The common European asylum system and the rights of the child: an exploration of meaning and compliance

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1 Introduction

1.1 The thesis of the study

This study addresses the question of whether the Common European Asylum System (CEAS) complies with the rights of the child. It contrasts the normative standards of international child rights law with the standards of treatment of child asylum seekers and refugees in the CEAS. More particularly, it identifies the attributes of the rights of the child that are most relevant to the asylum context and systematically examines whether and to what extent those attributes are reflected in the existing and proposed recast CEAS legislation.

1.2 The background to the study

Early in the new millennium the EU began to harmonize asylum law and policy.[1] The original treaty basis for a common asylum system was inserted into the Treaty Establishing the European Community (TEC) by the Treaty of Amsterdam which 'communitarised' asylum by moving it from the intergovernmental third pillar to the Community first pillar. Article 63 TEC envisaged the adoption within five years of the entry into force of Amsterdam of 'measures on asylum' in accordance with the 1951 Geneva Convention relating to the Status of Refugees. By the end of 2005, the Union legislator had adopted Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (hereinafter, the Reception Conditions Directive), Council Regulation No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (hereinafter, the Dublin Regulation), 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 (hereinafter, the Qualification Directive) and Council Directive 2005/85/EC of 1 December 2005 on minimum standards on pro-

1 For the history of pre-CEAS cooperation on asylum, see Ingrid Boccardi, *European and Refugees – Towards an EU Asylum Policy* (The Hague: Kluwer Law International, 2002).

cedures in Member States for granting and withdrawing refugee status (hereinafter, the Asylum Procedures Directive).[2] The Common European Asylum System was born.

Already at this stage the CEAS instruments made specific provision for children: as minors, unaccompanied minors and persons with special needs. Thus, the instruments are interspersed with age-specific provisions which refer sometimes to the 'needs' of children, sometimes to their rights and nearly always to the concept of the best interests of the child. This is remarkable because the legislation was passed at a time when there was no coherent Community commitment to the rights of the child. Although all Member States had ratified the seminal UN Convention on the Rights of the Child (CRC), the EU had no power – nor indeed was the idea mooted – to accede to the Convention.[3] Of course the European Court of Justice (ECJ) had been 'reading down' human rights protection in its interpretation and application of EC law since the late 1960s through the guise of the 'general principles' of Community law including the general principle of respect for fundamental rights. In articulating the content of this principle, the Court takes inspiration from the common constitutional traditions of Member States and guidance from international human rights treaties to which the Member States are party, especially the European Convention on Human Rights (ECHR).[4] While the ECHR has not been, until recently, a source of child-rights jurisprudence,[5] the CRC could theoretically have been used to inform the general principles doctrine. However, it was not until 2007 that the ECJ referred (obiter) to the CRC as an international instrument to which it has regard in the interpretation of general principles of EC law.[6] Until that point, cases involving children were resolved by reference to substantive EU law, but not by reference to the rights of the child.[7]

2 Council Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, was also adopted as part of the CEAS package.

3 See, by anology, *Opinion 2/94 of the Court*, 28 March 1996.

4 ECJ, *Nold v Commission*, Case 4/73, Judgment of 14 May 1974.

5 See, for example: Immigration Law Practitioners' Association (ILPA), 'Consideration by the European Court of Human Rights of the UN Convention on the Rights of the Child 1989' (2008); Mitchell Woolf, 'Coming of Age? – The Principle of "The Best Insterests of the Child"', *European Human Rights Law Review* 2 (2003): 205-221; and Ursula Kilkelly, 'The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child', *Human Rights Quarterly* 23 (2001): 308-326. For an account of how the Court's jurisprudence has become much more child-rights oriented latterly, see, in particular, Chapters 2 and 7 *infra*.

6 ECJ, *European Parliament v Council*, Case C-540/03, Judgment of 27 June 2006.

7 For a cross-section of the free-movement cases involving children, see ECJ, *Echternach and Moritz v Netherlands Minister for Education*, Joined cases 389/87 and 390/87, Judgment of 15 March 1989; ECJ, *Baumbast and R v Secretary of State for the Home Department*, Case C-413/99, Judgment of 17 September 2002; ECJ, *Chen v Secretary of State for the Home Department*,

Indeed, until the Amsterdam Treaty it was to be doubted whether children were subjects of Community law at all and any regulation of children was generally incidental to some other objective, such as free movement of their parents.[8] However, by 'communitarising' asylum, among other areas, the Amsterdam Treaty bought a whole new cohort of children within the purview of EU law, raising but not answering the question of a normative, child-rights framework. In this general context, the numerous references to the child in the CEAS instruments are noteworthy.

Nevertheless, the dearth of a coherent Community commitment to the rights of the child is evident in CEAS legislation. Thus, NGOs and academic commentators, while welcoming the fact that specific provision is made for children in the CEAS, have been generally critical of both the age-specific and the age-neutral provisions. They have pointed out that the mere existence of age-specific provisions does not necessarily equate to a protection of the rights of the child and indeed have characterized those provisions as establishing a fairly low level of child-rights protection.[9] They have criticised the age-neutral provisions as being insensitive to the rights of children.[10] These criticisms appear to have been born out: the evaluations of the CEAS instruments have generally found that children, along with other vulnerable groups, have not been well served under the CEAS regime.[11]

Case C-200/02, Judgment of 19 October 2004. For a more recent case, see CJEU, *Zambrano v Office national de l'emploi*, Case C-34/09, Judgment of 8 March 2011.

8 See, for example, Helen Stalford and Eleanor Drywood, 'Coming of Age? Children's Rights in the European Union', *Common Market Law Review* 46 (2009):143-172; Helen Stalford, 'Constitutionalising Equality in the European Union: A Children's Rights Perspective, *International Journal of Discrimination and the Law* 8, nos 1-2 (2005): 53-73; and Helen Stalford, 'The Citizenship Status of Children in the European Union', *International Journal of Children's Rights* 8 (2000): 101-131.

9 See, for example, Eleanor Drywood, 'Challenging Concepts of the "Child" in Asylum and Immigration Law: The Example of the EU', *Journal of Social Welfare and Family Law* 32, no. 3 (2010): 309-323; and Eva Zschirnt, 'Does Migration Status Trump the Best Interests of the Child? Unaccompanied Minors in the EU Asylum System', *Journal of Immigration, Asylum and Nationality Law* 25, no. 1 (2011): 34-55.

10 *Ibid.*

11 For example, the Commission has noted that: 'All first stage instruments underline that it is imperative to take account of the special needs of vulnerable people. However, it appears that serious inadequacies exist with regard to the definitions and procedures applied by Member States for the identification of more vulnerable asylum seekers and that Member States lack the necessary resources, capacities and expertise to provide an appropriate response to such needs. It appears therefore necessary to prescribe in more depth and detail the ways in which the special needs of the most vulnerable asylum seekers should be identified and addressed in all stages of the asylum process. This kind of comprehensive approach would focus in particular on issues such as regulating more precisely what constitutes adequate medical and psychological assistance and counseling for traumatized persons, victims of torture and trafficking and a proper identification and response to the needs of minors, especially unaccompanied minors; the development of appropriate interview techniques for these categories, based *inter alia* on cultural, age and gender awareness and inter-cultural skills as well as on the use of specialized interviewers and

In this regard, it is of no small significance that four of the five CEAS instruments are in the process of being recast, giving the EU legislator a chance to redress any child-rights deficit. A Phase Two CEAS was always part of the original design, the intention being to establish minimum standards in the first phase and a common asylum procedure and uniform status in the second. However, owing to a delay in the negotiation of the recasts, the Phase Two instruments will be adopted under a different legal basis than the original instruments: Article 78 of the Treaty on the Functioning of the European Union (TfEU). This phase is now well under construction. The recast Qualification Directive has been adopted,[12] although it has yet to enter into force, and the proposed recasts of the other three instruments are at various stages of advancement.[13] An outer deadline of 'by 2012' (meaning by the end of 2012) has been established for their adoption.[14] At the time of writing, although they may still undergo significant change, the proposed recasts provide a reasonably clear indication of the path ahead.

Furthermore, Phase Two CEAS is being adopted in the context of a much more coherent Union commitment to the rights of the child, due particularly to the EU Charter of Fundamental Rights. The rationale for the Charter was to make explicit and hence 'more visible' the fundamental rights that hitherto were protected through the general principles doctrine. In this task the drafters of the Charter took some liberties. Notably, Article 24 on the rights of the child went considerably beyond the Court's extant jurisprudence, providing for a cluster of rights deriving from the CRC.[15] The most far-reaching of those rights

interpreters, and laying down more detailed rules regarding what should be relevant to the assessment of claims based on gender- and child-specific persecution.' 'Green Paper on the future Common European Asylum System, COM (2007) 301 final', § 2.4.1, p. 7.

12 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).

13 At the time of writing, the latest update from the Danish presidency is that negotiations between the European Parliament and the Council are expected to start soon on the revised proposal for a recast Reception Conditions Directive which was tabled by the Commission on 1 June 2011. Negotiations between the European Parliament and the Council are also expected to start soon on the Commission's proposals for a recast Dublin Regulation. Finally, discussions in the Council preparatory bodies are on-going on the revised proposal for a recast Asylum Procedures Directive which was tabled by the Commission on 1 June 2011. See 'Note from Presidency to Council (Justice and Home Affairs on 26-27 April 2012)', Brussels, 16 April 2012, 8595/12, ASILE 62, CODEC 938.

14 'The Stockholm Programme – An open and secure Europe serving and protecting citizens', Official Journal C 115, 04/05/2010, p. 0001-0038.

15 Article 24 reads: '1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both

is the principle of the best interests of the child – a Trojan horse of a principle that arguably encompasses all the rights in the CRC (see Chapter 2). In 2006, even before the Charter had entered into force, the EU made a policy commitment to 'mainstreaming' the child rights in the Charter into relevant areas of activity, a commitment that was reiterated in 2011.[16] In 2009, the Charter became legally binding – Article 6(1) of the Treaty on European Union (TEU) placing it on a Constitutional footing. Underscoring the new Union commitment to the rights of the child, Article 3(3) TEU obliges the Union to promote the 'protection of the rights of the child.'[17]

Article 51(1) of the Charter obliges the Union institutions and Member States when 'implementing' Union law to respect and promote the rights in the Charter in accordance with their respective powers. It follows that the Union's legislative institutions when drafting, debating and adopting Phase Two CEAS and the Member States when implementing the CEAS are bound to respect and promote the rights of the child per Article 24. There is, however, an ambiguity about when Member States are 'implementing' Union law. Pre-Charter, the ECJ exercised fundamental rights jurisdiction over both acts of the institutions and acts of Member States when they were 'acting in the scope' of Union law. Member States have been held to be acting in the scope of Union law when they implement Union law,[18] invoke restrictive measures in order to derogate from one of the four fundamental freedoms,[19] and exercise permitted discretion to derogate from an obligation laid down in secondary legislation.[20] Member States are also acting in the scope of Union law when, on their own initiative, they derogate from a treaty obligation in order to protect fundamental rights that would otherwise be violated.[21] However, on a black-letter reading, the reference in Article 51(1) of the Charter to 'implementing' Union law appears narrower than the Court's formula of 'acting in the scope' of Union law. This is potentially problematic in the context of the CEAS because, as will become evident, the instruments that make up the CEAS are replete with derogations, discretionary provisions and vague injunctions that leave much to be interpreted. When Member States creatively (as they

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his or her parents, unless that is contrary to his or her interests.' According to Explanations Relating to the Charter of Fundamental Rights, 2007/C 303/02, Article 24 'is based on the New York Convention on the Rights of the Child […] particularly Articles 3, 9, 12 and 13.'

16 Commission Communication, 'Towards an EU Strategy on the Rights of the Child', COM (2006) 367 final and Commission Communication, 'An EU Agenda for the Rights of the Child', COM (2011) 60 final.

17 For an analysis of Article 3(3) TEU see, Helen Stalford and Mieke Schuurman, 'Are We There Yet? The Impact of the Lisbon Treaty on the EU Children's Rights Agenda', *International Journal of Children's Rights* 19 (2011): 381-403.

18 ECJ, *Wachauf v Bundesamt für Ernährung und Forstwirtschaft*, Case 5/88, Judgment of 13 July 1989.

19 ECJ, *ERT v DEP,* Case C-260/89, Judgment of 18 June 1991.

20 ECJ, *European Parliament v Council,* Case C-540/03, Judgment of Judgment of 27 June 2006.

21 ECJ, *Schmidberger v Austria,* Case C-112/00, Judgment of 12 June 2003.

must) transpose and execute these provisions, they are clearly 'acting in the scope' of Union law according to the Court's established jurisprudence. But are they 'implementing' Union law *stricto sensu*?

The explanations relating to the Charter are hopeful in this regard.[22] The explanation on Article 51 provides that '[a]s regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act *in the scope of* Union law'.[23] This statement appears to equate 'implementing' with 'acting in the scope of', an equation that is also evident in recent case-law of the Court of Justice of the EU (CJEU). For example, in *NS and ME*, the Court uses the 'acting in the scope of' phraseology when assessing whether the EU Charter is applicable to the exercise of discretion provided for in Union legislation.[24] The case concerned a discretionary provision of the Dublin Regulation. Noting that the discretionary provision 'forms an integral part of the Common European Asylum System' and that it 'must be exercised in accordance with the other provisions of that regulation', the Court held that 'a Member State which exercises that discretionary power must be considered as implementing European Union law within the meaning of Article 51(1) of the Charter.'[25] A narrow reading of the judgment suggests that only discretionary provisions of the CEAS instruments that are integral to the instrument and/or to the CEAS as a whole can be said to be implementing Union law. However, a broader reading focusing on the use of the phrase 'acting in the scope', which implies continuity with the Courts pre-Charter case-law, suggests that all discretionary provisions of the CEAS engage the Charter. Further case-law is awaited to clarify the issue.

The entry into force of the Charter and the (partial) clarification of the scope of its application to Member States are not the only recent developments of interest. A new child-rights consciousness pervades the European Court of Human Rights (ECtHR).[26] This is significant in the context of the CEAS because Charter rights that correspond to ECHR rights have the same meaning and scope as the Convention rights as articulated in the jurisprudence of the

22 The explanations have a quasi-legal status: Article 52(7) of the Charter provides that in the interpretation of the Charter the explanations are to be given 'due regard by the Court of the Union and of the Member States. Similarly, Article 6(1) TEU provides that the Charter must be interpreted with 'due regard' for the explanations.

23 Explanations Relating to the Charter of Fundamental Rights, 2007/C 303/02, Explanation on Article 51 – Field of application, para. 2 (emphasis added).

24 CJEU, *N.S. and others v Secretary of State for the Home Department and others*, Joined cases C-411/10 and C-493/10, Judgment of 21 December 2011. See also, CJEU, *Dereci v Bundesministerium für Inneres*, Case C-256/11, Judgment of 15 November 2011, in which the Court held that if a situation 'is covered' by EU law, the Charter is engaged.

25 *Ibid*, paras 65, 66 and 68 respectively.

26 See, in particular, Chapters 2 and 7 *infra*.

ECtHR.[27] Moreover, the ECHR remains a source of inspiration for the general principles of EU law, Charter notwithstanding.[28] And, of course, the EU is due shortly to accede to the ECHR.[29] Moreover, the issue of accession by the EU to the CRC is beginning to be debated.[30] It is in this changing normative context that Phase Two CEAS is being negotiated. It is therefore a timely moment to undertake a reappraisal of the Common European Asylum System in the light of the rights of the child, with Phase One CEAS serving as a baseline and proposed Phase Two serving as a measure of progress.

1.3 THE AIMS AND OBJECTIVES OF THE STUDY

This study seeks to evaluate whether the CEAS, in its first and second phases, complies with the rights of the child. As the title of the study suggests, there are two aims: an elucidation of the meaning of the relevant rights of the child and an assessment of whether the CEAS instruments comply with those rights. Each of these aims will be addressed in turn.

The meaning of the relevant rights of the child needs to be clearly articulated before any assessment of compliance can take place. The international law on the rights of the child has multiple sources but one stands out: the seminal United Nations Convention on the Rights of the Child (CRC). As *the* definitive normative statement on the rights of the child, the CRC is the point of departure for any theoretical discussion relating to child rights notwithstanding that it is currently channeled into EU law indirectly via the general principles of EU law, the Charter of Fundamental Rights and the ECHR. The Convention contains some 41 substantive articles, which are more or less relevant to the asylum seeking and refugee child (see section 1.4). However, the meaning of many of these rights is far from clear. Naturally, the more than 20 year old Convention comes replete with a large amount of jurisprudential baggage. But this is not always illuminating or helpful. For example, there is an *a priori* theoretical debate that has never been (and arguably cannot be) satisfactorily resolved, about whether children are properly rights-holders.[31] This un-

27 Article 52(3) EU Charter of Fundamental Rights and Explanation on Article 52, 2007/C 303/02.

28 Article 6(2) TEC.

29 The EU's accession to the ECHR is required under Article 6 of the Lisbon Treaty and foreseen by Article 59 of the ECHR as amended by Protocol 14.

30 See, for example, European Parliament, Directorate-General for Internal Policies, Policy Department C, 'EU Framework of Law for Children's Rights' (2012).

31 See, Laura Purdy, 'Why Children Shouldn't Have Equal Rights', *International Journal of Children's Rights* 2 (1994): 223-241; Anne McGillivray, 'Why Children Do Have Equal Rights: In Reply to Laura Purdy', *International Journal of Children's Rights* 2 (1994): 243-258; Tom Campbell, 'Really Equal Rights? Some Philosophical Comments on "Why Children Shouldn't have Equal Rights" by Laura M. Purdy', *International Journal of Children's Rights* 2 (1994):

resolved debate emerges in contestations over the meaning of particular rights.[32] Furthermore, there is no case-law on the part of the Committee on the Rights of the Child owing to the lack of an individual complaints mechanism, a lacuna that is starting to be filled as other adjudicative mechanisms take an interest in children's rights.[33] Consequently, ascribing meaning to a given right is often an exercise more philosophical and deductive than one of 'black letter' legal analysis. Finally, many of the rights of the child are drafted at a broad level of generality, making their meaning in the specific asylum context obscure.[34] It is necessary, therefore, to identify the attributes of any given right in a way that is meaningful to the asylum context. Consequently, the first aim of this study is to attempt to clarify the meaning of relevant rights of the child, in general and in the specific asylum context.

The second aim of this study is to assess the compliance of the CEAS instruments in both phases with the relevant rights of the child. But a distinction must be made between 'compliance' is a narrow adjudicative sense and 'compliance' in a broader evaluative sense. From an adjudicative perspective, the term must be understood in the context of the relationship between EU law and domestic law in areas of shared competence, a relationship characterized by the concept of subsidiarity.[35] Subsidiarity in the CEAS is expressed in the choice of the directive as the key legal instrument, in the choice of minimum standards legislation (which, nominally at least, become common standards in Phase Two) and in the large number of discretionary and derogation provisions that typify the CEAS legislation. When the CEAS instruments are transposed, the standards they contain operate as a 'floor' below which Member States cannot go and above which they are free to choose to go. But the way in which the 'floor' interacts with fundamental rights is not necessarily apparent and the responsibility is on Member States to transpose/ implement/ interpret the floor in a way that respects fundamental rights, to the extent

259-263; Laura Purdy, 'Why Children Still Shouldn't Have Equal Rights', *International Journal of Children's Rights* 2 (1994): 395-398.

32 See Chapter 2 *infra* on the principle of the best interests of the child.

33 See in particular Chapter 2 on the best interests principle and Chapter 7 on the right to liberty for how the European Court of Human Rights is integrating a child-rights perspective into its jurisprudence. An optional protocol to the CRC allowing for an individual complaints mechanism was adopted by the General Assembly in 2011. This has not yet entered into force.

34 Thus, Goodwin Gill observes that '[t]he Convention on the Rights of the Child offers little direct guidance […] often leaving appropriate responses to be deduced somewhat unsatisfactorily from general principles'. Guy Goodwin-Gill, 'Unaccompanied Refugee Minors, The Role and Place of International Law in the Pursuit of Durable Solutions', *International Journal of Children's Rights* 3 (1995): 412.

35 Article 5(3) TEU states, *inter alia*: 'Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.'

possible. In the multi-level system of governance of EU law, there are good reasons for this approach.[36] But it complicates any assessment of compliance of EU law with fundamental rights. In brief, in order to 'comply' with the rights of the child, the CEAS instruments must simply be susceptible to an interpretation that permits fundamental rights to be added on. Only if the instruments preclude this move, can they be considered non compliant, strictly speaking.

However, the view taken in this study is that when the EU sets minimum standards, and even more so when it adopts common standards, it should do so in a way that corresponds clearly to fundamental rights, in this case, the rights of the child. In this regard, the author agrees with De Schutter when he says that:

> […] where an EU instrument defines […] a certain minimal level of protection of certain fundamental rights or creates for the benefit of the Member States certain exceptions, this may create the impression that provided they comply with that instrument or remain within the boundaries set by that exception, the Member States are acting in conformity with the requirements of fundamental rights – an impression which, although in certain cases mistaken, may be difficult to dispel.[37]

It can be observed that in the context of the CEAS Member States may be inclined to indulge in this mistaken impression because, despite the rhetoric of solidarity, asylum harmonization is generally perceived as a zero sum game.[38] In this context, it is imperative that the standards of the CEAS should truly correspond to the standards established in international human rights law. Indeed, this may be a specific imperative of child-rights law – a point that will be taken up in the chapter on the principle of the best interests of the child.

Therefore, the second aim of this study is to assess whether the CEAS instruments direct Member States, *without more*, to act in such a way as complies with the rights of the child. Of course, the extent to which the instruments do not provide such direction is also precisely the extent to which Member States are supposed to exercise their own initiative in order to be rights compliant. Therefore, the question of whether the CEAS complies with the rights of the child is an interesting one, not simply as a critique of the work of the EU legislator in integrating child rights into asylum policy, but also for Member

36 See, Christoph Engel, 'The European Charter of Fundamental Rights, A changed Political Opportunity Structure and its Normative Consequences', *European Law Journal* 7, no. 2 (2001): 151-170.

37 Olivier De Schutter, 'The Implementation of the EU Charter of Fundamental Rights Through the Open Method of Coordination', *Jean Monnet Working Paper* 07/04 (2004): 21-22.

38 See, Jari Pirjola, 'European Asylum Policy – Inclusions and Exclusions Under the Surface of Universal Human Rights Language', *European Journal of Migration and Law* 11 (2009): 347-366; and Rosemary Byrne, Gregor Noll and Jens Vedsted Hansen, 'Understanding Refugee Law in an Enlarged European Union', *European Journal of International Law* 15, no. 2 (2004): 355-379.

States, national courts and the Court of Justice of the EU which must attempt to interpret the CEAS in a manner that is consistent with the rights of the child.

1.4 THE SCOPE OF THE STUDY

This study evaluates the extent of compliance of the CEAS in both phases with the rights of the child. Hence the first task is to identify the rights of the child that are implicated by the CEAS. Policy and advocacy documents often take the CEAS as their point of departure for identifying the relevant rights of the child. However, such an approach is rejected here for two reasons: first, it risks missing important rights of the child that are omitted from the CEAS; and second, it risks reducing the analysis of any given right to a *reaction* to however that right is dealt with by the CEAS. So an inverse, and, it is submitted, more rigorous approach is adopted here whereby the rights of the child drive the analysis. But still the question must be answered, what rights of the child are at issue?

Some guidance is provided by the CRC. Article 22 of the Convention establishes the right of the asylum seeking and refugee child to appropriate protection and humanitarian assistance in the enjoyment, *inter alia*, of applicable rights in the Convention. What, then, are the applicable rights in the Convention? According to the general principle of non-discrimination in Article 2 of the Convention, all the rights in the Convention are, in principle, applicable to all children.[39] Therefore, the question is less one of which rights are *applicable* to asylum seeking and refugee children and more one of which rights are *relevant* to this group. But a cursory glance at the rights in the Convention reveals that almost all the rights in the CRC are relevant to asylum seeking and refugee children. And yet it is not possible to undertake a detailed analysis of each and every right in the CRC and the extent to which the CEAS complies with it. A principled selection must be made. In this study, the selection is based on a kind of reflective equilibrium, to borrow Rawls' expression, between the rights of the child in the CRC and the provisions of the CEAS. After much deliberation, the following rights have been chosen:

- The principle of the best interests of the child (Chapter 2)
- The right of the child to seek and enjoy asylum (Chapter 3)

39 Article 2(1) CRC provides: 'States Parties shall respect and ensure the rights set forth in the present Covenant to each child within their jurisdiction without distinction of any kind, irrespective of the child's or his or her parent's or legal guardian's race color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.' The term 'other status' has been interpreted by the Committee on the Rights of the Child as extending to 'the status of a child as being unaccompanied or separated, or being a refugee, asylum seeker or migrant'. General Comment No. 6, 'Treatment of unaccompanied and separated children outside their country of origin', U.N. Doc CRC/GC/2005/6 (2005), para. 18.

- The right of the child to be heard (Chapter 4)
- The right of the asylum-seeking and refugee child, whether accompanied or unaccompanied, to day-to-day protection and care (Chapter 5)
- Key socio-economic rights of the child, namely, the right of the child to health, an adequate standard of living and education (Chapter 6)
- The right of the child to liberty (Chapter 7)

These rights have been chosen on the rather utilitarian basis that they are the most critical to the most number of asylum seeking and refugee children in the EU context.[40] It is, however, accepted that other rights not included here may be of greater importance to some asylum seeking and refugee children, such as the rights of the physically or mentally disabled child. Nevertheless, this study aims to go 'narrow and deep' in its focus, analysis and application and this demands selectivity. A more detailed explanation for the choice of each right is provided in each chapter.

A principled selection must also be made regarding which CEAS instruments to include in the study. This research is confined to the 'core' instruments of the CEAS: the Reception Conditions Directive and its proposed recast, the Dublin Regulation and its proposed recast, the Asylum Procedures Directive and its proposed recast and the Qualification Directive and its recast. The Family Reunification Directive is also briefly considered in so far as it establishes a right of refugees to family reunification. The Temporary Protection Directive is not included for consideration for two reasons. First, it has never been activated; and second, it has not been the subject of a proposed recast. Since a key aim of this research is to capture the dynamic aspect of the CEAS as it moves from Phase One to Phase Two, the Temporary Protection Directive is not of interest to the same extent as the other instruments. Nevertheless, the analysis undertaken in this study can be readily transferred to the Temporary Protection Directive, which shares many of the same child-specific provisions as the other instruments.

1.5 THE LIMITATIONS OF THE STUDY

This study begins from the premise that the CEAS should comply with the rights of the child. The fact that the EU, unlike its Member States, is not party to the key international child rights instrument, the CRC, does not undermine this premise, although there is an argument to be made for accession by the EU to the CRC.[41] This is because, as outlined in section 1.2, the EU has com-

40 Other commentators have fastened on a similar set of rights as being key to immigrant children. See, for example, Jacqueline Bhabha, 'Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights?', *Human Rights Quarterly* 31 (2009): 410-451.

41 *Supra* n. 30.

mitted itself in other ways to complying with the rights of the child: through the general principles of EU law; through the EU Charter of Fundamental Rights; through the ECHR; and through new Article 3(3) TEU. Consequently, it is submitted that the premise that the CEAS should comply with the rights of the child is a valid one. This is not to ignore the existence of an on-going debate about the precise relationship between EU law and fundamental rights, about whether the EU has or should have a general human rights competence or about whether the EU's human rights obligations are essentially negative in character or extend to a 'duty to fulfil'.[42] However, this study looks past that debate to get to the question of whether, in fact, the CEAS does comply with the rights of the child. Nevertheless, the broader debate is one that will be returned to in the concluding chapter.

This study is an exploration of two areas of substantive law: child rights law and the CEAS. An alternative way of approaching the question of whether the CEAS complies with the rights of the child would be to scrutinize the mechanics of how the EU legislator 'mainstreams' child rights into the CEAS. Such an approach might involve an exploration of the child-rights impact and child-rights assessment mechanisms that are in place (or not) in the different EU institutions, a contextualization of those mechanisms in the broader EU human rights mainstreaming agenda and an evaluation of how those mechanisms have worked at the different stages of the legislative process in Phase One and Phase Two CEAS.[43] However, this study is not primarily interested in matters procedural, but rather seeks to explore the inter-relationship between two areas of substantive law. Nevertheless, the findings of this study – whether they are that CEAS complies or does not comply broadly with the rights of the child – will also be a reflection of the EU legislator's mainstreaming attempts. Furthermore, this study is relevant to the question of mainstreaming in that, in identifying the essential attributes of the rights of the child in the asylum context and applying them systematically to the provisions of the CEAS instruments, this study, in effect, establishes a template for undertaking a child-rights compliance assessment in the asylum context. These issues will be taken up in the concluding chapter.

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42 For a select cross-section of scholarly literature see, Daniel Denman, 'The Charter of Fundamental Rights', *European Human Rights Law Review* 4 (2010): 349-359; Xavier Groussot and Laurent Pech, 'Fundamental Rights Protection in the European Union Post Lisbon Treaty', *Foundation Robert Schuman Policy Paper*, European Issues No. 173 (2010); Tawhida Ahmed and Israel de Jesús Butler, 'The European Union and Human Rights: an International Law Perspective', *European Journal of International Law* 17 (2006): 771; and Sionaidh Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis', *Common Market Law Review* 42 (2006): 629-665.

43 Although no systematic study of this kind has yet been done in the asylum context, the need for such a study is beginning to be highlighted. See, Eleanor Drywood, '"Child-Proofing" EU Law and Policy: Interrogating the Law-Making Processes Behind European Asylum and Immigration Provision', *International Journal of Children's Rights* 19 (2011): 405-428.

A number of miscellaneous limitations to the scope of this study should be noted. First, this study does not deal with the 'external dimension of asylum' which is increasingly referred to as being part of the CEAS.[44] The external dimension of asylum covers relations with countries of origin and transit. Second, this study does not deal with issues that arise prior to and after seeking international protection, such as interception, deflection and return. Third, this study is not a comparative analysis of how Member States have transposed, implemented and interpreted the CEAS, although state practice is referred to. The principle focus is on the CEAS instruments themselves and whether their provisions are *prima facie* consistent with the rights of the child. Finally, this research is on the treatment of asylum-seeking and refugee children, whether accompanied or unaccompanied, in the CEAS. This is both broader and narrower than a related subject of research – that of unaccompanied minors.[45] The term 'unaccompanied minors' (or more properly 'separated children') encompasses, but is broader than, unaccompanied minor asylum seekers, since it also includes irregular migrants and victims of trafficking. On the other hand, this study is not confined to the treatment of unaccompanied minor asylum seekers, but extends to all minor asylum seekers.

1.6 THE SOURCES AND METHODOLOGY OF THE STUDY

The first aim of this study is to establish the meaning and legal requirements of relevant child rights. As previously mentioned, the point of departure in seeking to understand any given child right is its presentation in the CRC. In trying to access the meaning of each right, reference is made to all the usual sources for the interpretation of the CRC, namely, the *travaux préparatoires* of the CRC, Concluding Observations of the Committee on the Rights of the Child to States Parties periodic reports and General Comments of the Committee on the Rights of the Child in respect of particular rights. However, international child rights law is not limited to the CRC, and other non child-specific human rights instruments can be illuminating for a number of reasons. First, the rights in the CRC are often child-specific iterations of a right that is found in general human rights law. An analysis of the general right can prove useful both in providing context as well as in acting as a counterpoint to illustrate the specificity and uniqueness of the child-specific right. Second, many general

44 The 'external dimension of asylum' was originally conceived of and outlined separately to the programme on the CEAS and was not limited to asylum but extended also to migration. However, with the entry into force of the Lisbon Treaty, it found a treaty basis in Article 78(2)(g) TfEU and therefore now constitutes part of the CEAS.

45 For example, Marie Diop, 'Unaccompanied Minors' Rights Within the European Union, Is the EU Asylum and Immigration Legislation in Line with the Convention on the Rights of the Child?', *Legal paper presented under the supervisions of Philippe de Bruycker and Rebecca O'Donnell*, Odysseus Network (2008-09) (on file with author).

international human rights instruments contain a child-specific provision or provisions.[46] The approach of the relevant monitoring bodies to such provisions can provide another perspective on the rights of the child. Third, increasingly, general human rights instruments are being interpreted through the lens of the CRC when the litigant is a child.[47] This is a welcome development as it supplies something that has been critically missing from the CRC framework, namely, case-law. Consequently, in attempting to clarify the meaning of a particular right in the CRC, recourse is also had to other international and regional (i.e. European) human rights instruments and the jurisprudence of their treaty monitoring bodies or courts. Scholarly literature on the rights of the child in general and in the specific asylum context is also accessed.

The second aim of this study is to assess the extent to which the CEAS, in its first and second phases, is compliant with the rights of the child. In terms of Phase One CEAS, the assessment begins with a textual analysis of the wording of the instruments as informed by the developing case law of the Court of Justice of the EU on the CEAS. Reference is also made to the Commission evaluations of the implementation by Member States of the various instruments and to empirical research into state practice by UNHCR and others. In terms of the Phase Two instruments, the assessment begins with a textual analysis of the wording of the recast (in the case of the Qualification Directive), and the proposed recasts (in the case of the other instruments). Thereafter, recourse is had to supplementary documents, such as explanatory memoranda, impact assessments, detailed explanations of the proposals, previous Commission proposals etc. in order to clarify the meaning of particular provisions. Reference is also made to policy and advocacy documents submitted by asylum, human rights and child rights NGOs in an attempt to influence the course of Phase Two CEAS. Finally, recourse is had to the scholarly literature on the CEAS and the small but important specialist literature on the treatment of children in the CEAS.

It should be clarified that, with the exception of the recast Qualification Directive which has already been adopted,[48] the analysis of the Phase Two instruments is based on the latest version of the Commission proposal for a

46 Examples are Article 24 of the International Covenant on Civil and Political Rights on the right of the child without any discrimination to such measures of protection as are required by his status as a minor and Article 17 of the Revised European Social Charter on the right of children and young persons to social, legal and economic protection.

47 See in particular Chapter 2 on the best interests principle and Chapter 7 on the right to liberty for how the European Court of Human Rights is integrating a child-rights perspective into its jurisprudence.

48 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (hereinafter, recast Qualification Directive').

recast of those instruments.[49] This is to avoid the problem of the constantly moving target since, at the time of writing, the proposed recasts are at various stages of advancement in the legislative process.[50] It is accepted that, by focusing on the Commission proposal rather than on the current state of play of the proposal, the analysis risks being out of date. However, it is submitted that the converse approach is impractical. Furthermore, the analysis of the Commission proposal is of enduring relevance to the eventual recast whether the latter stays the same or differs.

1.7 THE STRUCTURE OF THE STUDY

This study is composed of six substantive chapters, each of which is devoted to a right or a group of related rights. The purpose of each chapter is to identify the key attributes of the right or group of rights and to assess whether those attributes are accurately reflected in relevant CEAS instruments, Phase One and Phase Two. The chapters follow the same basic structure: a first section outlines the normative content of the right, a second section assesses whether the relevant provisions of relevant CEAS instruments are compliant with the right and a third section assesses the prospects for enhanced compliance in Phase Two CEAS. In chapters which deal with more than one right, this structure is repeated internally within the chapter in respect of each right. A slight deviation is made to this structure in Chapter 2 for reasons that will be explained below.

Chapter 2 concerns the principle of the best interests of the child. As a general principle of the CRC and arguably the most talked-about (but least understood) of child rights concepts, it makes sense to begin the thesis here. In terms of structure, this chapter is slightly unique in that, having clarified the normative content and legal requirements in the first two sections, the findings inhibit the possibility of undertaking *at this stage* a full compliance assessment of the CEAS in both its phases. This is because, in addition to its well-known application to decisions concerning individual children, the best interests principle is found to have an important collective dimension, in the

49 Amended proposal for a directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers, COM (2011) 320 final (hereinafter, 'proposed recast Reception Conditions Directive'); Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (recast), COM (2011) 319 final (hereinafter, 'proposed recast Asylum Procedures Directive'); the Proposal for a Regulation of the European Parliament and of the Council establishing the Criteria and Mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), COM (2008) 820 final (hereinafter 'proposed recast Dublin Regulation').

50 See *supra* n. 13.

sense that it requires the legislator to shape legislation that concerns children in accordance with the rights of the child. Therefore, two 'compliance' questions can be asked: first, in their direction to Member States on the best interests of the child in individual cases, do the CEAS instruments comply with the legal requirements of the principle? Second, of much greater importance, is the CEAS itself in the best interests of children? The first question is answered in this chapter in respect of the Phase One and Two CEAS instruments. The second question is deferred until later, since all the other chapters of this study are devoted to assessing whether the CEAS complies with the rights of the child. As such, Chapter 2 is a foundational chapter for the rest of the thesis.

Chapter 3 deals with the right of the child to seek and qualify for international protection. It begins by clarifying the meaning of this 'right'. First of all, to the extent that anyone has a right to seek asylum, the child too has this right. This means that the child, whether accompanied or unaccompanied, must be allowed to lodge an asylum application. Rules regarding the lodging of asylum applications are laid down in the Asylum Procedures Directive and its proposed recast and are scrutinized accordingly. Secondly, like anyone else, the child who qualifies for international protection has the right to be granted international protection. But eligibility in the case of children also depends on having the rights of the child recognized as refugee-relevant. It is argued that various obstacles to recognizing the rights of the child as refugee-relevant are created by the intersection of international human rights law and international refugee law. The relevant CEAS instrument – the Qualification Directive – is examined to see whether these obstacles have been transferred to the CEAS and whether the recast directive eliminates some or all of these obstacles.

Chapter 4 outlines the right of the child to be heard, a general principle of the CRC which has significant implications for the asylum procedure. The right is the child-specific equivalent of the general human right to a fair hearing. It comprises the right of the child to a hearing, to be able to participate meaningfully in that hearing and to have his/her views given due consideration in accordance with the age and maturity of the child. It has potentially transformative consequences for the asylum interview which range from a right to be interviewed, to possible exemption from negative credibility inferences. Many provisions of the Asylum Procedures Directive are implicated by the right of the child to be heard. These are analyzed for compliance with the various aspects of the right. The proposed recast is then scrutinized to assess the prospects for enhanced compliance in Phase Two.

Chapter 5 concerns the right of the asylum-seeking and refugee child to day-to-day protection and care. In the case of accompanied children this right is generally met by their parents, underscoring the importance of a cluster of rights that fall under the rubric of 'family unity' such as the concept of derived rights and the prohibition on separating a child from his/her parents against their will. In the case of unaccompanied and separated children, the right to protection and care cannot be met by their parents and hence must

be met by the state acting in a surrogate capacity. The state is required to identify such children, to appoint a representative to oversee their best interests and to provide alternative care. Various provisions of the Reception Conditions Directive, the Qualification Directive and the Dublin Regulation speak to these issues and are duly assessed. Finally, the Phase Two instruments, actual and proposed, are assessed in order to evaluate the prospects for improved compliance with these rights.

Chapter 6 concerns certain socio-economic rights of the child, namely, the right of the child to health, to an adequate standard of living and to education. A modified approach to elucidating the content of these rights is advanced because of the distinct legal obligation inherent in socio-economic rights (i.e. progressive realization rather than full immediate realization). In brief, the normative content and the 'core' content of each right is delineated on the premise that the relevant CEAS instruments should generally conform to the former, but that in their discretionary and derogation provisions, they should conform at least to the latter. The relevant CEAS instruments are the Reception Conditions Directive and the Qualification Directive. A compliance analysis is undertaken of these directives and repeated in respect of the recasts, proposed and actual.

Chapter 7 relates to the right of the child to liberty. It is an unhappy fact that many asylum seeking children in the EU, both accompanied and unaccompanied, are deprived of their liberty because of widespread policies of administrative detention of asylum seekers. These policies are sanctioned by the CEAS. This chapter explores the meaning of the right of the child to liberty in the light of recent developments in the jurisprudence of the European Court of Human Rights as regards the administrative detention of children. It evaluates provisions of the Reception Conditions Directive and Asylum Procedures Directive which expressly or implicitly authorize detention. It assesses whether the provisions of the proposed recasts – which are supposed to radically revise the CEAS position on detention – comply with the right of the child to liberty.

Chapter 8 concludes the study by synthesizing and commenting on the findings relating to the meaning of the various rights of the child, the extent of compliance of the Phase One instruments with those rights and the prospects for enhanced compliance in Phase Two CEAS. Some general observations are drawn from the findings as to possible causes for non-compliance and a view is offered on whether and how these might be overcome and on how future research might contribute to the debate.

1.8 THE SCIENTIFIC CONTEXT OF THE STUDY

How children are treated in the CEAS has been the subject of research and advocacy work by child-rights and asylum intergovernmental and non-governmental organizations since the inception of the CEAS. There is also a small but

rich vein of academic commentary on child migrants and a number of commentators have focused on the treatment of child asylum seekers in the CEAS. Particular attention has been paid to the situation of unaccompanied minors seeking asylum since they constitute an especially vulnerable group. An emerging area of research relates to the mainstreaming of child rights by the EU legislator. However, the subject of the child in refugee law is still in its infancy when compared to that of women – another group on the margins of refugee law.

Moreover, to my knowledge, no one has undertaken a complete analysis of the CEAS in the light of the rights of the child in a single work. In this regard, it is submitted that this study expands the sum of knowledge in the area in a number of ways. Most importantly, it offers a systematic, rights-driven methodology for assessing whether the CEAS is compliant with the rights of the child. However, in so doing, it also clarifies the meaning or the applied meaning in the asylum context of certain rights that hitherto have been the subject of considerable confusion. Two examples will illustrate this point. First, most commentators feel duty bound to refer to the principle of the best interests of the child, but few really grapple with the meaning or legal implications of the concept. This study clarifies the meaning, scope and weight of the best interests principle, allowing for a more searching compliance assessment than has been undertaken hitherto. Second, existing research has attempted to integrate the rights of the child into the refugee definition. This study also attempts this maneuver but advances a new theoretical perspective on why the refugee definition has proven resistant to such attempts. This perspective helps to identify obstacles to the integration of child rights into refugee law generally which, in turn, informs the assessment of compliance of the CEAS – in this case, the Qualification Directive – with the rights of the child. Finally, this study has been conducted at a time when child-rights law has been undergoing a minor revolution, owing mainly to a new child-rights consciousness at the European Court of Human Rights. Fortuitously, this has coincided with the process of recasting the CEAS, making this study at once novel and timely.[51]

1.9 A WORD ON TERMINOLOGY

This study uses the terms 'minor' and 'child' interchangeably. Also, when referring to what is properly known as a 'separated child', this work uses the more descriptive term 'unaccompanied or separated child'. However, because the CEAS employs the term 'unaccompanied minor', that term is used when discussing relevant provisions of the CEAS instruments. The term 'seeking

51 This study is up to date as of April 28, 2012.

asylum' in this study generally means seeking international protection, whether refugee protection or subsidiary protection, unless otherwise stated.

2 The principle of the best interests of the child

2.1 INTRODUCTION

The principle of the best interests of the child is laid down in Article 3(1) CRC which provides: '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'.[1] Two other international human rights instruments expressly recognize the principle – the 1979 Convention on the Elimination of Discrimination Against Women[2] and the 2006 Convention on the Rights of Persons with Disabilities[3] – while the International Covenant on Civil and Political Rights implicitly recognizes the concept.[4] At the regional level, although the European Convention on Human Rights (ECHR) is silent on the rights of the child, the European Court of Human Rights (ECtHR) has been referring to the best interests principle in the context of Article 8 ECHR for quite some time,[5] and recently extended the scope of application of the best interests principle beyond the Article 8 context.[6] Significantly, the best interests principle is one of three rights of the child listed in Article 24 of the EU Charter

1 While best interests as a general principle is laid down in Article 3(1) CRC, seven further provisions of the CRC refer to the best interests of the child in specific contexts: Article 9(1), 9(3) & 9(4) (separation of a child from his/her parents against their will), Article 18 (parental responsibilities), Article 21 (adoption), Article 37(c) (treatment while in detention) and Article 40 (juvenile justice).

2 Article 5 regarding the common responsibility of men and women in the upbringing and development of their children.

3 Article 23 relating to respect for home and the family.

4 The Human Rights Committee considers the principle to be implicit in Articles 23 and 24 ICCPR. See, respectively, Human Rights Committee, General Comment 19, 'Article 23', U.N. Doc. HRI/GEN/1/REV.1 at 28 (1994), para. 6 and Human Rights Committee, General Comment 17, 'Article 24', U.N. Doc. HRI/GEN/1/REV.1 at 23 (1994), para. 6.

5 For a cross-section of cases see, ECtHR, *Bronda v Italy* (40/1997/824/1030) Judgment of 9 June 1998; ECtHR, *Mayeka and Mitunga v Belgium*, Appl. No. 13178/03, Judgment of 12 October 2006; ECtHR, *Maslov v Austria*, Appl No. 1638/03, Judgment of 23 June 2008; ECtHR, *Neulinger and Shuruk v Switzerland*, Appl. No. 41615/07, Judgment of 6 July 2010; and ECtHR, *Nunez v Norway*, Appl. No. 55597/09, Judgment of 28 June 2011.

6 ECtHR, *Rahimi v Greece*, Appl. No. 8786/08, Judgment of 5 April 2011. The best interests principle was used in the context of Article 5 ECHR.

of Fundamental Rights.[7] Finally, although the best interests principle is not explicitly mentioned in the various articles that relate to children in the revised European Social Charter, the European Committee of Social Rights has stated that 'when ruling on situations where the interpretation of the Charter concerns the rights of a child, the Committee considers itself bound by the internationally recognized requirement to apply the best interests of the child principle.'[8] Hence, the best interests principle is widely recognized in international and regional human rights law. The question for resolution is whether the CEAS complies with the principle.

However, this is not (simply) a matter of confronting the one with the other. Or at least, there is a substantial amount of spade work that has to be undertaken before the final confrontation can take place. This is because the best interests concept is notoriously problematic. It is no exaggeration to say that it is one of the most amorphous and least understood of legal concepts. It has been variously described as '*only* a principle of interpretation'[9] (as opposed to a right or duty), an 'open concept with no definite content',[10] and even 'a vehicle for the furtherance of the interests or ideologies of others, not of the interests of children'.[11] Moreover, in the asylum context, it has frequently been 'hijacked' to serve absolutist agendas. Thus, one can observe in state practice a resistance to the concept of best interests in the asylum context, since the child may not have a right to what is in his/her best interests. In other words, whether or not it is in the child's best interests to remain in the host country is independent of the question of whether the child qualifies as a beneficiary of international protection. From this perspective, doing what is in a child's best interests is perceived to involve a lowering or softening of standards.[12] On the other hand, an ethnocentric view is sometimes discernible in the literature – the view that any child, whatever his/her provenance, identity, personal experience or circumstances, would be better off in Western Europe, or that being a child dispenses with the need for status determination and the application of a system of asylum regulation.[13] Such absolutist

7 Article 24(2) of the Charter, which corresponds to Article 3(1) CRC, provides: 'In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.'

8 European Committee of Social Rights, *Defence for Children International (DCI) v The Netherlands*, Complaint No. 47/2008, Decision on the merits, 20 October 2009, para. 29.

9 Geraldine Van Bueren, *The International Law on the Rights of the Child* (The Hague/ Boston/ London: Martinus Nijhoff Publishers, 1998), 46 (emphasis added).

10 Johanna Schiratzki, 'The Best Interests of the Child in the Swedish Aliens Act', *International Journal of Law, Policy and the Family* 14 (2000): 206.

11 John Eekelaar, 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism', *International Journal of Law and the Family* 8 (1994): 58.

12 See sections 2.4 and 2.5 *infra*.

13 For example, Bhabha and Young opine that '[i]n the majority of cases where unaccompanied minors seek asylum, it will be in their best interests to be granted refugee status, both in terms of their immediate protection needs and their future legal status and standard of

positions are symptomatic of a general lack of understanding of the best interests principle.

Consequently, one of the aims of this chapter is to draw out the complexity and richness of the best interests concept – in general and in the specific asylum context. Sections 2.2 and 2.3 are devoted to this aim. Section 2.2 explores the vexed issue of the meaning of the term 'best interests', contrasting the two predominant approaches to interpreting the term and coming down firmly in favour of a rights-based approach. Section 2.3 explores the nature of the legal obligation inherent in making the best interests of the child a primary consideration in all actions concerning children. It analyses the scope of the obligation, the weight to be attached to the best interests of the child in decision-making and the emerging guidance on how to conduct the best interests assessment in individual cases. The second aim of this chapter is to assess whether the CEAS instruments in both phases comply with the principle of the best interests of the child. However, as indicated in Chapter 1, the findings made in relation to meaning of 'best interests' and the nature of the legal obligation indicate that there are two significant 'best interests' questions to be asked: 1) is the direction given to Member States on the best interests of the child consistent with the normative requirements of the principle? 2) is the CEAS itself in the best interests of children? Only the first question can be answered at this stage since the second question entails an inquiry into whether the CEAS instruments are broadly compliant with the rights of the child, which is the task of the remaining chapters of the thesis. Consequently, the compliance sections of this chapter are limited to the first question. These sections are relatively short because they pre-empt more detailed analysis in subsequent chapters of the thesis. Section 2.4 analyses the references to the best interests principle in the Phase One instruments and section 2.5 does the same in respect of the proposed Phase Two instruments.

2.2 THE MEANING OF THE TERM 'BEST INTERESTS

What does it mean to make the best interests of the child a primary consideration in all actions concerning children? Bringing a literal analysis to bear on the term 'best interests' offers little. What are interests? What is the relationship of interests to rights?[14] Are they interests as identified by the child or by the

living.' To be fair, Bhabha and Young accept that 'the scope of the refugee definition is narrower than a 'best interest' judgement'. Jacqueline Bhabha and Wendy Young, 'Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines', *International Journal of Refugee Law* 11, no. 1 (1999): 98.

14 It should be stated that the concept of the best interests of the child bears no relation to the interest theory of rights, even though the latter is regarded as providing a particularly useful account of why children have rights. On the interest theory and child rights see Tom

adult decision-maker? Presumably, not all interests are worth protecting. In this regard, what function does the adjective 'best' play? It implies a value judgment, an evaluation of the interests identified, but by whom and how?

2.2.1 One interpretation: 'best interests' is a welfare concept

A historical analysis might be expected to shed some light on the term. Unhelpfully, the *travaux préparatoires* of the CRC reveal that the meaning of 'the best interests of the child' was not discussed by the drafters. The first draft of the article was a *ver batim* reproduction of Principle 2 of the Declaration on the Rights of the Child 1959, which reads:

> The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.[15]

Therefore the best interests of the child was originally conceived as instrumental to the protection and development of the child. However, even before any substantive discussion of the article had taken place, a revised text was proposed – very close to the text of Article 3(1) as adopted – which removed the reference to the broader context of the best interests assessment.[16] In subsequent discussions, little attention was paid to the meaning of 'interests' or to what the adjective 'best' brings to the equation. Alston opines that '[i]t reflects rather poorly on the drafting [process] that although Article 3(1) was discussed at some length by the Working Group, it meaning seems either to have been taken for granted or to have been considered unimportant.'[17]

It is quite likely, however, that delegates were familiar with the concept from domestic law. Indeed the 'best interests of the child' was originally a creature of the common law, pre-dating its incarnation in the Convention on

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Campbell, 'The Rights of the Minor: As Person, As Child, As Juvenile, As Future Adult', *International Journal of Law and the Family* 6 (1992): 1-23.

15 Article II of the Draft Convention on the Rights of the Child submitted by Poland on 7 February 1978, reproduced in Sharon Detrick, *The United Nations Convention on the Rights of the Child, A Guide to the Travaux Préparatoires* (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1992), 33.

16 Basic working text as adopted by the 1980 Working Group, E/CN.4/1349, pp. 2-3, reproduced in Sharon Detrick, *ibid*., 131-132.

17 Philip Alston, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights', *International Journal of Law and the Family* 8 (1994): 10 & 11.

the Rights of the Child by about 100 years.[18] At its most benign, its function was to introduce welfare considerations (as determined by prevalent social understandings of children and assumptions about what was 'good' for them) into decision-making about children, particularly decisions about child custody – something that would have been an anathema previously. The concept was introduced into international law in the 1959 UN Declaration on the Rights of the Child, which was also motivated by a child welfare agenda, although with some tentative leanings towards a concept of child rights. It would be reasonable to speculate that the drafters of the Convention simply intended this welfare-oriented concept to be 'carried over' into the Convention.

However, there are two arguments against such an interpretation. First, the domestic law version of the principle was already, at the time of the drafting of the Convention, subject to severe criticism for being hopelessly indeterminate. Mnookin's seminal 1975 critique of the concept is worth quoting at some length:

> Deciding what is best for a child poses a question no less ultimate than the purposes and value of life itself. Should the judge be primarily concerned with the child's happiness? Or with the child's spiritual and religious training? Should the judge be concerned with the economic 'productivity' of the child when he grows up? Are the primary values of life in warm, interpersonal relationships or in discipline and self-sacrifice? Is stability and security for a child more desirable than intellectual stimulation? These questions could be elaborated endlessly.[19]

Thus, the best interests principle was criticized as providing 'the illusion rather than the reality of legislative guidance'.[20] Worse still, it was accused of being 'a convenient cloak for bias, paternalism and capricious decision-making'.[21] Simply put, since almost anything could be said to be in the best interests of children, it was entirely possible to conflate those interests with the interests of the decision-maker. The *travaux préparatoires* reveal that there *was* an awareness among delegates of these problems of indeterminacy and bias. Thus, the representative of Venezuela drew attention to the subjectivity of the standard, especially if the CRC contained no prior stipulation that the best interests of the child were his or her or all-round – or physical, mental, spiritual, moral and social – development. This would mean leaving the ultimate interpretation of the best interests of the child to the judgment of the person, institution or

18 For an overview of the history of the best interests principle, see Janet Dolgin, 'Why Has the Best Interest Standard Survived?: The Historic and Social Context', *Child Legal Rights Journal* 16, no. 2 (1996) Special Report; see further, John Eekelaar, 'The Emergence of Children's Rights', *Oxford Journal of Legal Studies* 6 (1986): 161-182.

