immutably a child at the time of assessment" at 6; *Decision V99-02929, V99-02929*, Canada, IRB, 21 Feb. 2000, <http://www.unhcr.org/refworld/docid/4b18e5592.html>, which found that "[t]he child's vulnerability arises as a result of his status as a minor. His vulnerability as a minor is an innate and unchangeable characteristic, notwithstanding the child will grow into an adult."

<sup>99</sup> In *In re Fauziya Kasinga, op. cit.*, it was held that "young women" may constitute a particular social group.

<sup>100</sup> In *V97-03500*, Canada, Convention Refugee Determination Division, 31 May 1999, it was accepted that abandoned children in Mexico can be a particular social group. (A summary is available at [http://www2.irb-cisr.gc.ca/en/decisions/reflex/index\\_e.htm?action=article.view&id=1749](http://www2.irb-cisr.gc.ca/en/decisions/reflex/index_e.htm?action=article.view&id=1749)). See also *RRT Case No. 0805331*, [2009] RRTA 347, Australia, RRT, 30 April 2009, <http://www.unhcr.org/refworld/docid/4a2681692.html>, where the Tribunal held that the applicant's (a two-year old child) particular social group was "children of persecuted dissidents".

<sup>101</sup> This has been affirmed in several decisions in Australia. See, for instance, *Chen Shi Hai, op. cit.* and more recently in *RRT Case No. 0901642*, [2009] RRTA 502, Australia, RRT, 3 June 2009, <http://www.unhcr.org/refworld/docid/4a76ddb2f2.html>.

<sup>102</sup> See *Aguirre-Cervantes, op. cit.*, where the Court found that "[f]amily membership is clearly an immutable characteristic, fundamental to one's identity", and noted that "[t]he undisputed evidence demonstrates that Mr. Aguirre's goal was to dominate and persecute members of his immediate family."

identity (that is, the applicant's young age) is no longer applicable. For instance, a past shared experience may be a characteristic that is unchangeable and historic and may support the identification of groups such as "former child soldiers"<sup>103</sup> or "trafficked children" for the purposes of a fear of future persecution.<sup>104</sup>

52. Some of the more prominent social groupings include the following:

- i. **Street children** may be considered a particular social group. Children living and/or working on the streets are among the most visible of all children, often identified by society as social outcasts. They share the common characteristics of their youth and having the street as their home and/or source of livelihood. Especially for children who have grown up in such situations, their way of life is fundamental to their identity and often difficult to change. Many of these children have embraced the term "street children" as it offers them a sense of identity and belonging while they may live and/or work on the streets for a range of reasons. They also may share past experiences such as domestic violence, sexual abuse, and exploitation or being orphaned or abandoned.<sup>105</sup>
- ii. **Children affected by HIV/AIDS**, including both those who are HIV-positive and those with an HIV-positive parent or other relative, may also be considered a particular social group. The fact of being HIV-positive exists independently of the persecution they may suffer as a consequence of their HIV status. Their status or that of their family may set them apart and, while manageable and/or treatable, their status is by and large unchangeable.<sup>106</sup>
- iii. Where children are singled out as a target group for **recruitment or use by an armed force or group**, they may form a particular social group due to the innate and unchangeable nature of their age as well as the fact that they are perceived as a group by the society in which they live. As with adults, a child who evades the draft, deserts or otherwise refuses to become associated with an armed force may be perceived as holding a political opinion in which case the link to the Convention ground of political opinion may also be established.<sup>107</sup>

**d) Internal "flight" or "relocation" alternative**

53. An assessment of the issue of internal flight alternative contains two parts: the relevance of such an inquiry, and the reasonableness of any proposed area of internal

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<sup>103</sup> In *Lukwago v. Ashcroft, Attorney General*, 02-1812, U.S. Court of Appeals for the 3<sup>rd</sup> Circuit, 14 May 2003, <http://www.unhcr.org/refworld/docid/47a7078c3.html>, the Court found that "membership in the group of former child soldiers who have escaped LRA captivity fits precisely within the BIA's own recognition that a shared past experience may be enough to link members of a 'particular social group'."

