

The best interests of the child in the context of national security

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Introduction

- Context: children associated with foreign fighters, and who are currently overseas; and issues surrounding their potential return to Australia;
 - Some numbers:
 - Approx 29 000 foreign children in Syria (20 000 Iraqi and 9 000 other nationalities) (UNICEF);
 - Al Hol camp held 70 000 residents in July 2019, of which 90% were women and children (OCHA); 2500 children under 12 born to ISIS fighters in Al Hol, while those over 12 held in other locations, separated from families (see at <https://news.un.org/en/story/2019/05/1038901>);
 - Approx 1200 children of various nationalities in the Rusafa prison, Bagdad; at least 1175 children (majority under the age of 12) held in Kurdish camps, on suspicion of having ISIS ties (*Report of the Special Representative of the Secretary-General for Children and Armed Conflict* 26 December 2018 para 18);
 - Australian minors in conflict zones – approx 70 (Cook and Vale (2017) *From Daesh to 'Diaspora'*);
- Can the concept of the best interests have any relevance/impact on the overwhelmingly complicated legal issues raised by this group of children?

Some issues to consider

- Children associated with foreign fighters are not a homogenous group;
- Children and their families may be in detention facilities, which increases their vulnerability;
- Some children are detained by non-governmental forces in areas outside a government's control (i.e. by Kurdish forces in Al Hol/Hawl camp);
- No diplomatic and consular presence by Australia in Syria;
- The time factor (i.e. passage of time is more significant for children than for adults).

International law issues

- A potential breach of international obligations by Australia? No straightforward answer, but:
 - Nationality rights under international law:
 - Art 12(4) of the ICCPR: ‘No one shall be arbitrarily deprived of the right to enter his own country’;
 - The right to acquire a nationality (art 24(3) ICCPR, arts 7 and 8 CRC);
 - Does the failure to assist the children amount to a denial of the right to acquire (art 24(3) ICCPR, art 7(1) CRC) or preserve one’s nationality (art 8(1) CRC)?
 - Jurisdictional issues;
 - Breach of a potential obligation to facilitate the return:
 - UN Security Council Resolution 2427 (2018) para 26 (seems to) require states to repatriate the children;
 - CRC Committee *Concluding observations Belgium* (2019) recommended: ‘Taking into consideration paragraph 26 of Security Council resolution 2427 (2018), promptly facilitate the repatriation of all Belgian children’... (para 50);
 - Increasing number of calls for the children to be repatriated (OHCHR and the High Commissioner for HR; other UN officials, including the Special Rapporteur on children and armed conflict; OSCE);
 - Acting against various Security Council resolutions which require states to cooperate to combat terrorism (Resolutions 2170 (2014) esp para 5 and 2178 (2014) esp para 4), and implicitly against art 2(2) UN Charter (state ‘shall fulfill in good faith the obligations assumed by them in accordance with the present Charter’);
 - Calls by US government, Syrian and Kurdish officials for detained terrorist fighters and their families to be repatriated.

International legal mechanisms to hold Australia accountable

- ICJ & provisional measures (what state would invoke Australia's responsibility?);
- Individual communications to the Human Rights Committee under the *Optional Protocol* to the ICCPR 1966/1976 (with the possibility of ordering interim measures);
- Interstate communication against Australia to the above Committee (Australia made the relevant declaration to art 41 ICCPR in 1993);
- Australia has not ratified the *Optional Protocol to the Convention on the Rights of the Child on a communications procedure* (2011/2014);
 - Communications numbers 77/2019 and 79/2019 to the CRC Committee concern two groups of children of French nationality, whose parents are allegedly associated with ISIS, and are detained in Kurdish camps in Syria. The claimants (grandparents) have argued breaches of articles 2, 3, 6, 20, 24, 37 of the CRC and sought the repatriation of the children.

International law issues cont.

- A potential breach of international obligation by another state/s?
 - Customary law norms in relation to the treatment of aliens and diplomatic protection;
 - The exercise of diplomatic protection is problematic:
 - Discretionary (international law) nature of diplomatic protection (in respect of initiation, extent and duration of protection, and the remedy sought) (*Barcelona Traction* case and the 2006 ILC *Draft Articles on Diplomatic Protection*);
 - Does the absence of diplomatic/consular representation in the forum state have a bearing on the discretion of the state of nationality in relation to the exercise of diplomatic protection?
 - Breach of international obligation likely not attributable to a state;
 - Might a state of nationality have an obligation to exercise some form of protection when otherwise its nationals would be under the protection of no other state?