19 Robert Mnookin, 'Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy', *Law and Contemporary Problems* 39, no. 3 (1975): 260-61.

20 Janet Dolgin, *supra* n. 18.

21 Stephen Parker, 'The Best Interests of the Child – Principles and Problems', *International Journal of Law and the Family* 8 (1994): 26.

organization applying the standard.[22] In view of this awareness, it seems unlikely that the drafters of the Convention intended the welfare version of best interests to prevail in the Convention context, warts and all, so to speak.

However, an even stronger argument can be made against the assumption that the Convention crystallized the historical child-welfare understanding of best interests. There is a fundamental contradiction between the paternalistic determination of someone else's welfare and the very idea of what it means to have a right (on the usual liberal understanding of a right as a freedom from government calculations of what is in the common good generally). Thus, as Eekelaar has noted 'if someone has the right to determine my welfare, do I have rights in any meaningful sense?'[23] Since the whole project of the CRC was to establish children as rights-bearers – subjects rather than objects of rights – it seems improbable that the drafters intended to plant in the Convention the seeds of its own undoing in the form of such an apparently perverse concept.

But if the term 'best interests' is not contiguous with the historical term and reveals little by way of a literal analysis, then what does it mean? It is submitted that the term can only be understood in context, in the light of the object and purpose of the Convention as a whole. Indeed, the Committee on the Rights of the Child (Committee RC) advocates a schematic or purposive approach to the interpretation of the rights in the Convention, emphasizing 'the indispensable, interconnected nature of the Convention's provisions'.[24] The next sub-section therefore undertakes a schematic analysis of the concept.

2.2.2 An alternative interpretation: 'best interests' is a rights-based concept

What is the connection between 'best interests' and the rights in the Convention on the Rights of the Child? Clearly, the concept of best interests cannot be fully assimilated to rights – otherwise the concept would be redundant. Nevertheless, it is submitted that there is an intimate connection between the best interests of the child and the rights of the child. The following sub-sections

22 Considerations by the 1989 Working Group, E/CN.4/1989/48, para. 120, reproduced in Sharon Detrick (1992), *supra* n. 15, at 137.

23 John Eekelaar, 'The Importance of Thinking That Children Have Rights', *International Journal of Law and the Family* 6 (1992): 223.

24 Committee on the Rights of the Child (hereinafter, 'Committee RC'), General Comment No. 1 (2001), *The aims of education*, U.N. Doc. CRC/GC/2001/1, para. 6. The ECtHR referred to this approach in *Neulinger and Shuruk v Switzerland*, noting that 'the Committee [RC] has emphasized on various occasions that the convention must be considered as a whole, with the relationship between the various articles being taken into account. Any interpretation must be consistent with the spirit of that instrument and must focus on the child as an individual having civil and political rights and its own feelings and opinions'. Appl. No. 41615/07, Judgment of 6 July 2010, para 51.

offer a number of schematic arguments in support of the proposition that the best interests concept is fundamentally a rights-based concept.

2.2.2.1 'Best interests' informs the meaning of rights

The best interests obligation as established in Article 3(1) CRC has been identified by the Committee RC as a general principle of the Convention, applicable across all the other substantive rights. Thus it has stated in its jurisprudence that '[a]s regards Article 3 Paragraph 1 of the Convention, the Committee emphasizes that the Convention is indivisible and its articles are interdependent and that the best interests of the child is a general principle of relevance to the implementation of the whole Convention.'[25]

In terms of its value-added to the substantive rights in the Convention, at least three functions of the best interests principle can be identified. First, it may be used as an interpretative device, giving meaning to a substantive right where the meaning of the right is obscure or obscure in a particular context. The CJEU has begun to use the best interests principle in Article 24 of the Charter of Fundamental Rights as an aid to the interpretation of other Charter rights[26] and secondary legislation,[27] albeit not yet in the asylum context. The ECtHR regularly uses the best interests principle in its interpretation of Article 8 ECHR and in the past year has begun to use the principle to inform the meaning of Article 5 ECHR in cases involving immigration detention of minors.[28]

Second, the best interests concept can act as a means of extending the scope of a right to a situation of *non-liquet*. For example, while the CRC refers in articles 5 and 18(2) to the concept of legal guardianship, and provides in Article 20 that a child temporarily or permanently deprived of his/her family environment 'shall be entitled to special protection and assistance provided by the state', the Convention falls short of establishing the right of a child temporarily

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25 Committee RC, Concluding Observations to, *inter alia*, Jordan in 2006, U.N. Doc CRC/C/JOR/CO/3, para. 37.

26 In *European Parliament v Council*, the European Court of Justice (ECJ) held that '[t]he Charter […] recognizes, in Article 7, the […] right to respect for private or family life. This provision must be read in conjunction with the obligation to have regard to the child's best interests, which are recognized in Article 24(2) of the Charter, and taking account of the need, expressed in Article 24(3), for a child to maintain on a regular basis a personal relationship with both his or her parents.' Case C- 540/03, Judgment of 27 June 2006, para. 58.

27 For example, in *Mercredi v Chaffe*, the CJEU interpreted the term 'habitual residence' in Regulation (EC) No. 2201/2003 of 27 November 2003 in the light of the best interests of the child, which were stated in a recital to be an objective of the regulation. Case C-497/10, Judgment of 22 December 2010. Similarly, in *Zarraga v Pelz*, the CJEU interpreted the right of the child to be heard in the same regulation and in the Charter of Fundamental Rights in the light of the best interests of the child. Case C-491/10, Judgment of 22 December 2010.

28 See, for example, ECtHR, *Rahimi v Greece*, Appl. No. 8786/08, Judgment of 5 April 2011. See Chapter 7 for further case-law and analysis.

or permanently deprived of his/her family environment, such as an unaccompanied minor, to a legal guardian or equivalent representative. However, the best interests concept can be brought to bear to bridge the gap between these two rights.[29]

Third, the best interests concept can act as a mediator in resolving possible conflicts between rights. For example, the immigration detention of accompanied children can pit two core rights against each other: the right of the child not to be deprived of his/her liberty arbitrarily under Article 37(b) CRC and a right not to be separated from his/her parents against their will under Article 9(1) CRC. The best interests of the *particular* child will be key in deciding whether to a) release the child into the care of the state, thus prioritizing the right not to be arbitrarily detained over the right not to be separated; b) keep the family together in detention, thus prioritizing the converse or c) release the entire family.[30]

2.2.2.2 Rights inform the meaning of 'best interests'

If 'best interests' inform the meaning of rights, it is also true to say that rights inform the meaning of best interests – something that has been recognized by the CJEU,[31] and the ECtHR.[32] Perhaps the clearest illustration of this dynamic is the inter-relationship between the best interests of the child and

29 The right of an unaccompanied minor to a representative was hinted at by the ECtHR in *Mayeka Mitunga v Belgium* in the context of Article 3 ECHR. Appl. No. 13178/03, Judgment of 12 October 2006, para. 52. In *Rahimi v Greece*, the failure to appoint a representative to an unaccompanied minor led to circumstances which the Court found to be inhuman and contrary to Article 3 ECHR. *Ibid*. The right of an unaccompanied minor to a representative is discussed in Chapters 4 and 5.

30 For a fuller discussion of this dilemma, see Chapter 7 and in particular the discussion therein of the ECtHR judgment in *Popov v France*, Appl. No. 39472/07 and 39474/07, Judgment of 19 January 2012.

31 In *Deticek v Sgueglia*, the CJEU stated that '[o]ne of the fundamental rights of [of the child] is the right, set out in Article 24(3) of the Charter to maintain on a regular basis a personal relationship and direct contact with both parents, *respect for that right undeniably merging into the best interests of the child*.' Emphasis added. Case C-403/09, Judgment of 23 December 2009, para. 54, reiterated by the Court in *J. McB. v L.E.*, Case C-400/10, Judgment of 5 October 2010, para. 60.

32 In *Maslov v Austria*, the ECtHR held that the expulsion of a juvenile offender was contrary to Article 8 ECHR because it was contrary to the best interests of the child. In interpreting the best interests concept, the Court had regard to Article 40 CRC on the reintegration of juvenile offenders, stating, '[i]n the Court's view, this aim [of reintegration] will not be achieved by severing family or social ties through expulsion, which must remain a means of last resort in the case of a juvenile offender. It finds that these considerations were not sufficiently taken into account by the Austrian authorities.' Appl. No. 1638/03, Judgment of 23 June 2008, para. 83. In *Rahimi v Greece*, the Court interpreted Article 3 CRC in the light of Article 37 CRC on the right to liberty and used both together to interpret Article 5 ECHR. Appl. No. 8687/08, Judgment of 5 April 2011, paras. 108 & 109. See Chapter 7 for analysis.

the right of the child to be heard – sometimes called the right of the child to participate. One of the traditional criticisms of the best interests concept was that it appeared to superimpose on the child a decision about what was in his/her best interests, contrary to or at least regardless of his/her own view of what was in his/her best interests. The problem is succinctly put by Archard and Skivenes:

> The problem arises because the two commitments [best interests and the child's views] seem to pull in different directions: promotion of a child's welfare is essentially paternalistic since it asks us to do what we, but not necessarily the child, think is best for the child; whereas, listening to the child's own views asks us to consider doing what the child, but not necessarily we, thinks is best for the child.[33]

However, an approach that construes the child's best interests in opposition to the child's views is not consistent with the scheme of the CRC. Article 3(1) on the best interests of the child is one of four general principles of the Convention. But another of the general principles is contained in Article 12, paragraph 1 of which provides: 'States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.'[34] The *travaux préparatoires* reveal that an early version of Article 3 referred to the best interests principle in paragraph 1 and the principle of child participation in paragraph 2.[35] However, as paragraph 2 overlapped with a separate article on the right to express opinions, it was decided to devote one single article (eventual Article 12) to the right of the child to be heard, thereby separating the concepts of best interests and participation.[36] However, the Committee RC has been consistent in its efforts to reunite the two concepts, culminating in General Comment No. 12 on the right of the child to be heard, in which the Committee notes that:

> There is no tension between articles 3 and 12, only a complementary role of the two general principles: one establishes the objective of achieving the best interests of the child and the other provides the methodology for reaching the goal of hearing either the child or the children. In fact, there can be no correct application of article 3 if the components of article 12 are not respected. Likewise, article 3

33 David Archard and Marit Skivenes, 'Balancing a Child's Best Interests and a Child's Views', *International Journal of Children's Rights* 17 (2009): 2.

34 This right, with minor textual changes, appears in Article 24(1) second and third sentences of the EU Charter of Fundamental Rights.

35 Text as adopted by the 1981 Working Group, E/CN.4/L. 1575, Annex, p.2, reproduced in Sharon Detrick, *supra* n. 15, at 135.

36 Considerations by the 1989 Working Group, E/CN.4/1989/48, para. 129, reproduced in Sharon Detrick, *ibid*, at 138.

> reinforces the functionality of article 12, facilitating the essential role of children in all decisions affecting their lives.[37]

To be clear: it is not that the child decides what is in his/her best interests; it is that the child participates in the decision-making process. There is no panacea to the real life difficulties of reconciling divergent accounts of best interests by the decision-maker and the child.[38] However, the participation of the child in the process increases the likelihood of a decision that coincides with the views of the child and ensures that a decision that is contrary to the views of the child is justified on that account, making the decision-making process more robust and the decision-maker more accountable.[39]

2.2.2.3 'Best interests' is a composite of rights

As was previously mentioned, unlike Principle 2 of the 1959 Declaration on the Rights of the Child, Article 3(1) CRC fails to refer to a broader context in which the concept of best interests might be understood. However, a broader context *is* provided in the next paragraph of Article 3 CRC, which provides that, 'States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties or his or her parents, legal guardians or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.'[40] Adopting a purposive approach to the interpretation of best interests, it is submitted that that concept should be understood in the light of the protection and care that are necessary to secure a child's well-being. Indeed, according to Zermatten, the Chairperson of the Committee RC, '[w]e can consider paragraph 2 [of Art 3 CRC] as providing the fullest explanation of the BI principle.'[41] Similarly, in the asylum context, UNHCR states that 'the term "best interests" broadly describes the well-being of a child'.[42]

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37 Committee RC, General Comment No. 12, 'The right of the child to be heard', U.N. Doc. CRC/C/GC/12 (2009), para. 74.

38 There is a considerable literature on this dilemma. See, for example, John Eekelaar, *supra* n. 11 and David Archard and Marit Skivenes, *supra* n. 33. For a more theoretical discussion, see Nigel Thomas, 'Towards a Theory of Children's Participation', *International Journal of Children's Rights* 17 (2007): 199-218.

39 The right of the child to be heard is analysed fully in Chapter 4.

40 The corresponding provision in the EU Charter of Fundamental Rights is Article 24(1) first sentence, which provides: 'Children shall have the right to such protection and care as is necessary for their well-being.'

41 Jean Zermatten, 'The Best Interests of the Child Principle: Literal Analysis and Function', *International Journal of Children's Rights* 18 (2010): 490.

42 UNHCR, 'Guidelines on Determining the Best Interests of the Child' (2008) p.14. The ECtHR quoted this statement with approval in *Neulinger and Shuruk v Switzerland* in the context

So to the question: what does it mean for children to have a right to 'such protection and care as is necessary for their well-being'? While 'protection' and 'care' are clearly presented as conditions necessary for 'well-being', these concepts are not defined in Article 3(2) CRC. However, they underpin a large number of other rights in the Convention. Indeed, it has become habitual for the rights in the Convention to be classified in a way that maps well onto the concepts of 'protection', 'care' and 'well-being', namely, classification according to the three 'P's': 1) the *protection* of children against discrimination and all forms of neglect and exploitation; 2) the *provision* of assistance for their basic needs; 3) and the *participation* of children in decisions affecting their lives.[43] What are the rights thus classified?

Briefly, protection rights are rights specifically accorded to children in view of their vulnerability. These child-specific rights include protection from physical, mental and sexual violence, special protection for the child deprived of family, appropriate protection and humanitarian assistance for the refugee and asylum-seeking child, protection from exploitation and sexual abuse, protection against trafficking, protection against under-age recruitment and the right to recovery and reintegration of the child victim of, *inter alia*, armed conflict. Provision rights include basic health and welfare entitlements – the latter concept understood, not in any paternalistic sense, but as socio-economic rights, such as the right to an adequate standard of living, to survival and development, to education, leisure and cultural activities. Participation rights include the civil and political rights ascribed to children in the Convention and in particular, the right of the child to express views and to have those views taken into consideration in decisions affecting the child, as set out in Article 12 CRC.[44]

Consequently, the right to 'such protection and care as is necessary for [children's] well-being' is a composite of the rights that fall under the three 'P's' typology, or, in other words, a composite of all the rights in the CRC.

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of Article 8 ECHR. ECtHR, *Neulinger and Shuruk v Switzerland,* Appl. No. 41615/07, Judgment of 6 July 2010, para. 52.

43 Geraldine Van Bueren, *supra* n. 9, at p. 15. In fact, Van Bueren identifies four 'P's', the forth being 'prevention'. Generally, however, protection and prevention are assimilated, thus leaving three 'P's'. Freeman notes that 'the triad is accepted by virtually every writer on the UNCRC': Michael Freeman *Article 3 The Best Interests of the Child, A Commentary on the United Nations Convention on the Rights of the Child* (Leiden: Martinus Nijhoff Publishers, 2007), at footnote 263. However, for critical commentary on the triad, see Ann Quennerstedt, 'Children, But Not Really Humans? Critical Reflections on the Hampering Effect of the "3 P's"', *International Journal of Children's Rights* 18 (2010): 619-635.

44 See Chapter 3 for an alternative typology of rights in the CRC.

2.2.2.4 *'Best interests' brings a rights perspective to bear*

The best interests concept not only functions as a general principle of the Convention; it also operates as an independent provision.[45] This is clear from the fact that the best interests of the child must be a primary consideration in 'all actions concerning children', not simply those actions that concern their rights. Of course, most actions concerning children will implicate some substantive right or other, but the point is that the application of the best interests principle is not confined to actions that are explicitly directed towards the furtherance (or impingement) of children's rights. For example, a child has no right to recognition as a refugee on the sole basis of being a child (or, it goes without saying, on the basis of the best interests principle *per se*). However, in determining whether the child is a refugee, the best interests of the child must be a primary consideration. In ascertaining the best interests of the child, recourse must be had to whatever substantive rights of the child are implicated by the status determination process. The right of the child to access the procedure or the right of the child to be heard in the procedure are obvious examples. In the end, the child may or may not be recognized as a refugee. The point here is that even in actions which are not ostensibly related to a child's rights, the application of the best interests standard brings a rights perspective to bear. Accordingly, UNHCR observes that '[t]he primary consideration for decision-makers is to determine which of the available options is best suited to securing the attainment of the child's rights, and is thus in his or her best interests.'[46]

2.2.3 General and specific implications of 'best interests' as a rights-based concept

It is clear from the preceding arguments that the rights-based approach to best interests has superseded the welfare approach. The rights-based approach underscores the symbiotic relationship between best interests and rights. Of course, it is not possible to say in the abstract what is in the best interests of any given child; indeed, part of the function of the best interests principle is to direct attention to the individual child and his/her unique circumstances. But the rights of the child function as general signposts of the child's best interests. Thus, Eekelaar comments that 'such rights [as are contained in the CRC] can be viewed as objective determinations by the international community

45 Whether 'best interests' is as a substantive or a procedural right can be debated. Thus, Zermatten notes that the best interests principle is a rule of procedure, the foundation for a substantive right and a fundamental interpretive legal principle. Jean Zermatten, *supra* n. 41.

46 UNHCR (2008), *supra* n. 42, p. 67.

of what children's interests are.'[47] Furthermore, the rights of the child and, indeed, the spirit of the Convention as a whole (which centres on the dignity of the individual) circumscribe what can be said to be in the best interests of the child.[48] Accordingly, it is simply not possible to assert that a given course of action is in the best interests of the child if it violates a relevant right of the child – something that has been reiterated by the Committee RC on numerous occasions.[49] Applied to the asylum context, the close connection between the best interests of the child and the rights of the child means that any assessment of best interests in the CEAS instruments (or indeed of whether the CEAS is in the best interests of children) is essentially an inquiry into the degree of respect for the rights of the child.

2.3 THE NATURE OF THE LEGAL OBLIGATION

Having established that the meaning of the term 'best interests' is determined largely by reference to the rights of the child that are relevant to the particular context, the question now arises as to the nature of the legal obligation inherent in the best interests principle. To reiterate, Article 3(1) CRC provides: '[i]n 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'. This provision will now be broken down into its constituent elements with a view to ascertaining the scope of the principle and the weight to be attributed to the best interests of the child in decision-making. The final subsection explores the emerging 'soft-law' guidance on how to conduct the best interests assess-

47 John Eekelaar, *supra* n. 11, p. 57.

48 Thus in General Comment No. 13, the Committee notes that '[t]he concept of dignity requires that every child is recognized, respected and protected as a rights holder and as a unique and valuable human being'. Committee RC, General Comment No. 13, 'Article 19: the right of the child to freedom from all forms of violence', U.N. Doc. CRC/C/GC/13 (2011), para. 3(c), p. 3.

49 The Committee RC makes this point most forcefully in General Comment No. 8, 'The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment', U.N. Doc. CRC/C/GC/8 (2006), at para 26: 'When the Committee RC has raised eliminating corporal punishment with certain States during the examination of their reports, governmental representatives have sometimes suggested that some level of 'reasonable' or 'moderate' corporal punishment can be justified as in the 'best interests' of the child. The Committee has identified, as an important general principle, the Convention's requirement that the best interests of the child should be a primary consideration in all actions concerning children […] But interpretation of a child's best interests *must be consistent with the whole Convention*, including the obligation to protect children from all forms of violence and the requirement to give due weight to the child's views; *it cannot be used to justify practices*, including corporal punishment, which *conflict with the child's human dignity* and *right to physical integrity*.' Emphasis added. Reiterated in Committee RC, General Comment No. 13, *ibid*, para. 54.

ment in individual cases. It is submitted that such guidance should be followed, not because it constitutes 'soft law' (which would be an untenable position), but rather because the soft-law guidance is an expression of the obligation that results from the demands of the best interests principle itself.

2.3.1 The scope of the obligation

2.3.1.1 What actions?

The best interests of the child must be a primary consideration in 'all actions *concerning* children'.[50] The question is, what level or degree of impact on children is required before an action can be said to concern them? This question is pertinent because the CEAS is not primarily intended to regulate how Member States treat children; rather, it is intended to regulate how Member States treat applicants for international protection, among whom there are children. Is the concept of 'actions concerning children' limited to actions explicitly directed at children or does it extent to actions that have a broader scope, but nonetheless have an effect on children?

According to Detrick, 'it has been submitted that the use of the term 'children' rather than the singular 'child' indicates that an overly restrictive interpretation of the word 'concerning' should not be adopted.'[51] Moreover, the *travaux préparatoires* of Article 3 CRC show that the decision to make the best interests of the child 'a primary consideration' as opposed to the paramount consideration (dealt with below) was the *quid pro quo* for a broad understanding of actions concerning children.[52] Simply stated, since the best interests concept was going to be widely implicated in general policy and practice, the primacy of the concept was reduced. This broad interpretation appears to be endorsed by the Committee RC, which uses a variety of terms in its jurisprudence when referring to actions concerning children, including 'affecting',[53] having 'an impact on',[54] 'relevant to'[55] and simply 'for'[56] children. Indeed, the Committee frequently invokes the following formula in its jurisprudence:

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50 Emphasis added.

51 Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (The Hague: Martinus Nijhoff Publishers,1999), 90.

52 UN Doc. E/CN.4/1989/48, pp 22-26, reproduced in Sharon Detrick, *supra* n. 15 at p. 137.

53 Committee RC, Concluding Observations to Canada in 2003, U.N. Doc. CRC/C/15/Add.215, para 24.

54 Committee RC, Concluding Observations to Georgia in 2000, U.N. Doc.CRC/C/15/Add. 124, para. 27.

55 Committee RC, Concluding Observations to Iraq in 1998, U.N. Doc. CRC/C/15/Add. 94, para. 16.

56 Committee RC, Concluding Observations to Denmark in 2001, U.N. Doc. CRC/C/15/Add 151, para. 29.

> The Committee recommends that the State Party strengthen its efforts to ensure that the general principle of the best interests of the child is understood, appropriately integrated and implemented in all legal provisions as well as in judicial and administrative decisions, and in projects, programmes and services that have *direct and indirect impact* on children.[57]

Furthermore, the ECtHR, which used to limit its consideration of the best interests of the child to Article 8 ECHR cases (family life being the typical domain of children), noted in *Neulinger and Shuruk v Switzerland* that 'there is currently a broad consensus – including in international law – in support of the idea that in *all decisions* concerning children, their best interests must be paramount'.[58] The Court put this principle into practice in *Rahimi v Greece*, in which it invoked the best interests principle in the context of Article 5 ECHR on immigration detention.[59] Notably, the regime of detention at issue was not directed at children *per se*, but rather at illegal immigrants. But the fact that the applicant was an unaccompanied minor brought the best interests principle to bear.

Consequently, it is submitted that the best interests of the child must be canvassed, not only when an action is explicitly or exclusively directed at children, like certain provisions of the CEAS instruments, but also whenever an action is of broader application but nevertheless has an impact on children, like most provisions of the CEAS instruments.

2.3.1.2 Actions by whom?

Article 3(1) CRC stipulates that the best interests of the child must be a primary consideration in 'all actions concerning children […] by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies'. Thus, the best interests principle is not deputed to a single actor, such as a guardian, although a guardian can play a useful coordinating and oversight role.[60] Rather, the best interests principle implicates a host of actors. In the asylum context, the list of actors in Article 3(1) arguably covers all asylum-related functions, even – as the reference in Article 3(1) to 'public or private' makes clear – if such functions are sub-contracted to private entities,

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57 For example, Committee RC, Concluding Observations to Benin in 2006, U.N. Doc. CRC/C/BEN/CO/2, para. 29 and Concluding Observations to Kazakhstan in 2007, U.N. Doc. CRC/C/KAZ/CO/3, para. 29. Emphasis added.

58 ECtHR, *Neulinger and Shuruk v Switzerland*, Appl. No. 41615/07, judgment of 6 July 2010, para. 135.

59 ECtHR, *Rahimi v Greece*, Appl. No. 8687/08, Judgment of 5 April 2011. See Chapter 7 for further case-law and analysis.

60 In this regard, the Committee RC recommends that the best interests determination is overseen by a competent guardian. General Comment No. 6, 'The Treatment of Unaccompanied and Separated Children Outside Their Country of Origin', U.N. Doc. CRC/GC/2006/6 (2005), para. 21.

such as private reception agencies or private detention centres.[61] The following actors can be readily identified: immigration officials, staff of reception agencies, staff of detention centres, social workers, child psychologists, legal advisers, adjudication officers with responsibility for status determination and related issues such as Dublin transfers, whether at first instance or on appeal, judges within the regular court system, the minister of the relevant government department and his/her staff and the police. This is not an exhaustive list. Whenever one of these actors takes a decision about a child, he/she must assess the best interests of the child.

It follows from the large number and diversity of actors obligated, that the best interests obligation is not (or at least not only) the domain of specialists; it is often deputed to generalists, or more accurately, specialists in some other area. This gives rise to a number of concerns. First, it raises a question about the capacity of relevant actors to discharge the best interests obligation, which, in turn, raises issues relating to staff selection, training and supervision. Second, it raises a concern about the responsibility of relevant actors: are they primarily responsible to the child or to the organization for which they work? In this regard, Dunn at al. note the fiction that the best interests assessment 'will be entirely compatible with the personal and professional identity of those involved in its operationalisation and to their relationship with the person for whom they are making the decision.'[62] These issues have a particular resonance in the highly politicized and resource-scarce arena of asylum. They point to the need for substantive and procedural guidance on how to assess the best interests of the child, a matter addressed in sub-section 2.3.3 below.

2.3.1.3 In whose best interests: the child or children?

Article 3(1) of the CRC provides: 'In all actions concerning *children* […] *the best interests of the child* shall be a primary consideration.'[63] This wording combines the concept of the best interests of the child (singular) with actions relating to children (plural). It raises the question about the proper identity of the right-holder. Is it the individual child or is it the collective group? This has a knock-on effect on the type of obligation at issue. Is it a macro obligation, applying

61 The *travaux préparatoires* of Article 3 CRC reveal that the debate about what actors were obligated centered on whether the scope of Article 3 should be limited to public actors or should also encompass private actors, such as parents and private welfare providers. Ultimately, a proposal to include the word 'official' was rejected in favor of a more horizontal formulation. Considerations by 1981 Working Group, E/CN.4/L. 1575, para. 25, reproduced in Sharon Detrick (1992), *supra* n. 15, at p. 134.

62 Michael Dunn et al, 'Constructing and Reconstructing 'Best Interests': An Interpretative Examination of Substitute Decision-Making Under the Mental Capacity Act 2005', *Journal of Social Welfare and Family Law* 29, no. 2 (2007): 129.

63 Emphasis added.

to all children who are affected by the action contemplated, or a micro obligation, applying to the individual child who is the subject of the decision?

The answer can be gleaned from the list in Article 3(1) CRC of the entities obligated, namely, public and private social welfare institutions, courts of law, administrative authorities and legislative bodies. The first two make decisions in individual cases, while the latter two make general policy and law. Hence, a textual analysis of Article 3(1) suggests that the right-holder is both the individual child and the collectivity 'children' and the obligation has both a micro and a macro dimension. This has been confirmed by the Committee on the Rights of the Child in a number of its General Comments. Thus, in General Comment No. 11, '[t]he Committee notes that the best interests of the child is conceived both as a collective and individual right',[64] General Comment No. 12 provides that 'Article 3 is devoted to individual cases, but explicitly, also requires that the best interests of children as a group are considered in all actions concerning children',[65] and, most comprehensively, General Comment No. 7 distinguishes between the:

> 'best interests of individual children [whereby] all decision-making concerning a child's care, health, education etc. must take account of the best interests principle, including decisions by parents, professionals and others responsible for children [and the] 'best interests of […] children as a group or constituency [whereby] all law and policy development, administrative and judicial decision-making and service provision that affect children must take account of the best interests principle.'[66]

Thus, in simple terms, the best interests of the child must be assessed each time a decision about an individual child is taken as well as each time a legislative, policy or programmatic decision is being made that has an impact on children. Indeed the one informs the other: the best interests of the individual child is informed by the perception of the best interests of the group, and vice versa. However, the two assessments have different purposes: in the case of the individual child, the best interests assessment feeds into a decision

64 Committee RC, General Comment No. 11, 'Indigenous children and their rights under the Convention', U.N. Doc. CRC/C/GC/11 (2009), para.30.

65 Committee RC, General Comment No. 12, *supra* n. 37, para. 72.

66 Committee RC, General Comment No. 7, 'Implementing child rights in early childhood', U.N. Doc. CRC/C/GC/7/Rev.1(2006), para. 13. This duality of obligation (and recipient) is also apparent in the Concluding Observations of the Committee on the Rights of the Child in which the Committee regularly recommends that the State Party 'a) appropriately integrate general provisions of the Convention, in particular the provisions of [Article 3] in all relevant legislation concerning children; b) apply them in all political, judicial and administrative decisions, as well as in projects, programmes and services which have an impact on all children; and c) apply these principles in actions taken by social and health welfare and educations institutions, courts of law and administrative authorities.' See, for example, Committee RC, Concluding Observations to Andorra in 2002, U.N. Doc. CRC/C/176, para. 27.

about that child; in the case of children as a group, the best interests assessment shapes the development of law and policy. Thus, according to the Committee RC:

> Ensuring that the best interests of the child are a primary consideration in all actions concerning children […] demands a continuous process of child impact assessment (predicting the impact of any proposed law, policy or budgetary allocation which affects children and the enjoyment of their rights) and child impact evaluation (evaluating the actual impact of implementation).[67]

Applied to the asylum context, this dual legal obligation means that, firstly, every decision taken in relation to an individual child within the asylum process must be subject to a best interests assessment and secondly, all asylum policy and legislation that relates to children must be vetted pre- and post-hoc for its conformity with the best interests of the child. This duality of obligation has profound implications for the EU legislator in the context of the Common European Asylum System.

2.3.2 The weight of the child's best interests

The best interests principle has a broad material and personal scope. But how much weight should be attached to the best interests of the child? Article 3(1) CRC refers to the child's best interests as 'a primary consideration'. This contrasts with wording of the precursor to Article 3(1) CRC, namely, Principle 2 of the 1959 UN Declaration on the Rights of the Child, which referred to the best interests of the child as 'the paramount consideration'.[68] It also contrasts with other, stronger formulations of the best interests principle in the context of specific rights in the CRC and in other international legal instruments.[69]

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67 Committee RC, General Comment No. 5, 'General measures of implementation of the Convention on the Rights of the Child', U.N. Doc CRC/C/GC/2003/5 (2003), para. 45.

68 'The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a health and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.'

69 'Best interests' is referred to in seven other provisions of the CRC: Article 9(1), 9(3) & 9(4) (separation of a child from his/her parents against their will), Article 18 (parental responsibilities), Article 21 (adoption), Article 37(c) (treatment while in detention) and Article 40 (juvenile justice). In Article 18, the best interests of the child is said to be parents' 'basic concern'. In Article 21, the best interests of the child is stated to be 'the paramount consideration'. In the other articles, a negative formulation is used whereby an action is prescribed except if it is contrary to the child's best interests or proscribed unless it is necessary for the best interests of the child. Consequently, all these provisions establish the best interests of the child as the decisive consideration. As for other instruments of international law, Article 5 of the Convention on the Elimination of Discrimination Against

'Primary' has slightly weaker connotations than 'paramount' – a comparative weakness that is compounded in Article 3(1) by the use of the indefinite, as opposed to the definite, article.[70]

These apparently minor textual subtleties have potentially profound implications that need to be explored. If the best interests of the child constitutes a primary consideration amongst others, as opposed to the paramount consideration, it can be displaced by counter-veiling interests. Frequently, in contexts where decisions must be taken about a child or children, such as child custody decisions, the best interests of the child must be weighed against the interests/rights of others. However, in the asylum context, there is the added complexity of the state's interest in immigration control and the risk, consequently, of the child's best interests habitually taking second place. Against this backdrop, the critical question is, in taking decisions that affect children, what counter-veiling interests can be considered and what respective weight should be allocated to the various interests?

There are essentially two different ways of approaching the question of weight: to consider the best interests of the child as being equivalent to, or less than, any counter-veiling interests; or to consider the primacy requirement as elevating 'best interests' to a near absolute norm.

2.3.2.1 One approach: equivalency or less

If primacy is less than paramountcy, should we think about best interests the way we would about any other non-absolute (i.e. derogable, limitable) right? Van Beuren seems to think so. In response to the charge that the Convention does not provide any guidance about how to resolve conflicts between the best interests and competing rights/interests, she comments:

> Such criticism does not attach sufficient weight to the fact that it is the function of many international and regional human rights fora to balance one right against another, privacy against freedom of expression for example, without the treaty providing guidance as to the weight to be ascribed to each article. Such flexibility and discretion is necessary to be able to meet the demands of justice in each case. It would be impossible for the Convention or for other international laws to provide guidance as to the different weights which decision makers ought to accord to specific factors.[71]

Women refers to the best interests of the child as 'the primordial consideration' and Article 16 provides that the best interests of the child 'shall be paramount'. Article 23 of the Convention on the Rights of Persons with Disabilities also uses the latter formulation.

70 According to the Oxford English Dictionary, 'primary' means the fact of being primary, pre-eminent or more important, while 'paramount' means more important than anything else or supreme. The New Oxford Dictionary of English, Oxford University Press, 1998.

71 Geraldine Van Bueren, *supra* n. 9, p. 47-48.

This approach is helpful in the sense that it clarifies that any limitation on giving effect to the best interests of the child must be subjected to the rigorous balancing exercise familiar to human rights lawyers (i.e. shift in the burden of proof, legitimate aim, reasonable relationship of proportionality etc). However, it is submitted that this 'regular' approach to balancing rights fails to take sufficient account of the primacy factor. Certainly, primacy is less than paramountcy (in the sense of absoluteness), but, it must be something more than equivalency, otherwise why introduce the term? It was, after all, open to the drafters of the CRC to simply state that the best interests of the child must be *a* consideration in all actions concerning children. Furthermore, such is the ambiguity surrounding the best interests principle that, once we lose sight of the primacy factor, there is a danger of the analysis stopping well short of even the 'regular' approach to balancing rights.

Thus, although the CJEU has recently referred to the need 'to ensure that the best interests of the child are given *the utmost consideration*',[72] in its seminal case on child rights – *European Parliament v Council* – the Court appeared to be satisfied with a much lesser degree of scrutiny.[73] The case involved an action for annulment of the Family Reunification Directive by the European Parliament on the grounds, *inter alia*, that it breached the rights of the child. Article 4(1) of the directive establishes a right of family reunification for prospective long term residents with members of their immediate family, including minors.[74] However, it also establishes in the final sub-paragraph an optional derogation provision whereby Member States are allowed to impose a pre-condition for integration on children over the age of 12 who arrive independently from the rest of the family. However, Article 5(5) of the directive requires Member States, when examining an application for family reunification, to have 'due regard' to the best interests of minor children. One of the questions for the Court was whether the integration condition was consistent with the principle of the best interests of the child as laid down in the EU Charter of Fundamental Rights. The Court held:

> [It does not] appear that the Community legislature failed to pay sufficient attention to children's interests. The content of Article 4(1) of the Directive attests that the child's best interests were a consideration of prime importance when that provision was being adopted and it does not appear that its final subparagraph fails to have sufficient regard to those interests or authorizes Member States which choose to take account of a condition for integration not to have regard to them. On the contrary, as recalled in paragraph 63 of the present judgment, Article 5(5) of the

72 CJEU, *Mercredi v Chaffe*, Case C-497/10, Judgment of 22 December 2010, para. 47 (emphasis added).

73 ECJ, *European Parliament v Council,* Case C-540/03, Judgment of 27 June 2006.

74 Council Directive 2003/96/EC of 22 September 2003 on the right to family reunification.

> Directive requires the Member States to have due regard to the best interests of minor children.[75]

However, it is submitted that the logic of the argument is flawed. By its reference to the general rule of reunification in Article 4(1), the Court implicitly identified reunification of minor children with their parents as being in the best interests of the child. It follows that barriers to reunification, such as are established in the derogation provision, cannot be in the best interests of the child. Therefore, it is a *non-sequitur* to suggest that the derogation provision benefits from the best interests credentials, so to speak, of the general rule. Elsewhere in the judgment, the Court identified the reasons for the derogation provision as being 'intended to reflect the children's capacity for integration at early ages and […] to ensure that they acquire the necessary education and language skills at school.'[76] It is unclear whether the Court considered integration to be in the best interests of the child (contrary to its earlier implicit identification of family reunification as being in the best interests of the child) or whether the Court considered integration as a legitimate aim which justified interference with the best interests of the child. In the case of the former, it can be observed that the assimilation of best interests to integration falls foul of the injunction to interpret best interests consistently with the rights of the child. A child's capacity to integrate into a new environment does not reflect any right of the child.[77] A child's need for family unity does.[78] Consequently, the child's best interest was defined by reference to a largely undemonstrated assumption about children's capacity for integration, in a manner contrary to a relevant child right. In the case of the latter, the Court should properly have balanced the best interests of the child against the objective of integration. But then, as Drywood observes, '[a]ny doubts as to a child's capacity to integrate into a new environment at the age of 13 [must] surely [be] eclipsed by the potential consequences of long-term or permanent separation from the

75 ECJ, *European Parliament v Council*, Case C-540/03, Judgment of 27 June 2006, para. 73 (emphasis added).

76 *Ibid*, para. 67.

77 A possible exception is the right to education as established in Articles 28 & 29 CRC. However, a central element of the right to education is the prohibition of discrimination in education, including indirect discrimination. In this regard, the right to education is an argument for positive measures of integration, rather than a justification for negative measures of exclusion. See Chapter 6.

78 The right of the child to family unity is established in six provisions of the CRC: Article 7(1) (right to know and be cared for by parents), Article 8(1) (right to preserve identity including family relations); Article 9 (right not to be separated from parents against their will and, where separated, to maintain personal relations and direct contact with both parents on a regular basis); Article 10 (family reunification); Article 16 (right to respect for family life) and Article 22 (family tracing for the child seeking or enjoying refugee status). See Chapter 5.

family unit at such a young age.[79] The Court avoided reaching this conclusion by delegating the task to Member States in individual cases. However, Article 5(5), which places an obligation on *Member States* to have due regard to children's best interests, is not *per se* evidence of the *directive's* compliance with the best interests requirement, bearing in mind the collective dimension of the principle. The Court in *European Parliament v Council* adopted rather a superficial approach to the meaning, scope, weight and method of balancing the best interests of the child against contrary considerations.

2.3.2.2 An alternative approach: primacy or more

The CJEU's minimalist approach to best interests in the family reunification case can be contrasted with the approach of the ECtHR. Indeed, recent jurisprudence suggests that the Court attaches great weight to the best interests of the child, tending more towards paramountcy than towards equivalency. In the seminal case of *Neulinger and Shuruk v Switzerland*, which involved the legality under Article 8 ECHR of a decision to send a child back to his father's country from which he had been 'wrongfully removed' (under the terms of the Hague Convention) by his mother, the Court gave its fullest consideration to date to the best interests of the child.[80] The Court observed that '[i]n this area the decisive issue is whether a fair balance between the competing interests at stake – those of the child, of the two parents, and of public order – has been struck […] bearing in mind, however, that the child's best interests must be *the primary consideration*.'[81] The use of the definite article was not accidental on the part of the Court as it went on to say that the best interests of the child, depending on their nature and seriousness, override those of the parents – the interests of the parents remaining 'a factor' when balancing the various interests at stake. Moreover, it noted that:

> [T]here is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be *paramount*. As indicated, for example, in the [EU] Charter [of Fundamental Rights], 'every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.'[82]

However, this passage does reveal some confusion. The right to a personal relationship and direct contact with parents is found in Article 24(3) of the Charter and derives from Article 9(3) CRC. Article 9(3) CRC is one of seven

79 Eleanor Drywood, 'Challenging Concepts of the 'Child' in Asylum and Immigration Law: The Example of the EU', *Journal of Social Welfare and Family Law* 32, no. 3 (2010): 317.
80 ECtHR, *Neulinger and Shuruk v Switzerland,* Appl. No. 41615/07, Judgment of 6 July 2010.
81 *Ibid*, para. 134 (emphasis added).
82 *Ibid*, para. 135.

context-specific iterations of the best interests principle in the CRC, which establishes an absolute principle.[83] This contrasts with the general principle of the best interests of the child in Article 3(1) CRC which is reflected in Article 24(2) of the Charter. Whether this nuance of child-rights law was lost on the Court or challenged by the Court is unclear. It could have been an oversight: even the Committee RC sometimes refers to the general principle of the best interests of the child in terms of paramountcy.[84] However, the Court may well have been signaling that it attaches decisive weight to the best interests of the child.

This interpretation is supported by the recent case of *Nunez v Norway*, which may be as significant as *Neulinger* because the Court had to balance the interests of the state against the best interests of the child – which is where the real rub lies.[85] In *Nunez*, the applicant had committed multiple immigration offences, which were characterized by the Court as being of an 'aggravated character'. She challenged her expulsion to the Dominican Republic on the grounds that it constituted a violation of her right to family life since it would involve her being indefinitely separated from her two young children. The children had been placed in the custody of their father, a settled immigrant in Norway, when the couple separated, because of the likelihood that the mother would be expelled. On principle, the Court stated that it considered 'that the public interest in favour of ordering the applicant's expulsion weighed heavily in the balance when assessing the issue of proportionality under Article 8 of the Convention.'[86] However, the Court went on to rule that the children's best interests – which, as it painstakingly demonstrated, was to be with their mother, weighed more heavily still and consequently that there had been a violation of Article 8. Although the Court was keen to confine the judgment

83 The others are in Article 9(1), 9(4), 18, 21, 37 and 40. See Chapter 5.

84 Thus, in 2003 the Committee censured Romania for failing to 'ensure that the best interests of the child shall be a paramount consideration in all legislation and policies affecting children'. Committee RC, Concluding Observations to Romania in 2003, U.N. Doc. CRC/C/15/Add.199, para. 29. In its 2002 Concluding Observations to the UK, having referred to its concern that 'the principle of primary consideration for the best interests of the child is not consistently reflected in legislation and policies affecting children throughout the State Party', the Committee went on in the following paragraph to recommend that 'the State Party adopt the best interests of the child as a paramount consideration in all legislation and policy affecting children throughout its territory, notably within the juvenile justice system and in immigration practices.' Committee RC, Concluding Observations to the United Kingdom of Great Britain and Northern Ireland in 2002, U.N. Doc. CRC/C/15/Add. 188, paras. 25 & 26.

85 ECtHR, *Nunez v Norway*, Appl. No. 55597/09, Judgment of 28 June 2011.

86 *Ibid*, at para. 73.

to the 'concrete and exceptional circumstances of the case',[87] nevertheless, it does signal a departure from precedent.[88]

It is submitted that the approach of the ECtHR to weighing 'best interests', which tends more towards paramountcy, is the correct approach for a number of reasons. First, it is consistent with the *travaux préparatoires* relating to Article 3(1) CRC, which indicate that, although not strictly absolute, the child's best interests can only be displaced in extremely compelling circumstances.[89] Second, there is some support for the idea that the best interests of the child can only be displaced by other rights-based considerations, as opposed to the state's general interest in immigration control.[90] This can only be explained by the fact that it is perceived as a very weighty right. Finally, if it is accepted that 'best interests' is a rights-based concept, it follows that the principle must

87 *Ibid*, at para. 84.

88 For example, although the Court also found for the applicant in the previous similar case of *Rodrigues da Silva and Hoogkamer v the Netherlands*, it did so primarily on the basis of the right to family life of the mother, who could reasonably have expected to be able to continue her family life in the Netherlands, given the possibility of lawful residence. The best interests of her daughter was a secondary consideration. Appl. No. 50435/99, Judgment of 31 January 2006, in particular paras. 43 and 44. It should be noted that *Nunez* has been followed by two contrary judgments in which little or no consideration was given to the best interests of the child in assessing whether the expulsion of a parent was contrary to Article 8: *Arvelo Aponte v The Netherlands* Appl. No. 28770/05, Judgment of 3 November 2011 and *Antwi and Others v Norway*, Appl. No. 26940/10, Judgment of 14 February 2012 (note the forceful dissent of Judge Sicilianos joined by Judge Lazarova Trajkovska on the issue of the best interests of the child). However, these cases can be distinguished from *Nunez* on the basis that the parents were not separated and consequently that there were no insurmountable obstacles to their enjoying family life elsewhere. *Nunez* was cited with approval by the Court in *Kanagaratnam and others v Belgium*, involving the best interests of the child in the context of immigration detention. Appl. No. 15297/09, Judgment of 13 December 2011.

89 It was stated during negotiations that the interests of the child should be a primary consideration in all actions concerning children, but were not the overriding, paramount consideration in every case, since other parties might have equal or even superior legal interests in some cases, such as in medical emergencies during childbirth. Considerations by the 1981 Working Group, UN Doc. E/CN.4/L.1575, para, 24, reproduced in Sharon Detrick, *supra* n. 15, p. 133. The medical emergencies example suggests that the best interests of the child should prevail in all usual circumstances.

90 For example, according to UNHCR, '[t]he interests of a child can sometimes conflict with the interests of other persons or groups in society. The general principle contained in the CRC provides that the best interests of the child shall be a primary consideration. The Convention does not, however, exclude balancing other considerations, which, *if they are rights-based*, may in certain rare circumstances, override the best interests considerations.' UNHCR, *supra* n. 42, p. 76 (emphasis added). In a similar vein, the Committee RC has noted that '[e]xceptionally, a return to the home country may be arranged after careful balancing of the child's best interests and other considerations, *if the latter are rights-based* and override the best interests of the child. Such may be the case in situations in which the child constitutes a serious risk to the security of the state or to the society. *Non rights-based arguments, such as those relating to general migration control, cannot override best interests considerations*.' Committee RC, General Comment No. 6, *supra* n. 60, para 86 (emphasis added).

sometimes be absolute. This occurs when the subject matter of the action concerning the child is also governed by a substantive Convention right, the violation of which would lead to irreparable harm. Thus in its Guidelines on Determining the Best Interests of the Child, which are outlined in detail in the next sub-section, UNHCR notes that '[t]he right to life and freedom from torture, other cruel, inhuman or degrading treatment or punishment *set decisive parameters for a best interests determination. […]* Therefore, if [it is determined] that the child is exposed or likely to be exposed to violations of fundamental rights of the kind described in the previous paragraph, this would *normally outweigh any other factor*.[91]

2.3.3 The conduct of the assessment in individual cases

This subsection moves from principle to praxis. We have seen that the best interests principle has a broad scope and carries considerable, if not decisive, weight. But what about the actual process of assessing the best interests of the child: how should it be done? This question has a particular resonance in the asylum context in view of the large number of actors obligated by the best interests principle and the associated problems of competence and impartiality. These issues underscore the need for guidance and safeguards. Fortunately, in this regard, the last five years or so have seen an impressive shift in 'soft law' guidance on refugee and asylum-seeking children from acknowledging the best interests principle to spelling out what the principle demands in practice.[92] This subsection synthesizes recent guidance from a number of sources: UNHCR's Guidelines on Determining the Best Interests of the Child from 2008;[93] Executive Committee Conclusion No. 107 from 2007;[94]

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91 UNHCR, *Ibid*, p. 69 (emphasis added).

92 The principle is acknowledged, but without any detailed guidance in the following Excom Conclusions: No. 105 (LVII), 2006, 'Women and Girls at Risk'; No. 103 (LVI), 2005, 'Provision on International Protection Including Through Complementary Forms of Protection'; No. 98 (LIV), 2003, 'Protection from Sexual Abuse and Exploitation'; No. 88 (L), 1999, 'Protection of the Refugee's Family'; No. 84 (XLVIII), 1997, 'Refugee Children and Adolescents'; No. 47 (XXXVIII), 1987; 'Refugee Children'. Other guidelines that refer but without practical detail to the best interests principle are: Separated Children in Europe Programme (SCEP), 'Statement of Good Practice' (4th revised ed., 2009) and earlier editions; UNHCR, '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', HCR/GIP/09/08 (2009); UNHCR, UNICEF, ICRC, IRC, Save the Children (UK) and World Vision International, 'Inter-Agency Guiding Principles on Unaccompanied and Separated Children' (2004); Save the Children UK, 'Working with separated children, Field Guide, Training Manual and Training Exercises' (1999); UNHCR, 'Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum' (1997); UNHCR, 'Working with Unaccompanied Children: A Community-Based Approach' (1996); UNHCR, 'Refugee Children: Guidelines on Protection and Care' (1994).

93 UNHCR, *supra* n. 42.

and the Committee RC's General Comment No. 6 from 2005 on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin.[95]

There is an emerging consensus, evident in the above documents, that a distinction should be made between the best interests assessment and a formal best interests determination. According to UNHCR, the former refers to the basic assessment that takes place systematically when decisions are being made about a child. It can be done alone or in consultation with others by staff with the required expertise and requires the participation of the child. Otherwise it does not require any particular formality nor strict procedural safeguards. It suffices for most actions. The latter refers to a more 'formal process designed to determine the child's best interests for particularly important decisions affecting the child that require stricter procedural safeguards.'[96]

2.3.3.1 The best interests assessment

Let us consider first the 'regular' best interests assessment. The two requirements specified are that the staff undertaking the assessment has the required expertise and that the child participates in the assessment. Since the importance of child participation has already been discussed in this chapter, the focus here will be on staff expertise. In this regard, it is worth drawing attention to the often overlooked third paragraph of Article 3 CRC which obliges states to 'ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.' Freeman, adopting a purposive approach to Article 3(3), notes that these standards must comply with the best interests principle set out in Article 3(1).[97] The converse must also be true: that the best interests assessment must conform to quality standards. Based on the *travaux préparatoires*, Freeman considers that the reference to 'suitability of staff' is particularly significant, mandating appropriate training and qualification of officials and personnel working in the area of care or protection of children.[98] Similarly, the Committee RC frequently iterates the need for research and training for professionals on the best interests

94 Excom. Conclusion No. 107 (LVIII), 2007, 'Children at Risk'.

95 Committee RC, General Comment No. 6 (2005), *supra* n. 60. Also of relevance is a 2010 UN General Assembly Resolution on 'Guidelines for the Alternative Care of Children', A/RES/64/142 (2010). However, these guidelines are insufficiently detailed on the conduct of the assessment to be of assistance here.

96 UNHCR, *supra* n. 42, p. 23.

97 Michael Freeman, *supra* n. 43.

98 *Ibid*.

concept.[99] Consequently, even those staff who undertake the 'regular' best interests assessment must be trained to do so.

2.3.3.2 The best interests determination

As regards the formal best interest determination (BID), two questions are significant. Firstly, what are 'particularly important decisions affecting the child' that trigger the need for a formal BID? Secondly, what does a formal BID involve?

When?

In its BID Guidelines from 2008, UNHCR identifies three decisions which require a formal BID: 1) the identification of the most appropriate durable solution for unaccompanied and separated refugee children (i.e. local integration, resettlement or voluntary repatriation); 2) temporary care arrangements for unaccompanied and separated children in certain exceptional circumstances (i.e. where there is suspected abuse or neglect by the accompanying adult and where existing care arrangements are not suitable); and 3) decisions which may involve the separation of a child from parents against their will.[100] While the UNHCR guidelines are directed at UNHCR field staff, nevertheless they have been quoted with approval by the ECtHR in its interpretation of the best interests principle.[101] This endorsement indicates that the guidelines have a broader application.[102]

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99 For example, in its 2003 concluding observations to Canada, the Committee stated that it '[r]emains concerned that the principle that primary consideration should be given to the best interests of the child is still not adequately defined and reflected in some legislation, court decisions and policies affecting certain children, especially those facing situations of divorce, custody and deportation, as well as Aboriginal children. Further the Committee is concerned that there is *insufficient research and training for professionals* in this respect.' Emphasis added. Committee RC, Concluding Observations to Canada in 2003, U.N. Doc. CRC/C/15/Add.215, para. 24.

100 UNHCR, *supra* n. 42, Chapter 2, pp. 30-44.

101 ECtHR, *Neulinger and Shuruk v Switzerland*, Appl. No. 41615/07, Judgment of 6 July 2010, para 52.

102 However, there is a difference between UNHCR staff operating under the UNHCR mandate in the field and States administering their own refugee protection and child protection systems. Given the different contexts, UNHCR in association with UNICEF is currently preparing BID guidelines for industrial countries for publication in the first half of 2012. It is understood that these guidelines will advocate for a BID at certain strategic points of the asylum process, namely, when a decision is taken regarding whether to lodge an asylum claim on behalf of an unaccompanied minor; when a decision is taken about an unaccompanied minor under the Dublin Regulation; and when an important decision has to be taken about a child 'at risk', such as to separate the child from an accompanying adult who the authorities feel is not a family member. However, since these guidelines are not yet published, they will not form part of this analysis.