<sup>104</sup> UNHCR, *Guidelines on Victims of Trafficking*, para. 39. See also, *RRT Case No. N02/42226*, [2003] RRTA 615, Australia, RRT, 30 June 2003, <http://www.unhcr.org/refworld/docid/4b17c2b02.html>, which concerned a young woman from Uzbekistan. The identified group was "Uzbekistani women forced into prostitution abroad who are perceived to have transgressed social mores."

<sup>105</sup> See, for instance, *Matter of B-F-O-*, A78 677 043, U.S. BIA, 6 Nov. 2001 (unpublished, non-precedent decision). The Court found that the applicant, who was an abandoned street child, had a well-founded fear of persecution based on membership in a particular social group. See also, *LQ (Age: Immutable Characteristic) Afghanistan v. Secretary of State for the Home Department*, *op. cit.* The Tribunal found that the applicant's fear of harm as an orphan and street child "would be as a result of his membership in a part of a group sharing an immutable characteristic and constituting, for the purposes of the Refugee Convention, a particular social group", at 7.

<sup>106</sup> See further, CRC, *General Comment No. 3: HIV/AIDS and the Rights of the Child*, 17 Mar. 2003, <http://www.unhcr.org/refworld/docid/4538834e15.html>.

<sup>107</sup> UNHCR, *Handbook*, paras. 169–171; UNHCR, *Guidelines on Religion-Based Persecution*, paras. 25–26.

relocation.<sup>108</sup> The child's best interests inform both the relevance and reasonableness assessments.

54. As in the case of adults, internal relocation is only **relevant** where the applicant can access practically, safely and legally the place of relocation.<sup>109</sup> In particular with regard to gender-based persecution, such as domestic violence and FGM which are typically perpetrated by private actors, the lack of effective State protection in one part of the country may be an indication that the State may also not be able or willing to protect the child in any other part of the country.<sup>110</sup> If the child were to relocate, for example, from a rural to an urban area, the protection risks in the place of relocation would also need to be examined carefully, taking into account the age and coping capacity of the child.

55. In cases where an internal flight or relocation alternative is deemed relevant, a proposed site of internal relocation that may be **reasonable** in the case of an adult may not be reasonable in the case of a child. The "reasonableness test" is one that is applicant-specific and, thus, not related to a hypothetical "reasonable person". Age and the best interests of the child are among the factors to be considered in assessing the viability of a proposed place of internal relocation.<sup>111</sup>

56. Where children are unaccompanied and, therefore, not returning to the country of origin with family members or other adult support, special attention needs to be paid as to whether or not such relocation is reasonable. Internal flight or relocation alternatives, for instance, would not be appropriate in cases where unaccompanied children have no known relatives living in the country of origin and willing to support or care for them and it is proposed that they relocate to live on their own without adequate State care and assistance. What is merely inconvenient for an adult might well constitute undue hardship for a child, particularly in the absence of any friend or relation.<sup>112</sup> Such relocation may violate the human right to life, survival and development, the principle of the best interests of the child, and the right not to be subjected to inhuman treatment.<sup>113</sup>

57. If the only available relocation option is to place the child in institutional care, a proper assessment needs to be conducted of the care, health and educational facilities that would be provided and with regard to the long-term life prospects of adults who were institutionalized as children.<sup>114</sup> The treatment as well as social and cultural

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<sup>108</sup> UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, HCR/GIP/03/04, 23 July 2003, <http://www.unhcr.org/refworld/docid/3f2791a44.html>.

<sup>109</sup> *Ibid*, para. 7.

<sup>110</sup> *Ibid*, para. 15.

<sup>111</sup> *Ibid*, para. 25. See further factors in the CRC, *General Comment No. 6*, para. 84, on Return to Country of Origin. Although drafted with a different context in mind, these factors are equally relevant to an assessment of an internal flight/relocation alternative.