Domestic law issues

- The exercise of diplomatic protection (the domestic aspects):
 - Law remains unsettled post-*Hicks*;
 - Recent European developments: Brussels Court of Administrative Appeal (12 August 2018) rejected repatriation request because camps not under Belgian control; German court ordered (12 July 2019) the repatriation of children and wife of an ISIS fighter whose whereabouts are unknown; the Dutch Children's Ombudsman reportedly urged the government to 'take its responsibility to protect children' of the foreign fighters;
 - Political will is uncertain and the geo-political context complicated;
 - *Counter-Terrorism (Temporary Exclusion Orders) Bill 2019* (reintroduced on 4 July 2019) – Clause 10(3):
 - 'If the person is 14 to 17 years of age, the Minister must, before making a temporary exclusion order in relation to the person, have regard to:
 - (a) the protection of the community as the paramount consideration; and
 - (b) the best interests of the person as a primary consideration'.
- Children as citizens (citizenship & diplomatic protection; and citizenship as a source of a right to special protection as a child);
- Exercise of criminal jurisdiction for terrorism-related offences (where relevant) – however, no extradition treaties with Iraq or Syria.

What of the best interests of the child?

- Article 3(1) of the CRC:

‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration’.

- Internationally

- Australia’s jurisdiction in relation to the application of article 3(1) of the CRC (independent application and application in conjunction with other CRC provisions or the provisions of other international treaties);
- Diplomatic protection and the best interests of the child:
 - Does the exercise of diplomatic protection fall under the ambit of article 3(1) of the CRC?
 - Does the obligation which it creates - to give a primary consideration to the best interests of the child - affect the discretionary nature of diplomatic protection?

What of the best interests of the child?

- Domestically
 - No domestic constitutional recognition for the best interests of the child and thus limited traction in controlling the Cth legislation and executive action;
 - No autochthonous formulation of a cross-cutting best interests provision;
 - Paradoxically, the Human Rights Commission (under the Australian Human Rights Commission Act 1986) and the Parliamentary Joint Committee on Human Rights (under the *Human Rights (Parliamentary Scrutiny) Act 2011*) are authorized to assess the compatibility of proposed or existing Cth statutes with, *inter alia*, the CRC and implicitly art 3(1);
 - Citizenship and the common law: ‘citizenship carries with it a common law right on the part of children and their parents to have a child's best interests taken into account, at least as a primary consideration, in all discretionary decisions by governments and government agencies which directly affect that child's individual welfare...’ (Gaudron J in *Teoh*);
 - This view warrants further exploration (only approved by Kirby J in *DJL v Central Authority* [2000] HCA 17 para 135), including in relation to its relevance for the exercise of diplomatic protection.

Best interests – domestic cont.

- *Counter-Terrorism (Temporary Exclusion Orders) Bill 2019*

- Explanatory Memorandum to the Bill and Attachment A *Statement of Compatibility with Human Rights* etc finds the Bill compatible, *inter alia*, with art 3(1) of the CRC:

‘41. Where a child may pose a threat to the Australian community the Government must balance the protection of the Australian community with the best interests of the child. The Bill enables this balance.

...

42. Australia is required to take into account the best interests of the child as a primary consideration, not the only primary consideration. Where a child is [sic] poses a threat to the Australian community, it is appropriate that the legitimate objective of protecting the Australian community is the paramount consideration with the best interests of the child being a primary consideration’.

Best interests – domestic cont.

- Some problems:
 - Seizes on the procedural formulation and dimension of article 3(1), without seeking a meaningful application of its requirements;
 - Lip service paid to the essence of article 3(1): apart from the limited reference to the best interests of the child, the Bill does not create a different regime for children; and no mitigating measures in relation to children if TEOs are made;
 - CRC Committee stresses that article 3(1) must inform actions concerning children directly as well as indirectly (*General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*) – the Bill envisages the consideration of the best interests of the child only in orders directed at the child and not at the child’s parent, for example;
 - As formulated, the Bill makes it largely impossible for the best interests of the child to be given priority, which is contrary to article 3(1), and its interpretation given by the Committee and the HCA in *Teoh*.

Conclusions

- Giving appropriate consideration to the best interests of the child in the given context tests political and legal boundaries, both internationally and domestically;
- International and domestic law institutions require further development for a meaningful accommodation of the best interests of the children concerned;
- Acknowledging their position of extreme physical and legal vulnerability and their dependence on pro-active state intervention can be suggested as starting points.