The other sources of guidance are less prescriptive about the situations when a formal BID is required. Thus, in its General Comment No. 6 on the Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, the Committee RC notes that 'the [best interests] principle must be respected during all stages of the displacement cycle. At any of these stages, a best interests determination must be documented in preparation of *any decision fundamentally impacting on the unaccompanied or separated child's life*.'[103] Similarly, Excom Conclusion 107 on Children at Risk, envisages the use of a BID whenever a decision is being taken in relation to a child 'at risk'. Individual risk factors are identified as including but not limited to unaccompanied and separated children.

[104] A conservative synthesis of the above sources of guidance, based on what they have in common, suggests that all important decisions about unaccompanied or separated children seeking or benefiting from international protection should be subject to a BID. On principle, a BID should also be undertaken in respect of important decisions regarding accompanied children seeking or benefiting from international protection if they are 'at risk'.

What?

As to the content of the BID, general guidance is provided by the Committee RC's General Comment No. 6 and Excom. Conclusion 107. The former stipulates that the BID should begin with a clear and comprehensive assessment of the child's identity which requires the collation and assessment of basic bio-information (including his or her nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs), should be conducted in a friendly and safe atmosphere by qualified professionals who are trained in age and gender-sensitive interviewing techniques and should be overseen by a competent guardian. The child's views and wishes should be elicited and taken into account.[105] Excom. Conclusion 107 states that the BID should 'facilitate adequate child participation without discrimination: where the views of the child are given due weight in accordance with age and maturity; where decision makers with relevant areas of expertise are involved; and where there is a balancing of all relevant factors in order to assess the

103 Committee RC, General Comment No. 6, *supra* n. 60, para. 19 (emphasis added).

104 Paragraph (c) identifies the following children as being 'at risk': unaccompanied and separated children, adolescents, in particular girl mothers and their children; child victims of trafficking and sexual abuse, including pornography, paedophilia and prostitution; survivors of torture; survivors of violence, in particular sexual and gender-based violence and other forms of abuse and exploitation; children who get married under the age specified in national laws and/or children in forced marriages; children who are or have been associated with armed forces or groups; children in detention; children who suffer from social discrimination; children with mental or physical disabilities'. Wider environmental risk factors are also identified. One example is 'lack of access to child-sensitive asylum procedures'.

105 General Comment No. 6, *supra* n. 60, paras. 19-21 and 25.

best option'.[106] The UNHCR BID Guidelines from 2008 are more much specific with chapters on setting up a BID procedure, including establishing an inter-disciplinary BID panel, collecting and managing information, balancing competing rights in making a decision including the right of the child to be heard, informing the child and follow-up measures, keeping records and re-opening a BID.[107]

A synthesis of the guidance suggests that the BID is a phased procedure, with an information gathering and assessment phase, including soliciting the views of the child, and a determination phase to be undertaken by professionals (a panel of experts is implicit or explicit in all the guidance), which can weigh competing interests and arrive at a nuanced determination of the child's best interests.

In sum, the BID is the domain of specialists, whereas the best interests assessment is the domain of generalists – albeit ones who have been trained in the best interests of the child. The BID involves a separate procedure prior to the decision at hand, whereas the best interests assessment is simply a regular part of decision-making. The BID is reserved for particularly important decisions concerning unaccompanied minors and children at risk, whereas the best interests assessment suffices for all other decisions.

2.4 THE PRINCIPLE OF THE BEST INTERESTS OF THE CHILD IN THE CEAS (PHASE ONE)

Section 2.2 outlined how the meaning of the best interests principle is intimately connected with the substance of relevant rights of the child. Section 2.3 revealed how the best interests principle has a broad scope in terms of actions and actors implicated and in the sense that it has an individual and a collective dimension. Furthermore, it carries almost decisive weight. When considered in the context of the CEAS, two questions arise. Most importantly, is the CEAS itself in the best interests of children? Considering that the subsequent chapters of this thesis address the question of whether the CEAS complies with key rights of the child, this is a question that must be deferred until later. In the meantime, a more modest question can be tackled: does the principle of the best interests of the child as laid down in the CEAS instruments comply with the normative requirements of the Article 3(1) CRC? In particular, is the CEAS version of 'best interests' consistent with the proper scope and primacy of the

106 Excom Conclusion 107, *supra* n. 94, para. (g)(i).

107 It is expected that the forthcoming UNHCR guidelines on BID in industrialized countries will advocate that the BID should be undertaken by a panel of independent experts (e.g. guardian, lawyer, social worker) – in other words, professionals independent of the asylum process – who would make recommendations to decision-makers within the asylum process about the child's best interests.

principle and the soft-law safeguards and guidance on assessing 'best interests' in individual cases? In answering these questions, it will also emerge whether the concept of the best interests in the CEAS instruments is a rights-based concept. This section examines the Phase One instruments.

2.4.1 The scope of the principle

Two aspects of the scope of the best interests principle are pertinent to our analysis of the CEAS instruments: the broad subject-matter scope of the best interests principle and the broad personal scope – in terms of actors obligated – of the best interests principle. The second aspect is dealt with in subsection 2.4.3 below on the conduct of the assessment. Therefore, the focus here is on the broad subject-matter scope of the best interests principle.

It is useful at this point to make some general comments about the scheme of the CEAS instruments from an age perspective. The instruments are generally framed in age-neutral terms with the exception of specific provisions that are designed to provide additional guarantees for minors (and occasionally additional obligations too).[108] All the CEAS instruments, without exception, refer to the best interests principle, a fact that can only be regarded as positive. However, the specific question for resolution is whether the best interests principle as stated in the instruments is limited to the age-specific provisions or extends also to the age-neutral provisions when they are applied to minors. In this regard, recall the earlier finding that the best interests of the child is a primary consideration not only when an action is explicitly or exclusively directed at children but also whenever an action is of broader application but nevertheless has an impact on children.

2.4.1.1 The Reception Conditions Directive

Article 18 (Minors) of the Reception Conditions Directive (RCD) provides in the first paragraph: '[t]he best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Directive that involve minors.' A rather reaching interpretation of the provision could render it compliant with the proper scope of the best interests principle by reading the term 'affect' for the term 'involve'. However, the more obvious interpretation suggested by the wording (and, it is submitted, the one more likely to be adopted by Member States) is that the application of the best interests principle is confined to those provisions of the directive that are clearly directed at minors.

108 For example, Article 17(5) of the Asylum Procedures Directive provides that unaccompanied minors may be required to undergo medical examinations to determine their age.

The provisions of the RCD that involve minors comprise: Article 10 relating to the schooling and education of minors; Article 14(3) which provides for family unity of minor children with their parents or adult family member responsible for them; Article 18 itself, paragraph 2 of which requires Member States to ensure access to rehabilitation services for minors who have been victims of various forms of ill-treatment; and Article 19 on unaccompanied minors. Specifically, Article 19 obliges Member States to appoint a representative, to secure a child placement (subject to an optional derogation provision in respect of over 16s), to 'endeavor' to trace the minor's family and to ensure that those working with unaccompanied minors are appropriately trained and bound by the confidentiality principle. In fact, Article 19 expressly refers to the best interests of the child in the context of placing unaccompanied minor siblings together and of family tracing.[109] One further provision can be interpreted as involving minors. Article 17(1) requires Member States to 'take into account' the situation of vulnerable persons in the national legislation implementing the provisions of the directive relating to material reception conditions and health care. Minors are unaccompanied minors are listed as examples of vulnerable persons. However, Article 17(2) states that '[p]aragraph 1 shall only apply to persons found to have special needs after an individual evaluation of their situation', casting doubt on whether being a child *per se* is enough to qualify as a vulnerable person or whether some further vulnerability must be demonstrated. This ambiguity aside, the best interests of the child must be a primary consideration in the implementation of these various provisions.

However, most of the directive comprises provisions that do not involve minors, in other words, age-neutral provisions. These include the provisions relating to detention, minimum standard of living, minimum standard of health care and the reduction, withdrawal and refusal of reception conditions. The best interests of the child need not be a primary consideration in the implementation of these provisions.

2.4.1.2 The Dublin Regulation

Unlike the RCD, the Dublin Regulation (DR) contains no general statement on the best interests principle. However, the principle is mentioned in various articles. Thus, Article 6 relating to unaccompanied minors provides that 'the Member State responsible for examining the application shall be that where a member of his or her family is legally present, provided that this is in the best interest of the minor.' Article 6 is silent on which Member State is responsible if family reunification is not in the best interests of the child. However, it does provide that, in the absence of a family member, the Member State

109 Article 19(2) and 19(3), respectively.

responsible for examining the application is that where the minor lodged his or her application. This is not made subject to a best interests assessment.

The so-called 'humanitarian clause' in Article 15 provides in paragraph 3 that 'if the asylum seeker is an unaccompanied minor who has a relative or relatives in another Member State who can take care of him or her, Member States shall if possible unite the minor with his or her relative or relatives, unless this in not in the best interests of the minor.' While Article 15(3) is drafted in stronger terms than the two preceding paragraphs (which provide that Member States, respectively, 'may' bring family members together, and 'shall normally' reunite dependants with their carers), the words 'if possible' in paragraph 3 nevertheless underscore the discretionary nature of the provision.[110] The Dublin Detailed Rules supplement Article 15(3), providing in Article 12(1) that:

> Where the decision to entrust the care of an unaccompanied minor to a relative other than the mother, father or legal guardian is likely to cause particular difficulties, particularly where the adult concerned resides outside the jurisdiction of the Member State in which the minor has applied for asylum, cooperation between the competent authorities in the Member States, in particular the authorities or courts responsible for the protection of minors, shall be facilitated and the necessary steps taken to ensure that those authorities can decide with full knowledge of the facts, on the ability of the adult or adults concerned to take charge of the minor in a way which serves his best interests.

While an extremely positive provision, an anomaly should be noted. The DR is the only CEAS instrument that does not foresee the appointment of a representative to an unaccompanied minor. Without a representative to act as focal point in the interaction of the various authorities referred to above, the ability of the authorities to make a decision 'with full knowledge' must be doubted.[111]

Finally, a number of important provisions of the DR omit any reference to the best interests of the child. Thus, the procedures for notifying the applicant of a decision to transfer him/her and the possibilities for an appeal in Articles 19 and 20 DR make no mention of the best interests of the child. Furthermore, as regards the accompanied minor, Article 4(3), which establishes the principle of family unity, provides that the child's situation is in dissociable from that of his/her parent or guardian. This is not made subject to a best interests assessment. It can be observed that assimilating a child's situation

110 A reference for a preliminary ruling on the question of whether Article 15 might be mandatory in certain circumstances has been made: Case C-245/11, *K v Bundesasylamt*.

111 Although a representative is assigned to an unaccompanied minor under the RCD, it is unclear whether the scope of the RCD extends to Dublin Regulation cases. A reference for a preliminary ruling on this question has been made: Case C-179/11, *CIMADE and GISTI v Ministry of the Interior*.

to his/her parent's for the purposes of the DR potentially pits two rights of the child against each other, namely, the right of the child to family unity (various articles of the CRC – see Chapter 5) and the right of the asylum seeking child to *appropriate* protection (Article 22 CRC – see Chapters 3 and 4). The best interests principle should have an important role to play here in mediating the conflict between the two rights, making its omission all the more regrettable.[112] In sum, the best interests of the child is a consideration in respect of some, but by no means all, decisions relating to children under the DR.

2.4.1.3 The Asylum Procedures Directive

The scope of the best interests principle in the Asylum Procedures Directive (APD) is set out in Recital 14 and Article 17. Recital 14 provides: '[i]n addition [to general procedural guarantees], specific procedural guarantees for unaccompanied minors should be laid down on account of their vulnerability. In this context, the best interests of the child should be a primary consideration.' Article 17 (Guarantees for unaccompanied minors) provides in paragraph (6) that: '[t]he best interests of the child shall be a primary consideration for Member States when implementing this Article.' Since there is no discernible difference between Recital 14 and Article 17, the analysis that follows will be of the substantive provision.

It is clear from the wording of Article 17 that the APD does not envisage that the best interests of the child be a primary consideration for Member States when implementing all the provisions of the directive. The best interests of the child are to be a primary consideration in implementing certain provisions of the directive concerning unaccompanied minors. By contrast, the provisions concerning *accompanied* minors do not have to be implemented in accordance with the best interests of the child. What provisions are these? Two provisions of the directive are explicitly directed towards accompanied minors. In terms of access to the procedure, Article 6(4) authorizes Member States to determine in national legislation the cases in which a minor can make an application on his/her own behalf and the cases in which the minor's claim is subsumed into that of his/her parent(s). In terms of the right to a personal interview, per Article 12(1), 'Member States may determine in national legislation the cases in which a minor shall be given the opportunity of a personal interview.'[113] The best interests of the child does not have to be considered in the implementation of these provisions.

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112 In this regard it is interesting to note that in its 2011 Concluding Observations to Denmark, the Committee RC recommends 'only applying the Dublin II Regulation in cases where it is in keeping with the child's best interests.' Committee RC, Concluding Observations to Denmark in 2011, U.N. Doc CRC/C/DNK/CO/4, para. 58.

113 This provision applies equally to accompanied and unaccompanied minors.

Moreover, in addition to these two explicit provisions, all the other procedures in the directive either directly (if a minor makes an application in his/her own right) or indirectly (if a minor's claim is subsumed into that of his/her parent(s)) affect the accompanied minor. For example, as outlined in detail in Chapter 4, the APD is characterized by a large number of extraordinary procedures such as an accelerated/manifestly unfounded procedure, an admissibility procedure, various border procedures and a procedure for processing subsequent applications. Some of these procedures are based on concepts of dubious legality (from an international human rights and refugee law perspective), such as safe country concepts. They all apply, directly or indirectly, to accompanied minors without any exceptions on grounds of age or vulnerability. Their application to any particular accompanied minor is not subject to a best interests assessment.

So the best interests principle in the APD is reserved for unaccompanied minors. Moreover it is reserved for those actions that fall under Article 17 (Guarantees for unaccompanied minors). This is a limitation within a limitation, because the scope of Article 17 does not exhaust the totality of the actions that may/must be taken in respect of unaccompanied minors. Thus, Article 17 provides for the appointment of a representative to represent/assist the unaccompanied minor with respect to the examination of the application and the personal interview.[114] It outlines circumstances where Member States may derogate from the obligation to appoint a representative. It specifies that if an unaccompanied minor has a personal interview, that interview must be conducted by a person with the 'necessary knowledge of the special needs of minors' and that the eventual decision must be taken by a similarly knowledgeable official. It authorizes Member States to use age assessments. When implementing these actions, the best interests of the child must be a primary consideration.

However, outside (and prior to and determinate of) the Article 17 actions, two other actions explicitly relate to unaccompanied minors. First, in terms of access to the procedure, Article 6(4) permits Member States to determine in national legislation 'the cases in which the application of an unaccompanied minor has to be lodged by a representative'. There is no requirement to take best interests into account in determining such cases. Furthermore, since Article 17 does not mention the representative's role in lodging an application, it is unclear whether the decision by a representative to lodge an application on behalf of an unaccompanied minor is subject to a best interests assessment. Second, in terms of the right to a personal interview, this is left entirely to

114 The definition of 'representative' in Article 2 APD also refers to the best interests concept. It provides: '"representative" means a person acting on behalf of an organization representing an unaccompanied minor as legal guardian, a person acting on behalf of a national organization which is responsible for the care and well-being of minors, or any other appropriate representation appointed to ensure his/her best interests.'

Member State discretion, as per Article 12(1) mentioned above. Consequently, as regards unaccompanied minors, the best interests principle is only triggered once a number of significant decisions have already been taken about the child. Furthermore, beyond the actions that explicitly relate to unaccompanied minors, all the other actions foreseen in the directive, such as the extraordinary procedures, implicitly relate to them. Their application to any particular unaccompanied minor is not subject to a best interests assessment.

2.4.1.4 The Qualification Directive

The Qualification Directive (QD) is unlike the other instruments because, although it contains a substantive provision on best interests which has a restricted scope, it also contains a recital on best interests which gives the principle its full scope. Thus, Article 20(5) of Chapter VII (Content of International Protection) stipulates that '[t]he best interest of the child shall be a primary consideration of Member States when implementing the provisions of this Chapter that involve minors.' Recital 12, by contrast, provides that '[t]he "best interests of the child" should be a primary consideration of Member States *when implementing this Directive*.'[115] So which is it?

While Member States may be tempted to confine themselves to the substantive obligation, when the CJEU comes to interpret Article 20(5) it is quite likely that it will be strongly influenced by the recital. This is because the Court tends to adopt a schematic approach to the interpretation of legislation, using the recitals to inform the meaning of substantive provisions. For example, in *Elgafaji v Staatssecretaris van Justitie*, the Court interpreted Article 15(c) of the QD in a manner that was 'not invalidated' by the wording of Recital 26 which related to the same issue.[116] In the case of the best interests provisions of the directive, the Court will be operating under a further constraint (than just the schematic one), which is the duty to reconcile the diverging requirements of the recital and the substantive provision in a manner that is consistent with the principle of the best interests of the child in the Charter of Fundamental Rights. Hence, it is submitted that Article 20(5) is likely to be interpreted as a context-specific reiteration of the best interests principle as set out in Recital 12, the latter applying to the whole directive. The significance of this becomes apparent when Article 20(5) is considered on its own.

Article 20(5) establishes a limitation within a limitation – the first confining the scope of the best interests principle to Chapter VII; the second confining the scope of the principle within Chapter VII to those provisions that involve minors. As to the first limitation, it can be observed that, as the title of the directive suggests, the QD is divided between provisions relating to status and

115 Emphasis added.

116 CJEU, *Elgafaji v Staatssecretaris van Justitie* Case C-465/07, Judgment of 17 February 2009, para. 36. See Chapter 3 for analysis.

provisions relating to qualification. Three chapters deal with status: Chapters IV and VI deal with the granting (and revoking) of refugee and subsidiary protection status, respectively, while Chapter VII outlines the rights that attach to refugee and subsidiary protection status. Similarly, three chapters are devoted to qualification: Chapter II (Assessment of Applications for International Protection), Chapter III (Qualification for Being a Refugee), and Chapter V (Qualification for Subsidiary Protection). Article 20(5) limits the scope of application of the best interests principle to Chapter VII, meaning that Member States are not required to make the best interests of the child a primary consideration when implementing most of the provisions of the directive dealing with status or any of the provisions dealing with qualification. However, as Chapter 3 outlines, integrating a child-rights perspective into the qualification provisions is critical if children are to be recognized as eligible for international protection. The best interests principle should have an important facilitative role here but Article 20(5) does not provide the legal basis for it.

As to the second limitation, the best interests of the child is to be taken into consideration, not when implementing all the provisions of Chapter VII, but only when implementing the provisions 'that involve minors'. Three such provisions can be readily identified. Article 20(3) establishes an obligation to 'take into account the specific situation of vulnerable persons such as minors [and] unaccompanied minors', in implementing the chapter although, like the equivalent provision of the RCD, this obligation extends 'only to persons found to have special needs after an individual evaluation of their situation.' Article 27 governs access to education and includes a right of minor beneficiaries of international protection to full access to the education system under the same conditions as nationals. Article 30 relates to unaccompanied minors and covers the obligation to appoint a representative, to secure a child placement for the unaccompanied minor, to 'endeavor' to trace the minor's family and to ensure appropriate training for those working with unaccompanied minors. Indeed, Article 30 expressly refers to the best interests of the child in the context of placing unaccompanied minor siblings together and of family tracing.[117] A fourth provision – Article 23, which relates to family unity and derivative rights – could be argued to involve minors, even though it lacks any reference to them. The other provisions of Chapter VII which are of general application – and these range from *non-refoulement* to health care to social welfare – are not subject to the best interests principle in Article 20(5).

In this context, Recital 12 has an important role to play in circumventing the narrow scope of Article 20(5) and brining the best interests principle to bear on all the provisions of the directive when they are applied to children.

117 Article 30(4) and Article 30(5) respectively.

In sum, the CEAS instruments place various restrictions on the scope of the best interests principle. This is contrary to the proper scope of the best interests principle as laid down in Article 3(1) CRC. However, the QD contains an unrestricted statement of the best interests principle in a recital which is thought likely to 'correct' the narrower scope in the substantive article. Indeed, it is it is submitted that when the CJEU comes to interpreting the principle in any of the instruments, it is likely to transcend the narrow wording of the specific instrument. This is because of its own developing jurisprudence on best interests as well as the burgeoning jurisprudence of the ECtHR as outlined in section 2.3. Indeed, in a recent case the ECtHR assimilated the best interests provision in the RCD to Article 3 CRC in the context of immigration detention of children, even though the detention provisions of the RCD are age-neutral (and hence do not 'involve' minors).[118] This illustrates that the Court was prepared to overlook the narrow wording of the best interests provision in the RCD. As for the CJEU, a preliminary reference in a case involving a child is awaited in order to settle the matter.

2.4.2 The weight of the child's best interests

The best interests of the child must be a primary consideration. At a minimum, this requires a rigorous balancing of the best interests of the child against counter-veiling considerations. At best, the best interests of the child should routinely prevail over contrary considerations, except in exceptional circumstances. Even in exceptional circumstances, where the best interests of the child corresponds to an absolute right of the child, it must prevail.

In the provisions of the CEAS instruments that deal with the best interests obligation, the best interests of the child is always stated to be 'a primary consideration', just as it is in Article 3(1) CRC. Indeed, in certain provisions of the Dublin Regulation, an action is specified provided it is in the best interests of the child or precluded unless it is in the best interests of the child, which suggests that the best interests of the child is decisive.

However, formal allegiance to the primacy of the best interests of the child does not dispose of the matter. Even leaving aside the problem of scope just discussed, it can be observed that the best interests of the child can only be a primary consideration in any given action concerning children if no mandatory contrary requirement is laid down. Put simply, if a mandatory contrary

118 ECtHR, *Popov v France*, Appl. Nos. 39472/07 and 39474/07, Judgment of 19 January 2012, para. 141: 'La Convention internationale relative aux droits de l'enfant préconise que l'intérêt supérieur des enfants soit une considération primordiale dans toute décision les concernant (article 3). *De meme*, la directive 'accueil' […] prévoit expressément que les Etat members accordent une place d'importance à la notion d'intérêt supérieur de l'enfant.' Emphasis added. See Chapter 7 for analysis.

requirement is laid down, then the best interests of the child cannot be a consideration, much less a primary consideration. If a discretionary contrary requirement is laid down the situation is more complicated. Theoretically, in such a scenario the best interests principle could have a potentially transformative effect, informing (i.e. constraining) the transposition and implementation of contrary discretionary provisions and their application to any given child. However, in reality, where a discretionary contrary requirement is specified, the primacy of the best interests consideration is likely to become blurred: Member States are authorized to act according to a contrary consideration but must still make the best interests of the child a primary consideration. In this regard, the author agrees with the Commission view in *European Parliament v Council* that 'Member States should not be expected to realize by themselves that a given measure permitted by a Community directive is contrary to fundamental rights.'[119] In turn, Member States should not expect the individual decision-maker to prioritize the best interests of the individual child over and above the policy options established in the legislation.

This raises the question: how to identify a provision that is contrary to the best interests of the child? In order to answer this question, it is useful to revert to the discussion on the meaning of the term 'best interests' in section 2.2. It will be recalled that 'best interests' is fundamentally a rights-based concept: 'best interests' informs rights; rights inform 'best interests'; 'best interests is a composite of rights; and 'best interests' brings a rights perspective to bear. In short, there is an intimate connection between the rights of the child and what can be said to be in the best interests of the child. A provision of an instrument that implicates a right of the child and that is inconsistent with that right cannot, *ipso facto*, be in the best interests of the child. Therefore, it is contrary to the best interests of the child.

It follows from this discussion that in order to truly assess whether the primacy of the best interests principle is respected in the CEAS instruments, it is necessary to establish whether there are any provisions of the instruments that are contrary to the best interests of the child, or, in other words, contrary to the rights of the child. This is the task of the remaining chapters of this thesis.

2.4.3 The conduct of the assessment in individual cases

It will be recalled from the discussion about the personal scope – in terms of actors obligated – of the best interests principle, that the obligation devolves to any actor who takes 'an action' relating to a child. A plethora of actors can be identified in the asylum context. This raises concerns about competence

119 ECJ, *European Parliament v Council*, Case C-540/03, Judgment of 27 June 2006, para. 18.

and impartiality. In this regard, the emergence of soft law guidance on assessing the best interests of the child is a welcome development. The question is whether the best interests and other provisions of the CEAS instruments are consistent with this guidance.

Since the soft-law guidance emerged after the Phase One CEAS instruments were negotiated, it would be unreasonable to expect the instruments to reflect the distinction between a best interests assessment and a BID, or to provide detailed guidance (or a direction to Member States to elaborate such guidance) on the conduct of a BID. And indeed, the CEAS instruments make no such distinction and provide no such guidance. However, it is reasonable to expect that the basic requirements of the best interests assessment, namely, that the child participates in the decision-making process and that the staff undertaking the assessment have the required expertise, are reflected in the CEAS instruments. This is a reasonable expectation because these basic requirements derive from the nature of the legal obligation inherent in the best interests principle itself. Both of these issues are dealt with in detail in Chapter 4 on the rights of the child to be heard. However, some general comments, anticipating the detailed discussion in Chapter 4, will briefly be made.

As regards child participation, there is but one solitary reference to soliciting the views of the child in the CEAS. Article 30 QD provides in paragraph 3, relating to securing a placement for an unaccompanied minor, that '[i]n this context, the views of the child shall be taken into account in accordance with his or her age and degree of maturity.' While undoubtedly a positive provision, it is unclear why, among all the various provisions of the QD, the issue of placements for unaccompanied minors should be singled out for child participation. There is no commitment to child participation in the corresponding article of the RCD on placements for unaccompanied minors nor in any other article of that directive. If one were to alight on a directive where the participation of the child seems critical to success it would be the APD. Yet the only provision of the APD that relates to child participation is Article 12 (Personal Interview). Article 12(1) provides that an applicant for asylum 'shall be given the opportunity of a personal interview on his/her application for asylum'. However, the third sub-paragraph provides that 'Member States may determine in national legislation the cases in which a minor shall be given the opportunity of a personal interview.' Consequently, Member States are authorized to place restrictions on the participation of minors in the procedure or, indeed, not to legislate for the issue at all. Even where Member States elect to interview minors, the APD permits the personal interview to be omitted in numerous situations – some within the framework of the 'regular' procedure and some within the framework of the numerous 'extraordinary' procedures established in the directive. Minors, whether unaccompanied or unaccompanied, are fully susceptible to all procedures in the APD. Finally, no provision of the DR relates to child participation.

As for the issue of appropriately qualified staff, the situation is somewhat more promising. The RCD and the QD in Article 19 and 30 respectively establish an obligation to ensure appropriate training for those working with unaccompanied minors. Article 17 of the APD provides that if an unaccompanied minor has a personal interview, that interview must be conducted by a person with the 'necessary knowledge of the special needs of minors' and that the eventual decision must be taken by a similarly knowledgeable official. The DR does not contain any requirement that staff applying the regulation to children be appropriately qualified. However, the Dublin Detailed Rules do envisage cooperation between the competent authorities, 'in particular the authorities or courts responsible for the protection of minors' in ensuring that reunification with relatives is in the best interests of the child.[120] Since child protection is at issue, it can be assumed that the officials are appropriately qualified. However, none of the instruments establish that those working with accompanied minors should be appropriately qualified.

In short, it cannot be stated that all CEAS instruments establish the preconditions for a best interests assessment, namely, child participation and staff training.

To conclude this section on the principle of the best interest of the child in Phase One CEAS, overall, the references in the instruments to best interests are inconsistent with the scope of the principle and the instruments fail to establish the conditions precedent for a best interests assessment. As regards the weight of the principle, all the instruments do direct Member States to make the best interests of the child a primary consideration, but this presupposes at a minimum that no mandatory requirements contrary to the rights of the child are laid down in the instruments. This remains to be seen.

2.5 The principle of the best interests of the child in the CEAS (Phase Two)

In this section, just two aspects of the best interests obligation as it is reflected in the Phase Two instruments are assessed: the subject-matter scope of the principle and issues relating to the conduct of the assessment in individual cases. The issue of the weight of the principle is not addressed, as it raises the same issue as identified in the analysis of Phase One, namely, whether the instruments contain provisions that are contrary to the rights of the child. This question is addressed in the remaining chapters of the thesis.

120 Article 12(1).

2.5.1 The scope of the principle

There is a marked improvement in the proposed Phase Two instruments regarding the scope of the best interests principle.

2.5.1.1 The proposed recast Reception Conditions Directive

The proposed recast RCD provides in Recital 9 that 'Member States should seek to ensure full compliance with the principle of the best interests of the child and the importance of family unity in the application of this Directive, in line with the Charter of Fundamental Rights of the European Union, the 1989 United Nations Convention on the Rights of the Child and the European Convention on Human Rights respectively.' By contrast, there is no change to the substantive provision relating to the scope of the best interests principle (now Article 23) which provides that '[t]he best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Directive that involve minors.' However, as previously observed in relation to the QD, the substantive article is likely to be interpreted by reference to the recital with the effect that the best interests principle applies to the implementation of all articles of the directive when applied to minors.

Furthermore, specific references are made to the best interests principle in the context of the role of the representative,[121] the detention of minors (prohibited unless it is in the best interests of the child),[122] family unity,[123] and the option to derogate from the obligation to secure a child placement for unaccompanied minors who are over 16 (now only 'if it is in their best interests').[124] The ambiguous provision requiring Member States to 'take into account' the specific situation of vulnerable persons such as minors and unaccompanied minors in the national implementing legislation is clarified by the deletion of the caveat that the provision only applies after an individual evaluation.[125] This provision is now one that clearly 'involves' minors for the purposes of Article 23, although this is something of a moot point because it would be 'caught' anyway by the best interests recital.

Finally, for the first time, guidance is provided on the factors to be taken account of in assessing the best interests of the child.[126] This will be elaborated on in subsection 2.5.2 below on the conduct of the assessment.

121 Article 2(j) and Article 24.
122 Article 11(2).
123 Article 23(5).
124 Article 24(2).
125 Article 21.
126 Article 23(2).

2.5.1.2 The proposed recast Dublin Regulation

The proposed recast DR contains the most radical changes of all the proposed Phase Two instruments on the specific issue of the best interests of the child. Recital 10 states, *inter alia*, that '[i]n accordance with the 1989 United Nations Convention on the Rights of the Child and the Charter of Fundamental Rights of the European Union, the best interests of the child should be a primary consideration of Member States in the application of this Regulation.' This is reflected in Article 6(1) which provides that '[t]he best interests of the child shall be a primary consideration for Member States with respect to *all procedures* provided for in this Regulation.'[127] This is the boldest endorsement of all the recasts of the proper scope of the best interests principle.[128] Indeed Article 6 is a new article establishing specific guarantees for minors, relating to the appointment of a representative, family tracing and staff training, bringing the DR into line with the specific guarantees of the other CEAS instruments. Furthermore, Article 6(3) stipulates that in assessing the best interests of the child, 'Member States shall closely cooperate with each other' and lays down the same guidance as is provided in the proposed recast RCD on the factors to be taken account of in assessing the best interests of the child.

As regards the specific criterion for determining the Member State responsible for unaccompanied minors, this is augmented by two new criteria. Thus Article 8(2) makes the current humanitarian clause relating to relatives legally present in another Member State a binding criterion 'provided that this is in the best interests of the child' and Article 8(3) makes the best interests of the child the determining factor where there are family members or relatives legally present in more than one Member State. The default criterion in the absence of a family member or relative in another Member State is no longer where the minor lodged his/her application, but, per Article 8(4), where he/she lodged *the most recent* application 'provided that this in the best interests of the minor'. Article 8(5) envisages the adoption of supplementary measures by the Commission relating to conditions and procedures for implementing paragraphs 2 and 3. This is potentially significant in the context of procedural guidance on assessing the best interests of the child and will be returned to in the subsection on the conduct of the assessment.

Finally a new article on detention is introduced which provides that '[m]inors shall not be detained unless it is in their best interests' and '[u]naccompanied minors shall never be detained.[129] However, as regards the latter provision, it should be noted that the original Commission proposal for

127 Emphasis added.

128 However, it should be noted that the proposed recast DR is also the oldest of all the recasts and hence probably least reflective of current realities in terms of what is agreeable to the Union legislator.

129 Article 27.

a recast of the RCD contained an identical provision but that this was replaced in the 2011 version by a provision permitting the detention of unaccompanied minors 'only in particularly exceptional cases'.[130] It is highly likely that the equivalent provision in the proposed recast DR will go the same way.

2.5.1.3 The proposed recast Asylum Procedures Directive

The proposed recast APD also contains an important new recital. Recital 26 provides that '[t]he best interests of the child should be a primary consideration of Member States when implementing this Directive, in line with the Charter of Fundamental Rights of the European Union and the 1989 Convention on the Rights of the Child.' This contrasts with the substantive reference to the best interests principle in Article 25 on guarantees for unaccompanied minors which provides that '[t]he best interests of the child shall be a primary consideration for Member States when implementing this Article.' Again, it is submitted that this provision should be interpreted in light of the recital, making the best interests principle of horizontal application across the whole directive.

Like the proposed recast RCD, the role of the representative for unaccompanied minors is re-defined with reference to the best interests principle.[131] However, the obligation to appoint a representative can be derogated from where the unaccompanied minor is likely to 'age out' and no mention is made of the best interests of the child in the derogation provision. This contrasts with the derogation provision in respect of unaccompanied minors in the RCD (relating to a child placement) which is made subject to the best interests of the child. Finally, unlike the proposed recast RCD and DR, no reference is made in the proposed recast APD to the factors to be taken account of in assessing the best interests of the child. This omission will be discussed further below.

2.5.1.4 The recast Qualification Directive

As for the recast QD, there continues to be a difference in the stated scope of the best interests principle in a recital versus a substantive provision.[132] However, this was already found to be unproblematic. There are several new preambular references to the best interests principle in specific contexts, namely, the definition of family members,[133] and the application of the con-

130 Article 11(1) of the 2008 proposed recast (COM (2008) 815 final) was replaced by Article 11(2) of the 2011 proposed recast.

131 Article 2(n) and Article 25(1).

132 Recital 18 and Article 20(5).

133 Recital 19 explains that the best interests of the child is the rationale for extending the definition of family members in the directive, while Recital 38 provides that Member States should take the best interests of the child into account when deciding on whether to extend the derived rights in the directive to chose relatives who are not family members as defined

cept of internal protection to unaccompanied minors.[134] Significantly, Recital 18 provides direction to Member States on the factors to be taken account of in assessing the best interests of the child, as per the RCD and DR. The fact that the direction is contained in a recital as opposed to a substantive provision is not considered to be significant. However, unlike the other instruments, no definition is provided of the representative for unaccompanied minors and consequently there is no statement of the role of the representative viz. a viz. the best interests of the child.

In sum, the commitment to the full scope of the best interests principle in a recital in the proposed recast RCD and APD and in a substantive provision of the proposed recast DR is noteworthy and a considerable improvement on the current situation. However, a certain unevenness can be detected across the proposed recasts in terms of the practice of reiterating the principle in the context of certain rights.

2.5.2 The conduct of the assessment

It was found that the Phase One instruments did not comply with the requirements of the best interests assessment regarding child participation and staff competence. With the exception of the APD, the Phase Two instruments contain an important innovation in this regard, which is an explicit direction to Member States on issues to consider in assessing the best interests of the child. Article 12(2) of the proposed recast RCD, for example, provides:

> In assessing the best interests of the child, Member States shall in particular take due account of the following factors:
> (a) family reunification possibilities;
> (b) the minor's well-being and social development, taking into particular consideration the minor's ethnic, religious, cultural and linguistic background;
> (c) safety and security considerations, in particular where there is a risk of the minor being a victim of trafficking;
> (d) the views of the minor in accordance with his/her age and maturity.[135]

The reference to the views of the child is particularly noteworthy as is the fact that, in order to acquit the obligation in good faith, staff would surely have to be competent to do so.

The omission of a similar provision in the proposed recast APD is regrettable. Furthermore, there is no change to the provision of the APD that

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in the directive. This could 'exceptionally' be the case as regards a married minor who is not accompanied by his/her spouse. The significance of this is discussed in Chapter 5.

134 Recital 27.

135 An identical provision is found in Article 6(3) of the proposed recast DR and a summary version in Recital 18 of the recast QD.

speaks most clearly to the issue of child participation, namely, the question of a personal interview.[136] However, the proposal does contain some new quality control provisions that are of general application[137] and a new obligation on Member States to ensure that 'the personnel examining applications and taking decisions are instructed and have the possibility to seek advice, whenever necessary, from experts on particular issues such as […] child-related […] issues.'[138] Unfortunately, there are ample opportunities, express and implied, in the proposed recast APD for Member States to derogate from these standards.[139] On balance, there is no net gain in the proposed recast APD in terms of the conduct of the best interests assessment.

Between the two phases of the CEAS, important soft-law guidance has evolved regarding the BID. It is not suggested that such guidance should necessarily be integrated into Phase Two CEAS as such guidance could usefully be supplied in other formats, such as supplementary measures adopted by the Commission (as envisaged in the proposed recast DR) or guidelines developed by the European Asylum Support Office.[140] However, what is important is that the Phase Two instruments should not contain provisions that are inimical to the conduct of a BID. Recall that the BID applies in principle to all important decisions about unaccompanied or separated children seeking or benefiting from international protection as well as accompanied children when they are 'at risk'. The BID is undertaken by an expert group on the basis of an evaluation of all the available information about the child. Therefore information is key. So the question arises: do any of the Phase Two instruments preclude the gathering and evaluation of all available information relating to the child?

Here again, the proposed recast APD is problematic in that it retains various extraordinary procedures that truncate the examination of the asylum claim and preclude information gathering. Examples are the accelerated/manifestly unfounded procedure,[141] the admissibility procedure,[142] the border pro-

136 Article 14(1).

137 For example, Article 4(3) provides: Member States shall ensure that the personnel of the determining authority are properly trained. To that end, Member States shall provide for initial and, where relevant, follow-up training which shall include the elements listed in Article 6(4)(a)-(e) of Regulation (EU) No. 439/2010. Member States shall also take into account the training established and developed by the European Asylum Support Office.' In turn, Article 6(4)(c) of Regulation (EU) No. 439/2010 provides for training on issues related to the handling of asylum applications from minors and other persons with specific needs. See further Chapter 4.

138 Article 10(3)(d).

139 See Chapter 4 for a thorough description and analysis.

140 Article 12(2) of Regulation (EU) No. 439/2010 authorises the European Asylum Support Office to adopt guidelines.

141 Article 31(6).

142 Article 33.

cedure[143] and various 'safe country' procedures, so-called.[144] The admissibility procedure, in particular, is objectionable because it excludes from consideration the facts as they relate to the substance of the claim. While Article 25(6) exempts unaccompanied minors from the scope of application of *some* of these extraordinary procedures, accompanied minors are not similarly exempt.[145] As previously observed, at least some accompanied minors, notably, those 'at risk', should be subject to a BID when important decisions are being made. Therefore, the processing of such children within the framework of the extraordinary procedures in the proposed recast APD is inimical to the conduct of a BID.

In sum, while the proposed recast RCD and DR and the recast QD provide important instruction on the factors to be considered in assessing the best interests of the child, the proposed recast APD curiously lacks an equivalent provision. Furthermore, the proposed recast APD contains some provisions that preclude the conduct of a BID.

To conclude this section on the principle of the best interest of the child in Phase Two CEAS, there is a considerable improvement in the recast QD and the proposed recast instruments in relation to the scope of the best interests principle. Furthermore, the conditions precedent for a best interests assessment are established, expressly or impliedly, in the new guidance on factors to be considered in assessing best interests that is found in the recast QD and the proposed recast RCD and DR. However, no such guidance is provided in the proposed recast APD and furthermore, certain provisions of that instrument appear to preclude the conduct of a BID. As to whether the Phase Two instruments permit Member States to give primacy to the best interests principle in fact, this remains to be seen.

2.6 Final remarks

There is a distinction between the question of how the principle of the best interests of the child is dealt with in the CEAS and the broader question of whether the CEAS is in the best interests of children. The broader question is more complex than the rather forensic analysis undertaken in this chapter of what the CEAS instruments have to say, explicitly or implicitly, about best interests. The broader question is also more important: there is little point in the EU legislator directing Member States to make the best interests of the child a primary consideration in the implementation of this or that provision, article or chapter if the minimum standards established in the directive are not in the best interests of children. This would be an exercise in tokenism, a smoke

143 Article 43.
144 Section III.
145 See further Chapter 4.

and mirrors use of the best interests principle. It would also, as has been observed, undermine the obligation on Member States to ensure the primacy of the child's best interests. Furthermore, the EU legislator is itself under an obligation to make the best interests of the child a primary consideration when adopting legislation. This is clear from the collective dimension of the best interests obligation as discussed in section 2.3. The question comes down to this: is the CEAS in the best interests of children, meaning, does the CEAS broadly respect the rights of the child? This question is answered in the remaining chapters of this study.

3 The right of the child to seek and qualify for international protection

3.1 Introduction

This chapter explores the right of the child to seek and qualify for international protection. This 'right' requires some explanation for two reasons. First, the right (of anyone) to seek international protection, as distinct from the right of *non-refoulement*, is not uncontested in international law.[1] The aim here is not to establish that the child has any greater right to seek international protection than has anyone else, but rather that the right to seek international protection, such as it exists, applies equally to the child. Second, the right to qualify for international protection presupposes that the applicant meets the qualification criteria. The contention here is not that the child has a right to qualify simply by virtue of being a child, but rather that the child has a right to qualify, like anyone else, if he/she meets the qualification criteria. However, a further nuance must be added: it is generally accepted that the qualification criteria are not neutral, but reflect a hidden adult and, indeed, male bias. In order to remedy this bias and make the qualification criteria meaningful for children, it is suggested that the qualification criteria should be sensitive to the rights of the child. Persecution, for example, should comprehend child-specific forms of persecution. Hence what is meant in this chapter by the right of the child to qualify for international protection is that the child has a right to have his/her rights as a child regarded as refugee-relevant.

This chapter is divided into two substantive sections – the first relating to the right of the child to seek international protection and the second relating to the right of the child to qualify for international protection. Thus, section 3.2 explores the right of the child to seek international protection. It establishes

1 The right 'to seek and to enjoy in other countries asylum from persecution' in Article 14 of the Universal Declaration of Human Rights finds no equivalent in the legally binding ICCPR. Furthermore, the seminal 1951 Convention relating to the Status of Refugees contains no express right to seek asylum. In this context, the 'right to asylum' in Article 18 of the EU Charter of Fundamental Rights is innovative. It provides: 'The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 18 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.' The right to asylum in the Charter is considered to cover the right of individuals to seek *and* to enjoy asylum. See Maria-Teresa Gil-Bazo, 'The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law', *Refugee Survey Quarterly* 27, no. 3 (2008): 33-52.

the existence of such a right and then evaluates whether the APD – the relevant CEAS instrument – conforms to the right. It scrutinizes the proposed recast APD in order to assess the prospects for enhanced compliance in Phase Two CEAS. Section 3.3, by far the larger section, examines the right of the child to qualify for international protection. The first subsection (3.3.1) defends the proposition that the rights of the child *tout court* are potentially relevant to establishing an international protection need and exposes the obstacles in international human rights law and refugee law that hinder a general acceptance of this proposition. The next subsection (3.3.2) explores whether the qualification criteria (in the QD mainly) are sensitive to the rights of the child or, conversely, reproduce the obstacles referred to above. The final subsection (3.3.3) examines the changes to the qualification criteria in Phase Two CEAS in order to assess the prospects for greater sensitivity to the rights of the child.

3.2 THE RIGHT OF THE CHILD TO SEEK INTERNATIONAL PROTECTION

3.2.1 The right of the child to seek asylum

Consistent with the traditional lack of an explicit right to seek asylum in international human rights law, the CRC does not establish any express right of the child to seek asylum. However, Article 22 relating to special measures of protection for refugee and asylum seeking children provides guarantees for children who are (already) seeking asylum, which implies a prior right to seek asylum. Article 22(1) provides:

> States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance the applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the Convention and in other international human rights or humanitarian instruments to which the said states are Parties.

The term 'humanitarian instruments' includes the 1951 Convention relating to the Status of Refugees which establishes the right of the refugee to *non refoulement* and, implicitly, (since refugee status is declaratory rather than constitutive) a right to seek asylum.[2] The term 'other international human

2 The 1951 Convention categorises itself as a humanitarian instrument in the preamble, but nowadays is typically classified as a human rights instrument. See for example, P.R. Chandhi *Blackstone's International Human Rights Documents*, 5th ed. (Clarenden: Oxford University Press, 2006). On the declaratory nature of refugee status, see UNHCR, 'Note on Determination of Refugee Status under International Instruments', EC/SCP/5 (1997), available at: http://www.unhcr.org/refworld/docid/3ae68cc04.html [accessed 14 February 2012].

rights […] instruments' includes the Convention Against Torture, the International Covenant on Civil and Political Rights and the ECHR all of which establish a right of *non-refoulement* in the specific context of torture (and in the case of the latter two also inhuman and degrading treatment or punishment) which is absolute and not limited to refugees.[3] Here the right of *non-refoulement* implies a right to seek protection, albeit not necessarily a right to some sort of status. The right of *non-refoulement* in the torture context is reiterated in Article 19 of the EU Charter of Fundamental Rights and the CJEU held in *Elgafaji v Staatssecretaris van Justitie* that 'the fundamental right guaranteed under Article 3 ECHR forms part of the general principles of Community law, observance of which is ensured by the Court'.[4]

It is submitted that the link in Article 22(1) CRC between the child who is seeking refugee status and the protection rights in other international human rights or humanitarian instruments establishes that the child has a right to seek asylum, broadly understood as the right to seek some form of protection recognized under international law. This is confirmed in General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin, in which the Committee RC stipulates that '[a]sylum seeking children, including those who are unaccompanied or separated, shall enjoy access to asylum procedures and other complementary mechanisms providing international protection irrespective of their age.'[5]

If the child has a right of access to the procedure, it follows that he/she must have the right to lodge an application for international protection. Thus, in respect of unaccompanied or separated children, the Committee RC states that:

> In the case facts become known during the identification and registration process which indicate that the child may have a well-founded fear or, even if unable to explicitly articulate a concrete fear, the child may be objectively at risk of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, or otherwise be in need of international protection, such a child should be referred to the asylum procedure and/or, where relevant, to mechanisms providing complementary protection under international and domestic law.[6]

However, an ambiguity arises in relation to the *accompanied* child: is he/she entitled to lodge an independent application or is it enough that his/her claim be subsumed into that of his/her parent's (or parents')? In the case of the former, the child acquires his/her own status; in the case of the latter, the child

3 See Article 3, 7 and 3 respectively.
4 ECJ, Case C-465/07, Judgment of the Court (GC) of 17 February 2009, para. 28.
5 Committee RC, General Comment No. 6, 'Treatment of Unaccompanied and Separated Children Outside their Country of Origin', U.N. Doc. CRC/GC/2005/6 (2005),, para. 66.
6 *Ibid*.

derives his/her status from that of his/her parent. In this regard, at least three scenarios can be distinguished: a) the parent is the principal applicant and there are no separate elements relating to the child's risk of persecution or serious harm; b) the child is the principal applicant in that it is the child (not the parent) who is at risk of persecution or serious harm; c) both parent and child are at risk of persecution or serious harm and there are separate elements to their claims or their claims warrant separate evaluation.[7] Here the wording of Article 22(1) CRC is instructive: the child who is seeking refugee status, whether unaccompanied or *accompanied by his or her parents* must receive *appropriate protection*. Only in the case of scenario a) above is it appropriate to subsume the child's claim into that of his/her parent. Accordingly, UNHCR advises:

> 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. 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. […] 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.[8]

It follows that the accompanied child must have the possibility of lodging an independent asylum application or, at the very least, of making submissions in the context of his/her parent's claim.

In brief, the right of the child to seek asylum is the right of both the unaccompanied or separated child and the accompanied child.

3.2.2 Phase One CEAS: compliance with the right of the child to seek asylum

At the outset it should be noted that the CEAS transforms the hitherto inchoate right to seek asylum into an actionable right. Thus, the DR provides in Article 3(1) that 'Member States shall examine the application of any third country national who applies at the border or in their territory to any one of them for asylum. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.'

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7 Of course, there may be cases in which the risk of persecution emanates from the parent, underscoring the importance of the option to make a separate claim. See Peter Margulies, 'Children, Parents and Asylum', *Georgetown Immigration Law Journal* 15 (2000-01): 289-317.

8 UNHCR, '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', HCR/GIP/09/08 (2009), para. 9.

Although couched in the language of state responsibility, Article 3(1) DR effectively establishes the right of a third country national to have his/her asylum claim examined, in other words, a right to seek asylum.[9] Furthermore, the APD fills a gap left by international law regarding the procedures that must be followed in assessing an asylum claim.[10] In laying down minimum standards for asylum procedures, this directive gives practical effect to the right to seek asylum. Finally, the QD provides that individuals 'shall' be granted refugee or subsidiary protection status if they meet the definitional requirements laid down in the directive. This establishes a practical corollary to the right to seek asylum, namely, the right to be granted international protection. However, despite these significant advances, it is not clear that the CEAS conforms to the right of the *child* to seek asylum. In this regard, a number of provisions of the APD are of concern.

Access to the procedure is dealt with in Article 6 APD. Article 6(2) provides that each adult having legal capacity has the right to make an application for asylum on his/her own behalf. As regards minors, Article 6(4) provides that:

> Member States may determine in national legislation:
> (a) the cases in which a minor can make an application on his/her own behalf;
> (b) the cases in which the application of an unaccompanied minor has to be lodged by a representative as provided for in Article 17(1)(a);
> (c) the cases in which the lodging of an application for asylum is deemed to constitute also the lodging of an application for asylum for any unmarried minor.

Hence, Member States can opt not to legislate at all on the question of children's access to the procedure. If they do legislate pursuant to Article 6(4), the options outlined therein do not clearly establish a *right* of access to the procedure.

Thus, as regards *accompanied* minors, it can be observed that between Article 6(4)(a) and (c), there is no reference to a right of the minor either to lodge an application on his/her own behalf or to be included in someone else's application. Moreover, the reference to the marital status of the minor in Article 6(4)(c) but not Article 6(2) places the married minor at particular risk of falling between two stools – excluded from his/her parents' application but not

9 This right is compromised somewhat by the fact that the Dublin Regulation is not a 'closed system' in the sense that it allows Member States in Article 3(3) to 'retain the right, pursuant to national law, to send the asylum seeker to a third country, in compliance with the provisions of the Geneva Convention.'

10 The 1951 Convention relating to the Status of Refugees is silent on the status determination procedure. International Human Rights Law has supplied limited procedural guarantees, mainly in the form of the right to an effective remedy and in establishing minimum safeguards relating to expulsion. The gap has been filled *de facto* by various UNHCR publications, such as the 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees', HCR/IP/4/Eng/REV.1 Re-edited (Geneva, January 1992, UNHCR 1979).

considered as an adult with a right to make his/her own application. The precarious position of married minors in the CEAS will be further commented on commented on in Chapter 5.

The lack of a right of an accompanied minor to lodge an independent application can be contrasted with the situation of dependent adults. Thus, Article 6(3) foresees the making of an application by an applicant on behalf of his/her dependents but stipulates, in such cases, that 'Member States shall ensure that the dependant adults consent to the lodging of the application on their behalf, failing which they shall have an opportunity to make an application on their own behalf.' Furthermore, Article 9(3) provides that, in the case of dependent adults as referred to in Article 6(3), Member States may take one single decision 'whenever the application is based on the same grounds'. The interaction of Article 6(3) and 9(3) suggests that the consent procedure involves establishing that there are no separate grounds which might justify separate decisions. This is an acknowledgement of the fact that, even in situations of dependency, individuals may have different protection needs. However, this is also true for minor dependants, whose claim may well have a child-specific dimension.

The omission of any instruction to Member States to inquire into the possible existence of a child-specific dimension in deciding whether a minor can access the procedure in his/her own right could, in some cases, result in a failure to grant the child *appropriate* protection. The Commission evaluation of the APD states that applicants made by parents 'generally' cover dependant minors, and gives examples of three Member States which allow minors over a certain age to lodge an application on their own behalf.[11] While the latter practice is preferable to the former, the imposition of age thresholds is objectionable because it misses the point, which is that even very young children may need to have their claims separately evaluated.

In the absence of a right to lodge an independent application or of any case-by-case scrutiny of the need to lodge an independent application, the question arises as to whether the accompanied minor can make a claim at a later point or made later submissions in the context of his/her parent's claim. Just one provision of the APD provides, by negative inference, for a later application by an accompanied minor.[12] Article 23(4), relating to the acceler-

11 'Report from the Commission to the European Parliament and the Council on the Application of Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, COM (2010) 465 final', p. 4. Hereinafter, 'Commission evaluation of the APD'.

12 This contrasts with the situation of a dependant adult who makes a later application on his/her own behalf. Such an application can be dealt with in one of three ways. Firstly, Article 32 permits Member States to examine further representations or a subsequent application by a person who has already applied for asylum in the framework of the previous application or on appeal, where possible, or, if a decision has already been taken on the previous application, to process the subsequent application in a 'preliminary examina-

ated/manifestly unfounded procedure, lists numerous grounds for acceleration including ground (o):

> The application was made by an unmarried minor to whom Article 6(4)(c) applies, after the application of the parents or parent responsible for the minor has been rejected and no relevant new elements were raised with respect to his/her particular circumstances or to the situation in his/her country of origin.

A contrario, if new elements are raised, the child's subsequent application may be considered in the context of the ordinary procedure. However, the requirement of raising new elements is problematic for two reasons. Firstly, it may be less a case of introducing new elements as having the claim considered from the perspective of the rights of the child – an issue that will be addressed in section 3.3. Secondly, the burden of proof appears to be placed squarely on the child – something that is problematic from the point of view of the right of the child to be heard, a right that will be analyzed in Chapter 4.