<sup>112</sup> See, for instance, *Elmi v. Minister of Citizenship and Immigration*, Canada, Federal Court, No. IMM-580-98, 12 Mar. 1999, <http://www.unhcr.org/refworld/docid/4b17c5932.html>.

<sup>113</sup> CRC, Arts. 3, 6 and 37. See also *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application No. 13178/03, ECtHR, 12 Oct. 2006, <http://www.unhcr.org/refworld/docid/45d5cef72.html>, which concerned the return (not internal relocation) of an unaccompanied five-year old girl. The Court was "struck by the failure to provide adequate preparation, supervision and safeguards for her deportation", noting further that such "conditions was bound to cause her extreme anxiety and demonstrated such a total lack of humanity towards someone of her age and in her situation as an unaccompanied minor as to amount to inhuman treatment [violation of article 3 of the European Convention on Human Rights]", paras. 66, 69.

<sup>114</sup> See CRC, *General Comment No. 6*, para. 85. See also *Inter-Agency Guiding Principles*, *op cit.*, which notes that institutional care needs to be considered a last resort, as "residential institutions can rarely offer the developmental care and support a child requires and often cannot even provide a reasonable

perceptions of orphans and other children in institutionalized care needs to be evaluated carefully as such children may be the subject of societal disapproval, prejudice or abuse, thus rendering the proposed site for relocation unreasonable in particular circumstances.

#### e) The application of exclusion clauses to children

58. The exclusion clauses contained in Article 1F of the 1951 Convention provide that certain acts are so grave that they render their perpetrators undeserving of international protection as refugees.<sup>115</sup> Since Article 1F is intended to protect the integrity of asylum, it needs to be applied “scrupulously”. As with any exception to human rights guarantees, a restrictive interpretation of the exclusion clauses is required in view of the serious possible consequences of exclusion for the individual.<sup>116</sup> The exclusion clauses are exhaustively enumerated in Article 1F, and no reservations are permitted.<sup>117</sup>

59. In view of the particular circumstances and vulnerabilities of children, the application of the exclusion clauses to children always needs to be exercised with great caution. In the case of young children, the exclusion clauses may not apply at all. Where children are alleged to have committed crimes while their own rights were being violated (for instance while being associated with armed forces or armed groups), it is important to bear in mind that they may be victims of offences against international law and not just perpetrators.<sup>118</sup>

60. Although the exclusion clauses of Article 1F do not distinguish between adults and children, Article 1F can be applied to a child only if s/he has reached the age of criminal responsibility as established by international and/or national law at the time of the commission of the excludable act.<sup>119</sup> Thus, a child below such minimum age cannot be considered responsible for an excludable act.<sup>120</sup> Article 40 of the CRC requires

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standard of protection”, p. 46.

<sup>115</sup> UNHCR’s interpretative legal guidance on the substantive and procedural standards for the application of Art. 1F is set out in UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/03/05, 4 Sep. 2003, (hereafter: “UNHCR, *Guidelines on Exclusion*”) <http://www.unhcr.org/refworld/docid/3f5857684.html>; UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 Sep. 2003, (hereafter “UNHCR, *Background Note on Exclusion*”), <http://www.unhcr.org/refworld/docid/3f5857d24.html>; UNHCR, *Statement on Article 1F of the 1951 Convention*, July 2009, (hereafter “UNHCR, *Statement on Article 1F*”), <http://www.unhcr.org/refworld/docid/4a5de2992.html>, and UNHCR, *Handbook*, paras. 140–163.

<sup>116</sup> UNHCR, *Guidelines on Exclusion*, para. 2; UNHCR *Background Note on Exclusion*, para. 4. UNHCR, *Handbook* para. 149. See also ExCom Conclusions No. 82 (XLVIII), *Safeguarding Asylum*, 17 Oct. 1997, <http://www.unhcr.org/refworld/docid/3ae68c958.html>, para. (v); No. 102 (LVI) 2005, *General Conclusion on International Protection*, 7 Oct. 2005, <http://www.unhcr.org/refworld/docid/43575ce3e.html>, para. (i); No. 103 (LVI), *Conclusion on the Provision on International Protection Including Through Complementary Forms of Protection*, 7 Oct. 2005, <http://www.unhcr.org/refworld/docid/43576e292.html>, para. (d).