The situation is not much better for *unaccompanied* minors: as between Article 6(4)(a) and (b) the right of an unaccompanied minor to either lodge an application or have one lodged on his/her behalf by a representative is not clearly established. Paragraph 4(b) certainly gives the impression that if the unaccompanied minor him/herself has no right to lodge an application, such a right is vested in his/her representative. However, the provisions of Article 17 (Guarantees for unaccompanied minors) which specify the role of the representative are confined to the representative's tasks in assisting the minor in relation to the examination of the application and in preparing the minor for the personal interview, if there is one.[13] These tasks necessarily follow on from the lodging of an application. But there is no provision explicitly establishing the right of the representative to make an application on behalf of the minor.

In sum, the APD does not clearly establish that the accompanied child has a right to make an application for asylum, either on his/her own behalf or by being included in his/her parents' application. The trend appears to be

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tion procedure' in derogation from the basic principles and guarantees established in the directive. Subsequent applications may encompass applications by a dependant who consented to have an application made on his/her behalf pursuant to Article 6(3) (hence, not dependent minors). Secondly, Article 25 relating to inadmissible applications establishes as a ground of inadmissibility ground (g): 'a dependant of the applicant lodges an application, after he/she has in accordance with Article 6(3) consented to have his/her case be part of an application made on his/her behalf, and there are no facts relating to the dependant's situation which justify a separate application.' Thirdly, Article 23(3)(h) relating to grounds for an accelerated (and manifestly unfounded) procedure applies where 'the applicant has submitted a subsequent application which does not raise any relevant new elements with respect to his/her particular circumstances or to the situation in this/her country of origin'.

13 See Chapter 4 for a full discussion of the role of the representative in the APD.

to include the child within the parent's application. But unlike dependant adults there is no consent requirement – and, by implication, no scrutiny of whether the claim is the same as the parents' claim. The only possibility for a later application is envisaged in the context of an accelerated/manifestly unfounded procedure, which is problematic *per se*, and because of the requirement to introduce new elements. As regards unaccompanied minors, the directive fails to clearly establish that a right to lodge an application is vested either in the child him/herself or in his/her representative. The lack of an explicit right of all minors to lodge an application – one way or another – falls short of the requirements of Article 22 CRC.

3.2.3 Phase Two CEAS: prospects for enhanced compliance

The proposed recast of the APD makes a number of significant amendments to the provisions on access to the procedure and subsequent applications which, with some misgivings, can be regarded as an improvement on the current situation.

Firstly, while Article 6(4) APD permitting Member States to determine in national legislation the cases in which a minor can make an application on his/her own behalf etc. is retained (now Article 7(5)), this is supplemented by new Article 7(3) which provides:

> Member States *shall* ensure that a minor has the right to make an application for international protection either on his/her own behalf, if he/she has the legal capacity to act in procedures according to the national law of the Member State concerned, or through his/her parents or other adult family members, or an adult responsible for him/her, whether by law or by national practice of the Member State concerned, or a representative.[14]

This provision, which was introduced 'with a view to align the Directive with Article 22(1) of the 1989 Convention on the Rights of the Child',[15] clearly establishes that the minor has a *right* to make an application for international protection – one way or another. However, the reference to legal capacity, which was introduced in the 2011 version of the recast, is unfortunate as the key issue in determining whether the child should be allowed to make his/her own application is not whether the child has reached the age of legal capacity

14 Emphasis added.

15 Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection, COM (2009) 554 final, ANNEX, 'Detailed Explanation of the Proposal', p. 4. It is assumed that the detailed explanation of provisions of the 2009 proposal applies to the equivalent provisions of the 2011 proposal to the extent that such provisions remain unchanged. There is no detailed explanation of the 2011 proposal.

under national law but rather whether the child has an independent claim, separate elements to his/her claim or elements that warrant separate evaluation.

As regards unaccompanied minors, the reference to the representative in Article 7(3) is welcome as it (implicitly) establishes the right of the representative to lodge an application on behalf of the minor. Other bodies too are entitled to make an application on behalf of an unaccompanied minor. Thus Article 7(4) makes a cross-reference to Article 10 of the Returns Directive which rather obscurely specifies that 'appropriate bodies' other than those involved in enforcing returns must be consulted before a decision is taken to return an unaccompanied minor.[16] Article 7(4) establishes that those bodies 'have the right to lodge an application for international protection on behalf of an unaccompanied minor if, on the basis of an individual assessment of his/her personal situation, those bodies are of the opinion that the minor may have international protection needs'. Unfortunately, the term 'appropriate bodies' is not defined in either the Returns Directive or the proposed recast APD.

Finally, on the question of whether an accompanied minor can make later submissions or a later application, significant changes are envisaged. Ground (o) is deleted from the list of accelerated/manifestly unfounded grounds in proposed recast Article 31(5). Henceforth, Member States can elect to deal with applications by unmarried minors after an application has already been made on their behalf with under a (revised) procedure for dealing with subsequent applications.[17] Under this procedure, the minor's application is examined by way of a 'preliminary examination' in order to decide whether there are 'facts relating to [his/her] situation which justify a separate application'.[18] The preliminary examination does not have to comply with the basic principles and guarantees laid down in the directive. If the preliminary examination finds that a separate application is not justified, the application is deemed inadmissible. If, however, the separate application is found to be justified, it is further examined in accordance with the basic principles and guarantees laid down in the directive.

On the one hand, the processing of later applications by unmarried minors in the context of what is essentially an admissibility procedure is potentially no less prejudicial than in the context of an accelerated/manifestly unfounded procedure.[19] However, on the other, the wording of the subsequent application provision is preferable in that it refers to 'facts […] which justify a separate application' as opposed to 'new elements'. Nevertheless, the burden of assert-

16 Directive 2008/115/EC of the European Parliament and of the Council, OJ L 348, 24.12.2008, p. 98.

17 Section IV, Article 40(6).

18 *Ibid*.

19 Apart from the prejudice to the processing and outcome of the application, making a subsequent application is grounds for reducing or withdrawing reception conditions under Article 20(1)(c) of the proposed recast RCD.

ing those facts still lies on the child. The proposed recast does not specify what course of action Member States should adopt if they choose not to apply this procedure to late applications by accompanied unmarried minors. In all, this procedure can be regarded as only a modest improvement on the current method of dealing with late applications by accompanied minors.

In sum, the proposed recast APD is an improvement on the current directive in that it provides for a right of all minors to lodge an asylum application, either directly or through a family member or representative. However, where an accompanied minor is included in a family member's application, making a later application may still attract considerable negative consequences.

3.3 THE RIGHT OF THE CHILD TO QUALIFY FOR INTERNATIONAL PROTECTION

3.3.1 The relevance of the rights of the child to eligibility for international protection

Let us begin with a proposition: the rights of the child *tout court* are potentially relevant to establishing an international protection need. This proposition follows directly from the principle of the best interests of the child, which implicitly encompasses the rights of the child and which applies to all actions concerning children including, therefore, determining a child's eligibility for international protection (see Chapter 2).[20] However, there is nothing inevitable about this proposition. The cornerstone of international protection – the 1951 Convention relating to the Status of Refugees – contains no provision specific to children and no hint that the definition of refugee might be relevant to children.[21] Indeed, as has been observed in the context of feminist critiques of refugee law, the 1951 Convention definition is the product of a particular historical and social moment (post WWII) and protects the central protagonist

20 See also, Jane McAdam, 'Seeking Asylum Under the Convention on the Rights of the Child: A Case for Complementary Protection', *International Journal of Children's Rights* 14 (2006): 251-274.

21 The only indication that the refugee might be a child is in Article 22 on public education which establishes an obligation to 'accord to refugees the same treatment as is accorded to nationals with respect to elementary education'. The silence of the 1951 Convention on the issue of child refugees is surprising given that there *was* an international awareness of the existence and plight of refugee children at that time, as evidenced by the fact that the International Refugee Organisation (the precursor of UNHCR) included in its 1946 Constitution a group of orphans under 16 as one of four categories of persons defined as refugees. Furthermore, the *travaux preparatoires* of the 1951 Convention reveal that the U.S. delegation proposed including in the definition a specific 'unaccompanied children' category but the consensus was that it would lead to legal difficulties concerning guardianship. *Ad Hoc* Committee, 18 January 1950, art. 1A(3)(b).

of that moment: the male activist fleeing totalitarianism.[22] Thus, the definition prioritizes types of public harm (i.e. persecution by State authorities) that are perpetrated on the basis of aspects of civil and political identity (i.e. race, religion, nationality, social group and political opinion). Owing to the public/private divide as revealed in feminist jurisprudence, non-prototypical refugees, such as women and children, have found it difficult to fit within the dominant paradigm.[23]

Still, great strides have been made over the past 60 years, not least owing to the partial convergence of refugee law and international human rights law, in making the definition of the refugee more relevant. Thus Haines comments that developments in international law have 'fundamentally transformed the 1951 Convention from a document fixed in a specific moment in history into a human rights instrument which addresses contemporary forms of human rights abuses.'[24] In theory, then, it should be no great task to establish that the rights in the CRC – or more particularly serious violations of those rights, are refugee-relevant. Indeed, this is a task that has been taken up by the Committee RC,[25] UNHCR[26] and the Executive Committee of the High Commissioner's Programme (UNHCR Excom)[27] in the past five years or so.[28]

However, there is a major obstacle that is not expressly recognized by any of the above bodies. While it is true that international human rights law has had a powerful influence on our understanding of the definition of the refugee, the concept of *non-refoulement* and the emergence of the notion of complementary protection, the influence has come mainly from one branch of human

22 See, for example, Heaven Crawley, *Refugees and Gender, Law and Process* (Bristol: Jordan Publishing, 2001).

23 On the public/private divide, see, Hillary Charlesworth, Christine Chinkin and Shelley Wright 'Feminist Approaches to International Law' in *International Rules: Approaches from International Law and International Relations,* eds. R.J. Beck, A.C. Arend, and R.D. Vander Lugt (Clarendon: Oxford University Press, 1996); on the application of feminist jurisprudence to the CRC, see Frances Olsen, 'Children's Rights: Some Feminist Approaches to the United Nations Convention on the Rights of the Child', *International Journal of Law and the Family* 6 (1992): 192-220; on the difficulties of non-prototypical refugees see, Jacqueline Bhabha, 'Demography and Rights: Women, Children and Access to Asylum', *International Journal of Refugee Law* 16 (2004): 227-243.

24 Quoted by Alice Edwards, 'Age and Gender Dimensions in International Refugee Law' in *Refugee Protection in International Law, UNHCR's Global Consultations on International Protection,* eds. Erika Feller, Volker Türk and Frances Nicholson (Cambridge: Cambridge University Press, 2003), p. 46, n. 1.

25 Committee RC, General Comment No. 6, *supra* n. 5.

26 UNHCR, *supra* n. 8.

27 Executive Committee Conclusion No. 107 (LVIII) – 2007, 'Children at Risk'.

28 Earlier, less focused efforts to make the rights of the child refugee-relevant can be discerned in UNHCR, 'Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum (1997) and Refugee Children, Guidelines on Protection and Care' (1994).

rights law, namely, the civil and political branch.[29] Thus, the concept of persecution is typically informed by the denial of civil liberties such as freedom of thought, conscience and religion, freedom of association and assembly, freedom from arbitrary arrest and detention. Complementary protection is a response to the extra-territorial dimension of the prohibition of torture and a (very) limited number of other civil and political rights.[30] But the idea that economic, social and cultural rights should have an extraterritorial dimension has traditionally been resisted.[31] Indeed, typically, a rigid distinction is maintained between violations of civil and political rights, which are regarded as refugee-relevant, and economic, social and cultural rights, which are not, the purpose of which is to maintain a clear demarcation between the refugee and the economic migrant. A denial of economic, social and cultural rights can be refugee-relevant, not *per se*, but as evidence of discrimination which may amount to persecution if it leads to 'consequences of a substantially prejudicial nature'.[32] Even then, it must be linked to one of the grounds of persecution, each of which relate to aspects of civil or political identity.

What has this got to do with establishing that the rights of the child are refugee-relevant? A typology of the rights in the CRC will help to illustrate the problem (see table in Annex). The typology I propose here groups the rights in the CRC into three broad categories: civil and political rights, socio-economic rights and protection rights.[33] The bias in refugee law towards

29 See generally, Kees Wouters, *International Legal Standards for the Protection from Refoulement* (Intersentia, 2009).

30 For example, the right to life (e.g. ECtHR, *Bader and others v Sweden*, Appl no. 13284/04, Judgment 8 November 2005) and the right to a fair trial (e.g. ECtHR, *Othman (Abu Qatada) v The United Kingdom*, Appl. No. 8139/09, Judgment of 17 January 2012).

31 Generally, the ECtHR has been reluctant to categorise violations of economic, social and cultural rights as inhuman or degrading treatment contrary to Article 3 ECHR, with the result that such violations have not generally fallen within the scope of the *non-refoulement* guarantee. A well known exception was ECtHR, *D. v UK,* Appl. No. 30240/96, Judgment of 2 May 1997, regarding health. However, the circumstances in that case were said by the Court to be 'very exceptional' and it is generally accepted that no precedent was set. See ECtHR, *N v The United Kingdom,* Appl. No. 26565/05, Judgment (GC) of 27 May 2008. However, recent case-law may signal a softening of the Court's position. See ECtHR, *M.S.S. v Belgium and Greece*, Appl. no. 30696/09, Judgment of 21 January 2011, regarding living conditions and ECtHR, *Sufi and Elmi v The United Kindgom*, Appl. nos. 8319/07 and 11449/07, Judgment of 28 June 2011, regarding humanitarian conditions.

32 See UNHCR Handbook (1979), *supra* n. 10, paras. 54 & 55.

33 The typology advanced here is in response to Ann Quennerstedt's criticism of the 'hampering effect' of the usual classification of rights in the CRC according to the '3 P's': provision, protection and participation. Quennerstedt makes the point that the '3 P's' classification suggests that the rights of the child are a different species entirely from general human rights, making their acceptance as part of the orthodoxy difficult. She argues for a more usual classification i.e. as civil, political and social rights. While I agree with her on the main point, not all the rights of the child in the CRC can be thus categorized, as will emerge later. Ann Quennerstedt, 'Children, But Not Really Humans? Critical Reflections on the Hampering Effect of the '3 P's'', *International Journal of Children's Rights* 18 (2010): 619-635.

violations of civil and political rights will be assessed in relation to each category in turn.

Firstly, as regards civil and political rights, it can be observed that the bias towards these types of rights in refugee law disadvantages children because children are often perceived as not having a civil and political status. This is part legacy of the traditional resistance to the idea of children as rights-holders and part rooted in the Western idealized conception of childhood as apolitical and unburdened by 'adult' concerns.[34] Here, the CRC is of assistance because some 21 of the rights it contains can be classified as 'civil and political' rights. These include such typical civil and political rights as freedom of expression, freedom of thought, conscience and religion, privacy, freedom from arbitrary arrest and detention and freedom from torture or other cruel, inhuman, degrading treatment or punishment. The fact that all children have these rights confirms, not only their civil and political status, but also the fact that children suffer egregiously from violations of these rights.[35] Moreover, none of the rights in the CRC is subject to derogation. While some are subject to limitation and hence are not absolute in that specific sense, there is no notion that any rights of the child can be legitimately derogated from in times of public emergency. This is due to the transient nature of childhood, the impossibility of postponing the child's development and consequently the lack of proportionality between the reasons for derogation and the impact on the child.

Secondly, the bias towards civil and political rights disadvantages children because 16 of the rights in the CRC are best classified as economic, social and cultural rights. Indeed, the CRC was pioneering in its attempt to break down the artificial barrier between civil and political rights, on the one hand, and economic, social and cultural rights, on the other. Consequently, the CRC can be regarded as a real (as opposed to a rhetorical) attempt to bring the doctrine of indivisibility through to its logical conclusion. The economic, social and cultural rights in the CRC include the right to survival and development (which, together with the right to life, is one of the general principles of the Convention), the right to health (which incorporates an obligation to abolish harmful traditional practices such as female genital mutilation), the right to education and the right to an adequate standard of living. UNHCR stresses the importance of such rights to determining whether the child has an international protection need, stating:

> Children's socio-economic needs are often more compelling than those of adults, particularly due to their dependency on adults and unique developmental needs.

34 See Philippe Aries, *Centuries of Childhood* (New York: Vintage Books, 1962).

35 For a recent example, see 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic to the UN Human Rights Council', A/HRC/S-17/2/Add. 1, 23 November 2011, which notes that children are being routinely extra-judicially killed, arbitrarily detained and tortured in the government crack-down on dissident activity.

> 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.[36]

Thirdly, and perhaps most importantly, 23 of the rights in the CRC do not fit into the traditional divide. These rights are most appropriately classified as protection-related rights and are *child-specific*. They include such rights as protection from physical, mental and sexual violence, special protection for the child deprived of family, appropriate protection and humanitarian assistance for the refugee and asylum-seeking child, protection from exploitation and sexual abuse, protection against trafficking, protection against under-age recruitment and the right to recovery and reintegration of the child victim of, *inter alia*, armed conflict. While the subject-matter of these rights (i.e. protection) is particularly relevant to the question of international protection, the fact that these are not civil and political rights combined with the insidious public/provide divide may prevent decision-makers from perceiving the relevance.

When the bias in refugee law towards civil and political rights is superimposed on the typology of rights in the CRC outlined above (viz. civil and political rights, economic, social and cultural rights and protection rights), it becomes clear that not all the rights of the child in the CRC are likely to be recognized as relevant to international protection.

UNHCR attempts to address this problem, but, it is submitted, without a clear sense of what the problem is.[37] Thus, in affirming the centrality of 'child-specific rights' (by which it means the standards of the CRC), it distinguishes between 'child-related manifestations of persecution' (i.e. same harm as adults, but differently experienced) and 'child-specific forms of persecution'. As regards the latter, UNHCR provides the following examples: under-age recruitment, child trafficking and labour, FGM, domestic violence against children and violations of economic, social and cultural rights. Apart from the objection that UNHCR's typology is confusing and inaccurate,[38] it leads UNHCR out of the domain of legal obligation and into the realm of appeals to common-sense discretion. For example, as regards so-called child-related manifestations of persecution, UNHCR warns about the need to adjust the threshold level of harm accordingly since a level that might not amount to persecution in the case of an adult, might well do in the case of a child owing to his/her 'immaturity, vulnerability, undeveloped coping mechanisms and dependency as well as the differing stages of development and hindered capacities.' A similar appeal

36 UNHCR (2009), para. 14, *supra* n. 8.

37 *Ibid*.

38 It falls foul of Quennerstedt's injunction to analyze child rights, insofar as it is possible to do so, according to the vocabulary used for general human rights. Ann Quennerstedt, *supra* n. 33.

to discretion is evident in the quote about economic, social and cultural rights above.

It is submitted that this analysis is wrong-headed. It is less a case of lowering the threshold for what constitutes a serious violation of a given right because the applicant is a child and more a case of being cognizant that the content of the child-version of the right may be subtly, but importantly, different from its adult counterpart.[39] An example is the right to an adequate standard of living, which is pitched higher in the CRC than the adult equivalent in the International Covenant on Economic, Social and Cultural Rights (ICESCR), as will be discussed in Chapter 6. A further example is the right to liberty/freedom from arbitrary arrest or detention in the CRC which is qualitatively different from corresponding rights in the ECHR and the International Covenant on Civil and Political Rights (ICCPR), as will be demonstrated in Chapter 7. Hence, the obligation to undertake a different threshold analysis derives from the nature of the right itself, not from any (discretionary) common sense about children. Furthermore, once attention is drawn to the CRC as the locus of child-rights, then it is a simple matter to accept that all the rights therein are potentially relevant to eligibility for international protection. The next section evaluates the extent to which the relevant CEAS instruments evidence an acceptance of this proposition.

3.3.2 Phase One CEAS: eligibility concepts and the rights of the child

The question for resolution is whether the concepts in the CEAS instruments that relate to eligibility for international protection are sensitive to child rights and child rights violations, or conversely, whether they reproduce the bias in refugee law towards civil and political rights. The analysis that follows is of the key concepts relating to inclusion, cessation and exclusion – concepts which are found in the QD. Specifically, an analysis is offered of the refugee definition (3.3.2.1), the definition of serious harm (3.3.2.2), sources of harm and protection (3.3.2.3), the concept of internal protection (3.3.2.4), country of origin information (3.3.2.5), cessation (3.3.2.6) and exclusion (3.3.2.7). For the sake of completeness, the so-called 'safe country' concepts in the APD are also analyzed because they implicitly restrict inclusion (3.3.2.8).

39 Thus Goodwin Gill notes that '[i]n certain cases the CRC ensures that children are even better protected than adults.' Guy Goodwin-Gill, 'Unaccompanied Refugee Minors, The Role and Place of International Law in the Pursuit of Durable Solutions', *International Journal of Children's Rights* 3 (1995): 411.

3.3.2.1 The refugee definition

According to Article 2 QD, the definition of refugee in the is the same as is contained in Article 1A(2) of the 1951 Convention, but important guidance is provided in the directive on what constitutes an act of persecution and on the reasons for persecution.

Acts of persecution
Article 9 QD (Acts of persecution) provides in paragraph 1:

> Acts of persecution within the meaning of Article 1(A) of the Geneva Convention must:
> (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
> (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).

Two observations can be made about these provisions. First, the threshold level of harm is high: a severe violation of basic human rights, whether on a one-off or cumulative basis. This level is mandatory and inflexible. Second, a particular sub-group of human rights are identified as being particularly relevant to a finding of persecution: rights in the ECHR – hence civil and political rights – and moreover, non-derogable rights in the ECHR.[40] As regards the prioritization of rights in the ECHR, it should be noted that unlike the other major international convention relating to civil and political rights – the ICCPR, the ECHR contains no child-specific rights,[41] and has not traditionally been regarded as a child-friendly instrument.[42] As regards the further prioritization of non-derogable rights in the ECHR, this is arguably incompatible with the principle of non-derogability established in the CRC. The non-derogable rights in the ECHR comprise the right to life (except in respect of deaths resulting

40 Thus, the CJEU recently described refugee protection under the QD as relating to 'individual liberties'. CJEU, *Abdulla, Hasan, Adem, Rashi and Jamal v Bundesrepublik Deutschland,* Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, Judgment of 2 March 2010, para. 90.

41 Article 24 ICCPR provides: '1. Every child shall have, without any discrimination as to race, color, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. 2. Every child shall be registered immediately after birth and shall have a name. 3. Every child has the right to acquire a nationality.'

42 See, for example, Immigration Law Practitioner's Association (ILPA), *Consideration by the European Court of Human Rights of the United Nations Convention on the Rights of the Child 1989* (2008). However, latterly the Court has become noticeably more child-rights friendly, as evidenced by its pronouncements on the best interests of the child. See Chapter 2.

from lawful acts of war), freedom from torture or inhuman or degrading treatment or punishment, the prohibition of slavery and the prohibition of retrospective punishment. Notably each corresponds to a right in the CRC.[43] But what about the numerous other rights of the child, including other civil and political rights, economic, social and cultural rights and child-protection rights?

Article 9(2) on acts of persecution is of utmost importance in this regard. It states:

> Acts of persecution as qualified in paragraph 1, can, *inter alia*, take the form of:
> (a) acts of physical or mental violence, including acts of sexual violence;
> (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
> (c) denial of judicial redress resulting in a disproportionate or discriminatory punishment;
> (d) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2);
> (e) acts of a gender-specific or child-specific nature.

The problem of threshold (sufficiently serious/severe violation) is carried over from Article 9(1) by virtue of the chapeau in Article 9(2). However, it is submitted that if the acts of persecution are interpreted by reference to the CRC, then the threshold of seriousness is already included in the definition of the right itself. The question, then, is whether any of the acts in Article 9(2) correspond to rights in the CRC. While all of the acts as listed are potentially relevant to the claims of children – discriminatory administrative measures in sub-paragraph (b), for example, covering discrimination in education – sub-paragraphs (a), (d) and (e) are of particular interest.

Sub-paragraph (a) covers violence against children (whether physical, mental or sexual). It corresponds to several of the protective rights in the CRC such as protection against all forms of physical or mental violence, injury or abuse including sexual abuse in Article 19. It cuts across the public/private divide since violence against children is known to be perpetrated in the public sphere (e.g. in state institutions) as well in the private sphere, (e.g. as in the case of domestic violence). Moreover, sub-paragraph (a) also allows for human trafficking – a contentious issue in the refugee context – to be comprehended as persecution, at least when the victim is a child.[44] In this regard, UNHCR notes:

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43 Article 6(1), Article 37(a), Article 35 (if one classifies trafficking as a modern form of slavery) and Article 40(2)(a), respectively.

44 See UNHCR, 'Guidelines on International Protection: 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', HCR/GIP/06/07 (2006).

> 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.[45]

Sub-paragraph (e) corresponds, according to the typology advanced earlier, to all the protective rights in the CRC, some of which overlap with economic, social and cultural rights. Furthermore, the reference to gender-specific acts is important because in the case of the girl-child, there is often an overlap between gender and age in terms of rights violations. The practice of female genital mutilation is a case in point.[46] Unfortunately, such violations are often overlooked because, as Taefi notes, '[g]irls are marginalized within the category of children as female, and within the category of women as minors.'[47] Against this backdrop, the reference to gender- specific and child-specific forms of persecution in the same sub-paragraph is potentially helpful because it can serve to integrate the two concepts.

Finally, sub-paragraph (d) can be interpreted as covering prosecution or punishment for refusal to perform military service by a child under the age of 15. This is because the crimes or acts falling under the exclusion clause as set out in Article 12(2) include war crimes 'as defined in the international instruments drawn up to make provision in respect of such crimes'. The Rome Statute of the International Criminal Court classifies as war crimes the enlistment and use of children under the age of 15 years as combatants, whether in the armed forces of the state or in opposition forces.[48] This reflects the prohibition of the recruitment or direct participation in hostilities of children under the age of 15 in Article 38 CRC.[49] One criticism can be made, however, of sub-paragraph (d): it has a hidden adult bias. The focus on prosecution or punishment for refusal to perform military service suggests that the persecution

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45 UNHCR, *supra* n. 8., para. 26.

46 Other examples are: forced or early marriages, ritual killing of girls, dowry violence, virginity testing, girl-child infanticide and selective abortions.

47 Nura Taefi, 'The Synthesis of Age and Gender: Intersectionality, International Human Rights Law and the Marginalisation of the Girl-Child', *International Journal of Children's Rights* 17 (2009): 345. See further, Kirsten Backstrom, 'The International Human Rights of the Child: Do They Protect the Female Child?', *George Washington Journal of International Law and Economics* 30 (1996-1997): 541-582.

48 Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, Article 8(2)(b)(xxvi) relating to international armed conflict and Article 8(2)(e)(vii) relating to armed conflicts not of an international character.

49 The raising of the age for forced recruitment and direct participation in hostilities to 18 in the case of States Parties and the complete ban on recruitment (whether forced or voluntary) of under 18s by non-State actors in the Optional Protocol to the CRC do not (yet) constitute war crimes, but UNHCR considers the Optional Protocol evidence of a 'strong trend for a complete ban on under-age recruitment'. UNHCR, *supra* n. 8, p. 10, footnote 42.

emanates from the denial of a right of conscientious objection (another civil liberty). While children may well be conscientious objectors, it is submitted that the greater persecution in their case derives from the threat of military service itself. Thus, according to the Committee RC:

> [U]nderage 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).'[50]

Despite this criticism, it is considered that Article 9(2) QD is generally positive from the point of view of incorporating the rights of the child into the concept of persecution. Moreover, the acts of persecution listed in Article 9(2) are illustrative, not exhaustive, enabling violations of child rights that do not fit easily within the list to be comprehended as persecution. It is submitted that Article 9(2) neutralizes the potentially negative effect of Article 9(1) taken alone.

Reasons for persecution

The reasons for persecution are *per* the 1951 Convention (namely, race, religion, nationality, membership of a particular social group and political opinion) but they are elaborated on in Article 10(1) QD. The question arises whether the reasons thus enlarged on are consistent with the reasons children are persecuted. Attention will be focused here on two of the grounds of persecution which are particularly relevant to children's asylum claims, namely, 'membership of a particular social group' and 'political opinion'.

'Membership of a particular social group' is a ground that is particularly important for children's asylum claims for two reasons: because of the lack of an explicit age ground and because of the difficulties children may experience in having their claims recognized under the other grounds due to a perceived lack of civil or political status. Article 10(1)(d) provides:

> A group shall be considered to form a particular social group where in particular:
> – members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it; and
> – that group has a distinct identity in the relevant society, because it is perceived as being different by the surrounding society.

These tests are familiar from UNHCR's guidelines on membership of a particular social group, but with one critical difference: whereas UNHCR presents the tests

50 Committee RC, General Comment No. 6, *supra* n. 5, para. 59.

as being alternatives (i.e. the group may be identified *either* by the innate/fundamental characteristics test *or* the social perception test), the QD presents the tests as being cumulative (i.e. two prongs of a single test).[51] This seriously disadvantages claims of persecution on grounds of age. For example, a claim by a 14-year old former child soldier may not meet the requirements of the innate characteristics test if an unenlightened approach is taken to age as something that is constantly changing;[52] but it may meet the social perception test if child soldiers are a readily identifiable group in that particular society. Consequently, the applicant will qualify under the second test but not the first, and, it follows, not both taken together. It is unfortunate then, that the two tests are presented in Article 10(1)(d) QD as being cumulative. However, the reference to the phrase 'in particular' may allow for flexibility in this regard.

The 'political opinion' ground is important for children's asylum claims because children *are* politically active and hence their claims should not be automatically corralled into 'membership of a particular social group'.[53] However, the political opinions of children are unlikely to be recognized if a narrow interpretation is given to the concept of political opinion. Such an interpretation is typified by Grahl Madsen's understanding of the concept as 'opinions contrary to or critical of the policies of the government or ruling party'[54] which suggests an opinion grounded in a political philosophy or ideology (in a Western 'Enlightenment' sense). While some of today's conflicts do fit within this stereotype, many identity-based and resource-driven conflicts of the post-Cold War era are less ideological.[55] The protagonists may not be the government or ruling party. And children's involvement in them may be peripheral and practical, but none the less important for that. For example, as noted by UNHCR, while there are many examples of children's involvement in organizational and leadership roles within political struggles, children are more likely to be involved in distributing pamphlets, participating in demonstrations, acting as couriers and engaging in subversive activities. Furthermore, they may challenge prevalent social mores by non-conformist behaviour.[56]

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51 UNHCR, 'Guidelines on International Protection: "Membership of a particular social group" within the context of Arti cle 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees', HCR/GIP/02/02 (2002).

52 As one commentator bluntly put it: children's 'main remedy is to grow up'. Onora O'Neill, 'Children's Rights and Children's Lives', *International Journal of Law and the Family* 6 (1992): 39.

53 Writing in the North American context, Bhabha notes that children whose claims to international protection are based on their own activism are less likely to be recognized than children whose claims are based on their vulnerability as children. Jaqueline Bhabha, 'Minors or Aliens? Inconsistent State Intervention and Separated Child Asylum-Seekers', *European Journal of Migration and Law* 3 (2001): 283-314.

54 Atle Grahl-Madsen, *The Status of Refugees in International Law* (Leyden: Sijthoff, 1972), 220.

55 Contrast the political opinions that have led to the 'Arab Spring' with some of the recent and on-going conflicts in sub-Saharan Africa.

56 UNHCR, *supra* n. 8., p. 18.

In such contexts, political activity *is* political opinion, but only if political opinion is construed broadly, for example, along the lines suggested by Goodwin Gill i.e. 'any opinion on any matter in which the machinery of the state, government and policy may be engaged.'[57] Indeed, one might go further and suggest that political opinion is anything that engages – in whatever large or small way – the dominant power structures (both state and non-state) in society.

In short, in order for the full gamut of children's political opinion to be comprehended as political opinion proper, it is important that the term be given a broad construction. In this regard, Article 10(1)(e) QD states: 'The concept of a political opinion shall in particular include the holding of an opinion, thought or belief on *a matter related to the potential actors of persecution* mentioned in Article 6 and to their *policies or methods*, whether or not that opinion, thought or belief has been acted upon by the applicant.[58] It is submitted that this provision does three noteworthy things. First, it grounds the concept of political opinion in the political culture of origin (as opposed to any Western conception of political opinion). Second, it links the opinion to the potential actors of persecution. Article 6 QD establishes that actors of persecution (or serious harm) are not confined to state actors but extend to parties or organizations controlling the state or a substantial part of it and even non-state actors if the authorities are unable or unwilling to provide protection.[59] This is highly significant in the context of children's asylum claims because of the often private nature of the harm suffered, for example, at the hands of parents, carers and authority figures in the community. Where children take a view on the workings of the actors of persecution, this is a political opinion. The personal becomes political, to coin a phrase. Finally, Article 10(1)(e) connects the political opinion to the policies *or* methods of the potential actors of persecution, establishing that the opinion need not be ideological. Seen from the perspective of why children tend to be persecuted, Article 10(1)(e) can be regarded as a positive provision.

Equally important is the assertion in Article 10(2) that the grounds of persecution need not be actually possessed by the applicant 'providing that such a characteristic is attributed to the applicant by the actor of persecution'. This is critical in the context of children's asylum claims, as frequently the persecution will be meted out because of the assumption that the child shares, for example, the religious beliefs or political opinion of the parent(s), clan or ethnic group. This is underscored by Recital 27 of the directive which notes

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57 Guy Goodwin Gill, *The Refugee in International Law* (2dn ed.) (Clarendon: Oxford University Press, 1996), 49.

58 Emphasis added.

59 Prior to the QD, there was a considerable divergence in state practice between EU Member States on the question of whether persecution by non-state actors was refugee-relevant. See, for example, ECtHR, *T.I. v United Kingdom*, Appl. No. 43844/98, Decision of 7 March 2000.

that '[f]amily members, merely due to their relation to the refugee, will normally be vulnerable to acts of persecution in such a manner that could be the basis for refugee status.'

There is one further provision of the QD that is relevant to the present analysis. Article 9(3) QD establishes that 'there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in [Article 9(1)]. This is not new – a causal connection is implicit in the wording of Article 1A(2) of the 1951 Convention which provides that a refugee is someone who has a well-founded fear of being persecuted 'for reasons of' race, religion etc. However, Article 9(3) takes a position on a hitherto unresolved debate about non-state actors of persecution and whether the link to the ground is confined to the actor of persecution or can equally be drawn to the reason the state failed to protect.[60] As previously noted, the QD is commendably progressive on the issue of non-state actors of persecution. However, Article 9(3) appears to be a retrograde step in this regard because, on its face, it precludes satisfying definitional requirements by making a connection between the persecution and the reason the state failed to protect.[61] Some examples will help to illustrate the problem. Domestic violence may be perpetrated for purely sadistic reasons, child sex trafficking or bonded labour for financial reasons and underage recruitment by a militia because of a need for combatants of whatever age but the state may be unwilling to protect because of the race, religion, nationality, social group or political opinion of the child. Article 9(3) QD effectively mean that such claims are not refugee-relevant, unless, as seems unlikely, a highly creative approach is taken to the grounds.

To conclude, the provisions of the QD relating to the reasons for persecution are a mixed-bag from the point of view of the rights of the child. 'Membership of a particular social group' appears to require a two-pronged cumulative test. 'Political opinion', on the other hand, is defined broadly. Helpfully, the grounds of persecution need not actually be held by the actor but, unhelpfully, it seems that the nexus to the grounds can only be drawn to the persecution,

60 UNHCR rather blurs the issue in its guidelines on child asylum claims in which it states: '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 is not necessary that it be the sole, or even dominant, cause.' Emphasis added. UNHCR (2009), *supra* n. 8, para. 40.

61 It is interesting to note that the courts in no less than 10 Member States have ruled that the nexus requirement is also fulfilled where there is a connection between the acts of persecution and the absence of protection against such acts. See 'Report from the Commission to the European Parliament and the Council on the Application of 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, COM (2010) 314 final', § 5.2.1, p. 8. Hereinafter, 'Commission evaluation of the QD'.

not the reason the state failed to protect. In sum, the reasons for persecution as outlined in the QD contain both positive and negative aspects from the perspective of the rights of the child.

3.3.2.2 The definition of 'serious harm'

According to Recital 24 QD, '[s]ubsidiary protection should be complementary and additional to the refugee protection enshrined in the Geneva Convention.' The question is whether the definition of 'serious harm' for the purposes of subsidiary protection status expands the circumstances in which child rights violations are recognized as relevant to international protection. Article 2(e) QD defines a person eligible for subsidiary protection as someone in respect of whom 'substantial grounds have been shown' for believing that, if returned to his/her country of origin, he/she 'would face a real risk of suffering serious harm'. Serious harm is defined in Article 15 as:

> (a) death penalty or execution; or
> (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin, or
> (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

As has been noted by commentators, there is a large degree of overlap between the harms in (a) and (b) and the acts of persecution as defined in Article 9 QD.[62] In this regard, ground (c) appears to be the most fertile, although some of its limitations should be noted.

Firstly, Article 15(c) applies in situations of international or internal armed conflict. As the link between armed conflict and child-rights violations is well established, this provision is potentially useful for children in such situations.[63] However, Article 15(c) does not apply in peacetime. Consequently, ordinary 'common or garden' violations of children's human rights are not cognizable, which is a clear protection gap. Moreover, if the term 'internal armed conflict' is interpreted consistently with international humanitarian law, then this excludes violations of children's rights that occur in situations of internal disturbance and tension and in situations of low-level insurgency.[64]

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62 See, for example, Catherine Teitgen-Colly, 'The European Union and Asylum: An Illusion of Protection', *Common Market Law Review* 43 (2006): 1533.

63 See, for example, United Nations, 'Impact of Armed Conflict on Children: Report of the expert of the Secretary General, Ms Graça Machel, submitted pursuant to General Assembly Resolution 481/157', U.N. Doc. A/51/306 (1996).

64 Article 1 of Protocol II 1977 additional to the Geneva Conventions defines internal armed conflict as armed conflict that takes place 'in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement

Hence the focus on armed conflict excludes many potential child rights violations. On the other hand, the focus on armed conflict compensates for the prioritization of non-derogable rights in the definition of persecution – the implication there being that violations of rights that can be legitimately derogated from in times of emergency (such as armed conflicts) are less readily identifiable as persecution.

Secondly, the threat must be to a civilian's life or person, as distinct from a combatant's. This makes no allowance for the phenomenon of under-age recruitment. Yet, as has already been observed, children fleeing such recruitment may struggle to make out a link to a Convention ground and consequently may have difficulties in being recognized as refugees. The value-added of subsidiary protection should kick in here, but this is precluded by the restriction of the personal scope of Article 15(c) to civilians.

Finally, there is the apparent contradiction between an *individual* threat and *indiscriminate* violence. This was addressed by the CJEU in *Elgafaji v Staatssecretaris van Justitie*, although the Court may well have confused as much as it illuminated.[65] The question the Dutch Council of State referred to the Court was whether Article 15(c) QD had a distinct scope from that of Article 3 ECHR, which is generally regarded as being reflected in Article 15(b) QD. The confusion arose from a 2008 ruling by the ECtHR in *NA. v The United Kingdom*, in which the Court stated that it:

> […] has never excluded the possibility that a general situation of violence in a country of destination will be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention. Nevertheless the Court would adopt such an approach only in the most extreme cases of general violence, where there is a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return.[66]

If a situation of indiscriminate violence could engage Article 3 ECHR, then what is the value-added of Article 15(c) QD? In attempting to answer this question, the CJEU distinguished between Article 15(b) QD, which corresponds to Article 3 ECHR, and Article 15(c), which the Court said is different and must be interpreted in such a way that it has its own field of application. However, the Court was constrained by the statement in Recital 26 QD that '[r]isks to which a population of a country or a section of the population is generally exposed

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this Protocol [excluding, however] situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.' Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

65 ECJ, *Elgafaji v Staatssecretaris van Justitie,* Case C-465/07, Judgment of 17 February 2009.

66 ECtHR, *NA. v The United Kingdom*, Appl. No. 25904/07, Judgment of 17 July 2008, para. 115.

do normally not create in themselves an individual threat which would qualify as serious harm'. In attempting to square the circle, the Court held:

> […] the word 'individual' must be understood as covering harm to civilians irrespective or their identity, where the degree of indiscriminate violence characterizing the armed conflict taking place […] reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred to in Article 15(c) of the Directive.[67]

Such is the parallel between this passage and the above-quoted passage from *NA.* that it is unclear where the stated difference in scope between Article 15(b) and Article 15(c) actually lies.[68] The CJEU went on to say that such a degree of indiscriminate violence would be 'exceptional'; in a more normal situation (i.e. a lesser degree of indiscriminate violence), the general situation in the country would not be sufficient to meet the requirements of Article 15(c) and an applicant would have to demonstrate some personal targeting or heightened risk.[69] But in such a situation, one wonders why an applicant would not have been recognized as a refugee. Consequently, the value-added of Article 15(c) over and above Article 15(b) and over and above the refugee definition is unclear. This is attested to in a recent UNHCR study of state practice in relation to Article 15(c).[70] While this fact presents no greater barriers for children than it does for adults, nevertheless it further reduces the usefulness of Article 15(c) for children.[71]

In sum, the limitation in the material scope and personal scope of Article 15(c) to, respectively, situations of armed conflict and civilians, coupled with the overlap with either Article 15(b)QD or the refugee definition means that Article 15(c) offers little 'value added' to child claimants.

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67 Paras. 35 and 43.

68 The ECtHR has since stated that it 'is not persuaded that Article 3 of the Convention, as interpreted in NA., does not offer comparable protection to that afforded under the [Qualification] Directive.' ECtHR, *Sufi and Elmi v The United Kingdom*, Appl. Nos. 8319/07 and 11449/07, Judgment of 28 June 2011, para. 226.

69 See paras. 37-39.

70 UNHCR, 'Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum Seekers Fleeing Indiscriminate Violence, A UNHCR Research Project' (2011) in which Article 15(c) protection is described as an 'empty shell' (at p. 29). However, UNHCR notes that this is partly due to restrictive interpretations by states of Article 15(c).

71 Contrast the judgment in *Elgafaji* with UNHCR's suggested interpretation of Article 15(c) in 'UNHCR Statement on Subsidiary Protection Under the EC Qualification Directive for People Threatened by Indiscriminate Violence', January 2008. For academic commentary, see Roger Errera, 'The CJEU and Subsidiary Protection: Reflections on Elgafaji – and After', *International Journal of Refugee Law* 23, no. 1 (2010): 93-112.

3.3.2.3 Sources of harm and protection

Article 6 QD specifies the identity of potential actors of persecution or serious harm, while Article 7 lists potential actors of protection. Article 6 has already been favorably commented on for its broad personal scope which includes non-state actors of persecution or serious harm. This helps break down the public/private divide and makes children's claims more cognizable.

However, the *quid pro quo* for the acceptance in Article 6 that actors of persecution or serious harm can be non-state actors is the statement in Article 7 that actors of protection can also be non-state actors. A central part of the definition of a refugee in Article 1A(2) of the 1951 Convention is that the applicant is unable or unwilling to avail him/herself of the protection of the state. Traditionally, this has been interpreted to mean that the state must be shown to be unable or unwilling to provide effective protection.[72] However, in view of such factors as the prevalence of internal conflicts in which control over significant parts of the territory may be exercised *de facto* by opposition forces, the international preference for internal rather than international displacement, and the rise of transitional *interim* administrations, it began to be questioned whether effective protection could not be provided by non-state entities. This idea is formalized in Article 7 QD which provides:

> 1. Protection can be provided by:
> a. the state; or
> b. parties or organizations, including international organizations, controlling the state or a substantial part of the territory of the state.
> 2. Protection is generally provided when the actors mentioned in paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, *inter alia*, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection.
> 3. When assessing whether an international organization controls a state or a substantial part of its territory and provides protection as described in paragraph 2, Member States shall take into account any guidance which may be provided by relevant Council acts.

Before coming to the issue of non-state actors of protection, it is worth analyzing Paragraph 2 from a child-rights perspective. Paragraph 2, which applies whether state or non-state actors of protection are at issue, equates protection with preventive measures including the operation of an effective legal system for the detection, prosecution and punishment of acts of persecution or serious harm provided the applicant can access such protection. While of course the existence of a criminal justice response is important in assessing whether a

72 See UNHCR, *supra* n. 10, paras. 97-100.

child has an international protection need, it is only part of the picture. For example, a child who claims to be a victim of persecution at the hands of his/her family, in addition to being protected in the narrow criminal justice sense, will also need special protection, assistance and alternative care (under Article 20 CRC). Or a child who has been trafficked, in addition to judicial redress, has a further right to recovery and reintegration (under Article 39 CRC). While such protection-related rights of the child are not precluded by the example in Article 7(2), nor are they suggested by it.

Furthermore where the actor of protection is a non-state actor, it is unlikely such an actor would have the capacity to provide for the child's protection needs. This observation links with one of the main criticisms of the concept of non-state actors of protection from the perspective of international law, which is that non-state entities typically possess less than full international legal personality because they lack all the attributes of statehood.[73] Furthermore, non-state entities are often temporary constructs and thus inherently unsuited to providing for the long-term protection needs of children. A related finding is made by the Commission in its evaluation of the QD.[74] It notes that different Member States have different criteria for holding non-state entities to be actors of protection, with some Member States insisting that the actors of protection have the attributes of a state, and others proposing transient and relatively powerless organizations as actors of protection. Thus, the evaluation notes that 'in BE, HU and the UK, NGOs have been considered as actors of persecution with regard to women at risk of female genital mutilation and honor killings, to the extent that they diminish the risk. However, in practice, protection provided by these actors proves to be ineffective or of short duration.[75] While this practice is arguably in violation of the requirements of Article 7(1)(b) – a finding the Commission stops short of making – nevertheless, it is almost inevitable once it is admitted that non-state agents can provide protection.

In sum, while the recognition in the QD of non-state actors of persecution or serious harm is welcome from the point of view of the rights of the child, the recognition in the directive of non-state actors of protection is inimical to the rights of the child. Furthermore, the conflation of protection with a criminal justice response fails to reflect the more holistic approach to child protection that is evident in the CRC.

73 See Ian Brownlie, *Principles of Public International Law* (6th ed.) (Clarendon: Oxford University Press, 2003) Chapter 3 (Subjects of the Law).

74 Commission evaluation of the QD, *supra* n. 61.

75 *Ibid*, §5.1.4, p. 6.

3.3.2.4 Internal protection

The concept of internal protection (also known as the internal flight alternative) is found in Article 8 QD. Internal protection is the notion that if part of the country of origin can be identified as safe for the applicant, then there is no international protection need. Before analyzing Article 8 it is proposed firstly to outline how an analysis of internal protection should be undertaken and then secondly, to work out the implications of such analysis where the applicant is a child. This is necessary because there are a number of divergent approaches to dealing with internal protection and a legally defensible position must be advocated.[76]

It is proposed here that the internal protection analysis comprises three steps. It can be assumed that the applicant has a well founded fear of persecution or is at real risk of serious harm in the part of the country from which he/she fled, otherwise it would not be necessary to canvass the possibility of internal protection. Consequently, the first step is to assess whether the applicant would be free of the original persecution or serious harm in the proposed area of relocation. Second, unlike in the case of an 'ordinary' rejection, the applicant is not being sent home, but rather to another area of the country of origin. So the next step is to assess whether the relocation puts him/her at risk of any other persecution or serious harm. This is consistent with the forward-looking nature of the assessment. It is also consistent with the emerging case-law of the ECtHR. Thus, in *Sufi and Elmi v the United Kindgom*, the Court had to assess whether internal relocation in Somalia to an area that was safe from generalized violence – the basis of the Article 3 claim – was safe from other potential Article 3 violations.[77] The Court noted that the areas of Somalia with the least generalized violence are generally under the control of an extreme Muslim fundamentalist group associated with human rights violations and that '[c]onsequently, even if a returnee could travel to and settle

76 For example, UNHCR advocates a two-pronged approach which explores the *relevance* of applying the internal flight alternative in the circumstances of the case and the *reasonableness* of requiring an applicant to relocate internally. However, the reasonableness leg can be criticized because its legal antecedents are unclear: reasonableness is not an element in determining whether there is an international protection need; and if there is no international protection need, then the applicant can be obliged to relocate internally even if it is unreasonable. UNHCR, 'Guidelines on International Protection: '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' (2003). For criticism see James Hathaway and Michelle Foster, 'Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination' in *Refugee Protection in International Law, UNHCR's Global Consultations on International Protection*, eds. Erika Feller, Volker Türk and Frances Nicholson (Cambridge: Cambridge University Press, 2003), 357-417 and Ninette Kelley, 'Internal Flight/Relocation/Protection Alternative: Is It Reasonable?', *International Journal of Refugee Law* 14, no. 1 (2002): 4-44.

77 ECtHR, *Sufi and Elmi v the United Kingdom*, Appl nos. 8319/07 and 11449/07, Judgment of 28 June 2011.

in [such an area] without being exposed to a real risk of ill-treatment on account of the situation of general violence, he might still be exposed to a real risk of ill-treatment on account of the human rights situation.'[78]

The third, critical, step relates to the feasibility of the concept in the specific circumstances of the case. In particular, can the applicant practically, safely and legally get to the proposed area of relocation, and once there, can he/she stay there? In other words, is the proposed area of relocation *accessible* and *sustainable*? Because if it is not, then the likelihood is that the applicant will end up back in the original area of the country in which he has a well founded fear of persecution or a real risk of serious harm, contrary to the prohibition of (indirect) refoulement. Thus, in *Salah Sheekh v The Netherlands*, the ECtHR held that the poor humanitarian conditions in the proposed area of relocation were an important consideration, not because they constituted a violation of Article 3 ECHR *per se*, but because they jeopardized the prospects of staying there:

> The Court considers that as a precondition for relying on an internal flight alternative certain guarantees have to be in place: the person to be expelled must be able to travel to the area concern, gain admittance and settle there, failing which an issue under Article 3 may arise, the more so if in the absence of such guarantees there is a possibility of the expellee ending up in a part of the country of origin where he or she may be subjected to ill-treatment.[79]

The Court's case-law on internal protection has been further developed in *Sufi and Elmi v The United Kingdom* in which the Court held that dire humanitarian conditions, attributable to civil conflict, in the part of the country of origin identified as safe could themselves be categorized as inhuman treatment contrary to Article 3 ECHR. This development can be accommodated within the approach advocated here under step two: whether there is a risk of (new) persecution or serious harm by virtue of the relocation.

When applied to child applicants, the analysis of persecution and serious harm in steps one and two should take account of child rights violations. As regards the accessibility and sustainability requirements, these take on a whole new complexion when the applicant is a child, particularly when he/she is an unaccompanied minor. In this regard, how will the child get to the proposed area of relocation? Does he/she have family members there? Are they

78 *Ibid*, para. 272. The second step proposed here is also consistent with the CJEU's case-law on cessation – the cessation analysis being similar to the internal protection analysis in that the former is disjointed in time, latter disjointed in space, both arguably requiring two sets of analyses of persecution/serious harm. See CJEU, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Abdulla, Hasan, Rashi and Jamal v Bundesrepublik Deutschland*, Judgment of the Court, 2 March 2010.

79 ECtHR, *Salah Sheekh v The Netherlands* Appl. No. 1948/04, Judgment 11 January 2007, para 141.

willing to look after him/her? If not, who will provide the alternative care and assistance to which the child is entitled? On the last question, UNHCR observes that '[i]f 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.'[80] In terms of the three-step approach advocated here, this follows from the requirement to assess any risk of persecution or serious harm that could arise as a result of the relocation as well as the requirement of sustainability.

Consequently, the assessment of internal protection is a complex one, and all the more so in the case of children and particularly unaccompanied minors. To what extent is this complexity reflected in the QD? Article 8 QD (internal protection) provides:

> 1. As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country.
> 2. In examining whether a part of the country of origin is in accordance with paragraph 1, Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant.
> 3. Paragraph 1 may apply notwithstanding technical obstacles to return to the country of origin.

On the positive side, Article 8(1) refers to the absence of a well founded fear of persecution or real risk of serious harm. It is submitted that the categorical nature of this requirement ('no well founded fear', 'no real risk') mandates a thorough assessment of the original fear/risk and any new fear/risk. A further mandatory requirement is that the applicant can reasonably be expected to stay in the proposed area of relocation. Although this author thinks it best to avoid grounding obligations in reasonableness requirements, nevertheless this requirement can be regarded as corresponding to the sustainability requirement in step three of the proposed analysis. Furthermore, Article 8(2) requires that the safety assessment be made, not only in light of general circumstances in the proposed area of relocation but also of the personal circumstances of the applicant. It is submitted that this ensures that child-rights arguments can come to the fore.

On the negative side, Article 8(3) expressly excludes an analysis of accessibility. In this regard, it can be questioned whether, for example, locating family members or identifying a care placement for an unaccompanied minor

80 UNHCR, *supra* n. 8, para 57, p. 21.

is part of the assessment of safety under Article 8(2) or a mere 'technical obstacle to return' under Article 8(3). The Commission evaluation of the QD underscores these concerns, reporting that:

> Technical obstacles are generally defined as: lack of valid travel documents, impossibility to travel to the country of origin and lack of cooperation of authorities in the country of origin and physical inability of the applicant [due to] illness or pregnancy. Applicants falling within the scope of this paragraph are often not given any legal status or only tolerated status with limited social rights.[81]

Consequently, depending on the approach adopted by Member States, Article 8 can be interpreted in a way that either takes account of child accessibility requirements, or disregards them. The latter scenario risks violating the *non-refoulement* obligation.

In conclusion, the concept of internal protection must be applied with care in order to conform to the requirements of international human rights and refugee law. From a child-rights perspective, a child-sensitive analysis of the accessibility and sustainability of the proposed area of relocation is key. It is submitted that this is not adequately foreseen in Article 8 QD.

3.3.2.5 Country of origin information

The fear of persecution must be 'well-founded' and there must be a 'real risk' of serious harm if an applicant is to qualify, respectively, as a refugee or a beneficiary of subsidiary protection under the QD. The well-founded ness of the fear of persecution and the degree of risk of serious harm are evaluated, among other things, by reference to known facts about the situation in the country of origin. The difficulty is that country of origin information (COI) relating to child-rights violations is often confined to specialist reports.[82] The question, then, is whether such COI requirements as are laid down in the directives are sufficiently nuanced to include child-specific COI. One provision of the QD and several provisions of the APD relate to COI.

Article 4 QD (assessment of facts and circumstances) provides in paragraph 3 that the assessment of an application for international protection is to be carried out on an individual basis and includes taking into account 'all relevant facts as they relate to the country of origin at the time of taking a

81 § 5.1.5, p. 7.

82 Examples are: the Concluding Observations of the Committee RC and the Committee on the Elimination of Discrimination Against Women (in respect of the girl-child), relevant thematic mandates of the UN Human Rights Council, such as the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, reports of UN specialized agencies and programmes with a mandate relevant to child rights such as UNICEF, UNDP and UNIFEM and reports of non-governmental organizations that specialize in child rights monitoring such as the Save the Children Alliance.

decision on the application, including laws and regulations of the country of origin and the manner in which they are applied'. Thus, if the claim for international protection is based on child-rights violations, then the child-rights situation in the country of origin must be investigated, since without being investigated, it cannot be taken into account. Moreover, the reference not only to the laws and regulations but also to their application on the ground is important since (as the extent of ratification of the CRC itself attests) the formal allegiance to child rights can belie a sorry actual situation. For example, the formal outlawing of the practice of female genital mutilation frequently masks official inability or reluctance to eradicate what is usually a deeply embedded cultural practice.[83] Hence, Article 4(3) QD is drafted in such a way that child-specific COI must be investigated if it is relevant to the claim.

Article 8 APD (requirements for the examination of applications) provides that the obligation to undertake an 'appropriate examination' requires Member States to ensure that:

> precise and up-to-date information is obtained from various sources, such as the United Nations High Commissioner for Refugees (UNHCR), as to the general situation prevailing in the countries of origin of applicants for asylum and, where necessary, in countries through which they have transited and that such information is made available to the personnel responsible for examining applications and taking decisions.[84]

This provision is both positive and negative from the point of view of child-specific COI.

On the one hand, the reference to the 'general situation prevailing in the countries of origin' is arguably too broad to comprehend the child-specific situation. On the other, the reference to 'various sources' of country of origin information is positive since it can encompass specialist sources. Further references to 'various sources' or 'a range of sources' are made in other provisions of the APD.[85] While in practice it seems that the multiple sources requirement is not always followed, it is submitted that this is a problem of implementation, not an indictment of the provisions.[86]

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83 See, John Tobin, 'The International Obligation to Abolish Harmful Traditional Practices Harmful to Children's Health: What Does It Mean and Require of States?', *Human Rights Law Review* 9, no. 3 (2009): 373-396.

84 Paragraph 2(b). Paragraph 3 establishes that the appeals authorities must also have access to this information.

85 A reference to 'various sources' of country of origin information also appears in Article 38(3)(1) relating to procedural rules for the withdrawal of refugee status, while Article 30(5) relating to national designation of safe countries of origin refers to 'a range of sources' of country of origin information.

86 In a report on the implementation of the APD, UNHCR comments that '[i]t is of concern to note that in some states, decision-makers seem to rely on a limited number of COI

Since, per Article 4 QD, COI is an integral part of the assessment of facts and circumstances, one would expect a reference to COI in the requirements relating to the asylum decision. However, the relevant article – Article 9 APD – makes no reference to COI, leading UNHCR to observe that:

> It is of serious concern […] that the determining authorities in some Member States surveyed systematically failed to refer to any country of origin information which was used in decisions to refuse protection status. In other Member States, country of origin information was frequently referred to or cited in general terms but without specific indications of the sources or how this was applied to the assessment of the claim.[87]

The proper citation of COI is an important accountability mechanism which, in the context of child asylum claims, ensures that relevant, child-specific country of origin information is used in arriving at the decision. Consequently, the omission from Article 9 APD is significant.

Article 13 APD (requirements for a personal interview) establishes an obligation to 'ensure that the person who conducts the interview is sufficiently competent to take account of the personal or general circumstances surrounding the application, including the applicant's cultural origin or vulnerability insofar as it is possible to do so'. The disjunctive nature of this obligation means that the interviewer does not necessarily have to be versed in the general circumstances surrounding the claim, such as the situation in the country of origin. However, this is mitigated somewhat by the reference to the applicant's cultural origin or vulnerability, since these are not just personal matters. For example, an unaccompanied child coming from a source country for child-sex trafficking may be vulnerable for this reason, but this will not be immediately apparent to an interviewer who is not acquainted with the country of origin information. This ambiguity has led to problems in practice, as reported by UNHCR:

> Interviews must receive adequate information sufficiently in advance of the interview to enable them to conduct a thorough review of the case file and consult relevant country of origin information. UNHCR is concerned by evidence showing that a significant number of personal interviews are either poorly prepared or not prepared at all, and that interviewers in some determining authorities fail to familiarize themselves with information on the country of origin prior to the interview.[88]

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sources, usually state-sponsored ones.' UNHCR, 'Improving Asylum Procedures, Comparative Analysis and Recommendations for Law and Practice' (Brussels, 2010), p. 15.

87 *Ibid*. p. 15.

88 *Ibid*, p. 35.

A further omission from the APD is the lack of COI standards in respect of the safe country concepts (i.e. safe country of origin, safe third country, first country of asylum). These concepts are based on the notion that it is possible to designate some countries as *prima facie* 'safe' on the basis of objective factors such as ratification of and compliance with certain international human rights treaties. Sub-section *3.3.2.8* below considers whether the criteria for designating countries as safe is sensitive to child rights and child rights violations. Here, the question is whether the country of origin information on which such designations are based is sufficiently nuanced to take account of the child rights situation. However, since no COI requirements are laid down in respect of all but one of the safe country concepts, the question cannot be answered.[89] Nevertheless, one can surmise that in the absence of any standards, the specific child-rights situation is unlikely to be taken into account.

To summarize, there is a disconnect between the requirements of the QD and the specifications of the APD when it comes to COI. The QD and some provisions of the APD appear to mandate the consideration of specialist sources of COI where relevant to the claim. However, other provisions of the APD are silent on COI requirements. This has led to a poverty of COI research and application in practice. It is submitted that this is likely to impact negatively on children's asylum claims.

3.3.2.6 Cessation

Cessation of refugee or subsidiary protection status occurs when international protection is no longer needed. The focus here will be on cessation of refugee status, since it raises substantially the same issues as cessation of subsidiary protection status. Under Article 11 QD, which generally mirrors the cessation clauses in Article 1C of the 1951 Convention, refugee status can be ceased on a number of grounds, the most common of which is the 'ceased circumstances' ground.[90] This is reflected in Article 11(1)(e) QD which provides for cessation

89 Only the provisions of the APD relating to safe country of origin lay down COI requirements. Thus, Article 30(5) provides: 'The assessment of whether a country is a safe country of origin in accordance with this Article shall be based on a range of sources of information, including in particular information from other Member States, the UNHCR, the Council of Europe and other relevant international organizations.' Furthermore, Article 29 (Minimum common list of third countries regarded as safe countries of origin) contains a provision relating to country of origin information. Paragraph 3 provides '[w]hen making its proposal under paragraphs 1 or 2, the Commission shall make use of information from the Member States, its own information and, where necessary, information from UNHCR, the Council of Europe and other relevant international organizations.' However, Article 29 was annulled by the CJEU in Case C-133/06.

90 The other grounds listed in Article 11(1) are: (a) the refugee has voluntarily re-availed himself or herself of the protection of the country of nationality; (b) having lost his or her nationality, has voluntarily reacquired it; (c) has acquired a new nationality and enjoys the protection of the country of his or her new nationality; (d) has voluntarily re-established

when the refugee 'can no longer, because the circumstances in connection with which he or she has been recognized as a refugee have ceased to exist, continue to refuse to avail himself or herself of the protection of the country of nationality.' In making the decision, Article 11(2) obliges Member States to 'have regard to whether the change in circumstances is of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well-founded.'

The question that arises from a child-rights perspective is whether the change of circumstances that vitiates the need for refugee protection may or must take account of the child-rights situation. The answer seems obvious: if a risk of child-rights violations was an aspect of the claim that gave rise to refugee protection, then the changed circumstances must be shown to have eradicated such a risk. This logic was endorsed by the CJEU in the only case on cessation to come before the court to date. Thus in *Abdulla et al. v Bundesrepublik Deutschland*, the Court held that 'cessation thus implies that the change in circumstances has remedied the reasons which led to the recognition of refugee status.'[91] However, the CJEU went further. It held that not only must the circumstances which led to the original grant of refugee status have ceased, but it must be verified 'that the person has no other reason to fear being 'persecuted' within the meaning of Article 2(c) of the Directive [i.e. the refugee definition].'[92] Since the definition of refugee in the QD is reasonably amenable to child rights violations (see sub-section 3.3.1), it follows that such violations can be argued in the cessation context. An example will illustrate the potential importance of this. If an unaccompanied minor was persecuted by a regime that has since been toppled, the original fear of persecution has ceased. However, if he/she became separated from his/her family during flight and family tracing has proved unsuccessful, then it must be assessed whether the vulnerability caused by being alone would lead to fresh persecution if returned to the country of origin, for example, if the child were to end up on the street or in institutional care. Seen from this perspective, the ruling in *Abdulla* is a positive one.

3.3.2.7 Exclusion

Exclusion from refugee or subsidiary protection status occurs, most commonly, when a person is not deserving of international protection because of past

himself or herself in the country which he or she left of outside which he or she remained owing to fear of persecution; (f) being a stateless person with no nationality, he or she is able, because the circumstances in connection with which he or she has been recognized as a refugee have ceased to exist, to return to the country of former habitual residence. This last ground is essentially a 'ceased circumstances' ground for stateless persons.

91 CJEU, *Abdulla, Hasan, Adem, Rashi and Jamal v Bundesrepublik Deutschland,* Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, Judgment of 2 March 2010, para 69.

92 *Ibid*, para 76.

conduct. The intention here, as in the previous sub-section, is to focus on exclusion from refugee status. In particular, the focus will be on Article 12(2) QD which reflects, with some minor additions, the terms of Article 1F of the 1951 Convention.[93] Article 12(2) QD provides:

> A third country national or stateless person is excluded from being a refugee where there are serious reasons for considering that:
> a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
> b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;
> c) he or she is guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.

The application of Article 12(2) QD to children raises particular difficulties because it involves complex issues relating to the age of criminal responsibility, intent and circumstances vitiating individual criminal liability such as duress, coercion and self-defense. This can best be illustrated by referring, again, to the issue of child soldiers. Very often such children have been involved in committing war crimes – a ground of exclusion under Article 12(2)(a). However, as has already been outlined, the recruitment and participation of children under the age of 15 in hostilities is itself a war crime. Consequently, to exclude such children from refugee status is to exclude them for being victims of a war crime. Furthermore, Article 39 CRC provides, 'States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of […] armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.' Accordingly, the only response envisaged in the CRC to the phenomenon of child soldiers is the physical and psychological recovery and social reintegration of such children, which – it is clear – is diametrically opposed to excluding them from refugee status.[94]

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93 There are two other exclusion clauses in the QD which do not relate to the question of deservedness: Article 12(1)(a) which mirrors Article 1D of the 1951 Convention and which essentially excludes UNRWA refugees from refugee status and Article 12(1)(b) which reflects Article 1E of the 1951 Convention and which excludes *de facto* citizens of the host state from refugee status. Article 12(1)(a) was pronounced on by the CJEU in *Bolbol v Bevándorlási és Állampolgársági Hitvatal,* Case C-31/09, Judgment of 4 March 2010.

94 See further, Michael S. Gallagher, S.J., 'Soldier Boy Bad: Child Soldiers, Culture and Bars to Asylum', *International Journal of Refugee Law* 13, no. 3 (2001): 310-353.

Because of the complexity of applying Article 1F of the 1951 Convention (and hence also Article 12(2) QD) to children, UNHCR recommends that, as with any exclusion analysis, a three step analysis be undertaken: 1) does the act in question correspond to one of the grounds of exclusion? 2) can the act be attributed to the child? 3) are the consequences of exclusion from refugee status proportional to the seriousness of the act committed?[95] The last step follows from UNHCR's long-held position that inclusion comes before exclusion and hence that states have at their disposal all the necessary information about the applicant's well-founded fear of persecution in order to be able balance that against the seriousness of the crime. But furthermore, UNHCR recommends that:

> 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 needs to be considered.[96]

The CJEU pronounced on Article 12(2) in Joined Cases C-57/09 and C-101/09 (*B and D*).[97] The case involved exclusion on the basis of the alleged participation by two adults in serious non-political crimes and acts contrary to the purposes of the UN. The judgment of the Court is highly relevant to the question of exclusion of minors – in both positive and negative ways.

The requirement in Article 12(2) that there must be 'serious reasons for considering' that the person has committed the crime presupposes 'a full investigation into all the circumstances of each individual case'.[98] Individual responsibility 'must be assessed in the light of both objective and subjective criteria.'[99] In this regard, the Court stated that 'the competent authority must, *inter alia*, assess the true role played by the person concerned in the perpetration of the acts in question; his position within the organization; the extent of the knowledge he had, or was deemed to have, of its activities; any pressure to which he was exposed; or other factors likely to have influenced his con-

95 UNHCR, *supra* n. 8. See also, UNHCR, 'Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees', HCR/GIP/03/05 (2003).

96 UNHCR, *ibid*, para. 63.

97 CJEU, *Bundesrepublik Deutschland v B and D*, Joined Cases C-57/09 and C-101/09, Judgment of 9 November 2010. See also, CJEU, *Bolbol v Bevándorlási és Állampolgársági Hitvatal*, Case C-31/09, which deals with Article 12(1)(a) QD corresponding to the exclusion clause in Article 1D of the 1951 Convention (protection or assistance from other organs or agencies of the United Nations).

98 *Ibid* para. 93.

99 *Ibid* para. 96.

duct.'[100] This much of the judgment is highly positive from a child-rights perspective.

However, the Court was also asked to pronounce on whether a proportionality test was required for the purposes of Article 12(2). It categorically rejected the idea that inclusion comes before exclusion, stating:

> […] it is clear from the wording of Article 12(2) of [the QD] that, if the conditions laid down therein are met, the person concerned 'is excluded' from refugee status and that, within the system of the directive, Article 2(c) [i.e. inclusion] expressly makes that status of 'refugee' conditional upon the fact that the person concerned does not fall within the scope of Article 12.[101]

Since, *pace* UNHCR, inclusion is conditional upon there being no exclusion, the next logical step was to reject any proportionality requirement:

> Since the competent authority has already, in its assessment of the seriousness of the acts committed by the person concerned and of that person's individual responsibility, taken into account all the circumstances surrounding those acts and the situation of that person, it cannot […] be required, if it reaches the conclusion that Article 12(2) applies, to undertake an assessment of proportionality, implying as that does a fresh assessment of the level of seriousness of the acts committed.[102]

With respect to the Court, this logic is not entirely convincing: if exclusion comes before inclusion, then the 'fresh assessment' is not of the level of seriousness of the acts committed but rather of the persecution feared when considered in the light of the seriousness of the acts committed. But of greater concern, if the exclusion-therefore-no-inclusion scheme is applied to a child soldier, it is not obvious that a decision-maker would grasp that precisely what vitiates individual responsibility is that the child him/herself is also a victim of the excludable act *because it is an act of persecution*. Moreover, in failing to undertake a proportionality test, it is hard to see how the best interests of the child could be a primary consideration in the exclusion decision, since the best interest of the child who has a well founded fear of persecution is to be recognized as a refugee. This is not to suggest that the best interests of the child must trump the state's interest in exclusion, but there must be a weighing of competing interests in which primacy is given to the best interests of the child.

In conclusion, Article 12(2) QD as interpreted by the Court in *B and D* is both positive and negative from the perspective of the rights of the child. The Court's insistence on a full investigation into the circumstances of the individual case is positive, since it enables factors such as mental capacity, consent and duress to be explored. However, the Court's rejection of the chronology

100 *Ibid* para. 97.
101 *Ibid* para. 107.
102 *Ibid* para. 109.

of inclusion before exclusion and of a proportionality test may mean that the coincidence of the crime as an excludable act *and* as an act of persecution is missed.

3.3.2.8 Concepts that restrict inclusion: the example of 'safe country of origin'

The APD contains a number of restrictive concepts that are a legacy from the days of intergovernmental cooperation.[103] They can be broadly categorized as 'safe country' concepts and comprise the notions of safe country of origin, safe third country and first country of asylum. Safe country concepts are based on the premise that is it possible to establish, on the basis of generalized and formal criteria, the probable safety of any given individual in another country. This premise is generally regarded with skepticism by refugee lawyers in the light of the requirement of individual status determination that follows from the *non-refoulement* guarantee.[104] Yet the safe country concepts apply, without exception, to child claimants. So the question arises whether the assessment of what makes these countries safe includes or can be interpreted to include a child-rights assessment. The focus here will be on safe country of origin, but the analysis could be applied equally to the other safe country concepts.

The concept of safe country of origin (SCO) is based on the notion that it is possible to establish on the basis of the objective human rights record of a country that the country, or part of it, is generally safe and generally not associated with forced migration. This creates a rebuttable presumption that applicants from this country are *prima facie* unfounded, which in turn, justifies

103 Pre-Amsterdam, a number of Member States began to develop deterrence and deflection policies, which soon spread to neighbouring States for fear that they would be perceived as a 'soft touch' for asylum seekers. For example, Resolution adopted 30 November 1992 on a harmonised approach to questions concerning host third countries, Document WG I 1283; and Conclusions adopted the 30 November 1992 concerning countries in which there is generally no serious risk of persecutions, Document WG I 1281. These policies became the basis of the intergovernmental *acquis* on asylum. In this regard, although it is widely considered that the *acquis* influenced State practice, it is submitted that a more accurate account is that State practice influenced the *acquis*, which was then used by States to validate existing practice. On this point see, Rosemary Byrne, Gregor Noll and Jens Vedsted-Hansen, 'Understanding Refugee Law in an Enlarged European Union' *European Journal of International Law* 15, no. 2 (2004): 355-379. In turn, the *acquis* influenced the CEAS.

104 As Durieux convincingly puts it, '[i]n the final analysis […] deflection policies are bound to fail the protection test, simply because no state can guarantee the protection performance of another. In this sense, the debate over 'effective protection' in the receiving state as a criterion for 'returnability' thereto is rather sterile: try as one may – and many prominent lawyers *have* tried – effective protection cannot be defined in the abstract. Besides, it has to be on offer in the case at hand, not just threoretically available.' Jean François Durieux, 'Protection Where? – or When? First asylum, deflection policies and the significance of time', *International Journal of Refugee Law* 21, no. 1 (2009):77. See further, Cathryn Costello, 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?' *European Journal of Migration and Law* 7 (2005): 35-69.

severe procedural consequences. Thus, the claim may be accelerated, designated manifestly unfounded, and a personal interview may be omitted.[105] There is also a link between SCO and internal protection in the sense that internal protection is often mooted because part of a country has been designated as safe. The question for resolution here is whether the objective criteria for designating a country as a SCO take child rights and child-rights violations into account.

Originally, the Council was empowered to adopt a 'minimum common list' of SCO under Article 29 APD, in accordance with criteria for designation established in Annex II of the directive. However, Article 29 was annulled in case C-133/06 because it was contrary to the Treaty requirement of co-decision.[106] Nevertheless Annex II continues to be of relevance because, pursuant to Article 30, Member States are permitted to retain or introduce legislation for the national designation of SCO by applying the criteria laid down in Annex II. Consequently, Annex II, which was originally primarily intended to be administered centrally, subject to EU institutional oversight, is now exclusively interpreted and applied by Member States. Furthermore, although Article 31 obliges Member States to 'lay down in national legislation further rules and modalities for the application of the safe country of origin concept', no guidance is provided to Member States on the content or application of such rules. The resulting situation appears to be quite anarchic.[107] In this changed context, the provisions of Annex II take on an even greater significance.

Annex II provides that a country can be designated as a SCO if, by virtue of the official and actual legal and political system, three criteria are generally satisfied: there is 'generally and consistently no persecution as defined in Article 9 of the [QD], no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict.' Since these criteria broadly replicate the criteria for inclusion in refugee and subsidiary protection status under the QD, it is tempting to conclude that the same strengths and weakness from a child-rights perspective apply. However, it is submitted that the phrase 'generally and consistently' places a kind of filter on the kinds of harms that are likely to be associated with a given country. The fact that child-rights violations do not happen to the population generally may obscure the fact that they consist-

105 Article 23(4)(c)(i), Article 28(2), and Article 12(2)(c) APD respectively.

106 ECJ, *European Parliament v Council*, C-133/06, Judgment of 6 May 2008.

107 There appears to be a consensus that the procedure for national designation of SCO has led to widely divergent practices and that many Member States are not in compliance with the requirements of the directive, for example, regarding the formal designation and notification requirements implicit in Article 30. Indeed, many Member States appear to apply the notion on an *ad hoc* basis, unconstrained by any list of SCO, sometimes without informing the applicant that the concept is being applied. See Commission evaluation of the APD, *supra* n. 11, § 5.2.5, p. 12 and UNHCR, *supra* n. 86, p. 66.

ently occur, leading to the perception that they are neither general nor consistent. Absent a specific child to draw attention to such violations, generalized assessments may not be nuanced enough to reflect the child-rights situation. The fact that the child applicant can rebut the presumption of safety is of little succor because of the difficulties in discharging the burden of proof, as will be outlined in Chapter 4.

Annex II further provides that in making the assessment, four indicators are to be taken into account: the law of the country, official and actual; somewhat illogically in the context of the country of origin, whether the principle of *non-refoulement* is respected; whether there is a system of effective remedies against violations of human rights, and critically, whether certain 'core' human rights are respected. The paragraph outlining this last factor is worth quoting. Account must be taken of the:

> Observance of the rights and freedoms laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and/or the international Covenant for Civil and Political Rights and/or the Convention against Torture, in particular the rights from which derogation cannot be made under Article 15(2) of the said European Convention.

This poses exactly the same problem as Article 9(1) QD analyzed above, in terms of exclusive reliance on instruments for the protection of civil and political rights, and, moreover, non-derogable civil and political rights. Accordingly, it is submitted that it is quite possible to apply the general criteria laid out in Annex II of the APD and arrive at the conclusion that a given country is 'safe', when in fact it is not at all safe for children.

Furthermore, pursuant to Article 30(2) and (3), Member States are permitted, by way of derogation, to retain legislation existing on the date of the adoption of the directive that allows for the national designation of the country as safe or part of the country as safe or part or all of the country as safe for a specific group of persons on the basis of just two criteria.[108] Member States must be 'satisfied' that persons in the putative SCO are generally neither subject to: a) persecution as defined in the QD nor b): torture or inhuman or degrading treatment or punishment. Hence, the indiscriminate violence 'leg' established in Annex II is omitted. Furthermore, pursuant to paragraph 4, in making this assessment, Member States need only take into account some very broad indicators, namely, 'the legal situation, the application of the law and the general political circumstances in the third country concerned.' If the criteria and indicators for designation of a country as a SCO under Annex II are problematic from a child rights perspective, then the derogations are too *a fortiori*.

108 According to the Commission evaluation, 5 Member States (De, FI, FR, NL and UK) rely on the stand-still derogation clauses. Commission evaluation of the APD, *ibid*, § 5.2.5, p. 12.

In short, the criteria established in the APD for assessing what makes a country a SCO are not sufficiently nuanced to take account of the child-rights situation in the country.

It is useful at this point to summarize briefly the findings on whether Phase One CEAS reproduces or overcomes the obstacles in general refugee law to recognizing the rights of the child as refugee-relevant. In some respects the QD is quite progressive in this regard, for example, in its list of acts of persecution, in its broad construction of 'political opinion', in its recognition of non-state actors of persecution or serious harm and in its country of origin information requirements. In other respects the QD reproduces and even compounds the obstacles that exist in general refugee law, for example, in its dual test for 'membership of a particular social group', in its limited understanding of the nexus requirement, in its construction of protection as being equivalent to a criminal justice response, in its timid definition of serious harm for the purposes of subsidiary protection, in its endorsement of the concepts of non-state actors of protection and internal protection and in its failure to integrate child-specific standards into the concept of exclusion. From the analysis of the SCO concept, it can also be extrapolated that the 'safe country concepts' in the APD are insensitive to the rights of the child. The next subsection examines the changes to the eligibility concepts in Phase Two CEAS from the point of view of the rights of the child.

3.3.3 Phase Two CEAS: eligibility concepts and the rights of the child

3.3.3.1 The refugee definition

Acts of persecution

It was found that the QD in Article 9(1) conceives of acts of persecution through the lens of civil and political rights and sets a high threshold for persecution, but that this is mitigated by the illustrative list of acts of persecution in Article 9(2) which can be interpreted to include child rights violations. To what extent does the recast QD alter this situation?

Articles 9(1) and (2) are unchanged in the recast. However, a significant amendment is made to one of the recitals. Recital 18 reiterates the principle in existing Recital 12 that the best interests of the child should be a primary consideration of Member States when implementing the Directive, but adds that '[i]n assessing the best interests of the child, Member States should in particular take due account of the principle of family unity, *the minor's well-being and social development, safety and security considerations* and the views of the minor in accordance with his or her age and maturity.'[109] The italicized

109 Emphasis added.

phrases facilitate the recognition that economic, social and cultural rights and protection rights can be refugee-relevant.

Reasons for persecution

The reasons for persecution as elaborated on in Article 10(1) QD are of mixed benefit to child claimants. On the problematic side, the provision on 'membership of a particular social group' presents the innate characteristics test and the social perception test as two prongs of a single test, making the test difficult to meet. Furthermore, Article 9(3) requiring a connection between the reasons for persecution and the acts of persecution effectively excludes persecution by non-state actors where the link to the reasons for persecution emanates from the failure of state protection. To what extent are these problems remedied in the recast QD?

As regards the 'membership of a particular social group ground', the cumulative nature of the innate characteristics and social perception tests is retained. However, more guidance is provided on gender-related aspects of a social group. Recast Article 10(d) explicitly states that gender-related aspects includes gender identity. This is elaborated on in Recital 30 as follows:

> For the purposes of defining a particular social group, issues arising from an applicant's gender, including gender identity and sexual orientation, which may be related to certain legal traditions and customs, resulting in for example genital mutilation, forced sterilization or forced abortion, should be given due consideration insofar as they are related to the applicant's well founded fear of persecution.[110]

This is helpful, particularly to claims involving violations of the rights of the girl-child.

The problematic provision in Article 9(3) requiring a connection between the reasons for persecution and the acts of persecution is amended in draft recast Article 9(3) which adds that the connection can equally be drawn between the reasons for persecution and 'the absence of protection against such acts'. This allows child-rights violations perpetrated by non-state actors for private reasons to be refugee-relevant if the failure of state protection can be linked to one of the listed reasons.

In sum, two significant improvements are made in relation to the reasons for persecution, but the problematic cumulative test for the existence of a social group remains.

110 This is a significant development on existing Recital 21 which simply states: 'It is equally necessary to introduce a common concept of the persecution ground 'membership of a particular social group'.

3.3.3.2 The definition of 'serious harm'

The definition of 'serious harm' in the QD was criticized for being too narrow. In particular, Article 15(c) omits serious child-rights violations that occur in peace-time and one of the most serious child rights violations that occurs in time of conflict, namely underage recruitment. As interpreted by the CJEU in *Elgafaji*, its value-added to Article 15(b) is uncertain. In this regard, it is striking that the Commission decided that 'in view of the interpretative guidance provided by [the *Elgafaji*] judgment and of the fact that the relevant provisions were found to be compatible with the ECHR, an amendment of Article 15(c) is not considered necessary.'[111] Consequently, there is no change to Article 15(c) in the recast QD.

3.3.3.3 Sources of harm and protection

While Article 6 QD relating to sources of harm was considered praiseworthy for its inclusion of non-state actors of persecution, Article 7 was criticized for including non-state actors in the list of actors of protection. It was argued that this is not viable in the context of child protection because non-state actors generally lack the capacity and durability needed to provide for the myriad protection needs of children. In this regard, an important phrase is added to recast Article 7(2): protection against persecution or serious harm 'must be effective and of a non-temporary nature.' Providing effectiveness is assessed in relation to child-protection needs, then it is submitted that this provision remedies the deficiencies of current Article 7.

3.3.3.4 Internal protection

Article 8 QD was criticized in particular for its third paragraph which states that the concept of internal protection 'may apply notwithstanding technical obstacles to return in the country of origin.' In the particular context of unaccompanied minors, this leads to the risk that highly relevant factors, such as the ability to locate family members or identify a care placement, might be disregarded in applying the concept. The recast QD contains some significant improvements in this regard. Article 8(1)(b) now provides that the concept applies if the applicant has access to protection against persecution or serious harm in the part of the country of origin identified as safe and 'he or she can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there.' Furthermore, new Recital 27

111 Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted, COM (2009) 551, 'Explanatory Memorandum' , p. 6.

provides, *inter alia*, '[w]hen the applicant is an unaccompanied minor, the availability of appropriate care and custodial arrangements, which are in the best interest of the unaccompanied minor, should form part of the assessment as to whether that protection is effectively available.'

3.3.3.5 Country of origin information

The assessment of Phase One revealed that the COI standards in the QD are sufficiently nuanced to enable and even require child-specific COI to inform the assessment. However, COI standards in the APD are variable and in some respects wholly lacking. The question, therefore, is whether the proposed recast APD improves standards relating to COI.

Article 8 APD (requirements for the examination of applications) which establishes a standard for COI research in paragraph 2(b) is amended in proposed recast Article 10(3)(b). A new source of COI is added to the illustrative list of 'various sources', namely, the European Asylum Support Office. According to the EASO Regulation, one of the main duties of the office is to organize, promote and coordinate activities relating to information on countries of origin, in particular:

> [T]he gathering of relevant, reliable, accurate and up-to-date information on countries of origin of persons applying for international protection in a transparent and impartial manner, making use of all relevant sources of information, including information gathered from governmental, non-governmental and international organizations and the institutions and bodies of the Union.[112]

Since another of the duties of the office is to provide training on 'issues relating to the handling of asylum applications from minors and vulnerable persons with specific needs',[113] it is hoped that EASO will take an integrated approach to its mandate. If this happens – and it is too early yet to tell – then EASO could play a fruitful role in supplying Member States with child-specific COI.

Article 9 APD (requirements for a decision by the determining authority) was criticized for omitting to establish a requirement to incorporate COI analysis into the decision. Unfortunately, the omission is not remedied in Article 11 of the proposed recast.

Article 13 APD (requirements for a personal interview) was criticized for failing in paragraph 3(a) to require COI to inform the interview. Article 15(3)(a) of the proposed recast amends this provision by requiring that the person who conducts the interview be sufficiently competent to take account of the personal *and* (no longer 'or') general circumstances surrounding the application. It is

112 Regulation (EU) No. 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, Article 4.

113 *Ibid*, Article 6(4)(b).

submitted that this implicitly requires the interviewer to conduct research into relevant COI prior to the interview. Furthermore, the personal and general circumstances are now said to include 'gender, sexual orientation and gender identity', which is of potential benefit to the girl-child. Moreover, new paragraph 3(e) obliges Member States to 'ensure that interviews with minors are conducted in a child appropriate manner'. It is hard to see how this could be done if the interviewer had not researched child-specific COI in advance of the interview.

Finally, the APD was criticized for failing to establish any COI requirements for the designation of safe countries, with the exception of the safe country of origin concept. Inexplicably, the proposed recast strengthens the COI requirements in Article 37 dealing with safe country of origin by including a reference to EASO in the range of sources of information that inform the assessment of safety, while failing to lay down any COI specifications regarding safe third country or first country of asylum.

Consequently, from a child-rights perspective, the COI provisions of the APD are subject to some improvements in the proposed recast, but not systematic improvement.

3.3.3.6 Cessation

The cessation provisions in Article 11(1) and (2) QD were found not to be problematic from a child-rights perspective. Therefore, the fact that they are unchanged in the draft recast is also unproblematic. Interestingly, a new paragraph is added to Article 11 in the recast: the ceased circumstances provision 'shall not apply to a refugee who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself or herself of the protection of the [country of origin].'[114] This provision is a variation on Article 1C(5) of the 1951 Convention, second sub-paragraph, which was limited in scope to refugees who were recognized under various *ad hoc* arrangements in the 1920s and '30s. The impulse was humanitarian: to provide an exception to cessation in compelling cases. The inclusion of this provision, but without any limitation in personal scope, in Article 11(3) of the recast is significant from the point of view of the child claimant. One can readily envisage the use of the 'compelling reasons' exception when the persecution suffered or feared has had a lasting impact on the child (now perhaps an adult). However, the exception could also be raised when the child has spent a significant part of his/her life in the country of refuge and has lost all effective ties with the country of origin.[115] Consequently, recast Article 11(3) is a welcome provision.

114 Article 11(3).

115 On the basis of their research into the development and prospects of children living in asylum centers in The Netherlands, Kalverboer et al. report that all children in the 6-12 year age bracket who have spent five years or more in the asylum country 'feel attached

3.3.3.7 Exclusion

Article 12(2) QD which reflects the terms of Article 1F of the 1951 Convention is insufficiently nuanced to take account of the many considerations involved in applying the exclusion clauses to children. The likely exclusion of child soldiers is a poignant illustration of this. The interpretation of Article 12(2) QD by the CJEU in *B and D* is unhelpful in this regard. It is all the more unfortunate, then, that Article 12(2) of the recast QD remains unchanged.

3.3.3.8 Concepts that restrict inclusion: the example of 'safe country of origin'

In general, safe country concepts are too blunt an instrument to guarantee that an applicant will not be *refouled*. The risk is heightened in the case of children because child rights violations may not be detected in generalized assessments of safety. The analysis above of the SCO concept in the APD confirms that this is the case: the criteria for assessing safety in Annex II are too broadly defined to direct attention to child rights violations and the specific indicators of safety are based exclusively on non-derogable civil and political rights. Furthermore, a derogation provision allows Member States to retain their system of national designation of SCO provided it complies with minimal criteria. To what extent is the situation remedied in the proposed recast APD?

Under Article 37 of the proposed recast, national designation of SCO becomes the only method of designating such countries – Article 29 of the existing APD relating to Council designation being deleted. It can be observed that this change runs counter to the objective of Phase Two CEAS which is to move from minimum to common standards. The criteria in Annex II for designating a country as a SCO are replicated in Annex I of the proposed recast, although the derogation provision is deleted. Significantly, however, Article 25(6) of the proposed recast provides that unaccompanied minors are exempt from the operation of the accelerated/manifestly unfounded procedure while the possibility to omit a personal interview because the applicant comes from a SCO (currently in Article 12(2)(c) of the APD) is deleted. This effectively means that the SCO concept no longer applies to unaccompanied minors and, as regards accompanied minors, one of the three negative consequences of coming from a SCO are removed. While these are significant improvements, it is unclear why *all* minors are not simply exempted from the operation of the SCO concept.

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to their host society after five years and feel like strangers in the country of their parents. They are acquainted with expressing themselves freely. Being involuntarily sent back to a country where such rights are not guaranteed provides a culture shock. Most children in this age range almost exclusively speak the language of their host country.' Older children are also reported to be attached to the host society, but the attachment is more ambivalent. M.E. Kalverboer, A.E. Zijlstra and E.J. Knorth, 'The Developmental Consequences for Asylum-seeking Children Living with the Prospect of Five Years or More of Enforced Return to Their Home Country', *European Journal of Migration and Law* 11 (2009): 60.

3.4 Synthesis of findings

This chapter posed the question of whether the CEAS complies with the right of the child to seek and qualify for international protection. It began by exploring the right of the child to seek international protection. It established that the accompanied as well as the unaccompanied child has this right and therefore must be able to lodge an asylum application. It scrutinized the relevant provisions of the APD and found that the directive fails to explicitly establish the right of all minors to lodge an application. The proposed recast remedies this defect, establishing a right of all minors, directly or indirectly, to lodge an application. However, in the case of the accompanied minor, the proposed recast leaves it to the Member State to determine whether the child can make an independent application while also permitting Member States to attach negative procedural consequences to any subsequent applications by such minors. In sum, the right of the child to seek international protection is not categorically met in the CEAS.

This chapter also explored the right of the child to qualify for international protection, meaning the right of the child to have his/her rights as a child recognized as refugee-relevant. It was argued that the tendency to interpret eligibility concepts in refugee law through the exclusive lens of civil and political rights constitutes a real obstacle to recognizing the full gamut of child rights as potentially refugee-relevant. The QD was examined to establish the extent to which it reproduces or overcomes this obstacle. It was found that in many significant ways the directive is (or is capable of being interpreted in a way that is) sensitive to child rights but that in about as many significant ways it is not. However, the recast QD corrects many of the problems identified, such as: clarifying gender-related aspects of 'membership of a particular social group'; clarifying the permissibility of connecting the ground to *either* the persecution *or* the reason the state failed to protect; establishing that protection by non-state actors must be effective and non-temporary; inserting more rigorous standards relating to the use of internal protection, particularly as regards unaccompanied minors; and including a new reason to refrain from ceasing refugee status which seems readily applicable to children. The provisions of the proposed recast APD relating to country of origin information are also somewhat improved. Consequently, the number of problematic provisions from a child-eligibility perspective are considerably reduced. The remaining problematic provisions are: the double test for 'membership of a particular social group', the reduction of 'protection' to a criminal justice response; the limited material and personal scope of 'serious harm' for the purposes of subsidiary protection, and the failure in the proposed recast APD to exempt all minors from the application of the SCO notion. Without minimizing any of these remaining problems, it is submitted that Phase Two CEAS is generally compliant with the right of the child to have his/her rights recognized as refugee-relevant.

4 The right of the child to be heard

4.1 INTRODUCTION

Chapter 3 set out the right of the child to seek and qualify for international protection. But even assuming that the child is given access to the procedure and that the eligibility concepts are child-rights sensitive, there is still a problem: the typical asylum *procedure* is not designed for children. The adult-orientation is apparent in the central feature of the asylum process – an individual status determination procedure based usually on an interview. Asylum officers are required to elicit information from the applicant, who, in turn, is required to render an accurate and nuanced account, communicated verbally and often through the medium of a translator, of his/her reasons for not being able to return to her country of origin. The burden of proof rests principally on the applicant. This process implies that the applicant possesses relatively sophisticated communication skills and the ability to understand and analyse his/her predicament. However, it is clear, even from a superficial knowledge of the stages of child development, that depending on their age and maturity (not to mention the possible traumatic nature of their experience) children may not be able to communicate their story in this way. Since children are unlikely to meet the requirements of the procedure they risk not being interviewed at all.

So the question arises: what rights do children have that could make the adult-oriented asylum procedure more sensitive and amenable to children? The key right of the child in this regard is the right of the child to be heard in Article 12 CRC. This chapter is devoted to an exploration of the meaning of this right, its implications in the asylum context and whether or not the relevant provisions of the CEAS instruments comply with it. The format of the chapter is similar to previous chapters. The first substantive section (4.2) is devoted to an elucidation of the meaning of the right. For ease of analysis, the right is explored along three lines: the right to a hearing (4.2.1); the conduct of the hearing (4.2.2); and the evaluation of the child's views (4.2.3). The next section (4.3) scrutinises the extent to which the CEAS instruments are compliant with the three dimensions of right of the child to be heard. The final section (4.4) examines the prospects for enhanced compliance in Phase Two. In terms of which CEAS instruments are implicated by the right of the child to be heard, as might be expected, the APD is the critical instrument.

4.2 THE RIGHT OF THE CHILD TO BE HEARD

Article 12 CRC provides:

> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
> 2. For this purpose the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or appropriate body, in a manner consistent with the procedural rules of national law.

The right of the child to be heard in Article 12, sometimes called the right of the child to participate, is interpreted by the Committee RC as a general principle of relevance to the interpretation and implementation of all the rights in the CRC.[1] This right was *sui generis* in international human rights law at the time of the drafting of the Convention but it has since been restated in Article 24 of the EU Charter of Fundamental Rights.[2] Despite its originality, Article 12 CRC cannot be considered in isolation. It bears a relationship to a cluster of rights in general (i.e. non child-specific) human rights law which can be broadly categorised under the heading of the right to a fair hearing.[3] This relationship is evolving.

Thus, at the time of the drafting of the Convention, Article 12 CRC was conceived as an *alternative* to the procedural rights associated with a fair hearing. Under domestic law, children were typically precluded from enjoying the same procedural rights as adults because of a perceived lack of intellectual/emotional capacity and a resulting lack of legal capacity.[4] The presumption of a lack of capacity was also evident in international law. Thus the CRC contains no right of legal personality and consequently no right of access to the courts, to a fair hearing or to an effective remedy. For the same reason, it contained no individual complaints procedure. This presumption was also

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1 Committee RC, General Comment No. 5, 'General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para 6)', U.N. Doc. CRC/GC/2003/5 (2003).

2 Article 24(1) CFR provides, *inter alia*: '[Children] may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.'

3 The right to a fair hearing is established in Article 14 ICCPR, Article 6 ECHR and Article 47 of the EU Charter of Fundamental Rights. The associated right to an effective remedy is established in Article 2 ICCPR, Article 13 ECHR and is part of Article 47 of the EU Charter. The right to a fair hearing may be implicit in other substantive rights which involve a strong evaluative element, such as the prohibition of torture and lesser forms of ill-treatment. See *infra* § 4.2.1 for a more thorough discussion.

4 See, for example, Carole Smith, 'Children's Rights: Judicial Ambivalence and Social Resistance', *International Journal of Law, Policy and the Family* 11 (1997): 103-139.

discernible in the case-law of the ECtHR[5] and in EU law.[6] The original rationale for Article 12 must be understood in this context. Article 12 was inserted into the CRC as a substitute for the procedural rights normally associated with a fair hearing, its function to give the child a voice and (modestly) challenge the image of the child as a passive object of other people's decisions.

However, in the intervening years, the traditional resistance to the idea of children as having the capacity to enforce their rights has been steadily eroded. Thus, an optional protocol to the CRC allowing for an individual complaints mechanism was adopted by the General Assembly in 2011, and the Committee RC considers the right to an effective remedy to be implicit in the CRC,[7] including in Article 12 itself.[8] In 2009, the Committee RC produced a General Comment (No. 12) on the right of the child to be heard which gives it a dynamic, contemporary interpretation.[9] There are indications in the case-law of the ECtHR[10] and the CJEU[11] that the European courts, too, are revising

5 See, for example, ECtHR, *Golder v UK*, Appl. No. 4451/70, Judgment (Plenary Court) of 21 February 1975, in which it was held to be lawful to impose restrictions on access to the courts by minors.

6 Until relatively recently, it was doubted by commentators whether children were subjects of EU law in their own right (as opposed to being beneficiaries of rights derived from their parents). See Helen Stalford, 'Constitutionalising Equality in the EU: A Children's Rights Perspective' *International Journal of Discrimination and the Law* 8, nos. 1-2 (2005): 53-73; and Helen Stalford and Eleanor Drywood, 'Coming of Age?: Children's Rights in the European Union', *Common Market Law Review* 46 (2009):143-172.

7 Committee RC, General Comment No. 5, *supra* n. 1, para. 24: 'For rights to have meaning, effective remedies must be available to redress violations. This requirement is implicit in the Convention and consistently referred to in the other six major international human rights treaties. Children's special and dependent status created real difficulties for them in pursing remedies for breaches of their rights. So States need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives.' Similarly, the Human Rights Committee has stated that remedies for violations of rights in the ICCPR 'should be appropriately adapted so as to take account of the special vulnerabilities of certain categories of person, including in particular children.' Human Rights Committee, General Comment No. 31, 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', U.N. Doc CCPR/C/21/Rev.1/Add.13 (2004), para. 15.

8 According to the Committee RC, Article 12 implies a right to an effective remedy if the child is not given the opportunity to be heard or his/her views are not given due weight: Committee RC, General Comment No. 12, 'The right of the child to be heard', U.N. Doc. CRC/C/GC/12 (2009), para. 46.

9 *Ibid.*

10 The right of the child to participate has become an established element of the jurisprudence of the ECtHR relating to Article 6 ECHR on the right to a fair trial. See, for example, ECtHR, *T. v The United Kingdom*, Appl. No. 24724/94, Judgment of 16 December 1999 and ECtHR, *S.C. v The United Kingdom*, Appl. No. 60958/00, Judgment of 15 June 2004, discussed *infra* at § *4.2.2.2*.

11 For example in *Chen*, the Court rejected the proposition that a young child cannot activate free movement and residence rights, holding that 'a young child can take advantage of the rights of free movement and residence guaranteed by Community law. The capacity of a national of a Member State to be the holder of rights guaranteed by the Treaty and

their attitudes to the issue of children's (lack of) capacity. Indeed the Committee of Ministers of the Council of Europe has noted that:

> [A]s guaranteed under the ECHR and in line with the case law of the European Court of Human Rights, the right of any person to have access to justice and to a fair trial – in all its components (including in particular the right to be informed, the right to be heard, the right to a legal defence, and the right to be represented) – is necessary in a democratic society and *applies equally* to children, taking however into account their capacity to form their own views.[12]

Ironically, now that children are increasingly recognized as possessing the same procedural rights as adults, the right to be heard in Article 12 CRC may constitute an additional, rather than an alternative, set of guarantees. The following subsections outline the key aspects of the right of the child to be heard: the right to a hearing, the conduct of the hearing and the evaluation of the child's views.[13] Attention is paid throughout to the implications of the right in the asylum context.

4.2.1 The right to a hearing

Article 12 CRC establishes the right of the child to be heard, but does this right extend to the asylum context and, if so, what child is entitled to a hearing? In other words, what is the scope *ratione materiae* and *personae* of the right of the child to be heard?

On the first question, two main arguments can be adduced in favour of the proposition that the right of the child to be heard applies to the asylum context. The first relates to the broader context within which Article 12 CRC must be interpreted. The second relates to the wording and drafting history of Article 12 itself.

As to the first argument, as previously mentioned, there is a close connection between Article 12 CRC and the cluster of rights in general (i.e. non

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by secondary law on the free movement of persons cannot be made conditional upon the attainment by the person concerned of the age prescribed for the acquisition of legal capacity to exercise those rights personally.' ECJ, *Chen v Secretary of State for the Home Department*, Case C-200/02, Judgment of 19 October 2004, para. 20.

12 'Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice', adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies, preamble. Hereinafter, 'Council of Europe Guidelines 2010'.

13 The approach is necessarily selective: there are many rights that are corollary to the right of the child to be heard relating, for example, to free legal assistance or representation, to adequate time to prepare one's case and to an effective remedy. But in so far as these rights have no particular child-specific implications, it is submitted that there is little value to be added here to existing commentaries on the content and application of such rights in the context of the CEAS. See footnotes *infra* for citations of such commentaries.

child-specific) human rights law which can be broadly categorized under the heading of the right to a fair hearing. It is worth briefly digressing to establishing whether there is a general right to be heard in the asylum context. For reasons of space, attention will be confined to the European context.

As regards the ECHR, the most promising article in the ECHR relating to the right to be heard is the right to a fair trial in Article 6. But this right is expressly limited to the determination of civil rights and obligations, understood in the private-law sense. As immigration and asylum matters do not implicate civil rights and obligations, they fall outside the scope of Article 6.[14] However, procedural rights relevant to the asylum context have been developed jurisprudentially under the rubric of Article 3 (prohibition of torture and inhuman and degrading treatment or punishment), Article 13 (right to an effective remedy) and Protocol 4, Article 4 (prohibition of collective expulsion of aliens). The Court's case-law strongly implies a right to be heard.

Thus, the Court regularly reiterates the need for rigorous and close scrutiny of claims of a violation of Article 3 in the context of expulsion, involving an assessment, not only of the general situation, but also of the personal circumstances of the applicant.[15] This suggests a hearing. In a host of Article 3 cases involving Turkey, the Court has attached significant weight to UNHCR's assessment of the applicant's claim because, unlike the respondent state, UNHCR actually interviewed the applicant.[16] Similarly, in *E.G. v The United Kingdom*, in which the Secretary of State, in deciding on a subsequent application for asylum, disregarded key findings of fact of the asylum adjudicator, the Court held that, '[i]t is unfortunate, in the Court's view, that the Secretary of State did not consider the finding of the Adjudicator who had had the opportunity to *see the applicant give evidence in person*.'[17] Likewise, in *R.C. v Sweden*, the Court accepted that 'as a general principle, the national authorities are best placed to assess not just the facts [relating to an alleged risk of an Article 3 violation] but, more particularly, the credibility of witnesses, since it is they who have had an opportunity to *see, hear and assess* the demeanor of the individual concerned.'[18] As regards the right to an effective remedy, the Court

14 ECtHR, *Maaouia v France*, Appl. No. 39652/98, Judgment of 5 October 2000.

15 See for example, ECtHR, *Saadi v Italy*, Appl. No. 37201/06, Judgment of 28 February 2008 and ECtHR, *Baysakov and Others v Ukraine*, Appl. No. 54131/08, Judgment of 18 February 2010.

16 See ECtHR, *Jabari v Turkey*, Appl. No. 40035/98, Judgment of 11 July 2000, paras. 40 & 41; ECtHR, *Abdolkhani and Karimnia v Turkey*, Appl. No. 30471/08, Judgment of 22 September 2009, paras. 82 &113; ECtHR, *Charahili v Turkey,* Appl. No. 46605/07, Judgment of 13 April 2010, paras. 57 and 59; ECtHR, *M.B. and others v Turkey*, Appl. No. 36009/08, Judgment of 15 June 2010, para. 33; and ECtHR, *Ahmadpour v Turkey*, Appl. No. 12717/08, Judgment of 15 June 2010, para 39.

17 ECtHR, *E.G. v The United Kingdom,* Appl. No. 41178/08, Judgment of 31 May 2011, para. 72 (emphasis added).

18 ECtHR, *R.C. v Sweden,* Appl. No. 41827/07, Judgment of 9 March 2010, para. 52 (emphasis added).

has stated that an effective remedy in the context of an arguable claim of an Article 3 violation requires an individualized assessment.[19] Again, an individualized assessment suggests a hearing of the individual. In *I.M. v France*, the Court found a violation of Article 13 and 3 because, *inter alia*, an asylum applicant was only given a brief 30 minute hearing which did not allow for the complexities of his application to be properly communicated or explored.[20] Finally, in Protocol 4, Article 4 cases, the Court has underlined that the expulsion procedure must take the personal circumstances of each person genuinely and individually into account.[21] In sum, the Court's case-law clearly points to a right to be heard in these contexts. Given the overlap with the asylum context, including the risk of *refoulement*, it is reasonable to infer that asylum seekers also have such a right.

As regards EU law, Article 47 of the EU Charter of Fundamental Rights provides for a right to an effective remedy and to a fair trial, codifying existing general principles of EU law which encompass the right to be heard.[22] Thus, the right to be heard has been recognized as a general principle of EU law in contexts ranging from staff cases,[23] to competition law proceedings,[24] to anti-dumping cases.[25] The Court has held that a party to proceedings must generally be able to be exercise the right to be heard before an administrative decision is adopted.[26] Unlike Article 6 ECHR, Article 47 of the Charter is not limited to the determination of civil rights and obligations and therefore applies in principle to the asylum context.[27] Indeed, since the Charter applies to the EU legislative institutions and to the Member States when they are implementing EU law, and the CEAS is a creature of EU law, it is hard to see why the right

19 See ECtHR, *Gebremedhin v France*, Appl. No. 25389/05, Judgment of 26 April 2007, para. 58. See further ECtHR, *Jabari v Turkey*, Appl. No. 40035/98, Judgment of 11 July 2000, para 50.; ECtHR, *Abdolkhani and Karimnia v Turkey*, Appl. No. 30471/08, Judgment of 22 September 2009, para. 108; and ECtHR, *Baysakov and Others v Ukraine*, Appl. No. 54131/08, Judgment of 18 February 2010, para. 71.

20 ECtHR, *I.M. v France*, Appl. No. 9152/09, Judgment of 2 February 2012, particularly para. 155.

21 See ECtHR, *Conka v Belgium*, Appl No. 51564/99, Judgment of 5 February 2002 and ECtHR, *Sultani v France*, Appl. No. 45223/05, Judgment of 20 September 2007.

22 Relevant general principles include the principle of effectiveness and effective judicial protection. See generally, Takis Tridimas, *The General Principles of EU Law*, 2nd ed. (Clarendon: Oxford University Press, 2006), in particular Chapters 8 and 9.

23 ECJ, Case 32/62 *Alvis v Council*, Case 32/62, Judgment of 4 July 1963.

24 ECJ, Case 17/74 *Transocean Marine Paint v Commission*, Case 17/74, Judgment of 23 October 1974.

25 ECJ, Case C-49/88 *Al Jubail Fertilizer v Council*, Case C-49/88, Judgment of 27 June 1991, in which the right to be heard was characterized as a fundamental right.

26 See, for example, ECJ, *Technische Universität München*, Case C-269/90, Judgment of 21 November 1991, para 25, ECJ, *ERG and Others*, Joined Cases C-379/08 and C-380/08, Judgment (GC) of 9 March 2010, para 54-56 and ECJ, *Dokter*, Case C-28/05, Judgment of 15 June 2006, para. 74.

27 Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02), Explanation on Article 47, p.29.

to be heard would not apply to the asylum context. However, the CJEU has yet to adjudicate on the matter.