<sup>117</sup> UNHCR, *Guidelines on Exclusion*, para. 3; UNHCR, *Background Note on Exclusion*, para. 7.

<sup>118</sup> The Paris Principles state: “Children who are accused of crimes under international law allegedly committed while they were associated with armed forces or armed groups should be considered primarily as victims of offences against international law; not only as perpetrators. They must be treated in accordance with international law in a framework of restorative justice and social rehabilitation, consistent with international law which offers children special protection through numerous agreements and principles,” para. 3.6. It should also be noted that the prosecutor for the SCSL chose not to prosecute children between the ages of 15 and 18 years given that they themselves were victims of international crimes.

<sup>119</sup> UNHCR, *Guidelines on Exclusion*, para. 28.

<sup>120</sup> UNHCR, *Background Note on Exclusion*, para. 91. If the age of criminal responsibility is higher in the

States to establish a minimum age for criminal responsibility, but there is no universally recognized age limit.<sup>121</sup> In different jurisdictions, the minimum age ranges from 7 years to higher ages, such as 16 or 18 years, while the Statutes of the Special Court for Sierra Leone<sup>122</sup> and the International Criminal Court<sup>123</sup> set the cut-off age at 15 years and 18 years respectively.

61. In view of the disparities in establishing a minimum age for criminal responsibility by States and in different jurisdictions, the emotional, mental and intellectual maturity of any child over the relevant national age limit for criminal responsibility would need to be evaluated to determine whether s/he had the mental capacity to be held responsible for a crime within the scope of Article 1F. Such considerations are particularly important where the age limit is lower on the scale but is also relevant if there is no proof of age and it cannot be established that the child is at, or above, the age for criminal responsibility. The younger the child, the greater the presumption that the requisite mental capacity did not exist at the relevant time.

62. As with any exclusion analysis, a three-step analysis needs to be undertaken if there are indications that the child has been involved in conduct which may give rise to exclusion.<sup>124</sup> Such an analysis requires that: (i) the acts in question be assessed against the exclusion grounds, taking into account the nature of the acts as well as the context and all individual circumstances in which they occurred; (ii) it be established in each case that the child committed a crime which is covered by one of the sub-clauses of Article 1F, or that the child participated in the commission of such a crime in a manner which gives rise to criminal liability in accordance with internationally applicable standards; and (iii) it be determined, in cases where individual responsibility is established, whether the consequences of exclusion from refugee status are proportional to the seriousness of the act committed.<sup>125</sup>

63. It is important to undertake a thorough and individualized analysis of all circumstances in each case. In the case of a child, the exclusion analysis needs to take into account not only general exclusion principles but also the rules and principles that address the special status, rights and protection afforded to children under international and national law at all stages of the asylum procedure. In particular, those principles related to the best interest of the child, the mental capacity of children and their ability to understand and consent to acts that they are requested or ordered to undertake need to be considered. A rigorous application of legal and procedural standards of exclusion is also critical.<sup>126</sup>

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country of origin than in the host country, this should be taken into account in the child's favour.

<sup>121</sup> The Committee on the Rights of the Child urged States not to lower the minimum age to 12 years and noted that a higher age, such as 14 or 16 years, "contributes to a juvenile justice system which [...] deals with children in conflict with the law without resorting to judicial proceedings"; see, CRC, *General Comment No. 10 (2007): Children's Rights in Juvenile Justice*, CRC/C/GC/10, 25 Apr. 2007, <http://www.unhcr.org/refworld/docid/4670fca12.html>, para. 33. See also UN General Assembly, United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), A/RES/40/33, 29 Nov. 1985, <http://www.unhcr.org/refworld/docid/3b00f2203c.html>, which provides that the "beginning of that age should not be fixed at a too low an age level bearing in mind the facts of emotional, mental and intellectual maturity", Art. 4.1.