In sum, the case-law of the ECtHR indicates a right to be heard in contexts which overlap the asylum context, while there is a right to be heard in EU law which applies in principle to the asylum context. When Article 12 CRC is interpreted in the light of the requirements of regional human rights and supranational law, it becomes clear that the right of the *child* to be heard has an important application in the asylum context.

The second argument for considering that the right of the child to be heard applies to the asylum context relates to the wording and drafting history of Article 12 itself. Article 12(1) establishes the right to express views in 'all matters affecting the child'. The drafters of the Convention resisted inserting a list of matters on which children could express views and rejected limiting the scope of Article 12 to the *rights* of the child, with the result that the right to be heard has a broad subject-matter scope.[28] However, since 'all matters' includes *at least* the rights of the child (as evidenced by the fact that Article 12 is a general principle of the Convention) it is worth drawing a connection to Article 22(1) CRC which establishes the right of the child seeking refugee status to appropriate protection. If the child seeking refugee status has the right to appropriate protection, it follows that all decisions relating to protection, whether relating to admissibility or to the substantive claim, whether taken in a 'regular' or 'exceptional' procedure, whether at first instance or on appeal, are 'matters affecting the child' for the purposes of Article 12(1).

Furthermore, Article 12(2) states that the child shall '*in particular* be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child'.[29] Clearly, asylum procedures can be classified as either judicial or administrative proceedings or both, often depending on the instance. Accordingly, the Committee RC states that Article 12(2) 'applies to all relevant […] proceedings affecting the child, without limitation, including […] unaccompanied children, asylum seeking and refugee children.'[30]

Finally, the last clause of Article 12(2) states that the hearing should be 'in a manner consistent with the procedural rules of national law'. According to the Committee RC, '[t]his clause should not be interpreted as permitting the use of procedural legislation which restricts or prevents enjoyment of this fundamental right. On the contrary, States parties are encouraged to comply

28 On the drafting history of Article 12, see Lother Krappmann, 'The weight of the child's view (Article 12 of the Convention on the Rights of the Child)', *International Journal of Children's Rights* 18 (2010): 501-513.

29 Emphasis added. Similarly, the Council of Europe Guidelines 2010, which advocate the right of the child to be heard and express views, apply to 'all ways in which children are likely to be, for whatever reason and in whatever capacity, brought into contact with all competent bodies and services in implementing criminal, civil or administrative law.' *Supra* n. 12, para. 2.

30 Committee RC, General Comment No. 12, *supra* n. 8, para. 32.

with the basic rules of fair proceedings'. As to what the 'basic rules of fair proceedings' are, it can be observed that, in the asylum context, EU Member States are circumscribed by the requirements of the ECHR and EU law. This leads back to and reinforces the first argument. It follows that the right of the child to be heard in Article 12 CRC applies to the asylum context.

Having established that the material scope of Article 12 CRC extends to the asylum context, the question now arises as to which asylum-seeking children fall within its personal scope. The wording of Article 12(1) makes clear that the right extends to every child who is capable of forming his or her own views. According to the Committee RC:

> This phrase should not be seen as a limitation, but rather as an obligation for States Parties to assess the capacity of the child to form an autonomous opinion to the greatest extent possible. This means that States Parties cannot begin with the assumption that a child is incapable of expressing his or her own views. On the contrary, States Parties should presume that a child has the capacity to form his or her own views and recognize that she or he has the right to express them; it is not up to the child to first prove her or his capacity.[31]

In view of this presumption of capacity, the Committee considers that the imposition of fixed age thresholds on the right of the child to express his or her views is inappropriate. A presumption of capacity constitutes the point of departure and this can only be rebutted in the individual case.[32] As regards the meaning of capacity, the Committee RC challenges the predominant adult notion of capacity as being equivalent to a complete understanding of the matter at hand and an ability to express oneself clearly through the medium of language. It is enough that the child has sufficient understanding to be able to have a view on the matter and an ability to communicate his or her view by some means. Thus, the Committee provides that 'full implementation of article 12 requires recognition of, and respect for, non-verbal forms of communicating including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding,

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31 *Ibid,* para. 20.

32 The resistance to 'bright line' age thresholds can be traced back to the movement for children's liberation in the 1960s and '70s. See, for example, Hilary Rodham, 'Children under the law', *Harvard Education Review* 43, no. 4 (1973): 487-514 and Laurence Houlgate, *The Child and The State: A Normative Theory of Juvenile Rights* (John Hopkins University Press, 1980). Hence it is not a new idea. See further, Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child*, 3rd ed., (UNICEF, 2007) and Marie Françoise Lücker-Babel, 'The Right of the Child to Express Views and Be Heard: An Attempt to Interpret Article 12 of the UN Convention on the Rights of the Child', *International Journal of Children's Rights* 3 (1995): 391-404. It is interesting to note that the version of Article 12 that appears in Article 24 of the EU Charter of Fundamental Rights omits any reference to 'the child who is capable of forming his or her own views'. Article 24(1) simply says that '[children] may express their views freely' i.e. all children, regardless of capacity.

choices and preferences'.[33] The Committee also draws attention to the importance of Article 12 for children who experience difficulties in making their views heard, such as children with disabilities, migrant children and other children who do not speak the majority language. These children must be facilitated in expressing their views. Hence, the *problem* of child participation is reconceived: the problem is not the child; the problem is the adult-oriented nature of the process which excludes the child.

However, a *caveat* must be entered at this point. The reference to expressing views 'freely' in Article 12(1) and to the 'opportunity' to be heard in Article 12(2) indicates, according to the Committee RC, that '[e]xpressing views is a choice for the child, not an obligation.'[34] Consequently, it is for the child to decide whether he or she wishes to exercise or waive the right to be heard: the child cannot be forced to be heard against his/her will. Linked to this, the Committee RC warns that 'a child should not be interviewed more often than is necessary, in particular when harmful events are explored.'[35] This is because the hearing of a child can be a difficult process that can have a traumatic impact on a child. This was confirmed in the only case (to date) to come before the CJEU on the issue of the right of the child to be heard in Article 24 of the EU Charter of Fundamental rights. In *Zarraga v Pelz*, the Court linked the right of the child to be heard in Article 24(1) with the best interests of the child in Article 24(2) noting that 'hearing the child cannot constitute an absolute obligation, but must be assessed having regard to what is required in the best interests of the child in each individual case'.[36]

In sum, the right of the child to be heard is fully applicable to the asylum content and is a right of every child who has the capacity – broadly construed – to form and express his/her own views and who wishes to communicate those views. Finally, it is worth drawing attention to the strength of the legal obligation in Article 12: States Parties 'shall assure' the right of the child to freely express his or her views. According to the Committee RC, this is 'a legal term of special strength, which leaves no leeway for State Parties' discretion. Accordingly, States Parties are under strict obligation to undertake appropriate measures to fully implement this right for all children.'[37]

33 Committee RC, General Comment No. 12, *supra* n. 8, para. 21.
34 *Ibid*, para 16. The same point is made in the Council of Europe Guidelines 2010. *Supra* n. 12, para. 46.
35 *Ibid*, para. 24. In a similar vein, the Council of Europe Guidelines 2010 warn against 'secondary victimisation'. *Supra* n. 12, para. 11.
36 CJEU, *Zarraga v Pelz,* Case C-491/10, Judgment of 22 December 2010, para. 64.
37 *Ibid*, para. 19.

4.2.2 The conduct of the hearing

Article 12(1) establishes the right of the child with the requisite capacity to express views 'freely', while Article 12(2) relating to the right of the child in particular to be heard in any judicial or administrative proceedings provides that this may be done 'either directly, or through a representative or an appropriate body'. These provisions have a number of important implications for the conduct of the hearing.

4.2.2.1 The right to a representative

Once the child has decided to be heard, according to the Committee, he or she will have to decide whether to be heard directly or through a representative. In this regard, the Committee recommends that 'whenever possible, the child must be given the opportunity to be directly heard in any proceedings.'[38] In the case of an accompanied minor, the most obvious representative is the child's parent. The representation of a child by his/her parent is consistent with Article 5 CRC which requires states to respect the right and responsibility of parents to provide direction and guidance to the child in the exercise of his/her Convention rights in accordance with the evolving capacities of the child. However, the Committee draws attention to potential conflicts between the child and his/her most obvious representative and underscores the need in such circumstances for an independent representative.

In the case of an unaccompanied minor, the role of the representative should be acquitted by a guardian or adviser, which presupposes the formal appointment of such person. In this regard, it is worth quoting at some length from the Committee RC's General Comment No. 6 on the Treatment of unaccompanied and separated children outside their country of origin:

> […] States should appoint a guardian or adviser as soon as the unaccompanied or separated child is identified and maintain such guardianship arrangements until the child has either reached the age of majority or has permanently left the territory and/or the jurisdiction of the state […] The guardian should have the authority to be present in all planning and decision-making processes, including immigration and appeal hearings […]. The guardian or adviser should have the necessary expertise in the field of childcare […]. Agencies or individuals whose interests could potentially be in conflict with those of the child's should not be eligible for guardianship.[39]

It should be pointed out, because it is not always well understood, that the representative (*qua* guardian or adviser) is distinct from a *legal* representative.

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38 *Ibid*, para 35.

39 Committee RC, General Comment No. 6, 'Treatment of unaccompanied and separated children outside their country of origin', U.N. Doc CRC/GC/2005/6 (2005) para. 33.

The guardian or adviser, who should be a child-care professional, oversees the child's best interests and speaks for the child where necessary; the legal representative, who is a legal professional, provides the child with legal advice and/or representation. The distinction is clearly made in General Comment No. 6 which provides that '[i]n cases where children are involved in asylum procedures or administrative or judicial proceedings, they should, *in addition to* the appointment of a guardian, be provided with legal representation.'[40]

4.2.2.2 The adaptation of the hearing

In terms of the hearing itself, the right of the child to express views 'freely' requires that the hearing be conducted in an age-appropriate manner. Thus the CJEU stated in *Zarraga v Pelz* that the right of the child to be heard in Article 24 of the Charter 'require[s] the court to take all measures which are appropriate to the arrangement of such a hearing, having regard to the child's best interests and the circumstances of each individual case, in order to ensure the effectiveness of [Article 24], and to offer the child *a genuine and effective opportunity to express his or her views*.'[41] Similarly but more concretely the Committee RC observes that:

> A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for his or her age. Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms [and] clothing of judges and lawyers […].[42]

Indeed, there is a wealth of soft law guidance on how to adapt the status determination interview to the needs of children which ranges from guidance on the lay-out of hearing rooms to child-friendly questioning.[43] On the last

40 *Ibid*, para. 36, emphasis added. The Committee further states at para. 72 that the guardian and legal representative should be present during all interviews.

41 CJEU, *Zarraga v Pelz*, Case C-491/10, Judgment of 22 December 2010, para. 66 (emphasis added).

42 Committee RC, General Comment No. 12, *supra* n. 8, para. 34. The Council of Europe Guidelines 2010 provide similar guidance on 'organisation of the proceedings, child-friendly environment and child-friendly language'. *Supra* n. 12, paras. 54-63.

43 See generally, UNHCR, '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', HCR/GIP/09/08 (2009); Separated Children in Europe Programme (SCEP), 'Statement of Good Practice', 4th revised ed. (2009).; UNHCR, 'Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum' (1997). More detailed guidance can often be found in administrative guidance or practice instructions to asylum institutions at the national level. See for example, Canadian Immigration and Refugee Board, 'Child Refugee Claimants: Procedural and Evidentiary Issues' (1996); US Department of Justice, Immigration and Naturalisation Service, 'Guidelines for Children's Asylum Claims'

point, the Committee notes that '[e]xperience indicates that the situation should have the format of a talk rather than a one-sided examination',[44] an observation consistent with the findings of research into the interviewing of children for the purposes of refugee status determination.[45] However, a balance must be struck between a 'soft' approach to interviewing children and a comprehensive approach to interviewing children. In other words, the interviewer must enable the child to be heard by using child-friendly interview techniques, including lines and modes of questioning that are appropriate to the child, while facilitating a full ventilation of the claim by giving the child the opportunity to rebut any presumptions and challenge any negative inferences that are likely to be held against him/her when making the decision. After all, the child has a right pursuant to Article 22(1) to 'appropriate protection' – something the child is unlikely to get if the claim is not thoroughly explored.

In this regard, valuable guidance can be gleaned from the adaptation of the criminal procedure for minors, a question on which the ECtHR has pronounced in the context of the right to a fair trial in Article 6(1) ECHR. For example, in *S.C. v The United Kingdom*, while the Court accepted that a child defendant does not need to understand every point of law or evidential detail for the purposes of Article 6(1), it did hold that the child should be able to participate effectively in the proceedings:

> [E]ffective participation' in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence.[46]

(1998) ; Finnish Migration Board, Directorate of Immigration, 'Guidelines for Interviewing (Separated) Minors' (2002). For academic commentary on the importance of such guidance see Jacqueline Bhabha and Wendy Young, 'Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines', *International Journal of Refugee Law* 11, no. 1 (1999): 84-125.

44 Committee RC, General Comment No. 12, *supra* n. 8, para. 43.

45 For example, Olga Keselman et al., 'Mediated Communication with Minors in Asylum Seeking Hearings', *Journal of Refugee Studies* 21, no. 1 (2008): 103-116; and more generally, Gregory Smith, 'Considerations When Interviewing Children', *Children's Legal Rights. Journal* 12, no. 2 (1991): Special Report 1-7.

46 ECtHR, *S.C. v United Kingdom*, Appl. No. 60958/00, Judgment of 15 June 2004, para. 29. Reiterated most recently in ECtHR, *Güveç v Turkey*, Appl. No. 70337/01, Judgment of 20 January 2009, para 124. See further ECtHR, *T. v United Kingdom*, Appl. No. 24724/94, Judgment of 16 December 1999, in which the Court held that 'it is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level

It is submitted that the need for 'effective participation' in the international protection context, where *refoulement* is potentially at stake, is no less important than in the criminal context, where deprivation of liberty is potentially at stake. Consequently, a delicate balance must be struck between a 'soft' interviewing style and the need to address 'hard' issues relating to the core of the claim: properly handled, the two are not mutually exclusive.

In order that the hearing be conducted in an age-appropriate manner, staff involved in the hearing must be trained and competent to work with children. By now, it should be apparent just how difficult it is to sensitively but thoroughly interview children for the purposes of status determination. It is not something that can be done in the absence of specialized training.[47] The need for training is especially pronounced in the case of children who, because of their age, stage of development, disability or psychological state, cannot express themselves easily. Indeed, it is quite likely that in respect of such children the intervention of specialists will be required.[48] Thus, in its General Comment No. 12, the Committee RC notes that it is incumbent on States Parties to provide training on Article 12 and its application in practice to all professionals working with, and for, children including lawyers, judges, police, social workers, psychologists, caregivers, residential and prison officers, civil servants, public officials and asylum officers. In the asylum context, interpreters could usefully be added to this list, since they constitute the medium through which the child is heard. The obligation of staff training also derives from Article 3(3) CRC, which provides: 'States Parties shall ensure that the institutions, services and facilities responsible for the care or *protection* of children shall conform with the standards established by competent authorities, par-

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of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings.' Para. 84.

47 The need for specialized training for eligibility officers working with children has been stressed by the Committee RC in a number of concluding observations. For example, in its Concluding Observations to Austria in 2005, the Committee recommended that Austria 'ensure that all interviews with unaccompanied and separated asylum seeking children are carried out by professionally qualified and trained personnel.' UN Doc. CRC/C/15/Add.251 (2005), para. 48. Similarly, in its Concluding Observations to Finland in 2000, the Committee recommended 'that the State party ensure adequate resources for the training of the officials who receive refugee children, in particular in child interviewing techniques.' U.N. Doc. CRC/C/15/Add.132, para. 52. Training materials on interviewing asylum seeking children have been developed in a number of different fora. For example, the *European Asylum Curriculum*, a training project supported by the European Union, has a section on interviewing children. Available on http://www.gdisc.org/uploads/tx_gdiscdb/final_curriculum_EAC.pdf. See further, Separated Children in Europe Programme (SCEP), 'Training Guide' (UNHCR and Save the Children, 2001). On a project in Ireland to train asylum staff at first and second instance in interviewing children see, by this author, 'Refugee Status Determination of Separated Children: International Developments and the Irish Response, Part II – The Asylum Procedure', *Irish Journal of Family Law* 2 (2005):21-27.

48 See Fernando Gutierrez, 'Psychological Evaluation of Children and Families in the Immigration Context', *Children's Legal Rights Journal* 19, no. 3 (1999): 17-25.

ticularly in the areas of safety, health, in the number and *suitability of their staff*, as well as *competent supervision*.'[49]

4.2.3 The evaluation of the child's views

Article 12(1) CRC states that 'the views of the child [must be] given due weight in accordance with the age and maturity of the child.' There are a number of issues to be clarified in this statement: first, how to assess the age and maturity of the child; and second, the meaning and implications of the term 'due weight'.

4.2.3.1 Assessment of age and maturity

In the asylum context, the age of the child is not always apparent, particularly when the child is unaccompanied or separated. The Committee RC recommends that age assessment be conducted as part of the prioritized identification of a child as separated or unaccompanied. However, the Committee warns that age assessment:

> […] should not only take into account the physical appearance of the individual, but also his or her psychological maturity. Moreover, the assessment must be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity; and, in the event of remaining uncertainty, should accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, she or he should be treated as such.[50]

Indeed, there is a large amount of 'soft law' guidance and literature on the proper conduct and limits of age assessment.[51]

However, even where the age of the child can be established with a reasonable degree of accuracy, chronological age is not the only measure of the weight to be given to the views of the child: maturity is equally significant. Although the concept of maturity is difficult to define, useful guidance is supplied by Article 5 CRC which acknowledges the need for parental direction and guidance in the exercise by the child of his/her convention rights but links

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49 Emphasis added. See also Council of Europe Guidelines 2010, *supra* n. 12, paras. 14 and 15 on the training of professionals working with and for children.

50 Committee RC, General Comment No. 6, *supra* n. 39, para. 31(i).

51 See for example, UNHCR , *supra* n. 43, para. 75; SCEP, *supra* n. 43, para. D5; Heaven Crawley, *When is a Child Not a Child? Asylum, Age Disputes and the process of Age Assessment* (Immigration Law Practitioners' Association, 2007); Kate Halvorsen 'Report: Separated Children in Europe Programme Workshop on Age Assessment and identification', (Bucharest 2003) (on file with author).

the degree of parental oversight with the child's 'evolving capacities'. This concept acknowledges that maturity is something that is gained over time, not reached at a specific time. Consequently, it has an inherently variable quality depending on information, experience, environment, social and cultural expectations and levels of support. One of the variables is the matter at hand, which may be complex but not necessarily significant (e.g. the travel route), or straightforward but highly significant (e.g. the reason for flight), or complex and significant (e.g. multiple reasons for flight).[52] Consequently, the assessment of the child's maturity it itself a complex task and one that can only be undertaken on the basis of an individualized assessment.

4.2.3.2 The 'due weight' requirement

As to giving 'due weight' to the views of the child, an ordinary reading of the terms suggests that soliciting the views of the child is not enough but that considerable significance has to be attached to those views. Thus the Committee RC states that 'simply listening to the child is insufficient; the views of the child have to be seriously considered when the child is capable of forming his or her own views.'[53] Consequently, nominal or token consultation with the child is inconsistent with the requirements of Article 12.

However, giving 'due weight' to the child's views is complicated in the asylum context because there seems at first to be little correlation between a child's views and his/her eligibility for international protection. As Daniel O'Donnell notes, '[t]he use of the term 'views' in the second paragraph of Article 12 makes the right more relevant to certain kinds of legal and administrative proceedings than others', for example, in family law proceedings as opposed to juvenile justice proceedings.[54] Actually, it is submitted that the views of the child are relevant to both but different ways. This can be best appreciated by asking the question: views on what? In the family law context, the child's views are relevant to the outcome (which parent to live with), whereas in the juvenile justice context, the child's views on the outcome (prosecution or acquittal) are largely irrelevant. However, his/her views on what happened may be highly relevant from an evidential stand-point. The status determination context is like the criminal context in this regard: the views of the child as to whether he/she would prefer to remain in the host state or return home are largely irrelevant, just as they are in the case of an adult; however, the views of the child about the reasons for flight, the con-

52 On the interaction of maturity and subject-matter, see David Archard and Marit Skivenes, 'Balancing a Child's Best Interests and a Child's Views', *International Journal of Children's Rights* 17 (2009): 1-21.

53 Committee RC, General Comment No. 12, *supra* n. 8, para. 28.

54 Daniel O'Donnell, 'The Right of Children to be Heard: Children's Right to Have Their Views Taken into Account and to Participate in Legal and Administrative Proceedings', *Innocenti Working Paper* (UNICEF, 2009).

ditions in the country of origin and the risks on return are highly relevant from an evidential stand-point, just as they are in the case of an adult.

Consequently, Article 12 CRC requires 'due weight' to be given to the child's view of his/her protection needs, in accordance with his/her age and maturity: the greater sum of the age and maturity of the child, the more weight to be given to the child's views and vice versa.[55] The latter situation (i.e. minimal weight to the views of the child because of a deficit of age and maturity) does not prevent the decision-maker from taking a decision on the matter; rather, it requires the decision-maker to assume more responsibility for the decision, for example, by having greater regard to objective factors. In the asylum context, this has repercussions for the burden of proof and the principle of the benefit of the doubt. Thus, in its guidelines on child asylum claims UNHCR advises:

> 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. 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.[56]

Furthermore, giving 'due weight' to the views of the child in the asylum context has significant implications for the use of automatic, negative credibility inferences. In this regard, it is worth quoting at some length from the UNHCR guidelines:

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55 This casts doubt on the suggestion in the UNHCR Handbook that '[i]t can be assumed that – in the absence of indications to the contrary – a person of 16 or over may be regarded as sufficiently mature to have a well-founded fear of persecution. Minors under 16 years of age may normally be assumed not to be sufficiently mature. They may have fear and a will of their own, but these may not have the same significance as in the case of an adult'. UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1 (1979), Re-edited, Geneva, January 1992, para. 215. This approach effectively conflates age with maturity and conflicts with the Committee RC's recommendation about the presumption of capacity. For critical commentary of the UNHCR Handbook in this regard, see Jacqeuline Bhabha, 'Minors or Aliens? Inconsistent State Intervention and Separated Child Asylum-Seekers', *European Journal of Migration and Law* 3 (2001): 297-298.

56 UNHCR, *supra* n. 43, para 73. See further UNHCR Handbook, *ibid*, para. 219. According to paragraph 196 of the Handbook, 'while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, *it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application*.' Emphasis added. In *Hatami v Sweden*, the ECtHR pronounced on the need for flexibility in dealing with claims of traumatized persons or victims of rape or torture who may have difficulties in recounting their experiences. ECtHR, *Hatami v Sweden*, Appl. No. 32448/28, Judgment of 23 April 1998, para 106. Arguably the same principle applies to minors.

> 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 it 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 relating to abstract notions such as time or distance. Thus, what might constitute a lie in the case of an adult may not necessarily be a lie in the case of a child.[57]

Accordingly, it is submitted that giving 'due weight' to the views of the child in accordance with age and maturity – in the above sense of attributing the proper quality, substance or credence to the child's views – is simply not possible if the weight to be given to testimony has been pre-determined by rules establishing negative credibility inferences. This is particularly the case when such rules are founded on assumptions about how *adults* conduct themselves credibly (or incredibly) – assumptions that do not hold for children.

4.3 PHASE ONE CEAS: COMPLIANCE WITH THE RIGHT OF THE CHILD TO BE HEARD

According to Article 12 CRC, the right of the child to be heard pertains to 'any judicial and administrative proceedings affecting the child'. A large number of asylum proceedings (or 'procedures' to use the lexicon of the CEAS) can be identified as relevant to this right. Two sets of procedures are not covered by the APD: procedures for determining the Member State responsible under the DR and the procedures in the RCD for the reduction or withdrawal of reception conditions. The bulk of procedures, however, are governed by the APD, which will be the focus of this section.

The procedures in the APD may, with some shoe-horning, be classified as follows:

- what might be called the 'regular' first instance procedure which must generally, subject to some derogations, comply with the 'basic principles and guarantees' set out in Chapter II of the directive;[58]

57 UNHCR, *supra* n. 43, para. 72.

58 However, some of the guarantees attach to the *body* in charge of the procedure, as opposed to the procedure itself. Consequently, where an alternative body administers the procedure, such guarantees do not apply. Article 4(2) APD provides that a body other than the usual 'determining authority' may be established for DR cases, so-called national security cases, the specific procedures and the border procedure for processing claims at the border or in transit zones.

- what might be called 'exceptional' first instance procedures to which some or all of the 'basic principles and guarantees' as set out in Chapter II of the directive are not required to apply.[59] These consist of an admissibility procedure,[60] an accelerated procedure[61] and the so-called 'specific procedures'.[62] There are two specific procedures currently in operation:
  - a preliminary examination procedure for screening subsequent applications to determine whether they should be admitted to the regular procedure or summarily rejected;[63] and
  - a border procedure, which Member States can retain on the basis of a stand-still clause, for deciding on permission to enter the territory;[64]
- procedures for the withdrawal of refugee status which establish a unique set of procedural rules but also cross-reference a limited number of the provisions of the 'basic principles and guarantees' of Chapter II;[65] and
- appeal procedures which are governed by some of the 'basic principles and guarantees' of Chapter II and some rules specifically geared to the appellate stage.[66]

Not surprisingly, the procedural guarantees in the APD have been described as 'highly qualified and differentiated',[67] making an assessment of compliance with the right of the child to be heard a complex exercise – itself a portent of the difficulties the child is likely to face in participating in the procedure.

59 The term 'exceptional' is something of a misnomer as the chapter relating to first instance procedures (Chapter III) is largely taken up with establishing exceptional procedures. Thus as Costello opines 'exceptional procedures become the norm'. Cathryn Costello, 'The European Asylum Procedures Directive in Legal Context', *New Issues in Refugee Research*, UNHCR Research Paper No. 134 (2006): 8.

60 Article 25.

61 Article 23(4). The grounds for acceleration may also constitute grounds for a manifestly unfounded determination under Article 28(2).

62 Article 24.

63 Article 32-34.

64 Article 35(2)-(5). Hereinafter, the 'border entry procedure'. This procedure should be distinguished from the 'regular' border procedure under Article 35(1) whose function is to decide at the border or transit zones on applications made at such locations. The latter is not classified as a 'specific procedure'. There was originally a third 'specific procedure' under the directive, namely, the European safe third concept in Article 36. However, since ECJ, *European Parliament v Council*, Case C-133/06, Judgment of 6 May 2008, this concept is no longer operative and therefore will not be analyzed in the context of Phase One CEAS, although it will be analyzed in the context of Phase Two.

65 Articles 37 and 38.

66 Article 39.

67 Cathryn Costello, *supra* n. 59, p. 1.

4.3.1 The right to a hearing

Based on the general presumption of capacity, children should be given the opportunity of a hearing in all asylum procedures to which they are subject. To what extent is the right of the child to a hearing respected in the APD?

Article 12 (Personal interview) of Chapter II of the APD provides in paragraph 1:

> Before a decision is taken by the determining authority, the applicant for asylum shall be given the opportunity of a personal interview on his/her application for asylum with a person competent under national law to conduct such an interview. Member States may also give the opportunity of a personal interview to each dependant adult referred to in Article 6(3).
> Member States may determine in national legislation the cases in which a minor shall be given the opportunity of a personal interview.

As outlined in Chapter 3, Article 6(4) APD on access to the procedure permits but does not require Member States to determine whether a minor can be an 'applicant for asylum'. Where a Member State provides that a minor can be an applicant for asylum, the first sentence of Article 12(1), being a mandatory provision, should arguably take precedence over the third sentence, which is an optional provision. Thus, where a minor is an applicant for asylum, he/she must be given the opportunity of a personal interview. However, where a minor is not an applicant for asylum – because the Member State has omitted to legislate for this possibility or because the minor's claim is subsumed into that of his/her parents' or lodged by a representative – then the minor has no automatic right to a personal interview. The Commission's evaluation of the APD contains no information on whether or which Member States grant minors the opportunity of a personal interview.[68] However, a UNHCR report on the application of key provisions of the APD from 2010 notes that '[t]he research found that in the absence of a specific requirement in the APD, national legislation on the circumstances in which a child shall be given the opportunity of a personal interview in the asylum procedure is divergent, and in some cases absent.'[69]

In addition to the ambivalence in the APD regarding whether the child has a right to be interviewed, the directive provides for what has been described as an 'extensive catalogue of situations in which the personal interview can

68 'Report from the Commission to the European Parliament and the Council on the Application of Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status', COM (2010) 465 final. Hereinafter, 'Commission evaluation of the APD'.

69 UNHCR, 'Improving Asylum Procedures, Comparative Analysis and Recommendations for Law and Practice (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States)' (Brussels, 2010), 23.

be omitted'.[70] Therefore, even if the child is granted in principle a right to be interviewed under national law, the Member State may still omit the interview on numerous grounds. While there are at least ten such grounds in the APD, the focus here will be on those grounds which seem likely to be applied or are particularly detrimental to children.[71]

One such ground is Article 12(3) which provides for the omission of the personal interview where it is 'not reasonably practicable, in particular where the competent authority is of the opinion that the applicant is unfit or unable to be interviewed owing to enduring circumstances beyond his/her control'. This provision seems apt to be applied to young children whose age is an enduring circumstance beyond their control which, if the procedure is not adapted to children, could render them unfit or unable to be interviewed.[72] Furthermore, the reference to the 'competent authority' as opposed to the usual 'determining authority' means that a body that is not the normal status determination body can make the critical decision that the applicant is unfit or unable to be interviewed. So what kind of body is this 'competent authority'? Some insight is provided by Article 4(2) which provides that an authority that is not the determining authority may administer six different types of procedure, including two types of border procedures.[73] Hence, a body that administers any of these procedures is a 'competent authority' for the purposes of the directive. The idea, for example, that a border guard should be vested with the power to decide whether a child is fit or able to be interviewed is highly troubling.

Another problematic provision is Article 12(2)(c) which allows the personal interview to be omitted in certain unfounded cases which may also be the basis for an accelerated procedure and a manifestly unfounded determination.[74] In a recent judgment, the ECtHR found the respondent State to be in violation of Article 13 in conjunction with Article 3 for, *inter alia*, processing an application for asylum in an accelerated/manifestly unfounded procedure

70 *Ibid*, p. 21.

71 Four grounds arise in the context of the ordinary procedure: in Article 12(2)(a), Article 12(2)(b), Article 12(3) and Article 20. Five grounds arise in the context of the accelerated/manifestly unfounded procedure: in Article 12(2)(c) which cross-references Article 23(4)(a), (c), (g), (h) and (j). One relates to the preliminary examination of subsequent applications in Article 35(3)(d). Finally, Article 25 relating to the admissibility procedure is silent on the question of a personal interview.

72 No feedback on the operation of this provision is provided in the Commission's evaluation of the directive. Commission evaluation of the APD, *supra* n. 68.

73 The six procedures are: the DR procedure, a procedure for dealing with so-called 'national security cases', a preliminary examination procedure for processing subsequent applications, a border procedure for deciding on claims made at the border or in transit zones, a border procedure to decide on permission to enter, and a procedure for dealing with European safe third country cases.

74 According to the Commission evaluation of the directive, 9 Member States avail of the option to omit the personal interview in the context of accelerated procedures: CY, CZ, DE, EL,FI, IT,LU SI, UK. Commission evaluation of the APD, *supra* n. 68, § 5.1.4, p. 6.

which made it practically impossible for the applicant to make out his claim.[75] Of particular interest in the present context, the Court criticized the fact that the applicant was given only a brief half-hour interview. It follows that an accelerated/manifestly unfounded procedure which dispenses with the interview entirely, at least in contexts where there is an allegation of torture or lesser forms of ill-treatment, is likely to fall foul of Article 13 ECHR.

Over and above this general objection, the grounds listed in Article 12(2)(c) are apt to be applied to minors. Five grounds are enumerated: 1) the application is not relevant or of minimal relevance to qualification as a refugee; 2) the applicant comes from an objectively designated safe country of origin or a safe third country; 3) the applicant has made inconsistent, contradictory, improbable or insufficient representations which make his/her claim clearly unconvincing; 4) the applicant has submitted a subsequent application which does not raise any new elements; and 5) the applicant is making an application merely in order to delay or frustrate the enforcement of a removal decision. Four of these grounds are problematic in the context of minors. Grounds 1) and 2) are problematic because, as was outlined in Chapter 3, owing to the adult-oriented nature of the definition of persecution, serious harm and restrictive concepts such as safe country concepts, a child-specific protection need may not be immediately perceived as relevant to international protection. Ground 3) is problematic because children's accounts are prone to being non-linear, disjointed and sometimes – in consequence of the cultural relativism of the adjudicator – improbable. And ground 4) is problematic because children who fail to be recognized on account of the reasons just outlined may have no choice but to submit a subsequent application.

A final area where a personal interview can (apparently) be omitted and which is particularly detrimental to children is the admissibility procedure. Article 25 on inadmissible applications exempts the State from having to examine the substance of the application in seven circumstances.[76] Article 25 is silent on the question of a personal interview. However, it can be observed that two of the grounds of inadmissibility, namely, safe third country and the lodging of an identical application, overlap with two of the grounds in Article 12(2)(c). In consequence, a personal interview is not a prerequisite for a finding of inadmissibility on either of these grounds, at least.

The admissibility procedure is particularly detrimental to children because it conflicts with the right of the child to *appropriate* protection in Article 22

75 ECtHR, *I.M. v France*, Appl. No. 9152/09, Judgment of 2 February 2012.

76 The circumstances are: another EU Member State is a first country of asylum; a non-EU Member State is a first country of asylum; a non-EU Member State is a safe third country; the applicant has a status equivalent to refugee status; the applicant has a right to remain pending a decision on the granting of a status equivalent to refugee status; the applicant has lodged an identical application after a final decision; the application is a subsequent application by a dependent who formerly consented to be part of an application made on his/her behalf.

CRC. This mandates an assessment of the child's protection needs which, in turn, requires that a child's claim be considered substantively, as opposed to being screened to exclude a substantive examination on formal or procedural grounds. Moreover, deeming a child's claim to be inadmissible conflicts with the principle of the best interests of the child as laid down in Article 3(1) CRC. As outlined in Chapter 2, the best interests principle mandates an individualized assessment of all relevant facts in order to identify from the available options which is best. Since the admissibility procedure excludes from consideration the facts relating to the substance of the claim, it circumvents a best interests assessment.

Having dealt with the matter of the personal interview at first instance, there are two remaining procedures which must be evaluated in the light of the right of the child to be heard: the procedures for withdrawing refugee status and the appeals procedures.

Article 14 QD establishes the grounds on which refugee status can be withdrawn, grounds such as cessation and exclusion. However, the procedure is governed by the APD. As regards the right to be heard, Article 38(1)(b) APD provides that where a Member State is considering withdrawing refugee status, the person concerned is entitled to submit in a personal interview *or* in a written statement, reasons as to why his/her refugee status should not be withdrawn. Consequently there is no right to a personal interview. Article 38(1)(b) goes on to state that where there is a personal interview, it must be in accordance with Article 12. Article 12, as we have already seen, authorizes Member States to determine in national legislation the cases in which a minor shall be given the opportunity of a personal interview.[77]

However, in a number of cases concerning withdrawal of refugee status for reasons of exclusion and cessation, the CJEU has strongly indicated the need for a personal interview on the basis of the wording of the QD. Thus in joined cases *B and D*, the Court held that, in applying an exclusion ground to an applicant, there must be an 'individual assessment of the specific facts',[78] a 'full investigation into all the circumstances of each individual case',[79] and an assessment of individual responsibility 'in the light of both objective and subjective criteria.'[80] The particular case involved exclusion for membership in a terrorist organization. The Court established that:

> […] the competent authority must, *inter alia*, assess the true role played by the person concerned in the perpetration of the acts in question; his position within the organization; the extent of the knowledge he had, or was deemed to have, of

77 The Commission evaluation of the directive is silent on the issue of the personal interview in the context of withdrawal procedures. Commission evaluation of the APD, s*upra* n. 68.

78 CJEU, *Bundesrepublik Deutschland v B and D*, Case C-57/09 and C-101/09, Judgment of the Court (GC) of 9 November 2010, para. 91.

79 *Ibid*, para. 93.

80 *Ibid*, para. 96.

> its activities; any pressure to which he was exposed; or other factors likely to have influenced his conduct.[81]

It is hard to see how the competent authorities could discharge this obligation without interviewing the applicant. Similarly in *Abdulla and Others*, the Court held that, in applying the cessation ground relating to fundamental change of circumstances, the competent authorities must consider, not only whether the original circumstances for seeking refugee status have ceased, but also whether the person has any other reason to fear being persecuted. These issues must be assessed 'having regard to the refugee's individual situation'.[82] Again, this strongly implies that cessation is predicated on a personal interview. Accordingly, it is submitted that, despite the terms of Article 38(1)(b) APD which permit Member States not to interview a refugee in the context of withdrawal, the QD, as interpreted by the Court, does mandate a personal interview. This is significant in the context of children because, as was discussed in Chapter 3, minors are not exempt from having their refugee status withdrawn and, moreover, the application of exclusion and cessation grounds to minors raises particular difficulties from a child-rights perspective, underscoring the need for a personal interview.

Finally, as regards appeal procedures, Article 39(1) on the right to an effective remedy provides that asylum applicants have the right to an effective remedy before a court or tribunal against a first instance asylum decision including: a decision on admissibility; a decision taken at the border or in a transit zone; a refusal to reopen a discontinued application; a decision not to further examine a subsequent application; a decision refusing entry in the context of a border procedure; and a decision to withdraw refugee status. In *Diouf*, the CJEU summarized Article 39(1) as requiring a remedy against all decisions which entail rejection of the application for asylum for substantive reasons or for formal or procedural reasons which preclude any decision on the substance.[83] Consequently the material scope of the right to an effective remedy under the directive is broad.

However, Article 39 is silent on the question of whether the remedy must include a hearing or whether a paper review is sufficient. Certain provisions of the directive appear to militate against an appeal hearing while others appear to imply a hearing. For example, Article 7 provides that, subject to certain exceptions, applicants must be allowed to remain in the Member State until a first instance decision has been made. *A contrario*, there is no right to remain after the first instance decision has been made and, it follows, no right

81 *Ibid*, para. 97.

82 CJEU, *Abdulla, Hasan, Adem, Mosa Rashi and Jamal v Bundesrepublik Deutschland*, Joined cases C-175/08, C-176/08, C-178/08 and C-179/08, Judgment of the Court (GC) of 2 March 2010, para. 70.

83 CJEU, *Diouf v Ministre du Travail, de l'Emploi and de l'Immigration*, Case C-69/10, Judgment of 28 July 2011, para. 42.

to an appeal hearing. However, Article 7 must be interpreted in the light of Article 39(3) which allows Member States, in accordance with their international obligations, to decide on the question of suspensive effect. But Member States' international obligations (in particular, the right to an effective remedy under Article 13 ECHR) mandate a remedy with automatic suspensive effect.[84] Furthermore, the case-law of the ECtHR on Article 13 strongly suggests the need for an appeal hearing.[85] Unsurprisingly in view of the ambiguity in the directive on the question of an appeal hearing, state practice is mixed: although the Commission evaluation has nothing to say on the question of an appeal hearing, the UNHCR report on the directive notes that only six of the twelve countries surveyed provides the appellant with the possibility of a hearing.[86]

In sum, the qualified right of the child to a personal interview which is undermined by the catalogue of situations in which a personal interview may be omitted – some of which are apt to be applied or are particularly detrimental to children – suggest that the right of the child to a hearing is not guaranteed in the first instances procedures as established in the APD. The right of the child to a hearing is no better secured in the withdrawals procedure or in the appeals procedure. However, it is submitted that the discretion given to Member States regarding a personal interview or appeal hearing is likely to be fettered by the CJEU and the ECtHR.

There is one final issue to address in this subsection: whether the APD conceives of the hearing of the applicant as a right of the applicant or a duty of the applicant. Article 12 CRC establishes that a child cannot be forced to be heard against his/her will. However, the APD is ambiguous as to whether the hearing of the applicant is a right or a duty. Article 12 (Personal interview) refers to the 'opportunity of a personal interview', presenting the interview as a right, not an obligation. However, various other provisions of the directive suggest the contrary, providing for negative procedural consequences if the

84 For a cross-section of cases, see ECtHR, *Jabari v Turkey*, Appl. No. 40035/98, Judgment of 11 July 2000; ECtHR, *Conka v Belgium*, Appl. No. 51564/99, Judgment of 5 February 2002; ECtHR, *Gebremedhin v France*, 25389/05, Judgment of 26 April 2005; ECtHR, *Abdolkhani and Karimnia v Turkey*, Appl. No. 30471/08, Judgment of 22 September 2009; ECtHR, *Baysakov and Others v Ukraine*, Appl. No. 54131/08, Judgment of 18 February 2010; ECtHR, *M.S.S. v Belgium and Greece*, Appl. No. 30696/09, Judgment of 21 January 2011. For commentary, see Marcelle Reneman (2010) 'An EU Right to Interim Protection during Appeal Proceedings in Asylum Cases?' *European Journal of Migration and Law,* 12, 407-434.

85 For instance, in the context of an allegation that expulsion will violate Article 3, the ECtHR has stressed the need for a full and *ex nunc* assessment of the claim. It is hard to see how this could be done in the absence of an appeal hearing. See, for example, ECtHR, *Salah Sheekh v The Netherlands*, Appl. No. 1948/04, Judgment of 11 January 2007 and ECtHR, *NA. v The United Kingdom*, Appl. No. 25904/07, Judgment of 17 July 2008.

86 UNHCR, s*upra* n. 69, p. 91.

applicant does not appear for or engage with the personal interview.[87] There is no exemption for minors and indeed Article 17 on guarantees for unaccompanied minors, having established the right to a representative in paragraph 1, provides in the second sub-paragraph that 'Member States may require the presence of the unaccompanied minor at the personal interview, even if the representative is present.'[88] Consequently, the APD does not prohibit and may even facilitate the interviewing of children against their will.

4.3.2 The conduct of the hearing

The right of the child in Article 12 CRC to be heard 'either directly or through a representative' and to express views 'freely' has significant implications for the conduct of the hearing. In particular, the child has a right to a representative and to an appropriately modified hearing. To what extent are these rights met in the APD?

4.3.2.1 The right to a representative

Article 17 APD (Guarantees for unaccompanied minors) provides in paragraph 1(a) that Member States must 'take measures to ensure that a representative represents and/or assists the unaccompanied minor with respect to the examination of the application.' Article 17(1)(b) establishes that the representative plays an information and support role in relation to preparing the minor for the personal interview. Moreover, the representative must be permitted to be present at the interview and to ask questions or make comments within the framework set by the person who conducts the interview. The representative,

87 Thus, Article 12(6) provides: Irrespective of Article 20(1) Member States, when deciding on the application for asylum, may take into account the fact that the applicant failed to appear for the personal interview, unless he/she had good reasons for the failure to appear.' Article 20, in turn, sets out the procedure to be followed in the case of implicit withdrawal or abandonment of the application. It provides in paragraph 1(a) that failure to appear for interview constitutes a ground for implicit withdrawal or abandonment of an application. Article 33 (Failure to appear) allows Member States to apply the preliminary examination procedure for subsequent claims to an applicant who fails to appear before the competent authority at a specified time. Finally, failure to engage with the hearing may fall under any one of a number of grounds for accelerating the claim under Article 23(4) such as ground (d), withholding relevant information or ground (g) making insufficient representations, all of which also constitute grounds for a manifestly unfounded determination.

88 Similarly, Article 16 relating to the scope of legal assistance and representation provides in the second sub-paragraph of paragraph 4 'Member States may require the presence of the applicant at the personal interview, even if he/she is represented under the terms of national law by […] a legal adviser or counselor, and may require the applicant to respond in person to the questions asked.'

who can be the same person as the representative appointed under the RCD, is defined in Article 2(i) as:

> [A] person acting on behalf of an organization representing an unaccompanied minor as legal guardian, a person acting on behalf of a national organization which is responsible for the care and well-being of minors, or any other appropriate representation appointed to ensure his/her best interests.

On the one hand, these provisions can be regarded as positive since they establish the right of an unaccompanied minor to a representative. But on the other, the wording and generality of the provisions leads to ambiguities. For example, Article 2(i) fails to specify any minimum requirements relating to the qualifications, independence or role of the representative. Indeed, the task of the representative as it emerges from the above provisions of the APD is not necessarily to represent the child. In this regard, note the 'and/or' formulation in Article 17(1)(a) and the limited role of the representative at interview in Article 17(1)(b), which suggest that the role can be reduced to one of an assistant. This contrasts with Article 12 CRC which requires that, where necessary, the representative represent – in the sense of 'speak for' – the child. The net result of these various provisions is uncertainty about the role of the representative in the procedure.

This is reflected in the Commission evaluation of the APD which reports that while all Member States do provide for representation of unaccompanied minors in the procedure, generally in the form of a guardian, the guardianship systems vary considerably between Member States in terms of institutional arrangements, authorities involved and the guardians' role and qualifications.[89] This is consistent with the findings of a number of recent reports.[90] For example, in a report into separated children seeking asylum in the EU, the Fundamental Rights Agency found that 'most of the children interviewed were not fully aware of whether they had a guardian, who that person was or which responsibilities were attached to the guardianship function.'[91] Consequently, there is a need for a fuller definition of the role and responsibilities of the representative in the APD.

Furthermore, Article 17(2) and (3) APD establish derogations from the obligation to appoint a representative. Article 17(2) provides that Member States may refrain from appointing a representative where a) the unaccompanied minor will in all likelihood reach the age of maturity before a decision at first instance is taken (i.e. age out); b) can avail himself, free of charge, of

89 Commission evaluation of the APD, *supra* n. 68, § 5.1.6, p. 8.

90 See, for example, UNHCR, *supra* n. 69, p. 36 and Defence for Children International-ECPAT The Netherlands, 'Core Standards for Guardians of Separated Children in Europe: Goals for Guardians and Authorities' (Leiden, 2011).

91 EU Fundamental Rights Agency, 'Separated, asylum-seeking children in European Union Member States' (Summary Report/Conference Edition) (2010), 33.

a legal adviser 'or other counsellor admitted as such under national law to fulfil the tasks assigned above to the representative'; c) is married or has been married.[92] Article 17(3) permits Member States to retain a derogation existing at the time of the adoption of the directive from appointing a representative to an unaccompanied minor over 16 'unless he/she is unable to pursue his/her application without a representative.'[93]

Article 17(2)(b) is unfortunate because it conflates two fundamentally distinct roles: the representative and the legal adviser. As regards the other grounds for derogation, it can be observed that they all relate to the constructive emancipation of the minor – something that is discouraged by the Committee RC, as will be discussed in Chapter 5. On the other hand, a presumption of capacity on the part of older children is consistent with the notion of the evolving capacities of the child in Article 5 CRC, *providing that the presumption can be rebutted*. In this regard it is worth noting that Article 17(2) and (3) must be read in the light of Article 17(6) which establishes that the best interests of the child shall be a primary consideration for Member States when implementing the article. Since it is necessary to undertake an individualized assessment of best interests, it is submitted that this offers the possibility to rebut the presumption in the individual case. Consequently, the grounds for derogation that relate to constructive emancipation of the minor can be interpreted consistently with the right to a representative.

Article 17(1) on the right to a representative is explicitly stated to apply to 'all procedures provided for in this Directive'. However, it is unclear how this provision interacts with Article 24 which allows Member States to derogate from the basic principles and guarantees of Chapter II (including Article 17) in the context of the specific procedures. In this regard, it is necessary to refer to the provisions relating to the specific procedures. Articles 32-34 on the preliminary examination procedure for subsequent applications are silent on the question of a representative for unaccompanied minors. However, the provisions on the border entry procedure cross-reference Article 17(1)-(3), thereby establishing that the guarantees relating to the representative subsist, albeit subject to the derogation provisions.[94]

Finally, the obligation to appoint a representative only applies to unaccompanied minors. No provision of the APD refers to the need for an accompanied minor who lodges an application on his/her own behalf or makes representations in relation to his/her parent's claim to be represented by someone – either the parent or, in case of a conflict of interest, an independent representative. However, Article 13 (Requirements for a personal interview) does allow,

92 According to the Commission evaluation of the APD, '[o]nly a few Member States apply exceptions to the duty to appoint a representative.', *supra* n. 68, § 5.1.6, p.8.

93 According to the Commission evaluation of the APD, just two Member States have retained this derogation, *ibid*, § 5.1.6, p. 8.

94 Article 35(3)(f).

exceptionally, for the presence of family members at interview where the determining authority considers it necessary. Hence Article 13 could be used as an enabling provision. This would not, however, address the need for an independent representative where there is a conflict of interest.

In brief, the provisions of the APD relating to the appointment of a representative for unaccompanied minors are drafted at a level of generality that does not guarantee that the requirements of Article 12 CRC will be met. Furthermore, the obligation to appoint a representative to an unaccompanied minor can be derogated from in various circumstances, at least some of which are problematic. Finally, the APD fails to establish the right of an accompanied minor to an independent representative in situations of conflict of interest. In sum, therefore, it can be said that the APD goes some, but not all, the way toward meeting the requirements of Article 12 CRC regarding the right of the child to be heard, if necessary, through a representative.

4.3.2.2 The adaptation of the hearing

As regards the first instance procedure, Article 17 APD (Guarantees for unaccompanied minors) stipulates in paragraph 4 that personal interviews of unaccompanied minors (where they take place) and decisions on the applications of unaccompanied minors must be conducted/taken by a person 'with the necessary knowledge of the special needs of minors'. On the one hand, this is an important recognition of the fact that interviewing minors and assessing their claims is a qualitatively different exercise than in the case of adults. On the other hand, in view of the myriad ways that the interview needs to be adapted in order to be 'child-friendly', it is submitted that Article 17(4) is a rather inadequate expression of what is at stake.[95] While one would not necessarily expect guidelines on child-friendly interviewing to appear in legislation, one might legitimately expect to find a direction to Member States to provide such guidance in their domestic legislation along with some broad indications of the content of such guidance. In this regard, it is interesting to note that, in its report on the APD, UNHCR recommends that EU-wide guidelines on the personal interview of children should be adopted and implemented.[96]

While the reference in Article 17(4) to 'the necessary knowledge of the special needs of minors' implicitly presupposes staff training, Article 17 establishes no explicit training requirement much less any direction as to the content of such training. Indeed, there are only two references to training in the entire

95 In this vein, the Fundamental Rights Agency report observes that '[t]he interview process itself was invariably an unpleasant experience for children, who often complained, especially in Austria and Belgium, that it was a long and detailed interrogation with the same questions asked repeatedly.' EU Fundamental Rights Agency, *supra* n. 91, p. 100.

96 UNHCR, *supra* n. 69, p. 36.

APD – one in a recital[97] and one, ironically, relating to authorities *other than* the usual 'determining authority'.[98] The Commission evaluation notes that institutional arrangements for training including follow-up training are in place in just eight Member States and that 'other Member States tend to rely on *ad hoc* training and the length, intensity and content of training vary considerably.'[99] For its part, UNHCR recommends that:

> All determining authorities should ensure that there is specific training on interviewing children and that sufficient numbers of interviewers are available, of both genders, who are specially trained to conduct interviews of children.
> Determining authorities must ensure that all interviews of children are conducted by interviewers who have been specially trained and have the necessary knowledge regarding the psychological and emotional development and behaviour of children.[100]

Furthermore, unsatisfactory though it is, there is no corollary to Article 17 for accompanied minors. Consequently, those accompanied minors who are entitled to lodge an asylum application on their own behalf and who are permitted to be interviewed do not benefit from any child-specific guarantees relating to the hearing. In response to this lacuna, UNHCR recommends that '[t]he APD should be explicit in providing that all interviews of children – not just unaccompanied children – are conducted by a person who has the necessary knowledge of the special needs of children.'[101]

There are, however, a number of important general (i.e. non child-specific) standards established in the directive regarding staff competence, the examination of applications and the conduct of the personal interview, which are equally applicable to minors. Thus, Article 4 (Responsible authorities) requires in paragraph 1 that the designated determining authority must conduct an 'appropriate examination' of applications. Article 8 (Requirements for the examination of applications) reiterates this requirement in paragraph 2 and stipulates that the personnel examining applications and taking decisions must have knowledge of the relevant standards in asylum and refugee law. Article 12 (Personal interview) provides in paragraph 1 that before a decision is taken by the determining authority, the applicant must be given the

97 Recital 10 provides: 'It is essential that decisions on all applications for asylum be taken on the basis of the facts and, in the first instance, by authorities whose personnel has the appropriate knowledge or receives the necessary training in the field of asylum and refugee matters.'

98 Article 4(3) states: 'Where [alternative] authorities are designated […], Member States shall ensure that the personnel of such authorities have the appropriate knowledge or receive the necessary training to fulfill their obligations when implementing this Directive.'

99 Commission evaluation of the APD, *supra* n. 68, § 5.1.3, p. 5.

100 UNHCR, *supra* n. 69, p. 30.

101 *Ibid*, p. 31.

opportunity of a personal interview with 'a person competent under national law to conduct such an interview'.

Moreover, Article 13 (Requirements for a personal interview) provides in paragraph 3 that Member States must take appropriate steps to ensure that personal interviews are conducted under conditions which allow applicant to present the grounds for their application in a comprehensive manner, while sub-paragraph (a) obliges Member States to 'ensure that the person who conducts the interview is sufficiently competent to take account of the personal or general circumstances surrounding the application, including the applicant's cultural origin and vulnerability, insofar as it is possible to do so.' While the qualification of the term 'competent' is unfortunate, as is the reference to personal 'or' general circumstances as if they were alternatives,[102] the reference to vulnerability is promising for our purposes. This was picked up on by the Commission, which notes in its evaluation that '[w]hile this standard is of relevance to those applicants who due to their gender, *age* and/or consequences of trauma may be in need of additional support, the Directive does not explicitly set guarantees for applicants with special needs, such as gender sensitive interviews'.[103] However, it appears that the implicit reference to additional support for vulnerable applicants is not enough. In the research for its report, UNHCR observed a variety of poor interviewing techniques used in respect of both vulnerable applicants and in general. These included a lack of gender-sensitive interviewing, insufficient time allocated for the interview, failure to interview in an appropriate environment, poor structuring of the interview and inappropriate questioning dominated by credibility assessment.[104]

What is more, some or all of the general standards can be derogated from – explicitly or implicitly – in various circumstances, all of which potentially apply to minors. Firstly, it is not clear from the wording of Article 12(1) that the personal interview must be conducted by the determining authority.[105] If not, then the standards that are established in respect of the determining authority in Articles 4 and 8 are not applicable.

Secondly, Article 4(2) of the APD provides that an authority other than the usual 'determining authority' may be established for processing cases under

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102 In *R.C. v Sweden*, the ECtHR stated that '[i]n order to determine whether there is a risk of treatment, the Court must examine the foreseeable consequences of sending the applicant [back to his country of origin], bearing in mind the general situation there *and* his personal circumstances.' ECtHR, *R.C. v Sweden*, Appl. No. 41827/06, Judgment of 9 March 2010, para. 51 (emphasis added).

103 Commission evaluation of the APD, *supra* n. 68, § 5.1.4, p. 7 (emphasis added).

104 UNHCR, *supra* n. 69, pp. 35-40.

105 Article 12(1) first sub-paragraph provides: 'Before a decision is taken by the determining authority, the applicant for asylum shall be given the opportunity of a personal interview on his/her application for asylum with a person competent under national law to conduct such an interview.' It is not obvious that the 'person competent under national law' must be from the determining authority.

six categories, including the specific procedures (i.e. the preliminary examination of subsequent applications and the border entry procedure) and the border procedure to decide at the border or in transit zones on applications made at those locations. Here again the standards established in Articles 4 and 8 are not applicable. Article 4(3) does oblige Member States to 'ensure that the personnel of such [alternative] authorities have the appropriate knowledge or receive the necessary training to fulfil their obligations when implementing this directive.' However, this is clearly a lesser, or at least a less detailed, standard that that laid down in Article 8, in particular.

Thirdly, as regards the specific procedures, even if Member States do not appoint an alternative authority to administer such procedures, they are permitted in Article 24 to derogate from the basic principles and guarantees of Chapter II, including Article 8, 12, 13 and 17 discussed above. Hence the question arises as to whether the articles dealing with the specific procedures specify any minimum requirements regarding a possible hearing. As regards the preliminary examination procedure for subsequent applications, perhaps unsurprisingly in view of the fact that it permits Member States to omit a personal interview, Article 34 does not establish any standards regarding a hearing. As for the border entry procedure, although Article 35(3) cross-references some paragraphs of Article 17 (Guarantees for unaccompanied minors), no cross-reference is made to Article 17(4) requiring that any interview be conducted 'by a person who has the necessary knowledge of the special needs of minors.' Consequently, there is no requirement that border staff who decide whether the applicant can enter the territory should be specially qualified to interview unaccompanied minors. However, Article 35(3)(d) does require the interview to be conducted by 'persons with appropriate knowledge of the relevant standards applicable in the field of asylum and refugee law'.

Neither the provisions on withdrawal of refugee status nor the provisions relating to the appeals procedures make any reference to the need to adapt the hearing, if there is one, to facilitate the participation of minors. Indeed, the lack of any provision in the appeals chapter of the APD on a hearing, much less the conduct of the hearing, appears to have facilitated the growth of widely divergent approaches to the conduct of appeals in Member States. Thus, in a 2010 report on access to effective remedies under the APD, the Fundamental Rights Agency observes that:

> Although only a limited number of respondents had attended an appeal hearing, it appears that their role at the hearing varied considerably from country to country. In Austria and Hungary, asylum seekers found it important to stress that during the hearing they could present the reasons for not being able to return to their home country. In Ireland, Poland or the UK, respondents were only asked to reply to

> specific questions, whereas in a third group of countries – including Germany, Slovenia and Spain – respondents said [sic] not having spoken at all.[106]

In conclusion, the APD contains a limited acknowledgement of the need to adapt the interview for unaccompanied, though not accompanied, minors. While this is bolstered by a number of important general standards regarding staff competence, the examination of applications and the conduct of the personal interview, some or all of those standards may be derogated from in various circumstances. The provisions of the directive relating to the procedure for the withdrawal of refugee status and the appeals procedure contain no acknowledgement of the need to adapt the hearing for minors. Consequently, the APD falls short of the requirements of Article 12 CRC relating to the right of the child to express views 'freely'.

4.3.3 The evaluation of the child's views

Article 12(1) CRC establishes that the views of the child must be given due weight in accordance with the age and maturity of the child. This necessarily involves an assessment of age and maturity and a serious consideration and weighing of the views of the child. What provisions of the APD speak to these requirements and in what way?

4.3.3.1 Assessment of age and maturity

The APD envisages the use of medical examinations to determine the age of unaccompanied minors. Thus, Article 17 (Guarantees for unaccompanied minors) provides in paragraph 5:

> Member States may use medical examinations to determine the age of unaccompanied minors within the framework of the examination of an application for asylum. In cases where medical examinations are used, Member States shall ensure that:
> (a) unaccompanied minors are informed prior to the examination of their application for asylum and in a language which they may reasonably be supposed to understand, of the possibility that their age may be determined by medical examination. This shall include information on the method of examination and the possible consequences of the application for asylum, as well as the consequences of refusal on the part of the unaccompanied minor to undergo medical examination.
> (b) Unaccompanied minors and/or their representatives consent to carry out an examination to determine the age of the minors concerned; and

106 EU Fundamental Rights Agency, *'Access to effective remedies: The asylum-seeker perspective'*, Thematic Report, (2010), 35.

> (c) The decision to reject an application for asylum from an unaccompanied minor who refused to undergo this medical examination shall not be based solely on that refusal.
> The fact that an unaccompanied minor has refused to undergo such a medical examination shall not prevent the determining authority from taking a decision on the application for asylum.

According to the Commission evaluation, medical examinations to determine age are possible in 17 Member States, all of which request the minor's and/or his/her representative's prior consent. However, the Commission reports that '[w]here a person refuses to consent, he/she is treated as an adult (CZ, HU, NL, RO, PL and SK), the credibility of his/her statements is affected (AT and LU), or he/she may not rely on the benefit of the doubt principle (LT).'[107] Somewhat inconsistently, the Commission considers only the latter consequence to be 'at variance' with the Directive.

A number of observations may be made about Article 17(5). First, there is no reference to safeguards in conducting age assessment other than the requirement of consent. However, doubt must be cast on whether such consent as is obtained under Article 17(5) is free, in view of the negative consequences of withholding consent. Second, there is no reference to the principle of the benefit of the doubt. This, combined with the lack of safeguards, falsely suggests that medical assessments of age are reliable. Third, there is no reference to maturity. Finally, it is difficult to see how this provision could be applied consistently with the best interests principle which, according to Article 17(6), applies to the implementation of Article 17. In sum, the whole tenor of Article 17(5) suggests that the purpose of age assessment is not to identify the unaccompanied minor as such or to decide what weight to be given to the views of the child, but rather to expose adults masquerading as minors.[108] This underlying rationale for age assessment has been highlighted in a number of recent reports.[109] Nevertheless, it is submitted that Article 17(5) could

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107 Commission evaluation of the APD, *supra* n. 68, § 5.1.6, p. 8.

108 Bhabha has opined on the reasons adjudicators tend to be skeptical about the age of unaccompanied minors. She remarks: 'It is often claimed that these children are 'really' much older and can be treated as adults, that they are not children like 'our' children, but rather manipulative impostors. The traumatic quality of their life experience is so at odds with decision makers' concepts of what constitutes 'childhood', that the category 'child' is viewed as inapplicable to this class. Heightened skepticism and hostility rather than compassion are thus, paradoxically, typical official responses. Like street children in other contexts, they are viewed as 'people out of place', more rather than less suspect for being displaced and detached from firm anchoring in familiar social settings.' Jacqueline Bhabha, *supra* n. 55, at 294.

109 See, for example, Separated Children in Europe Programme (SCEP), 'Review of current law, policies and practices relating to age assessment in 16 European Countries' (2011); European Migration Network, 'Policies on Reception, Return and Integration arrangements for and numbers of Unaccompanied Minors – an EU comparative study' (2010), 73-83; and EU Fundamental Rights Agency, *supra* n. 91. The latter report found that '[m]ost children

(more) productively be put to use as one of the tools necessary in determining the weight to be given to the views of the child. The directive is silent on assessing the age and maturity of the accompanied child.

4.3.3.2 The 'due weight' requirement

Giving due weight to the child's view of his/her protection needs may require the Member State to assume a greater burden of proof, desist from applying automatic negative credibility inferences and/or apply more liberally the principle of the benefit of the doubt. To what extent is this foreseen in the APD?

Burden of proof

The APD does not contain any clear statement relating to the burden of proof. However, Article 4 of the QD (Assessment of facts and circumstances) is of relevance, even though it does not use that exact term. Article 4(1) provides that 'Member States *may* consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant, it *is* the duty of the Member State to assess the relevant elements of the application.'[110] Thus a distinction is made in the first and second sentences between, what Noll describes as a burden of assertion, which may be placed on the applicant, and a burden of assessment, which is placed on the Member State, to be acquitted in cooperation with the applicant.[111] The burden of assertion is the burden of submitting 'all elements needed to substantiate the application for international protection'. On first reading, this phrase implies that the burden of establishing eligibility may be placed on the applicant. However, when read in the light of Article 4(2) which exhaustively lists the elements needed to substantiate the application, this is clearly not the case. The list of elements in Article 4(2) comprise

expressed fear and were critical of age assessment procedures, and in some countries had little information on these procedures. In others, children considered age assessment essentially unfair and most children wished that officials would simply believe them. Some children seemed troubled and perplexed by the fact that their statements about their age were challenged, as well as being distressed about the possibility of being perceived as liars.' Summary/conference version, p. 36.

110 Emphasis added.

111 According to Noll, 'Article 4 QD merely demands that the applicant deliver a sufficient amount of information to trigger the procedure, which can be described as a 'burden of assertion'. Compared to the prevalent conception that the applicant is bound by some form of burden of proof, this puts the applicant in a less onerous position. On the face of it, placing the 'burden of proof' on the applicant would suggest that the claim is rejected if the application is unable to present evidence reaching the standard of proof. This is not the way refugee determination procedures should work in practice. Therefore, it appears to be more accurate to speak of a 'burden of assertion'. Gregor Noll, 'Evidentiary Assessment in Refugee Status Determination and the EU Qualification Directive', *European Public Law* 12, no. 2 (2006): footnote 17. See further, Gregor Noll (ed.), *Proof, Evidentiary Assessment and Credibility in Asylum Law* (Leiden/Boston: Martinus Nijhoff Publishers, 2005).

the applicant's statements and documentation relating to bio-information, previous asylum applications, travel routes, identity and travel documents and, critically, 'the reasons for applying for international protection'. Thus, when Article 4(1) first sentence is applied, the applicant must explain his/her reasons for applying for, *as distinct from being granted*, international protection.

Where an applicant is unable to do this, for example on account of age, the second sentence of Article 4(1) – a mandatory provision – subsists. Thus Member States must still discharge the burden of assessment. The factors to be taken into account in the assessment are illustratively listed in Article 4(3) and go beyond the elements of the application in Article 4(2). They include country of origin information and 'the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm'. Thus, Member States are required (Article 4(1) first sentence notwithstanding) to go beyond the information given to them by the applicant. Where the applicant is unable to give them much, the burden of assertion necessarily recedes and the burden of assessment comes to the fore. As a result of this dynamic between the burden of assertion and the burden of assessment, it is suggested that the (overall) burden of proof is shared and flexible.[112] This bodes well for giving 'due weight' to the views of the child.

However, while certain provisions of the APD appear to reinforce the concept of a shared and flexible burden of proof established in the QD, others appear to undermine it.[113] For reasons of space, the focus here will be on the 'safe country' concepts in the APD, which, among other provisions of the directive, appear to place the burden of proof solely on the applicant.[114] The

112 Thus, the CJEU has stated in relation to Article 4(1) and (2) of the QD that '[i]t must be acknowledged that the level of difficulty encountered, first, in gathering the relevant elements for the purposes of the assessment of the circumstances may, solely from the perspective of the relevance of the facts, prove to be higher or lower from one case to another.' CJEU, *Abdulla and Others v Bundesrepublik Deutschland*, Joined Cases C-175/08, C-176/08, C-178/08 and C-197/08, Judgment of 2 March 2010, para 86.

113 Certain paragraphs of Article 12, for example, reinforce the concept of a shared and flexible burden of proof. Paragraph 3 of Article 12 permits the personal interview to be omitted where the applicant is 'unfit or unable to be interviewed owing to enduring circumstances beyond his/her control'. Paragraph 4 establishes that this 'shall not prevent the determining authority from taking a decision on an application for asylum, while paragraph 5 states that the absence of a personal interview 'shall not adversely affect the decision of the determining authority.' If the lack of a personal interview is not to adversely affect the decision, it follows that the determining authority must assume greater responsibility for investigating the claim.

114 Two further provisions are of concern. Article 23(4)(o) was mentioned in Chapter 3. It relates to accompanied minors who lodge an application after their parents' claim is rejected and appears to place the burden entirely on the minor to raise new elements with respect to his/her particular circumstances or to the situation in his/her country of origin. Article

provisions of the APD that relate to safe country of origin (SCO), safe third country (STC) and first country of asylum (FCA) concepts establish a presumption based on objective factors that the country of origin or a third country is safe for the applicant, thereby placing the burden on the applicant to rebut that presumption. The stakes are high: in the case of SCO, if the applicant cannot rebut the presumption of safety, the claim may be accelerated, designated manifestly unfounded and a personal interview may be omitted;[115] in the case of STC, the claim may *additionally* be deemed inadmissible;[116] and in the case of FCA, the claim may 'simply' be deemed inadmissible.[117] The stakes are even higher for children because, as was outlined in Chapter 3, the assessment of what makes these countries safe does not necessarily include a child-rights assessment.

Thus, in relation to SCO, the APD establishes that Member States should be able to 'presume [a designated country's] safety for a particular applicant, unless he/she presents serious counter-indications'[118] and should operate 'on the basis of a rebuttable presumption of safety of that country'.[119] The presumption will be rebutted if the applicant submits 'serious grounds for considering the country not to be a safe country of origin in his/her particular circumstances and in terms of his/her qualification as a refugee […].'[120] In its report on the APD, UNHCR notes:

> The majority of states that apply the safe country of origin concept have legislation which increases the burden of proof on the applicant. However, in only one of those surveyed was the entire burden shifted to the applicant. In others, the responsibility *in law* to establish the facts continued to be shared between the applicant and the authority, in accordance with the QD. UNHCR is concerned that *in practice, however, some states may place the burden of proof entirely on the applicant*, sometimes in the context of an accelerated procedure, without adequately recognizing the necessity of a shared examination of the claim [emphasis added].[121]

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34 on procedural rules governing preliminary examinations of subsequent applications also appears to permit placing the burden of proof solely on the applicant. Specifically, Member States are permitted to establish rules in national law obliging the applicant concerned to 'indicate facts and substantiate evidence which justify a new procedure'.

115 Article 23(4)(c)(i), Article 28(2) and Article 12(2)(c) APD respectively.

116 Article 25(1)(c). The claim may also be accelerated and deemed manifestly unfounded under Articles 23(4)(c)(ii) and 29(2) and be decided without a personal interview under Article 12(2)(c).

117 Article 25(1)(b).

118 Recital 17.

119 Recital 19.

120 Article 31(1). The Commission evaluation of the APD reports that only 4 Member States do not have a SCO procedure in place and that '[w]ide divergences are identified between Member States which have SCO procedures in place.' S*upra* n. 68 , § 5.2.5, p. 12.

121 UNHCR (2010), *supra* n. 69, p. 71.

As regards STC, Article 27 provides in paragraph 2(c) that Member States must lay down in national legislation rules 'in accordance with international law' providing for an individual examination of the safety of the third country for the particular applicant which 'at a minimum, permit the applicant to challenge the application of the safe third country concept on the grounds that he/she would be subjected to torture, cruel, inhuman or degrading treatment or punishment.' The reference to international law in conjunction with the reference to torture, cruel, inhuman or degrading treatment or punishment suggests that international law can be reduced to the requirements of international human rights law. However, international law also includes international refugee law, which establishes a prohibition of *refoulement* which is broader in scope than the right of *non-refoulement* in the torture context.[122] Consequently, Article 27(2)(c) is highly ambiguous, mandating rules in accordance with international law but then establishing a minimum standard which falls short of the requirements of international law. Where Member States avail of the minimum option – and four do according to the Commission – this means that the presumption of safety on all other objective grounds is conclusive and hence that there is *no way* for the applicant to discharge the burden of proof in relation to those grounds.[123] Unfortunately, a recent judgment of the CJEU in relation to the DR (which is a specialized form of STC) lends credence to this reductionist approach.

In *N.S. and others v Secretary of State for the Home Department and others*, the question referred to the Court was whether Member States are entitled under the DR to operate on the basis of a conclusive presumption of safety even where there is clear evidence that the treatment of asylum seekers in a receiving EU Member State is contrary to fundamental rights in the EU Charter of Fundamental Rights.[124] The Court observed that the DR is part of the CEAS which establishes minimum standards for the treatment of asylum seekers in line with fundamental rights. Consequently, it is reasonable to assume that in all Member States asylum seekers will be treated in compliance with fundamental rights. It is 'not however inconceivable' that a Member State should

122 If *non-refoulement* in refugee law is interpreted strictly in line with Article 33(1) of the 1951 Refugee Convention, then a person cannot be returned to a country where his or her life or liberty is likely to be threatened on account of his/her race, religion, nationality, membership of a particular social group or political opinion. It can be observed that a threat to life or liberty encompasses but is broader than a risk of torture or inhuman or degrading treatment or punishment. If, however, in accordance with state practice, *non-refoulement* is interpreted in the light of the definition of a refugee in Article 1A(2) of the 1951 Convention, then it includes contemporary interpretations of persecution. According to Article 9 QD, acts of persecution within the meaning of the Geneva Convention comprise 'a severe violation of basic human rights'. It can be observed that 'basic human rights' are broader than simply the prohibition of torture and inhuman or degrading treatment or punishment.

123 Commission evaluation of the APD, *supra* n. 68, § 5.2.4, pp 11-12.

124 CJEU, *N.S. and others v Secretary of State for the Home Department and others* Joined Case C-411/10 and C-493/10, Judgment (GC) of 21 December 2011.

experience 'major operational problems' resulting in treatment of asylum seekers in a manner incompatible with their fundamental rights. However, rather than conclude, as the Advocate General did, that if there is a real risk of a serious violation of a fundamental right in a receiving state, the sending state's responsibility under the sovereignty clause is engaged,[125] the Court ruled that that eventuality only arises where the sending state 'cannot but be unaware that systematic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face *a real risk of being subjected to inhuman or degrading treatment* within the meaning of Article 4 of the Charter.'[126]

As regards FCA, Article 26 APD infers that the country is safe from the simple fact that the applicant was recognized as a refugee there or 'otherwise enjoys sufficient protection in that country, including benefiting from the principle of *non-refoulement*.' Article 26 is silent on whether or how an applicant can rebut the presumption of safety.

These safe country concepts appear to be fundamentally at odds with the obligation to give 'due weight' to the views of the child in Article 12 CRC and, in particular, the need for a shared and flexible burden of proof. However, the judgment of the ECtHR in *M.S.S. v Belgium and Greece* is cause for some hope in this regard.[127]

Preceding the *N.S.* judgment of the CJEU (and perhaps inadvertently setting the parameters for that judgment), the ECtHR in *M.S.S.* found, *inter alia*, that Belgium was in violation of Article 3 ECHR for sending the applicant, under the DR, back to Greece and thereby exposing him to harms arising from the deficiencies in the Greek asylum procedure amounting to a real risk of chain *refoulement*. The Court held that at the time of the applicant's expulsion Belgium knew or ought to have known about the crisis in Greece's asylum system and should have exercised its right under the so-called 'sovereignty clause' to take responsibility for the asylum claim. The Court also pronounced on the issue of the burden of proof, holding that 'the applicant should not be expected to bear the entire burden of proof' in establishing the risk of *refoulement* in a STC where such a risk is well known to the authorities.[128] The Court stated:

> The Government argued that the applicant had not sufficiently individualized before the Belgian authorities the risk of having no access to the asylum procedure and being sent back by the Greek authorities. The Court considers, however, *that it was*

125 Opinion of Advocate General Trstenjak delivered on 22 September 2011, *N.S. v Secretary of State for the Home Department*, Case C-411/10. See, in particular, para. 127.
126 *Ibid*, para. 94 (emphasis added).
127 ECtHR, *M.S.S. v Belgium and Greece,* Appl. no. 30696/09, Judgment of 21 January 2011.
128 *Ibid*, para. 352.

> *in fact up to the Belgian authorities*, faced with the situation described above, *not merely to assume* that the applicant would be treated in conformity with the Convention standards but, on the contrary, *to first verify* how the Greek authorities applied their legislation on asylum in practice. Had they done this, they would have seen that the risks the applicant faced were real and individual enough to fall within the scope of Article 3 [emphasis added].[129]

Thus the Court decisively shifted the burden of proof back onto the state. The principle established in *M.S.S.* – that the presumption of safety and the placing of the burden on the applicant to rebut the presumption are only tenable in the absence of known counter-indications – is equally applicable to all safe country concepts. Nevertheless, the scope of the judgment is restricted to cases where the supposed 'safe country' is clearly not safe on any objective evaluation. The fact remains that in many cases a 'safe country' will be, if not entirely safe, then not manifestly unsafe either. In such cases, the problem of the presumption of safety and the placing of the burden solely on the applicant persists.

In sum, despite the concept of a shared and flexible burden of proof in the QD, the APD contains a number of provisions that appear to place the burden of proof solely on the applicant. Minors are not exempt from these provisions. This is problematic in light of the obligation in Article 12 CRC to give 'due regard' to the views of the child, which may require the state to assume a greater than usual share of the burden of proof.

Automatic negative credibility inferences

An issue related to the burden of proof is the use of automatic negative credibility inferences which establish a presumption that the application is manifestly unfounded and justify the processing of the application in an accelerated procedure. Article 23(3) APD permits Member States to 'prioritise or accelerate' any asylum claim, while Article 23(4) specifies 16 different grounds on which Member States may fast-track applications, all of which may also constitute the basis for a manifestly unfounded determination under Article 28(2). Ostensibly, a claim can only be deemed manifestly unfounded, *per* Article 28(1) 'if the determining authority has established that the applicant does not qualify for refugee status pursuant to [the QD].' In reality, however, the grounds taint the credibility of the applicant and/or the substance of the claim, making a negative decision a formality. This is confirmed in the Commission evaluation of the APD which found that 11 Member States automatically reject an applicant as manifestly unfounded if the determining authority establishes a circumstance falling under Article 23(4) APD.[130] A recent judgment of the ECtHR casts doubt on the compatibility of such practices,

129 *Ibid*, para 359.

130 Commission evaluation of the APD, *supra* n. 68, § 5.2.1, p. 10.

at least in the context of Article 3 ECHR claims, with the right to an effective remedy in Article 13 ECHR.[131]

While many of the 16 grounds in Article 23(4) APD can be criticized for being irrelevant to the core of the claim and consequently to the credibility of the applicant on the main issue, the following ground (g) is particularly problematic for children: the making of 'inconsistent, contradictory, improbable or insufficient representations which make [the applicant's] claim clearly unconvincing in relation to his/her having been the object of persecution referred to in [the QD].' Apart from the general objection that this ground seems to be backward-, as opposed to forward-looking, there is the specific objection that this ground is apt to be applied to children, particularly younger, immature or less articulate children.[132]

The benefit of the doubt

Since many provisions of the APD are problematic from the point of view of the obligation to give 'due weight' to the views of the child, the question arises as to whether, as a counter-measure, a liberal application of the benefit of the doubt is possible. Here, the obstacle lies in the QD. Although the term 'benefit of the doubt' is not used in the QD, Article 4(5) does speak to the issue. It states:

> Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation, when the following conditions are met:
> (a) the applicant has made a genuine effort to substantiate his application;
> (b) all relevant elements, at the applicant's disposal, have been submitted, and a satisfactory explanation regarding any lack of other relevant elements has been given;
> (c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;
> (d) the applicant has applied for international protection at the earliest possible time unless the applicant can demonstrate good reason for not having done so; and
> (e) the general credibility of the applicant has been established.

On the one hand, the existence of a provision relating implicitly to the benefit of the doubt is to be welcomed. One the other, the grounds are both individually demanding and cumulative. Furthermore, sub-paragraphs (c) and (e)

131 ECtHR, *I.M. v France*, Appl. No. 9152/09, Judgment of 2 February 2012.

132 It is likely that this ground requires too much of adults too. See Hilary Evans Cameron, 'Refugee Status Determination and the Limits of Memory', *International Journal of Refugee Law* 22, no. 4 (2010): 469-511.

are highly problematic in the case of children, based as they are on linear, adult-based constructions of credibility. In short, Article 4(5) QD is likely to be of little benefit to child applicants.

In summary, the consistency of the APD with the obligation to evaluate the child's views in Article 12(1) CRC is highly doubtful. Although the directive permits and nearly all Member States conduct age assessments of unaccompanied minors, these are used to assess credibility and to detect 'abuse' but not to evaluate the weight to be given to the child's views. The directive does not establish that due weight be given to the views of the child in accordance with age and maturity. On the contrary, several provisions, for example, relating to the burden of proof in the context of the safe country concepts, the sanctioning of automatic credibility inferences and the principle of the benefit of the doubt appear to undermine the testimony of the child.

4.4 Phase Two CEAS: prospects for enhanced compliance

The proposed recast APD simplifies to a limited extent the plethora of confusing procedures that currently exist. Of greatest importance, there are no longer any 'specific procedures' in respect of which Member States can opt to derogate from the basic principles and guarantees of the directive.[133] The procedure for preliminary examination of subsequent applications subsists in a modified form and a new border procedure is put in place, but these are no longer categorized as 'specific procedures'.[134] Furthermore, the possibilities for establishing an authority in lieu of the usual determining authority – which is an indirect way of permitting derogations from the standards established in the directive for the determining authority – are somewhat reduced.[135] The accelerated/manifestly unfounded procedure subsists, albeit with fewer grounds, as does the admissibility procedure.[136] Separate guarantees are maintained in respect of procedures for withdrawing international protection and appeals procedures.[137] Hence, it is fair to say that the proposed recast falls short of the kind of radical revision that would make the APD transparent and easily comprehensible. Against this backdrop, the question arises as to

133 Existing Article 24 is deleted in its entirety.

134 Articles 40-42 and Article 43, respectively.

135 Article 4 (Responsible authorities) establishes that an authority other than the determining authority may be established in respect of Dublin Regulation cases and border procedures. Article 14 (Personal interview) provides that '[i]nterviews on the substance of the application for international protection shall be conducted by the personnel of the determining authority.' *A contrario*, interviews not on the substance of the application can be conducted by personnel of another authority. Article 14 further establishes that personnel of another authority may exceptionally conduct personal interviews where the determining authority is over-burdened by the number of applicants.

136 Article 31(5) and Articles 33-34, respectively.

137 Articles 44-45 and Article 46, respectively.

whether the right of the child to be heard is any better served in the proposed recast than it is at present.

4.4.1 The right to a hearing

Under the current directive, whether or not a minor has a right to a personal interview is left to the discretion of Member States. Even where such a right is established in domestic law, the APD provides for an 'extensive catalogue of situations' in which the personal interview can be omitted, which apply equally to adults and children alike. Three bases for omitting a personal interview seem likely to be applied or are particularly detrimental to children: where an applicant is deemed unfit or unable to be interviewed; on certain manifestly unfounded/acceleration grounds; and on (at least) some grounds of inadmissibility. Furthermore, the APD envisages that refugee status may be withdrawn without a personal hearing and fails to clearly establish a right to an appeal hearing. Consequently, the APD is highly ambivalent on the right of the child to a hearing. Is the situation improved in the proposed recast APD?

The most important thing to note is that the provision which gives discretion to Member States as to whether to give the opportunity of a personal interview to a minor (currently Article 12(1)) is unchanged in the proposed recast (Article 14(1)). However, the 'extensive catalogue of situations' in which Member States can opt to omit the personal interview is significantly reduced. In terms of the three areas mentioned in the analysis, the situation is substantially improved.

Firstly, while Article 14(2) of the proposed recast establishes that a personal interview can be omitted where the applicant is unfit or unable to be interviewed, this provision is tightened up in several respects. It is now only the determining authority which can decide that the applicant is unfit or unable to be interviewed. Furthermore, when in doubt, the determining authority must consult a medical expert to establish whether the condition that makes the applicant unfit or unable to be interviewed is temporary or permanent. Finally, owing to various other innovations in the proposed recast which effectively facilitate the claims of minors, analyzed below, the risk of systematically applying this ground to minors is significantly reduced.

Secondly, the provision allowing the personal interview to be omitted in the context of an accelerated/manifestly unfounded procedure is deleted. Furthermore, unaccompanied minors are exempted from such a procedure.[138]

Thirdly, section II of the proposed recast refines the admissibility procedure, adding a new article specifying that 'Member States shall conduct a personal interview on the admissibility of the application'.[139] An exception to this

138 Article 25(6).
139 Article 34(1).

requirement is crafted in respect of the preliminary examination of subsequent applications (which is now explicitly linked to the admissibility procedure).[140] As outlined in Chapter 3, an application by an unmarried minor who lodges an application after an application has already been made on his/her behalf by a parent may be dealt with under this procedure for subsequent applications.[141] However, in such cases, the exception to the personal interview does not apply. In other words, accompanied minors in this situation (as opposed to accompanied minors who lodge an independent application and subsequently lodge another one) must be afforded a personal interview. Furthermore, unaccompanied minors are exempt from the admissibility procedure on the ground of safe third country, although not on the other grounds of inadmissibility.[142]

No change is envisaged to the procedure for withdrawing refugee status and hence no right to a personal interview in such circumstances is envisaged.

Finally, as regards a possible appeal hearing, although this issue is not squarely addressed in the proposed recast certain provisions imply an appeal hearing.[143] Thus Article 46, reiterating the right to an effective remedy, provides in paragraph 3 for a full examination of both facts and law including an *ex nunc* examination of the claim, at least on appeal. This suggest a full (re) hearing of the claim. This suggestion is bolstered by the use of the term 'hearing' in the revised article on free legal assistance and representation which provides that:

> Member States shall ensure that free legal assistance and representation is granted on request in appeals procedures provided for in Chapter V. This shall include, at least, the preparation of the required procedural documents and *participation in the hearing* before the court or tribunal of first instance on behalf of the applicant.'[144]

This provision seems to take for granted the fact of an appeal hearing. Furthermore, the apparent discretion afforded to Member States in the APD on the question of suspensive effect – a significant practical obstacle to participation

140 Article 42(2)(b).
141 Article 40(6)(b).
142 Article 25(6).
143 One significant change to the material scope of the right to an effective remedy should be noted. Whereas under the APD, there is a right to appeal against a negative European Safe Third Country decision, this provision is deleted in the proposed recast. If there is no right to appeal against such a decision, it follows that there is no right to an appeal hearing. The deletion is problematic because, although the European STC concept is not operative at the moment, the power of the Council to designate European safe third countries having been successfully challenged by the European Parliament in Case C-133/06, Judgment of 6 May 2008, the proposed recast makes it workable again by allowing national, as opposed to Council, designation of European safe third countries.
144 Article 20(1).

in any appeal hearing – is addressed in the proposed recast. In line with the jurisprudence of the ECtHR, Article 46(5) establishes a norm of automatic suspensive effect. However, an exception to automatic suspensive effect is crafted in Article 46(6) in respect of accelerated procedures and admissibility procedures. Even in such cases, however, a court or tribunal must have jurisdiction to rule on a right to remain pending the outcome of the appeal, either on the request of the applicant or on its own motion and the Member State must allow the applicant to remain pending the outcome of that ruling. While *accompanied* minors remain fully susceptible to accelerated and admissibility procedures, unaccompanied minors are exempt from the former and from one of the grounds of inadmissibility (safe third country).[145]

The final issue to address in this subsection is whether the proposed recast APD is better than its predecessor in establishing that the interview, at least for minors, is a right and not an obligation. Unfortunately, the relevant provisions of the proposed recast are mostly unchanged in this regard.[146] Article 25 (Guarantees for unaccompanied minors), for example, still provides that Member States may compel the minor to be present at interview.

In sum then, although the right of a minor to a hearing is no more clearly established in the proposed recast than it is in the APD, if the minor is entitled to a hearing pursuant to domestic law, then the possibilities for further curtailing that right are significantly reduced in the proposed recast, particularly as regards unaccompanied minors. Of course, a clear articulation of the right of the child to be heard would be preferable. Finally, the proposed recast appears to permit Member States to compel a minor to be interviewed, contrary to Article 12 CRC.

4.4.2 The conduct of the hearing

4.4.2.1 The right to a representative

The APD establishes the right of an unaccompanied minor to a representative in Article 17. However, the definition and role of the representative is vague, leading to considerable divergence in State practice. Moreover, the obligation

145 Article 25(6). Furthermore, a new article on applicants in need of special procedure guarantees establishes that where it is considered that an applicant has been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, the accelerated procedure is not applicable (Article 24(2)).

146 There are two exceptions. First, Article 23(4)(g) APD, which establishes that making 'insufficient representations' is a manifestly unfounded ground, is amended: proposed recast Article 31(6)(e) no longer refers to 'insufficient representations'. Second, Article 33 APD on failure to appear is deleted. All the other provisions establishing or implying negative procedural consequences for failing to appear at or engage with the interview subsist in the proposed recast.

to appoint a representative can be derogated from on three grounds and a stand-still clause permits Member States to retain a further derogation existing in national law at the time of the adoption of the directive. To what extent is this situation improved in the proposed recast?

The definition of 'representative' undergoes substantial change in the proposed recast. Article 2(n) defines the representative as:

> A person or organization appointed by the competent bodies to act as a legal guardian in order to assist and represent an unaccompanied minor in procedures provided for in this Directive with a view to ensuring the child's best interests and exercising legal capacity for the minor where necessary. Where an organization acts as a representative, it shall appoint a person responsible for carrying out the duties of the legal guardian in respect of the minor, in accordance with this Directive.

This definition is superior to the existing definition in Article 2(i) in establishing that the representative is the legal guardian of the child, in specifying that the role of the representative is to assist *and* represent the child in the procedure, in establishing that the representative is the guardian of the child's best interests and in providing that, even where an organization acts as representative, it must appoint an individual to act as legal guardian. Furthermore, Article 25 (Guarantees for unaccompanied minors) is more elaborate on the qualities of the representative than existing Article 17. It reiterates the enabling role of the representative in the procedure and specifies that the representative 'shall have the necessary expertise in the field of childcare and shall perform his/her duties in accordance with the principle of the best interests of the child.' However, critically, a requirement of impartiality which was included in the 2009 proposed recast was omitted from the 2011 amended recast.[147] The significance of this, when Article 25 is read in the light of Article 2(n), is that the competent authority which appoints a representative could be the determining authority itself.

A further disappointing innovation in the proposed recast is that the representative's role at interview may be acquitted by 'a legal guardian or other counsellor admitted as such under national law'. This unfortunate conflation of the separate roles of the representative (*qua* guardian or adviser) and the legal adviser has already been commented upon in the context of the grounds for derogating from the obligation to appoint a representative in the current APD. On a more positive note, however, the other grounds for derogating from the obligation to appoint a representative are reduced to one

147 Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (recast), COM (2009) 554 final, Article 21(1)(a).

namely, where the minor is likely to 'age out' before a first instance decision is taken.

Finally, it should be noted that the obligation to appoint a representative is limited to unaccompanied minors in the proposed recast, just as it is currently. Consequently the accompanied minor has no right to an independent representative.

4.4.2.2 The adaptation of the hearing

In the article on guarantees for unaccompanied minors, the APD establishes that the personal interview of an unaccompanied minor and decision on his/her application must be conducted by a person 'with the necessary knowledge of the special needs of minors'. Accompanied minors, by contrast, benefit only from the general guarantees established in respect of staff competence, the examination of applications and the personal interview, which are rather vague, open to derogation and have lead to uneven practice.

In the proposed recast, the above-mentioned guarantee for unaccompanied minors subsists unchanged, but higher and in some cases child-specific standards are established in relation to staff competence and training, the examination of applications and the personal interview. These are significant from the point of view of adapting the hearing for *all* minors who get a hearing. However, a number of explicit and implicit derogations are established or retained in respect of these standards. For clarity, the new standards will be set out first, before addressing the various derogations.

Article 4 of the proposed recast (Responsible authorities) contains two significant additions. Firstly, a new requirement is laid down that the determining authority 'is provided with appropriate means, including competent personnel, to carry out its tasks in accordance with this Directive.'[148] Secondly, for the first time the issue of staff training is explicitly addressed. Paragraph 3 provides:

> Member States shall ensure that the personnel of the determining authority are properly trained. To that end, Member States shall provide for initial and, where relevant, follow-up training which shall include the elements listed in Article 6(4)(a)-(e) of [the EASO Regulation]. Member States shall also take into account the training established and developed by the European Asylum Support Office.

Of particular note for our purposes, Article 6(4)(b) of the EASO Regulation provides for training on issues related to the handling of asylum applications from minors and vulnerable persons with specific needs, while sub-paragraph

148 Para 1.

(c) provides for training on interview techniques.[149] While it is unfortunate that follow-up training is required only 'where relevant' – especially in view of the fast pace of developments in the area of the right to an effective remedy in general and the right of the child to be heard in particular – it is submitted that this provision will have a significant impact on the right of the child to an appropriately adapted hearing.

Article 10 (Requirements for the examination of applications) reiterates in paragraph 3 the requirement in current Article 8 that decisions by the determining authority on applications be taken after an appropriate examination. However, a new paragraph is added on the steps that have to be taken in this regard. Sub-paragraph (d) obliges Member States to ensure that 'the personnel examining applications and taking decision are instructed and have the possibility to seek advice, whenever necessary, from experts on particular issues such as […] child-related […] issues.' Article 14 (Personal interview) specifies, where existing Article 12 is silent, that interviews on the substance of the application for international protection shall be conducted by the determining authority.[150] This means that the Article 4 competence and training standards are fully applicable to staff conducting such personal interviews. Article 15 (Requirements for a personal interview) contains some apparently minor but actually significant amendments to the obligation in existing Article 13 that the person who conducts the interview is sufficiently competent to take account of the personal or general circumstances surrounding the application. Notably, the word 'sufficiently' is deleted, with the result that the requirement of competence is not qualified in any way; and the disjunction 'or' is replaced by the conjunction 'and' with the result that both personal and general circumstances must be taken into account.[151] Furthermore, a new sub-paragraph is added whereby Member States are obliged to 'ensure that interviews with minors are conducted in a child-appropriate manner.'[152] Finally, a new article (Content of a personal interview) is added in Article 16, which provides:

> When conducting a personal interview on the substance of an application for international protection, the determining authority shall ensure that the applicant is given an adequate opportunity to present elements needed to substantiate the application in accordance with Article 4 of the [QD] as completely as possible. This shall include the opportunity to give an explanation regarding elements which may be missing and/or any inconsistencies or contradictions in his/her statements.

As this provision applies equally to minors, it provides an important counterbalance to 'soft' requirements of a child-friendly hearing, and hence is a

149 Regulation (EU) No. 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office.
150 Para 1.
151 Para 3(a).
152 Para 3(e).

significant addition. In sum, while these amendments fall short of a direction to Member States to establish guidelines on child-friendly interviewing, the mix of improved general standards and additional child-specific standards makes for a better likelihood of a child-friendly hearing.

It is unfortunate, then, that many of these provisions can be derogated from in various circumstances. Firstly, Article 4 (Responsible authority), permits Member States to establish an alternative authority for DR cases and, significantly, for 'granting or refusing permission to enter' in the framework of the border procedure established in Article 43 'subject to the conditions as set out therein and on the basis of the opinion of the determining authority'.[153] Article 43, in turn, provides for an admissibility procedure for applications made at the border or in transit zones and an accelerated/manifestly unfounded procedure. It can be observed that the status of the 'opinion' of the determining authority in unclear. Specifically, it is unclear whether the alternative border authority must base the entry decision on the opinion of the determining authority or simply take note of it. In any event, the alternative authority is not subject to the training requirements of Article 4(3), but rather to the lesser requirements of Article 4(4) which provides that that personnel 'have the appropriate knowledge or receive the necessary training to fulfil their obligations when implementing this Directive'. Moreover Articles 10 and 16, outlined above, do not apply since they explicitly relate to the determining authority. While unaccompanied minors are exempt from border procedures by virtue of Article 25(6), accompanied minors remain fully susceptible to them.

Secondly, Article 14 (Personal interview) specifies that interviews on the substance of the application for international protection must be conducted by the personnel of the determining authority.[154] *A contrario*, interviews that are not on the substance of the application need not be conducted by the personnel of the determining authority. This raises the question: what is (and is not) the substance of the application? Recitals 34-36 of the proposed recast APD shed some light on this question. Recital 34 provides that all applications should be examined on the substance 'except where the present Directive provides otherwise, in particular where it can be reasonably assumed that another country would do the examination or provide sufficient protection.' Recital 34 goes on to list the concept of first country of asylum as such an instance. Recital 35 provides that Member States are not obliged to assess the substance of an application where the applicant comes from a safe third country. Recital 36 reiterates this position viz. a viz. European safe third countries – a currently defunct concept that is set to be reintroduced in the proposed recast (of which more below). Accordingly, as regards FCA, STC and European STC, interviews need not be conducted by the personnel of the

153 Para 2(b).
154 Para. 1.

determining authority. It follows that whatever standards are established in respect of the determining authority – notably in Article 4, 10 and 16, outlined above, will not apply. No alternative standards are specified, although the obligation to ensure that interviews with minors are conducted in a child-appropriate manner as set out in Article 15 is still applicable as this obligation is not expressly linked to the determining authority. Unaccompanied minors are exempt from the STC concept under Article 25(6) but are fully susceptible to the FCA and European STC concepts. Accompanied minors are susceptible to all safe country concepts.

Thirdly, Article 14 adds a new sub-paragraph to the provision on the personal interview, which provides:

> Where a large number of third country nationals or stateless persons simultaneously request international protection, which makes it impossible in practice for the determining authority to conduct timely interviews on the substance of an application, Member States may provide the personnel of another authority be temporarily involved in conducting such interviews. In such cases, the personnel of that authority shall receive in advance the necessary training which shall include the elements listed in Article 6(4)(a) to (e) of [the EASO Regulation] […].[155]

No exception is made for minors or other persons in need of special procedural guarantees. It is hard to see how another authority brought in at short notice to conduct personal interviews could possibly be competent to interview minors, notwithstanding the provision of training. In this regard, it is doubly unfortunate that Article 10 outlined above on instruction and advice on child-related matters is stated to apply to the determining authority and not, therefore, to any alternative authority.

No changes on question of the conduct of the hearing are made to the procedure for withdrawing refugee status or the appeals procedure. Hence, these procedures remain impervious to any child-specific modifications.

In short, the proposed recast APD contains substantial improvements with regard to the adaptation of the hearing for *all* minors at first instance. However, these improvements are diminished because Member States are permitted to derogate from the new standards in various circumstances. While unaccompanied minors are exempted from some (though not all) of the derogations, accompanied minors are not. No improvements are made to the procedure for the withdrawal of refugee status or the appeals procedure. Therefore, the proposed recast APD can best be characterized as a modified improvement on its predecessor in terms of adapting the hearing for minors.

155 Para 1, 2nd sub-para.

4.4.3 The evaluation of the child's views

4.4.3.1 Assessment of age and maturity

It was seen that Article 17(5) APD on medical examinations for age assessment is problematic as a method of evaluating the age and maturity of the child. Are any improvements envisaged in the proposed recast?

Article 25(5) replicates the provisions of Article 17(5) APD but add two new elements. First, the use of medical examinations to determine the age of unaccompanied minors is no longer presented as an automatic part of the procedure, but one to be resorted to 'where, following general statements or other relevant evidence, Member States still have doubts concerning the applicant's age.' This suggests that other (i.e. non medical) methods of age assessment should be deployed first. Moreover, it is stated that '[i]f those doubts persist after the medical examination, Member States shall assume that the applicant is a minor.' This provision is potentially far-reaching in view of the fact that medical assessments are notoriously unreliable in borderline cases. Hence, only in clear-cut cases of majority are medical assessments likely to produce definitive results. In such cases it is quite appropriate that the benefit of the doubt should be withheld. Second, Article 25(5) stipulates that '[a]ny medical examination shall be performed in full respect of the individual's dignity, selecting the less invasive examinations.' This is an important safeguard. However, the proposed recast gives no hint that age assessment can be used positively as a tool in ascertaining the weight to be given to the views of the child.

4.4.3.2 The 'due weight' requirement

The 'due weight' requirement in Article 12(1) CRC impacts on the burden of proof in asylum claims, requiring a shared and flexible burden of proof. It is inconsistent with the use of automatic negative credibility inferences and mandates a liberal application of the principle of the benefit of the doubt. The APD was found to undermine the shared and flexible burden of proof established in the QD in certain contexts, such as the safe country concepts. The APD was also found to sanction the use of automatic negative credibility inferences. Finally, the provision of the QD relating to the principle of the benefit of the doubt was found to be of little use to children. To what extent do the proposed recasts of the QD and APD improve this situation?

Burden of proof

On the question of the burden of proof, the first thing to note is that although Articles 4(1)-(3)QD implicitly relating to the burden of proof are unchanged in the recast of that directive, the proposed recast APD contains a new provision that appears to impact on Article 4(1) QD. Article 13 of the proposed recast

APD on obligations of the applicants for international protection provides in paragraph 1 that 'Member States shall impose upon applicants for international protection the obligation to cooperate with the competent authorities with a view to establishing their identity and other elements referred to in Article 4(2) of the [QD].' This appears to change the discretionary duty of assertion in the first sentence of Article 4(1) QD ('Member States may consider it the duty of the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection') into a mandatory duty. It can be observed that some children at least will be unable to discharge this obligation. Nevertheless, it is submitted that this new provision does not change the dynamic between the duty of assertion and the duty of assessment, nor, consequently, the overall burden of proof.

The second thing to note is that the burden of proof situation in relation to the safe country concepts is largely unchanged. Thus, as regards the safe country of origin and safe third country concepts, the burden of rebutting the presumption of safety continues to be placed on the applicant in Article 36(1) and 38(2)(c), respectively, although the latter no longer permits Member States to confine the rebuttal to the case of torture, cruel, inhuman or degrading treatment or punishment. Hence the applicant can rebut the presumption of safety on any grounds. Nonetheless, these provisions are contrary to the requirement of a shared and flexible burden of proof in the case of child applicants. Significantly, however, Article 25 of the proposed recast (Guarantees for unaccompanied minors) provides in paragraph 6 that the safe third country concept no longer applies to unaccompanied minors. It further provides that unaccompanied minors are exempt from the operation of the accelerated/manifestly unfounded procedure (and hence the concept of safe country of origin). These exemptions do not extend to accompanied minors, however.

As regards first country of asylum, Article 35 of the proposed recast adds a new stipulation that '[t]he applicant shall be allowed to challenge the application of the first country of asylum concept in his/her particular circumstances.' While this is an improvement on the silence of the current provision with its implication that the presumption of safety of the first country of asylum is conclusive, nevertheless, the burden seems to be placed solely on the applicant. There are no exemptions for either accompanied or unaccompanied minors.

Furthermore, in a definite retrograde step from the point of view of the appropriate burden of proof in children's claims, Article 39 of the proposed recast APD reintroduces the concept of the European safe third country. Modeled on existing (but inoperative) Article 36, Article 39 provides in paragraph 1:

> Member States may provide that *no, or no full, examination* of the application for international protection and *of the safety of the applicant in his/her particular circumstances* as described in Chapter II, shall take place in cases where a competent authority has established on the basis of the facts, that the applicant for international

> protection is seeking to enter or has entered illegally into its territory from a safe third country according to paragraph 2.[156]

If the minimum option of no examination of the safety of the applicant in his/her particular circumstances is adopted by Member States, this effectively establishes a conclusive presumption of safety which the applicant is powerless to rebut. However, it seems unlikely that Member States will be free to pursue this minimum option in the light of the judgments of the ECtHR and the CJEU in *MSS v Belgium and Greece* and *N.S.* respectively. But even the higher option – a perfunctory examination of the safety of the applicant – appears to place the burden solely on the applicant. Neither unaccompanied nor accompanied minors are exempt from the European STC concept. And yet unaccompanied minors would appear to be highly susceptible to the European STC concept as they generally enter the EU illegally, being unlikely to meet the formal requirements for legal entry into the EU owing to their age and unaccompanied status.[157]

Negative credibility inferences

On the issue of the use of negative credibility inferences, the situation in the proposed recast APD is somewhat improved. In a positive move, the grounds for an accelerated/ manifestly unfounded procedure are reduced from 16 to 7. Unfortunately, existing ground (g) (i.e. inconsistent, contradictory, improbable or insufficient representations, claim clearly unconvincing…) subsists albeit in an amended form. This contrasts with the situation under the 2009 proposed recast where ground (g) was deleted entirely.[158] Article 31(6)(e) now reads:

> The applicant has made clearly false or obviously improbable representations which contradict sufficiently verified country-of-origin information thus making his/her claim clearly unconvincing in relation to whether he/she qualifies as a refugee or a person eligible for subsidiary protection by virtue of the [QD].

This version is an improvement on the current ground (g) because only improbable representations (as opposed to inconsistent, contradictory or insufficient representations) trigger the ground, and the forward-looking nature of the assessment is reaffirmed. While the link to country of origin information looks at first to be an improvement, whether it actually is in the case of children depends on whether the country of origin information is child-sensitive, as demonstrated in Chapter 3.

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156 Emphasis added.

157 See European Migration Network, 'Policies on Reception, Return and Integration arrangements for, and numbers of, Unaccompanied Minors – an EU comparative study' (2010), Chapter 5 (Entry procedures including border controls).

158 2009 proposed recast APD, *supra* n. 147, Article 27(6).

Benefit of the doubt

Finally, on the issue of the principle of the benefit of the doubt, it will be recalled that the provision of the QD relating to the principle of the benefit of the doubt is too stringent to mandate a liberal application of the principle in the case of children. Unfortunately, this provision remains unchanged in the recast QD.

In sum, there are some modest improvements in the provisions of the proposed recast APD that impact on giving 'due weight' to the views of the child. However, these improvements are by no means systematic. For example, unaccompanied minors are exempt from two of the three safe country concepts in the APD, while accompanied minors are exempt from none. The rationale for the exemptions, according to the Commission, is 'that unaccompanied minors may be unable, *due to their age*, to articulate and substantiate their request for international protection'.[159] While this coincides exactly with what is being expressed in this chapter, it is not followed through to its logical conclusion, which is that *all* minors should be exempted from *all* such procedures.

4.5 SYNTHESIS OF FINDINGS

This chapter posed the question of whether the right of the child to be heard is met in the CEAS. The normative content of the right of the child to be heard was presented along three lines: the right to a hearing, the right to an appropriately adapted hearing and the right of the child to have his/her views given due weight in accordance with age and maturity. Phase One CEAS, in the form of the APD, was found to comply with none of these elements. Thus, whether or not the child is entitled to an asylum interview is left to Member States and, even if domestic law does allow the child to be interviewed, the directive permits Member States to omit the interview on numerous grounds, some of which are apt to be applied to or are particularly detrimental to children. Decisions relating to withdrawals can be taken without a hearing and the directive is silent on the question of an appeal hearing. Unaccompanied, though not accompanied, minors are entitled to a representative but the representative's role is unclear and the right can be derogated from in various situations. Where an interview occurs, the directive provides that the 'needs' of unaccompanied, though again not accompanied, minors must be taken into account

159 Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast) COM (2009) 554 final, ANNEX, 'Detailed Explanation of the Proposal', pp. 11-12 (emphasis added). It is assumed that the detailed explanation of provisions of the 2009 proposal applies to the equivalent provisions of the 2011 proposal to the extent that such provisions remain unchanged. There is no detailed explanation of the 2011 proposal.

– a stipulation that is omitted in the provisions relating to withdrawals and appeals. Finally, as regards giving due regard to the views of the child, not only does the directive not legislate for this, it contains several provisions relating to the burden of proof, safe country concepts and the benefit of the doubt that appear to disregard the views of the child. In short, Phase One CEAS does not comply with the right of the child to be heard.

Some improvements can be discerned in Phase Two. However, the improvements are generally qualified in some way. Thus, the opportunities for Member States to omit the interview are curtailed but the child still has no right to an interview; a general right to an appeal hearing is implied but not explicitly stated; significant improvements are made regarding the representative for the unaccompanied minor but still no provision is made for the possibility that the accompanied minor might need a representative; notable improvements are made with regard to the adaptation of the hearing for all minors but these improvements are detracted from because the proposed recast is peppered with derogation provisions, express and implied and, furthermore, no child-friendly modifications are made to the withdrawals or appeals procedure; some amendments improve the likelihood that 'due weight' will be given to the views of the child but these apply neither to all children nor to all objectionable concepts. In sum, relatively speaking, Phase Two CEAS is better than Phase One in terms of the right of the child to be heard, but considered on its own merits in the light of the normative requirements of the right, it cannot be said to be in compliance.