<sup>122</sup> UN Security Council, Statute of the Special Court for Sierra Leone, 16 Jan. 2002, Art. 7.

<sup>123</sup> ICC Statute, Art. 26.

<sup>124</sup> For further information on exclusion concerning child soldiers, see UNHCR, *Advisory Opinion From the Office of the United Nations High Commissioner for Refugees (UNHCR) Regarding the International Standards for Exclusion From Refugee Status as Applied to Child Soldiers*, 12 Sep. 2005 (hereafter "UNHCR, *Advisory Opinion on the Application of Exclusion Clauses to Child Soldiers*"), <http://www.unhcr.org/refworld/docid/440eda694.html>.

<sup>125</sup> UNHCR, *Statement on Article 1F*, p. 7.

<sup>126</sup> For a detailed analysis on procedural issues regarding exclusion, see UNHCR, *Guidelines on Exclusion*, paras. 31–36 and UNHCR, *Background Note on Exclusion*, paras. 98–113.

64. Based on the above, the following considerations are of central importance in the application of the exclusion clauses to acts committed by children:

- i. When determining individual responsibility for excludable acts, the issue of whether or not a child has the necessary **mental state** (or *mens rea*), that is, whether or not the child acted with the requisite intent and knowledge to be held individually responsible for an excludable act, is a central factor in the exclusion analysis. This assessment needs to consider elements such as the child's emotional, mental and intellectual development. It is important to determine whether the child was sufficiently mature to understand the nature and consequences of his/her conduct and, thus, to commit, or participate in, the commission of the crime. Grounds for the absence of the *mens rea* include, for example, severe mental disabilities, involuntary intoxication, or immaturity.
- ii. If mental capacity is established, other grounds for **rejecting individual responsibility** need to be examined, notably whether the child acted under duress, coercion, or in defence of self or others. Such factors are of particular relevance when assessing claims made by former child soldiers. Additional factors to consider may include: the age at which the child became involved in the armed forces or group; the reasons for which s/he joined and left the armed forces or group; the length of time s/he was a member; the consequences of refusal to join the group; any forced use of drugs, alcohol or medication; the level of education and understanding of the events in question; and the trauma, abuse or ill-treatment suffered.<sup>127</sup>
- iii. Finally, if individual responsibility is established, it needs to be determined whether or not the consequences of exclusion from refugee status are **proportional** to the seriousness of the act committed.<sup>128</sup> This generally involves a weighing of the gravity of the offence against the degree of persecution feared upon return. If the applicant is likely to face severe persecution, the crime in question needs to be very serious in order to exclude him/her from refugee status. Issues for consideration include any mitigating or aggravating factors relevant to the case. When assessing a child's claim, even if the circumstances do not give rise to a defence, factors such as the age, maturity and vulnerability of the child are important considerations. In the case of child soldiers, such factors include ill-treatment by military personnel and circumstances during service. The consequences and treatment that the child may face upon return (i.e. serious human rights violations as a consequence of having escaped the armed forces or group) also need to be considered.

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<sup>127</sup> Decisions in France have recognized that children who committed offences, which should in principle lead to the application of the exclusion clauses, may be exonerated if they were in particularly vulnerable situations. See, for instance, 459358, *M.V.*; *Exclusion*, CRR, 28 Apr. 2005, <http://www.unhcr.org/refworld/docid/43abf5cf4.html>; 448119, *M.C.*, CRR, 28 Jan. 2005, <http://www.unhcr.org/refworld/docid/4b17b5d92.html>. See also, *MH (Syria) v. Secretary of State for the Home Department*; *DS (Afghanistan) v. Secretary of State for the Home Department*, [2009] EWCA Civ 226, Court of Appeal (U.K.), 24 Mar. 2009, <http://www.unhcr.org/refworld/docid/49ca60ae2.html>, para. 3. For detailed guidance on grounds rejecting individual responsibility, see, UNHCR *Guidelines on Exclusion*, paras. 21–24. UNHCR, *Background Note on Exclusion*, paras. 91–93. UNHCR, *Advisory Opinion on the Application of Exclusion Clauses to Child Soldiers*, *op cit.* pp. 10–12.

<sup>128</sup> For detailed guidance on proportionality see UNHCR, *Guidelines on Exclusion*, para. 24; UNHCR, *Background Note on Exclusion*, paras. 76–78.

#### IV. PROCEDURAL AND EVIDENTIARY ISSUES

65. Due to their young age, dependency and relative immaturity, children should enjoy specific procedural and evidentiary safeguards to ensure that fair refugee status determination decisions are reached with respect to their claims.<sup>129</sup> The general measures outlined below set out minimum standards for the treatment of children during the asylum procedure. They do not preclude the application of the detailed guidance provided, for example, in the Action for the Rights of Children Resources Pack,<sup>130</sup> the Inter-Agency Guiding Principles on Unaccompanied and Separated Children and in national guidelines.<sup>131</sup>

66. Claims made by child applicants, whether they are accompanied or not, should normally be processed on a priority basis, as they often will have special protection and assistance needs. Priority processing means reduced waiting periods at each stage of the asylum procedure, including as regards the issuance of a decision on the claim. However, before the start of the procedure, children require sufficient time in which to prepare for and reflect on rendering the account of their experiences. They will need time to build trusting relationships with their guardian and other professional staff and to feel safe and secure. Generally, where the claim of the child is directly related to the claims of accompanying family members or the child is applying for derivative status, it will not be necessary to prioritise the claim of the child unless other considerations suggest that priority processing is appropriate.<sup>132</sup>

67. There is no general rule prescribing in whose name a child's asylum claim ought to be made, especially where the child is particularly young or a claim is based on a parent's fear for their child's safety. This will depend on applicable national regulations. Sufficient flexibility is needed, nevertheless, to allow the name of the principal applicant to be amended during proceedings if, for instance, it emerges that the more appropriate principal applicant is the child rather than the child's parent. This flexibility ensures that administrative technicalities do not unnecessarily prolong the process.<sup>133</sup>

68. For unaccompanied and separated child applicants, efforts need to be made as soon as possible to initiate tracing and family reunification with parents or other family members. There will be exceptions, however, to these priorities where information becomes available suggesting that tracing or reunification could put the parents or

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<sup>129</sup> The relevant applicable age for children to benefit from the additional procedural safeguards elaborated in this section is the date the child seeks asylum and not the date a decision is reached. This is to be distinguished from the substantive assessment of their refugee claim in which the prospective nature of the inquiry requires that their age at the time of the decision may also be relevant.

<sup>130</sup> Action for the rights of children, *ARC Resource Pack, a capacity building tool for child protection in and after emergencies*, produced by Save the Children, UNHCR, UNICEF, OHCHR, International Rescue Committee and Terre des Hommes, 7 Dec. 2009, <http://www.savethechildren.net/arc>.

<sup>131</sup> See, for instance, U.K. Asylum Instruction, *Processing an Asylum Application from a Child*, 2 Nov. 2009, <http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/specialcases/guidance/processingasylumapplication1.pdf?view=Binary>; U.K. Border Agency Code of Practice for Keeping Children Safe from Harm, Dec. 2008, <http://www.unhcr.org/refworld/docid/4948f8662.html>; Finland, Directorate of Immigration, *Guidelines for Interviewing (Separated) Minors*, Mar. 2002, <http://www.unhcr.org/refworld/docid/430ae8d72.html>; U.S. *Guidelines For Children's Asylum Claims*, *op cit.*; Canada, IRB, *Guidelines Issued by the Chairperson Pursuant to Section 65(4) of the Immigration Act: Guideline 3 - Child Refugee Claimants: Procedural and Evidentiary Issues*, 30 Sep. 1996, No. 3, <http://www.unhcr.org/refworld/docid/3ae6b31d3b.html>.

<sup>132</sup> UNHCR, *Procedural Standards for Refugee Status Determination Under UNHCR's Mandate*, 20 Nov. 2003, <http://www.unhcr.org/refworld/docid/42d66dd84.html>, pages 3.25, 4.21–4.23.

<sup>133</sup> This is especially relevant in relation to claims, such as FGM or forced marriage, where parents flee with their child in fear for his/her life although the child may not fully comprehend the reason for flight.

other family members in danger, that the child has been subjected to abuse or neglect, and/or where parents or family members may be implicated or have been involved in their persecution.<sup>134</sup>

69. An independent, qualified guardian needs to be appointed immediately, free of charge in the case of unaccompanied or separated children. Children who are the principal applicants in an asylum procedure are also entitled to a legal representative.<sup>135</sup> Such representatives should be properly trained and should support the child throughout the procedure.

70. The right of children to express their views and to participate in a meaningful way is also important in the context of asylum procedures.<sup>136</sup> A child's own account of his/her experience is often essential for the identification of his/her individual protection requirements and, in many cases, the child will be the only source of this information. Ensuring that the child has the opportunity to express these views and needs requires the development and integration of safe and child-appropriate procedures and environments that generate trust at all stages of the asylum process. It is important that children be provided with all necessary information in a language and manner they understand about the possible existing options and the consequences arising from them.<sup>137</sup> This includes information about their right to privacy and confidentiality enabling them to express their views without coercion, constraint or fear of retribution.<sup>138</sup>

71. Appropriate communication methods need to be selected for the different stages of the procedure, including the asylum interview, and need to take into account the age, gender, cultural background and maturity of the child as well as the circumstances of the flight and mode of arrival.<sup>139</sup> Useful, non-verbal communication methods for children might include playing, drawing, writing, role-playing, story-telling and singing. Children with disabilities require "whatever mode of communication they need to facilitate expressing their views".<sup>140</sup>

72. Children cannot be expected to provide adult-like accounts of their experiences. They may have difficulty articulating their fear for a range of reasons, including trauma, parental instructions, lack of education, fear of State authorities or persons in positions of power, use of ready-made testimony by smugglers, or fear of reprisals. They may be too young or immature to be able to evaluate what information is important or to interpret what they have witnessed or experienced in a manner that is easily understandable to an adult. Some children may omit or distort vital information or be unable to differentiate the imagined from reality. They also may experience difficulty

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<sup>134</sup> Family tracing and reunification have been addressed in a number of ExCom Conclusions, including most recently in ExCom, *Conclusion No. 107*, para. (h)(iii). See also UNHCR, *Guidelines on Determining the Best Interests of the Child*, *op cit.*; CRC, *General Comment No. 6*, para. 81.

<sup>135</sup> "Guardian" here refers to an independent person with specialized skills who looks after the child's best interests and general well-being. Procedures for the appointment of a guardian must not be less favourable than the existing national administrative or judicial procedures used for appointing guardians for children who are nationals in the country. "Legal representative" refers to a lawyer or other person qualified to provide legal assistance to, and inform, the child in the asylum proceedings and in relation to contacts with the authorities on legal matters. See ExCom, *Conclusion No. 107*, para. (g)(viii). For further details, see CRC, *General Comment No. 6*, paras. 33–38, 69. See also UNHCR, *Guidelines on Unaccompanied Children Seeking Asylum*, *op cit.*, p. 2 and paras. 4.2, 5.7, 8.3, 8.5.

<sup>136</sup> CRC, Art. 12. The CRC does not set any lower age limit on children's right to express their views freely as it is clear that children can and do form views from a very early age.

<sup>137</sup> CRC, *General Comment No. 6*, para. 25; CRC, *General Comment No. 12*, paras. 123–124.

<sup>138</sup> CRC, Arts. 13, 17.

<sup>139</sup> Separated Children in Europe Programme, *SCEP Statement of Good Practice*, Third edition, 2004, <http://www.unhcr.org/refworld/docid/415450694.html>, para. 12.1.3.

<sup>140</sup> CRC, *General Comment No. 9*, para. 32.

relating to abstract notions, such as time or distance. Thus, what might constitute a lie in the case of an adult might not necessarily be a lie in the case of a child. It is, therefore, essential that examiners have the necessary training and skills to be able to evaluate accurately the reliability and significance of the child's account.<sup>141</sup> This may require involving experts in interviewing children outside a formal setting or observing children and communicating with them in an environment where they feel safe, for example, in a reception centre.

73. Although the burden of proof usually is shared between the examiner and the applicant in adult claims, it may be necessary for an examiner to assume a greater burden of proof in children's claims, especially if the child concerned is unaccompanied.<sup>142</sup> If the facts of the case cannot be ascertained and/or the child is incapable of fully articulating his/her claim, the examiner needs to make a decision on the basis of all known circumstances, which may call for a liberal application of the benefit of the doubt.<sup>143</sup> Similarly, the child should be given the benefit of the doubt should there be some concern regarding the credibility of parts of his/her claim.<sup>144</sup>

74. Just as country of origin information may be gender-biased to the extent that it is more likely to reflect male as opposed to female experiences, the experiences of children may also be ignored. In addition, children may have only limited knowledge of conditions in the country of origin or may be unable to explain the reasons for their persecution. For these reasons, asylum authorities need to make special efforts to gather relevant country of origin information and other supporting evidence.

75. Age assessments are conducted in cases when a child's age is in doubt and need to be part of a comprehensive assessment that takes into account both the physical appearance and the psychological maturity of the individual.<sup>145</sup> It is important that such assessments are conducted in a safe, child- and gender-sensitive manner with due respect for human dignity. The margin of appreciation inherent to all age-assessment methods needs to be applied in such a manner that, in case of uncertainty, the individual will be considered a child.<sup>146</sup> As age is not calculated in the same way universally or given the same degree of importance, caution needs to be exercised in making adverse inferences of credibility where cultural or country standards appear to lower or raise a child's age. Children need to be given clear information about the purpose and process of the age-assessment procedure in a language they understand. Before an age assessment procedure is carried out, it is important that a qualified independent guardian is appointed to advise the child.

76. In normal circumstances, DNA testing will only be done when authorized by law and with the consent of the individuals to be tested, and all individuals will be provided with a full explanation of the reasons for such testing. In some cases, however, children may not be able to consent due to their age, immaturity, inability to understand what this entails or for other reasons. In such situations, their appointed guardian (in the absence of a family member) will grant or deny consent on their behalf taking into account the views of the child. DNA tests should be used only where other means for verification have proven insufficient. They may prove particularly beneficial in the case of children who are suspected of having been trafficked by individuals claiming to be

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<sup>141</sup> ExCom, *Conclusion No. 107*, para. (d).

<sup>142</sup> *Ibid*, para. (g)(viii), which recommends that States develop adapted evidentiary requirements.

<sup>143</sup> UNHCR, *Handbook*, paras. 196, 219.

<sup>144</sup> *Inter-Agency Guiding Principles*, *op. cit.*, p. 61.

<sup>145</sup> ExCom, *Conclusion No. 107*, para. (g)(ix).

<sup>146</sup> *Ibid*, para. (g)(ix); UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, *op. cit.*, paras. 5.11, 6.

parents, siblings or other relatives.<sup>147</sup>

77. Decisions need to be communicated to children in a language and in a manner they understand. Children need to be informed of the decision in person, in the presence of their guardian, legal representative, and/or other support person, in a supportive and non-threatening environment. If the decision is negative, particular care will need to be taken in delivering the message to the child and explaining what next steps may be taken in order to avoid or reduce psychological stress or harm.

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<sup>147</sup> UNHCR, *Note on DNA Testing to Establish Family Relationships in the Refugee Context*, June 2008, <http://www.unhcr.org/refworld/docid/48620c2d2.html>.