5 The right of the child to protection and care

5.1 INTRODUCTION

This chapter explores the conformity of the CEAS with the rights of the child relating to protection and care. A general source for this right is the best interests principle which includes the obligation 'to ensure to the child such protection and care as is necessary for his or her wellbeing'. Furthermore, a specific right of asylum seeking and refugee children to protection and assistance is established in Article 22 CRC, which provides in the first paragraph that:

> States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in this Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

A number of observations can be made about the scope of this provision. In terms of personal scope, it applies to both asylum seeking and refugee children: the former are entitled to *interim* protection and care while the latter are entitled to long-term protection and care in the form of durable solutions. However, there should be no major distinction between the two phases of protection and care since it is well recognized that, when it comes to children, the search for durable solutions should start immediately.[1] Moreover, the provision applies whether the child is unaccompanied or accompanied by his or her parents or by any other person. In terms of material scope, it is clear that Article 22 is very broad. It is essentially an umbrella provision, bringing asylum seeking and refugee children within the scope of application of applicable Convention rights as well as other rights established in international

1 As Goodwin Gill observes, '[t]here is no moment […] at which the refugee child in flight suddenly becomes ready for a durable solution; on the contrary, as the child will not postpone his or her growth or development, so the need to implement elements of a durable solution is immediate.' Guy Goodwin-Gill, 'Unaccompanied Refugee Minors, The Role and Place of International Law in the Pursuit of Durable Solutions', *International Journal of Children's Rights* 3 (1995): 415.

human rights and humanitarian law. As such, it is potentially relevant to all the chapters of this thesis and indeed has already featured in Chapters 3 and 4. For the purposes of this chapter, it is proposed to delimit the scope of application of Article 22 in three ways.

The first delimitation relates to the distinction between applicable Convention rights and other rights in international law such as the 1951 Convention relating to the Status of Refugees. Here the focus in on applicable rights in the CRC. The second, related, delimitation concerns the meaning of the term 'protection'. As Goodwin Gill notes, '[i]n refugee discourse, 'protection is a term of art, whose meanings are not always clear.'[2] In this chapter, the term 'protection' is used, not the classic refugee law sense of protection from *refoulement*, but rather in the more mundane (but equally important) sense of day-to-day protection and care of the child. Hence the question arises as to what rights in the Convention are applicable to the protection (in this specific sense) and care of the asylum seeking and refugee child? The answer to this question is still too broad to be useful: a great many rights in the CRC relate to protection and care, all of which are in principle applicable to all children by virtue of the general principle of non-discrimination laid down in Article 2.[3] So a third delimitation is necessary. This delimitation follows from the question: who, primarily, protects and cares for the child? In the normal course of events, children are primarily protected and cared for by their parents. Therefore the rights in the Convention that relate to keeping the family together – family unity, in other words – are key. However, in refugee-type situations it is not unusual for children to become separated from their parents. In such situations the state must step in and take over the parental role. Therefore the rights in the Convention that relate to surrogate protection and care are key.

Accordingly, the first substantive section of this chapter (section 5.2) relates to the concept of family unity. It explores the various rights of the child relating to family unity, focusing on the concept of derived rights, the prohibition on separating a child from his or her parents against their will and the right of the child to family reunification. It examines the extent to which the relevant CEAS instruments comply with these rights and evaluates the prospects for enhanced compliance in Phase Two. Section 5.3 relates to the protection and care of the unaccompanied or separated child. It sets out the

2 *Ibid*, at 406.

3 Article 2(1) CRC provides: 'States Parties shall respect and ensure the rights set forth in the present Covenant to each child within their jurisdiction without distinction of any kind, irrespective of the child's or his or her parent's or legal guardian's race color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.' The term 'other status' has been interpreted by the Committee RC as extending to 'the status of a child as being unaccompanied or separated, or being a refugee, asylum seeker or migrant': General Comment No. 6, 'Treatment of unaccompanied and separated children outside their country of origin', U.N. Doc CRC/GC/2005/6 (2005), para. 18.

right of the child who is deprived of family to surrogate protection and assistance. This right covers the right of the child who is deprived of family to be identified as such, to a guardian or similar representative and to alternative care. Finally, it evaluates the extent of compliance of the relevant CEAS instruments in their first and second phases. The relevant CEAS instruments are the Reception Conditions Directive (RCD), which contain provisions relating to the *interim* protection and care of asylum seeking children and the Qualification Directive (QD), which contains provisions relating to the long-term protection and care of children who are beneficiaries of international protection. Some provisions of the Dublin Regulation (DR) are also relevant.

5.2 FAMILY UNITY

5.2.1 The right of the child to family unity

In general human rights terms, the right to family unity derives from the right to respect for private and family life, such as is established under Article 8 ECHR and Article 17 ICCPR.[4] A similar right is established in Article 16 of the CRC which provides:

> 1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honor and reputation.
> 2. The child has the right to the protection of the law against such interference or attacks.

However, this is only one of a host of rights in the Convention either directly or indirectly relating to the concept of family unity, broadly understood.[5] Thus, Article 7(1) CRC provides that the child, as far as possible, has the right to know and be cared for by his/her parents. Article 8(1) establishes the right of the child to preserve his or her identity, including family relations, without unlawful interference. Article 9, which is perhaps the single most important article relating to family unity, prohibits the separation of the child from his/her parents against their will unless it is determined that separation is necessary

4 Article 8(1) ECHR provides: 'Everyone has the right to respect for his private and family life, his home and his correspondence.' Article 17(1) ICCPR provides: 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.'

5 Thus, family unity in international child rights law has a broader rights base than family unity in general human rights law. On the relationship between the terms 'family', 'family unity', 'family life' and 'family reunification' see Dallal Stevens, 'Asylum-Seeking Families in current legal discourse: a UK perspective', *Journal of Social Welfare and Family Law* 32, no. 1 (2010): 5-22.

for the best interests of the child. Article 9 further establishes the right of the child who is separated from one or both parents to maintain personal relations and direct contact with them, unless contrary to the child's best interests. Notably, this provision was the inspiration for Article 24(3) of the EU Charter of Fundamental Rights.[6] Furthermore, Articles 10 and 22(2) CRC relate to the right to family reunification – a right based on the logic of family unity.

Given the number of provisions of the CRC relevant to the right of the child to family unity, it is proposed to outline the normative content of the right under three headings: the concept of derived rights; the prohibition on separating a child from his/her parents; and the right to family reunification.

5.2.1.1 The concept of derived rights

Family unity is established as a kind of meta-norm in the CRC for two reasons, the first (more) ideological and the second (more) functional. The ideological rationale for family unity is most clearly expressed in the sixth preambular paragraph of the Convention which states that 'the child for the full and harmonious development of his/her personality should grow up in a family environment in an atmosphere of happiness, love and understanding'.

As to the more functional reason for the centrality of the concept of family unity in the Convention, this is best expressed in the fifth preambular paragraph of the Convention, which asserts that States Parties are '[c]onvinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly the children, should be afforded the necessary protection and assistance so that it can *fully assume its responsibilities within the Community*.'[7] This statement is based on the pragmatic consideration that in view of the inevitable dependence of the child on his/her parents or guardian, many of the rights in the Convention must be realized by or through the parents or guardian, albeit with the assistance of the State.[8] Thus, the Convention establishes in Article 18 the principle that parents or guardians have the primary responsibility for the child and the realization of his/her rights, with the state exercising a secondary role.[9] This principle is expressed in more applied terms in numerous other

6 Article 24(3) of the Charter of Fundamental Rights provides: 'Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.'

7 Emphasis added.

8 For critical commentary, see 'Donna Gomien, 'Whose Right (and Whose Duty) Is iI? An Analysis of the Substance and Implementation of the Convention on the Rights of the Child', *New York Law School Journal of Human Rights* 7 (1989-1990): 161-175.

9 Article 18 provides *inter alia*: '1. […] Parents, or as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern. 2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing

articles of the Convention.[10] In this regard, family unity is the mechanism through which the child realizes his/her rights, the extent of the state obligation depending on the circumstances of the parents. In the refugee law context, the term used to express this dynamic is 'derived rights' whereby the child who is accompanied by his/her parents or guardian derives his/her entitlements from their status.[11]

Ironically, in view of the centrality of family unity in the Convention scheme, the term 'family' is not defined in the Convention. The CRC uses a wide variety of terms to refer to family relationships.[12] Moreover, the Convention offers no definition of the term 'guardian' and seems to accept that the role of primary carer can be played, *de facto* or *de jure*, by a range of different adults who may or may not have blood ties with the child.[13] This suggests that the concept of family should be construed widely. Such an interpretation is supported by the broad purposive understanding of 'family' adopted by the ECtHR in its interpretation of Article 8 ECHR, which parallels Article 16 CRC.[14]

If the Convention's understanding of the family is unclear, by contrast, its understanding of who constitutes a child is unequivocal. Thus, Article 1 of the Convention provides that '[f]or the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.'

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responsibilities and shall ensure the development of institutions, facilities and services for the care of children.'

10 For example, Article 27 CRC relating to the right of the child to an adequate standard of living provides that the primary responsibility for securing an adequate standard of living for the child lies with the parents or other persons responsible for the child but that the State is under an obligation to assist the parents or others responsible for the child in this regard. See further Articles 3(2), 5, 14(2), 23(2) and (3), 24(2)(e) and (f) and 26(2).

11 The term 'family asylum' is sometimes used. See Christoph Bierwirth, 'The Protection of Refugee and Asylum Seeking Children, the Convention on the Rights of the Child and the Work of the Committee on the Rights of the Child', *Refugee Survey Quarterly* 24, no. 2 (2005): 102.

12 The following terms can be found in the Convention: 'parents', 'family members', 'legal guardians', 'parents or other members of the family', 'other individuals/persons legally responsible for the child', 'persons having responsibility for the maintenance of the child', 'others having financial responsibility for the child', 'members of the extended family or community as provided by local custom', 'others responsible for the child' and 'any other person who has the care of the child'.

13 *Ibid*.

14 The ECtHR has recognised the following relationship to constitute 'family': husband, wife and dependent children, including illegitimate and adopted children (*B. v UK*, Appl. No. 8940/82, Judgment of 8 July 1987; siblings (*Moustaquim v Belgium*, Appl. No. 12313/86, Judgment of 18 February 1991; grandparents (*Vermeire v Belgium*, Appl. No. 12849/87, Judgment of 29 November 1991; and importantly, 'young adults who had not yet founded a family of their own [and] their parents and other close family members' (*Osman v Denmark*, Appl. No. 38058/09, Judgment of 14 June 2011, para. 54).

In sum, the child (i.e. anyone under the age of 18 unless a lower age of majority is provided for in domestic law) is entitled to derive rights from the status of his her parents, guardian or other family members, as appropriate. This follows from the functional rationale for family unity that underpins many of the rights in the CRC.

5.2.1.2 The prohibition on separating a child from his/her parents

Although Article 7(1) CRC relates to the right of the child to know and be cared for by his/her parents and Article 8(1) relates to the right of the child to preserve family relations, it is Article 9 that does all the heavy lifting when it comes to supplying a 'core' right of the child to family unity. The first two paragraphs of Article 9 are of particular importance and will be analyzed in turn. They provide:

> 1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
> 2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

Article 9(1) is a complex provision establishing a general rule – no separation of the child from his/her parents against their will, and a limitation – except where competent authorities subject to judicial review determine in accordance with law that such separation is necessary for the best interests of the child. Two examples are provided of when a separation might be deemed to be necessary for the best interests of the child: abuse or neglect of the child and where the parents are living separately and a decision must be made about the child's place of residence. A number of observations may be made on the operation of this provision.

First, the best interests of the child functions differently in Article 9 CRC than it does when it operates as a general principle in Article 3 CRC. The general principle of the best interests of the child involves an evaluation of all available options with a view to deciding which is best; thus identified, the best interests of the child must be a primary, but not necessarily the paramount, consideration. By contrast, there is a presumption in Article 9 CRC that family unity with the parents is in the best interests of the child. This presumption is rebutted where it is shown that separation is necessary for the best interests of the child. Here the best interests of the child becomes the paramount consideration (c.f. 'necessary'). The illustrative examples of when

separation may be necessary for the best interests of the child – child abuse and custody arrangements when the parents are living separately – indicate that the reasons for separation are limited to those relating to the relationship between and personal circumstances of the child and his/her parents. Consequently, extraneous considerations relating to the interests of the State or the rights of others are immaterial.[15]

Second, whether separation is necessary for the best interests of the child must be determined in accordance with applicable law and procedures. This is akin to the requirement under Article 8 ECHR that the right to family life can only be interfered with 'except such as is in accordance with law and is necessary in a democratic society'.[16] Such a decision can only be taken by 'competent authorities'. While this term could apply equally to a court or an administrative body, the key requirement for the deciding body is competence. In his commentary on Article 9, Doek notes that:

> [C]ompetent means that the authority specially designated for the determination of the necessity of a separation, should not only be mandated to do so ('competent' in legal terms) but also competent in substantive terms. The authority concerned should be well-trained and have the necessary knowledge of child psychology and child development, parent-child attachment and of the existing alternative ways and means to address the problems in the parent-child relationship without resorting to separation.[17]

These observations are consistent with emerging 'soft law' standards relating to the formal determination of best interests and also with the requirements of Article 3(3) CRC which obliges states to 'ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as in competent supervision.'

Third, the decision of the competent authority must be subject to judicial review. However, this is not limited to an initial review of the placement on appeal but extends to a periodic review. In this regard, Doek links Article 9 with Article 25 CRC concerning placement of the child for the purposes of care, protection or treatment of his physical or mental health. He notes that 'separa-

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15 See Jacqueline Bhabha and Wendy Young 'Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines', *International Journal of Refugee Law* 11, no. 1 (1999): 84-125.

16 Indeed, in its jurisprudence on Article 8 EHCR as it relates to the separation of children from their parents, the ECtHR's approach is very similar to that required by Article 9 CRC. See, for example, *A.D. and O.D. v United Kingdom*, Appl. No. 28680/06, Judgment of 16 March 2010.

17 Jaap Doek, *A Commentary on the United Nations Convention on the Rights of the Child, Article 8, The Right to Preservation of Identity and Article 9, The Right Not to be Separated From his or her Parents* (Leiden/Boston: Martinus Nijhoff Publishers, 2006), 26.

tion from the parents by a competent authority is a placement'.[18] Article 25 obliges states to undertake 'a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.'

Article 9(2) specifies further procedural guarantees: all interested parties must be allowed to participate in the proceedings and make their views known. The interested parties are not limited to the parents, but extend to the child him/herself. This is evident when Article 9(2) is read in conjunction with Article 12 CRC, a general principle of the Convention which, as outlined in Chapter 4, establishes the right of the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

In sum, Article 9 establishes that the separation of a child from his or her parents is highly exceptional, relating only to reasons associated with the child-parent relationship; otherwise, the state is under an obligation not to separate a child from his/her parents or, put differently, to facilitate the unity of the child with his/her parents. When, exceptionally, separation is contemplated, it is subject to requirements of lawfulness, periodic judicial review and participation of the child in the decision.

5.2.1.3 The right of the child to family reunification

Article 22 CRC relating to the right of the child seeking or enjoying refugee status to appropriate protection and humanitarian assistance provides in paragraph 2, *inter alia*:

> For this purpose, States Parties shall provide, as they consider appropriate, cooperation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations cooperating with the United Nations to protect and assist such a child and to trace the parents of other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family.

Thus, Article 22(2) establishes an obligation to assist in efforts to trace the family of the refugee child, the purpose of such which is to facilitate the reunification of the child with his/her family. In addition to Article 22, various other articles of the CRC are relevant to the question of a right to family reunification, not least the plethora of provisions relating to the concept of family unity. However, before proceeding to that discussion, it is useful to situate the right to family reunification in the CRC in the broader context of the right to family reunification in general human rights law.

18 *Ibid*.

As is well known, there is no free-standing right to family reunification in general human rights law. Family reunification may arise as part of the right to respect for family life under Article 8 ECHR or Article 17 ICCPR. The focus here will be on the former, as the ECtHR has the most developed case-law on the subject. In the main, Article 8 ECHR involves the (negative) obligation not to interfere in family life, but it may, depending on the facts of the case, have a positive dimension, obliging states to permit family reunification in order to facilitate the enjoyment of family life.[19] The case-law of the ECtHR on this aspect of the right is not settled.[20] However, it appears that if there are 'obstacles'[21] or 'major impediments'[22] to the enjoyment of family life in the country of origin, then the state will be obliged to facilitate family reunification on its territory. As to what constitute such obstacles or impediments, the Court's case-law is rather inconsistent.[23] No case has yet been taken by a recognized refugee or beneficiary of subsidiary protection in respect of a family member left behind. It would seem logical to suggest that the 'obstacles/major impediments' test would be made out *ipso facto* in such cases.

In this rather unsettled context, the question arises as to whether the child beneficiary of international protection has a more established right to family reunification deriving from the CRC. As previously mentioned, Article 16 CRC corresponds to Article 8 ECHR. However, Article 9 and 10 CRC are also of relevance – provisions that are bolstered by the many references in the Convention to the concept of family unity.[24]

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19 ECtHR, *Abdulaziz, Cabales and Balkandali v The United Kingdom,* Appl No. 9214/80; 9473/81; 9474/81, Judgment (Plenary Court) of 28 May 1985.

20 See Thomas Spijkerboer, 'Structural Instability: Strasbourg Case Law on Children's Family Reunion', *European Journal of Migration and Law* 11 (2009): 271-293.

21 ECtHR, *Gül v Switzwerland*, Appl. No. 23218/94, Judgment of 29 February 1996, para. 42; ECtHR, *Sen v the Netherlands*, Appl. No. 31465/96, Judgment of 21 December 2001, para 40.

22 ECtHR, *Tuquablo-Teckle v The Netherlands*, Appl. No. 60665/00, Judgment of 1 December 2005, para. 48.

23 For example, contrast *Gül*, in which the fact that husband and wife had been granted humanitarian leave to remain in Switzerland, that they had a daughter there who was living in a care placement, that the wife's health was very poor and the husband was disabled were held not to be obstacles to return to their country of origin to reunify with their son who was aged 7 at the time of the initial application for family reunification, with *Sen* and *Tuquablo-Teckle*, in which the families' settled status in the Netherlands was held to be an obstacle to return to their country of origin to reunify with their daughters who were aged 9 and 15 respectively at the time of the initial application for family reunification. For critical commentary, see Thomas Spijkerboer, *supra* n. 20.

24 In *European Parliament v Council*, the ECJ referred to Articles 9 and 10 CRC when discussing the question of whether children have a right to family reunification. Thus, after analyzing Article 8 EHCR, paraphrasing Articles 9(1) and 10(1) of the CRC, and listing various relevant articles of the EU Charter of Fundamental Rights, the Court went on to find that, '[t]hese various instruments stress the importance to a child of family life and recommend that States have regard to the child's interests but they do not create for the members of a family an individual right to be allowed to enter the territory of a State and cannot be interpreted as denying States a certain margin of appreciation when they examine applications for

A literal reading of Article 9 suggests that it is limited to decisions about separating a child from his/her parents. Nevertheless, the Committee RC grounds its recommendations relating to family reunification principally in Article 9. Thus, in its General Comment No. 6 on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin, the Committee states:

> In order to pay full respect to the obligation of states under article 9 of the Convention to ensure that a child shall not be separated from his or her parents against their will, all efforts should be made to return an unaccompanied or separated child to his or her parents except where further separation is necessary for the best interests of the child […] While the considerations explicitly listed in article 9, paragraph 1 sentence 2, namely, cases involving abuse or neglect of the child by the parents, may prohibit reunification at any location, other best-interests considerations *can provide an obstacle to reunification at specific locations only*.[25]

What is interesting about the Committee's choice of Article 9 CRC to found a right of family reunification is that it establishes a) that the only impediment to family reunification with parents can be the best interests of the child (understood in the narrow sense of Article 9(2)); and b) that the only consideration regarding the location of family reunification with parents is the best interests of the child. As regards the refugee child or child beneficiary of subsidiary protection, one can observe that it can never be in the best interests of such a child to be returned to a country where he/she has a well founded fear of being persecuted or is at real risk of suffering serious harm. The contrary proposition leads to the absurd conclusion that it could be in the best interests of the child to be *refouled*. The Committee RC is quite categorical on this point, stating:

> Family reunification in the country of origin is not in the best interests of the child and should therefore not be pursued where there is a 'reasonable risk' that such a return would lead to the violation of fundamental human rights of the child. Such risk is *indisputably documented* in the granting of refugee status or in a decision of the competent authorities on the applicability of non-refoulement obligations (including those deriving from article 3 of the Convention Against Torture and

family reunification.' Case C-540/03, Judgment (GC) of 27 June 2006, para 59. However, the case concerned family reunification of immigrant, as opposed to refugee, children. Moreover, the Court undertook no separate analysis of the substantive content of the CRC rights, simply assuming that the content was the same as that of Article 8 ECHR. This is debatable.

25 Committee RC, General Comment No. 6, 'Treatment of unaccompanied and separated children outside their country of origin', U.N. Doc. CRC/GC/2005/6 (2005), para. 81 (emphasis added).

> Other Cruel, Inhuman or Degrading Treatment or Punishment and articles 6 and 7 of the International Covenant on Civil and Political Rights).[26]

It follows necessarily from point a) above that (absent a resettlement country in which the family can reunite) such a child must be reunited with his/her parents in the country that granted international protection. However, at this juncture, the Committee deploys Article 10 too, arguing that '[w]henever family reunification in the country or origin is not possible […] due to legal obstacles to return […] the obligation under articles 9 and 10 of the Convention come into effect and should govern the host country's decisions on family reunification therein.'[27]

Article 10 CRC provides *inter alia*:

> 1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.
> 2. A child whose parents reside in different states shall have the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. […]

Article 10(1) seems at first like a firm foundation for establishing a right to family reunification. However, the Committee RC is reluctant to deploy Article 10 to this end because of its uncertain scope *ratione personae* and *materiae*. There is some confusion as to whether Article 10(1) should be interpreted in the light of 10(2) or whether Article 10(1) establishes the general principle, with Article 10(2) pertaining to the specific situation of parental separation in different states.[28] If the former interpretation is adopted, this narrows the personal and material scope of Article 10(1), respectively, to situations of parental separation across states and to the right to leave any country and to enter one's *own* country. Owing to this ambiguity, the Committee has been slow to use

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26 *Ibid*, para. 82 (emphasis added).

27 *Ibid*, para. 83.

28 For example, the *travaux préparatoires* of the CRC reveal that 'Article 10 is intended to apply to separations involving different countries and relating to cases of family reunification. Article 10 is not intended to affect the general right of States to establish and regulate their respective immigration laws in accordance with their international obligations.' Statement made by the chairman of the open-ended Working Group, reported in S. Detrick (ed.), *The United Nations Convention on the Rights of the Child: A Guide to the Travaux Preparatoires*, (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1992), 168.

Article 10 as anything other than supplementary to Article 9.[29] Nevertheless, it is submitted that Article 9 alone or in combination with Article 10 suffices to establish a right of the child beneficiary of international protection to family reunification.

There remains the question of the right to family reunification of a child who has not (yet) been determined to be in need of international protection – in other words, the asylum-seeking child. Normally family reunification in the host country during the asylum process is premature, since family reunification in the country of origin remains a real possibility unless and until the child qualifies for international protection. However, the situation of an unaccompanied child with a family member in another EU Member State is different, since reunification with that family member is an *interim* measure pending the outcome of the asylum application. Here, the relevant provision of the CRC is Article 3 – the general principle of the best interests of the child. Subject to verification of the family relationship, of the ability and willingness of the family member to take care of the child and of the wishes of the child, it can be assumed that family reunification is in the best interests of the child. This also follows from the ideological rationale for family unity that permeates the CRC.

In brief, the child beneficiary of international protection has a right to family reunification with his/her parents in the country granting international protection, while it is likely to be in the best interests of the asylum-seeking child, as an *interim* measure, to be reunited with a family member in another EU Member State.

5.2.2 Phase One CEAS: compliance with the right of the child to family unity

This sub-section is structured, for convenience, according to the headings under which the right of the child to family unity have just been analyzed, namely, the concept of derived rights, the prohibition on separating a child from his/her parents and the right to family reunification. The provisions of the CEAS instruments that relate to family unity will be critiqued under these headings. The relevant CEAS instruments are the RCD, the QD and, to a limited extent, the DR.

29 This is evident in its General Comments. However, the Committee often uses the language of Article 10 CRC (i.e. dealing with applications for family reunification in a 'positive, humane and expeditious manner') in relation to family reunification of refugees in its concluding observations. See for example, Concluding Observations to Belgium in 2010, U.N. Doc. CRC/C/BEL/CO/3-4, para. 75 and Concluding Observations to Sweden in 2005, U.N. Doc. CRC/C/15/Add.248, § 7.

5.2.2.1 The concept of derived rights

The functional dimension of the right of the child to family unity finds expression in the refugee law context in the concept of derived rights, whereby children derive their rights from their parents' status. This concept is well recognized in both the RCD and the QD.

Thus, the personal scope of the RCD extends to asylum applicants and their family members if the latter are 'covered by such application for asylum according to the national law'.[30] In order to understand the meaning of this provision it is necessary to cross-reference the APD which provides in Article 6(4) that Member States may determine in national legislation the cases in which a minor can make an application on his/her own behalf and the cases in which an application by an adult is deemed to cover the application of any unmarried minor child. In the case of the former, the child is the asylum applicant and is directly entitled to the rights in the RCD; in the case of the latter, the concept of derived rights applies, as outlined in Chapter 3. State practice reveals that most Member States subsume the child's application into that of his/her parents'.[31]

Similarly, the QD establishes in Article 23(2) that 'Member States shall ensure that family members of the beneficiary of refugee or subsidiary protection status, who do not individually qualify for such status, are entitled to claim the benefits referred to in Articles 24-34, in accordance with national procedures and as far as compatible with the personal legal status of the family member.' However, of some concern, the next subparagraph states that '[i]nsofar as the family members of beneficiaries of subsidiary protection status are concerned, Member States may define the conditions applicable to such benefits.' This provision, which authorizes the placing of limits on the derived rights of children of beneficiaries of subsidiary protection, is contrary to the functional dimension of the right to family unity. The extent to which Member States have availed of it is unclear.[32]

However, the major problem with the concept of derived rights as provided for in both the RCD and the QD lies in the definition of the term 'family members'. Art 2(d) of the RCD provides:

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30 Article 3(1) (Scope).

31 The Commission evaluation of the APD states that applicants made by parents 'generally' cover dependant minors. 'Report from the Commission to the European Parliament and the Council on the Application of Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status', COM (2010) 465 final, § 4.3.1.1. Hereinafter, 'Commission evaluation of the APD'.

32 No information on the operation of this provision is provided in the Commission's evaluation of the QD. 'Report from the Commission to the European Parliament and the Council on the Application of 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', COM (2010) 314 final. Hereinafter, 'Commission evaluation of the QD'.

> '[F]amily members' shall mean, in so far as the family already existed in the country of origin, the following members of the applicant's family who are present in the same Member State in relation to the application for asylum:
> (i) spouse or unmarried partner of the asylum seeker or his or her unmarried partner in a stable relationship […];
> (ii) the minor children of the couple referred to in point (i) or of the applicant, on condition that they are unmarried and dependent and regardless of whether they were born in or out of wedlock or adopted as defined under the national law.

Article 2(h) of the QD supplies exactly the same definition of family members of the refugee or beneficiary of subsidiary protection status. This definition can be criticized for a number of reasons.

First, the definition freezes membership of the family at the moment the family left the country of origin. This means that any children born during transit or after arriving in the EU do not qualify as family members and consequently do not benefit from derived rights under the directives. This is rather startling, especially in view of the fact that pregnant women are included in the illustrative list of 'vulnerable persons' in Article 17 RCD and in Article 20(3) QD whose specific situation Member States must take into account in implementing, respectively, the provisions of the RCD relating to material reception conditions and health care and the chapter of the QD relating to the content of international protection. It may be observed that the vulnerability of pregnant women is unlikely to be diminished post-partum if their children are excluded from the scope of application of the directives.

Second, minor children are only comprehended within the definition if they are unmarried and dependent. This is a way of constructing the emancipation of children and, as *de facto* adults, of denying them their convention rights. It is inconsistent with the scheme of the CRC which defines the child as anyone under the age of 18 unless majority is attained earlier under domestic law and which conceives of child marriage as itself a cause for concern. In this regard, it is worth quoting from the Committee RC's General Comment No. 4 on adolescent health and development:

> [I]n some States Parties married children are legally considered adults, even if they are under 18, depriving them of all the special protection measures they are entitled under the Convention. The Committee strongly recommends that States Parties review and, where necessary, reform their legislation and practice to increase the minimum age for marriage with and without parental consent to 18 years, for both girls and boys.[33]

33 U.N. Doc. CRC/GC/2003/4 (2003), para. 20. The Committee on the Elimination of Discrimination against Women has made a similar recommendation in its General Comment No. 21 of 1994. The Convention on the Elimination of Discrimination Against Women states in Article 16(2): 'The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage […].'

Given these concerns, it follows that it may be in the best interests of the married/independent child to be included in the parents' family unit and derive his/her rights accordingly. But this possibility is precluded by the definition of family in the directives.

Third, the definition of family member omits any reference to a guardian or responsible adult in situations where there are no parents, meaning that the child is not entitled to derive rights from the status of that person. Presumably, such a child could make his/her own application for international protection under the APD, thereby becoming directly entitled to the rights in the RCD and the QD (if found eligible).[34] However, such a child would not be considered to be an 'unaccompanied minor' and thus entitled to special protection and assistance. This is because the term 'unaccompanied minor' is defined in the RCD and the QD as 'persons below the age of eighteen who arrive in the territory of the Member State *unaccompanied by an adult responsible for them whether by law or by custom*, and for as long as they are not effectively taken into the care of such a person.'[35] Therefore, there is an inconsistency between the definition of family member in the directives and the definition of an unaccompanied minor, the net effect of which is that the child who is accompanied by an adult who is not a parent but who is responsible for him/her whether by law or custom is considered not to be an unaccompanied minor by virtue of that relationship but is not entitled to derive any rights from the relationship. However, inconsistently, the RCD does envisage that such children should be lodged with the adult family member responsible for them, as will be outlined below.

Fourth, the definition of family member is constructed solely from an adult perspective, encompassing spouse or partner and (some) minor children. The lack of a definition of family member from the perspective of the child effectively means that a child cannot be the central claimant from whom other family members, such as parents or siblings, derive their rights. This signals a resistance to the idea of the child as a person with distinct protection needs and to the concept of asylum as an appropriate remedy for the child in his/her own right – ideas that were developed in Chapters 3 and 4.

In conclusion, although the concept of derived rights is amply provided for in both the RCD and QD, the latter authorizes placing restrictions on the derived rights of family members of beneficiaries of subsidiary protection. Furthermore, both directives define family members narrowly such that certain categories of children – those born after the family left the country of origin and married and presumptively independent children – are precluded from

34 Article 6(4) APD provides that Member States may determine in national legislation the cases in which a minor can make an application on his/her own behalf and the cases in which an application by an adult is deemed to cover the application of any unmarried minor child – the term 'child' presumably meaning child of the adult.

35 Article 2(h) RCD and Article 2(i) QD. Emphasis added.

deriving their rights from their parents' status. Children in the company of a guardian or responsible adult who is not a parent are in a particularly invidious position: precluded from being considered as unaccompanied minors but not entitled to derive any rights from the relevant adult's status. Finally, there is no definition of family member from the point of view of the child, meaning that the child cannot be the person from whom other family members derive their rights. In sum, the RCD and QD recognize the concept of derived rights but severely curtail the beneficiaries of such rights.

5.2.2.2 The prohibition on separating a child from his/her parents

Article 9 CRC establishes an absolute prohibition on separating a child from his/her parents unless, subject to various procedural guarantees, the separation is necessary for the best interests of the child. To what extent is this right reflected in the relevant CEAS instruments? The relevant instruments are the RCD, the QD and the DR.

As regards the RCD, various provisions of Chapter II (General Provisions on Reception Conditions) speak to the issue of family unity. Article 8 provides, *inter alia*, 'Member States shall take appropriate measures to maintain *as far as possible* family unity as present within their territory, *if applicants are provided with housing by the Member State concerned*.'[36] Article 14(2) stipulates that Member States must ensure the protection of family life where housing-in-kind is provided. Article 14(3) establishes the specific entitlement of the child to family unity, providing that 'Member States shall ensure, *if appropriate*, that minor children of applicants or applicants who are minors are lodged with their parents or with the adult family member responsible for them whether by law or by custom.'[37] However, Article 14(8) permits Member States to 'exceptionally' derogate from the Article 14 guarantees in four circumstances: (a) when an initial assessment of the specific needs of the applicant is required; (b) when material reception conditions are not available in a certain geographical area; (c) when housing capacities normally available are temporarily exhausted; (d) when the asylum seekers is in detention or confined to border posts. In such circumstances, different rules may apply 'for a reasonable period which shall be as short as possible'. In other words, in such circumstances, the duty to provide housing that assures protection of family life and to accommodate children with their parents may be limited.

These various provisions can be criticized from the point of view of the right of the child not to be separated from his/her parents on a number of grounds. First, the qualifying terms ('as far as possible', 'if applicants are provided with housing by the Member State concerned', 'if appropriate') are problematic. Article 9(1) CRC provides that the only situation in which the

36 Emphasis added.
37 Emphasis added.

separation of a child from his/her parents is permitted is if the separation is necessary for the best interests of the child. Consequently, predicating family unity on what is 'possible' (presumably, in terms of administrative convenience) and 'appropriate' (meaning unclear) is contrary to the requirements of Article 9. By the same token, limiting the State's obligation to situations of direct provision of accommodation overlooks the fact that where an accommodation allowance is provided it must be sufficient to pay for family accommodation.

Second, the derogation provision in Article 14(8) implicitly allows the child to be lodged separately from one or both parents for a number of management and administrative reasons. Since the only legitimate reason for separating a child from his or her parents is where separation is necessary for best interests – understood solely in terms of the relationship between and personal circumstances of the child and his/her parents – the derogation provision is contrary to Article 9(1) CRC. Article 14(3), which establishes the specific entitlement of the child to family unity, would seem to come within the scope of application of Article 18 of the directive which provides that '[t]he best interests of the child shall be a primary consideration for Member States when implementing the provisions of the Directive that involve minors.' Therefore any derogation from Article 14(3) would also be subject to a best interests assessment. However, as previously explained, the general principle of the best interests of the child (which is reflected in Article 18 RCD) is weaker than the specific best interests obligation in the context of forced separation, making Article 18 RCD of little succor in this context.

Third, Article 9(1) and (2) CRC mandate that any separation decision be taken by competent authorities subject to periodic judicial review and that all interested parties, including the child, be given the opportunity to make their views known and have their views considered. Chapter V RCD on appeals is potentially relevant to this issue. It contains just one article (21) which provides in the first paragraph that:

> Member States shall ensure that negative decisions relating to the granting of benefits under this Directive or decisions taken under Article 7 which individually affect asylum seekers may be the subject of an appeal within the procedures laid down in the national law. At least in the last instance the possibility of an appeal or review before a judicial body shall be granted.

Article 7 (an opaque provision permitting detention) is found in Chapter II, as are the provisions on family unity. Does this mean that any 'negative decision' taken under Chapter II, including therefore decisions relating to family unity, fall within the scope of application of Article 21? It is submitted that such an interpretation is unlikely from a schematic and purposive perspective. If Article 21 were applicable to every exercise of discretion or every use of a permitted derogation by Member States under Chapter II, then this would stymie the flexibility given to Member States as regards general re-

ception conditions. It is more likely that the reference to 'negative decisions relating to the granting of benefits under this Directive' relates principally to Chapter III of the directive (Reduction or Withdrawal of Reception Conditions). Chapter III outlines various presumed instances of abuse of the reception system and provides, by way of response, for the reduction, withdrawal and even outright refusal of reception conditions. That Article 21 relates principally to Chapter III is underscored by the express reference to Article 7 – a reference that would be superfluous if Chapter II generally fell within the scope of application of Article 21. Consequently, it is unlikely that Article 21 has any application to decisions interfering with the unity of the family taken under Chapter II, with the exception of when family unity is interfered with in detention. Therefore, the procedural requirements of Article 9(1) and (2) CRC are not met in the RCD.

Finally, it is unclear how the narrow definition of family member in Article 2(d) RCD, which has already been commented upon, maps on to the provisions relating to family unity. If Member States restrict the provisions on family unity to the family as defined in the directive, then children born after the parent(s) arrived in the EU and married and independent children will not benefit from the provisions on family unity. In sum, the family unity provisions of the RCD fall short of the strict requirements of Article 9 CRC not to separate the child from his/her parents against their will.

The QD and the DR also contain provisions relating to the issue of family unity of a child with his/her parents. The concept of family unity is provided for in Article 23 of the QD, with paragraph 1 providing that 'Member States *shall ensure* that family unity can be maintained.'[38] While, unlike the RCD, there is no separate statement of the child's entitlement to family unity, it is submitted that this is inconsequential in view of the categorical terms of Article 23(1). However, if this provision is interpreted in light of the narrow definition of 'family member' in Article 2(h) QD then not all children will benefit.

As regards the DR, Article 4(3) provides:

> For the purposes of this Regulation, the situation of a minor who is accompanying the asylum seeker and meets the definition of a family member set out in Article 2, point (i), shall be in dissociable from that of his parent or guardian and shall be a matter for the Member State responsible for examining the application for asylum of that parent or guardian, even if the minor is not individually an asylum seeker. The same treatment shall be applied to children born after the asylum seeker arrives in the territory of the Member States without the need to initiate a new procedure for taking charge of them.

This provision guarantees that the accompanied child will remain with his/her parents or guardian wherever they end up, thereby securing the unity of the

38 Emphasis added.

family.[39] Unlike the RCD and QD, the child born after arrival in the EU is included in the definition of family member in Article 2(i). However, like those two directives, the definition excludes married and independent children.

In sum, the RCD is problematic from the point of view of the right of the child not to be separated from his/her parents. This is because the family unity provisions are amenable to being applied (and derogated from) in a manner that undermines family unity. The QD and the DR are more robust in this regard, although an unfortunate feature of all the instruments is the narrow definition of 'family member'.

5.2.2.3 The right of the child to family reunification

Beginning with the obligation ancillary to family reunification, namely, the duty to assist in efforts to conduct family tracing, the 'Dublin system' (i.e. the DR, the Eurodac Regulation and the Dublin Detailed Rules), the RCD and QD all contain provisions of relevance to this issue.

As regards the Dublin System, none of the instruments contains an explicit provision on family tracing. However, it can be observed that Chapter VI of the DR relating to administrative cooperation, which envisages the exchange of a large amount of information about the applicant, together with the Eurodac database, effectively operate as channels for family tracing.

As regards the RCD, Article 19(3) provides:

> Member States, protecting the unaccompanied minor's best interests, shall endeavor to trace the members of his or her family as soon as possible. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis, so as to avoid jeopardizing their safety.

An identical provision appears in Article 30(5) of the QD. While the passive connotations of the phrase 'endeavor to trace' are unfortunate (it is unclear whether the state has acquitted its obligation if it tries (once) and fails to trace family members or whether the absence of any family tracing mechanisms within the state could vitiate the obligation), the wording does at least convey the importance of family tracing.

As for family reunification, a right of the unaccompanied minor seeking asylum to family reunification within the EU is foreseen in the DR, while a right of the refugee child to family reunification is provided for, not in the QD, but

39 The DR as a specialized form of 'safe third country' and its implications for the rights of the child were analyzed in Chapters 3 and 4.

in the Family Reunification Directive.[40] These instruments will be considered in turn.

A number of the criteria laid down in the DR for determining the Member State responsible for processing a given asylum claim are based on the concept of family reunification.[41] Of particular note, Article 6 provides that the Member State responsible for examining the application of an unaccompanied minor is that where a member of his or her family is legally present, provided that this is in the best interests of the minor.[42] Unlike the RCD and the QD, the term 'family member' is not defined solely from the perspective of an adult, but is also defined from the perspective of a child as 'the father, mother or guardian when the applicant or refugee is a minor and unmarried'.[43] The inclusion of the child's guardian within the family unit is noteworthy. However, the fact that married unaccompanied minors are precluded from reuniting with their parents is unfortunate. Also of note, a 'humanitarian clause' in Article 15 allows (but does not compel) Member States to reunite an unaccompanied minor who has a relative or relatives in another MS who can take care of him or her.[44] The concept of 'relatives' is undefined and it is unclear whether the term could cover siblings. It is to be regretted that this potentially important provision is discretionary.

As regards the right of the refugee child to family reunification, although the QD is silent on the issue of family reunification, the issue of family reunification of refugees is dealt with in the Family Reunification Directive. The Directive establishes a *right* of family reunification of refugees. Article 10(3) provides:

> If the refugee is an unaccompanied minor, the Member States:
> (a) shall authorize the entry and residence for the purposes of family reunification of his/her first-degree relatives in the direct ascending line […]

40 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

41 Four out of nine of the criteria for determining the Member State responsible relate to family reunification: Article 6, 7, 8 and 14.

42 Article 6 is silent on which Member State is responsible if family reunification is not in the best interests of the child. However, it does provide that, in the absence of a family member, the Member State responsible for examining the application is that where the minor lodged his or her application. This is not made subject to a best interests assessment.

43 Article 2(i)(iii).

44 Important safeguards regarding possible reunification with relatives are found in Article 12(1) of the Dublin Detailed Rules (Commission Regulation (EC) No. 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No. 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national.)

(b) may authorize the entry and residence for the purposes of family reunification of his/her legal guardian or any other member of the family, where the refugee has no relatives in the direct ascending line or such relatives cannot be traced.

Thus, the unaccompanied minor refugee is entitled to reunification with his/her parents, consistent with Articles 9 and 10 CRC. Problems arise thereafter. Member States retain discretion about whether or not to reunite the child with his/her legal guardian or other family members if he/she has no or no traceable parents. It is submitted that the distinction between parents and legal guardian is not justifiable. Moreover, the reference to 'any other member of the family' is somewhat confusing, as 'family members' are defined in Article 4 of the directive exclusively from the adult perspective.[45] Therefore, it is not clear what family members the unaccompanied minor might be permitted to reunite with.

Furthermore, the right of the child to family reunification is less extensive than that of an adult. Owing to the definition in the directive of family member from the perspective of an adult (per Article 4: spouse and minor children) where the refugee is an adult, he/she is entitled to reunification with his/her entire nuclear family.[46] Conversely, where the refugee is a child, he/she is entitled only to reunification with his/her parents, but not his/her siblings. This difference in treatment is problematic.[47] It places the parents of the refugee unaccompanied minor who have more than one child in the invidious position of having to choose between their children. This would seem to give rise on the part of the parent to a claim under Article 8 ECHR that his/her right

45 Article 4 defines family members as: sponsor's spouse, minor children of sponsor and spouse, minor children of sponsor or spouse subject to custody guarantees, dependent parents who do not enjoy family support in the country of origin, adult unmarried children of sponsor or spouse where they are objectively unable to provide for their own needs on account of their state of health, sponsor's unmarried partner in a stable relationship subject to the laws of the Member State.

46 It is not suggested that family reunification with 'the entire nuclear family' is enough, just that the unaccompanied minor refugee is not even entitled to that degree of family reunification. For crucial commentary of the narrow construction of family in EU law as regards third country nationals see, Dallal Stevens (2010), *supra* n. 5.

47 It would be difficult to establish that this constitutes discrimination on grounds of age, since arguably adults are not in a comparable position to children when it comes to family reunification. Indeed, in *European Parliament v Council*, the Court held that 'the fact that a spouse and a child over 12 years of age are not treated in the same way cannot be regarded as unjustified discrimination against the minor child. The very objective of marriage is long-lasting married life together, whereas children over 12 years of age will not necessarily remain for a long time with their parents.' Case C-540/03, Judgment (GC) of 27 June 2006, para. 75. From a child-rights perspective, one might agree with the Court about the differences between spouses and children over 12, but use those differences as an argument for more rather than less entitlement to family reunification on the part of the child. In any event, because of the comparability problem in arguing discrimination on grounds of age, a different argument is advanced here, based on the parents' right to family reunification.

to family life is being violated, since an 'obstacle' or 'major impediment' to reunification in the country of origin with the child or children left behind is the presence of the refugee child in the Member State.

However, arguably the biggest shortcoming of the Family Reunification Directive is the exclusion of beneficiaries of subsidiary protection from its personal scope.[48] While this exclusion is easily understandable from a chronological perspective – the concept of subsidiary protection not forming part of the asylum *acquis* at the time of the adoption of the Family Reunification Directive – it effectively means that the right of the minor beneficiary of subsidiary protection to family reunification is not met.

In sum, the DR establishes a right of family reunification for the unmarried, unaccompanied minor asylum seeker with his parents or guardian, while Member States retain discretion about reunification with other relatives. The Family Reunification Directive establishes a right of the refugee child to family reunification with his/her parents, but Member States retain discretion about reunification with his/her guardian or other family members. The child beneficiary of subsidiary protection currently has no right under EU law to family reunification. Therefore, the CEAS instruments only partially comply with the obligations in the CRC regarding family reunification.

5.2.3 Phase Two CEAS: prospects for enhanced compliance

5.2.3.1 The concept of derived rights

The central problem with both the RCD and the QD on the issue of derived rights is the restrictive definition of 'family member'. Do the proposed recast RCD and the recast QD solve this problem?

As regards the proposed recast RCD, it can be observed that first, the family is still limited to the family as it existed in the country of origin, thereby excluding children born after arrival or in transit.[49] Second, the exclusion of unmarried and dependent children from the definition of family is partly remedied. The dependency criterion is removed and some married minor children now fall within the definition of family, namely, those who are not accompanied by their spouses and in whose best interests it is to be considered as family members.[50] Third, for the first time, 'family member' is defined from the perspective of the child. However, a distinction is made in this regard

48 Article 3(2)(c) of the directive provides that the directive shall not apply where the sponsor is: 'authorised to reside in a Member State on the basis of a subsidiary form of protection in accordance with international obligations, national legislation or the practice of Member States'.

49 Article 2(c).

50 Article 2(c)(i).

between unmarried and married minors. When the applicant is an unmarried minor, family members comprise the parents or the responsible adult and minor siblings subject to various caveats relating to their marital status.[51] When the applicant is a married minor, the above persons are also included within the definition of family member, 'provided the applicant is not accompanied by his/her spouse and it is in the best interests of the applicant or his/her siblings to consider [these persons] as family members.'[52] Fourth, in the definition of family member from the perspective of a child, the first degree relatives in the direct ascending line are not limited to parents but extend to the 'adult responsible for the applicant whether by law or national practice of the Member State concerned'. This phraseology is also used in the revised definition of 'unaccompanied minor', thereby correcting the existing inconsistency between the two definitions.[53]

As regards the recast QD, it can be observed that exactly the same changes as outlined above were contained in the Commission proposal for a recast QD.[54] However, many of the changes were whittled down during the negotiation process. Thus, while Article 2(j) of the recast QD removes the dependency criterion in respect of minor, unmarried children, it fails to include any new provision in respect of married minor children.[55] It adds a new provision to the definition of family member from the perspective of the child, but only where the child is unmarried. Family members are defined as father, mother or other adult responsible for the beneficiary of international protection whether by law or by the practice of the Member State concerned. Like the proposed recast RCD, the latter phraseology is also used in the revised definition of 'unaccompanied minor'.[56] However, no mention is made of siblings. Hence, the situation of married minors is not improved under the recast QD and even unmarried minors who are siblings are not considered to be each other's family members. The recast QD does, however, delete the problematic sub-paragraph in current Article 23(2) which permits Member States 'to define the conditions' applicable to the benefits accruing to the family members of beneficiaries of subsidiary protection.

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51 Article 2(c)(ii) relates to minor siblings provided they are unmarried or, if they are married, provided they are unaccompanied by their spouses and it is in the best interests of the siblings to be together.

52 Article 2(c)(iii).

53 Article 2(e).

54 Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted, COM (2009) 551, Article 2(j).

55 However, Recital 38 is of some succor in this regard, providing, *inter alia*, that '[i]n exceptional circumstances, where the close relative of the beneficiary of international protection is a married minor but not accompanied by his or her spouse, the best interests of the minor may be seen to lie with his or her original family.'

56 Article 2(l).

To summarize, there are some significant improvements in the definition of family member in the proposed recast RCD. Of note is the definition, for the first time, of the family from the perspective of the child and the inclusion of the responsible adult within that definition. However, children born in transit or after arrival are still excluded from the definition and Member States are still permitted to make distinctions between children on the basis of their marital status. Moreover, concern must be expressed that the improvements in the proposed recast RCD will be whittled down during negotiations, as they were during the negotiations of the recast QD. This seems highly likely if consistency is to be maintained across the recasts. If so, Phase Two CEAS will comprise only a modest improvement on Phase One from the point of view of the derived rights of the accompanied child.

5.2.3.2 The prohibition on separating a child from his/her parents

A number of problems were identified in the critique of the family unity provisions in the RCD: the use of qualifying phrases in the provisions relating to family unity, the possibility of derogating from the guarantees relating to family unity, the lack of any procedural safeguards in decisions interfering with family unity and the narrow definition of 'family member'. As the latter has just been discussed, the focus here will be on the other problems and on whether they are remedied in the proposed recast of the directive. The DR also has a family unity provision which is undermined somewhat by the narrow definition of the family. The situation under the proposed recast DR will be briefly addressed in turn.

The general provision on 'families' in Article 8 of the RCD which obliges Member States to take appropriate measures to maintain family unity 'as far as possible' but only 'if applicants are provided with housing by the Member State concerned' remains unchanged (in Article 12 of the proposed recast). However, the specific right of minors to family unity is moved from the article on 'Modalities for material reception conditions' to the article on 'Minors' (Article 23 of the proposed recast). The significance of this move is that it is no longer subject to the derogation provision which implicitly permits the separation of the child from his/her parents. Furthermore, the qualifying term 'if appropriate' is removed and a new sentence is added relating to best interests. Thus, article 23(5) reads:

> Member States shall ensure that minor children of applicants or applicants who are minors are lodged with their parents or with the adult family member responsible for them whether by law or the national practice of the Member States concerned, provided this is in the best interests of the minors concerned.

Furthermore, an enhanced provision on best interests (Article 23(2) of the proposed recast) provides that in assessing best interests, Member States must take due account of, *inter alia*, the minor's well-being and social development,

taking into particular consideration the minor's ethnic, religious, cultural and linguistic background and safety and security considerations. When these two paragraphs of Article 23 are read together, they present a strong case for family unity and, it is submitted, are consistent with the requirements, including the procedural requirements, of Article 9 CRC.

As regards the proposed recast DR, Article 4(3), which guarantees that the situation of an accompanied minor who meets the definition of family member in the regulation is in dissociable from that of his/her parent or guardian, is restated in Article 20(3).[57] However, the category of minor children who are cognizable as family members is expanded in Article 2(i) to include independent minor children and even married minor children 'where it is in their best interests to reside with the applicant'. Therefore, such children cannot be separated from their parent or guardian in the Dublin process. However, an anomaly – possibly a drafting oversight, but none the less important for that – should be noted. Article 20(3) does not envisage that the situation of siblings should be in dissociable from one another, even though Article 2(i) expands the definition of family members to include certain siblings.[58] The effect of this is that the presence of a sibling in another Member State is grounds for a transfer under the Dublin Regulation, but the presence of a sibling in the same Member State will not guarantee that they will not be separated by virtue of the regulation.

Notwithstanding this anomaly, it is submitted that, overall, the proposed recast DR and the proposed recast RCD are consistent with the right of the child not to be separated from his/her parents against their will.

5.2.3.3 The right of the child to family reunification

As regards the family tracing obligation, relevant provisions of both the RCD and the QD are set to be enhanced in Phase Two. Thus Article 24(3) first sentence of the proposed recast RCD reads:

> Member States shall establish mechanisms for tracing the family members of an unaccompanied minor. They shall start to trace the members of the unaccompanied minor's family, where necessary with the assistance of international or of other relevant organizations, as soon as possible after an application for international protection is made whilst protecting his/her best interests.

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57 It is anticipated that the term 'guardian' in the proposed recast DR will be replaced during negotiations by the broader phrase 'other adult responsible for [the minor] whether by law or practice of the Member State concerned', since this is the expression used in the proposed recast RCD and recast QD.

58 Article 2(i)(v): minor unmarried siblings of the applicant, when the latter is a minor and unmarried, or when the applicant or his/her siblings are minors and married but it is in the best interests of one or more of them that they reside together

Similarly, Article 31(5) first sentence of the recast QD reads:

> If an unaccompanied minor is granted international protection and the tracing of his or her family members has not already started, Member States shall start tracing them as soon as possible after the granting of international protection, while protecting the minor's best interests. If the tracing has already started, Member States shall continue the tracing process where appropriate.

The net effect of these two amended provisions is that an unequivocal obligation is placed on Member States to initiate and continue family tracing as a matter of urgency, which may require the assistance of specialist international and other organizations. However, it can be observed that the rationale for the obligation to trace the family of a child beneficiary of subsidiary protection is somewhat unclear, given that this child has no right to family reunification.

As for family reunification, the right of the unaccompanied minor asylum seeker to family reunification within the EU is enhanced under the proposed recast DR in two ways. First, the definition of family members is expanded as outlined in the previous subsection. Second, the provision of the 'humanitarian clause' which permits reunification of an unaccompanied minor with a relative in another Member State is elevated to a binding criterion (currently Article 6; Article 8 under the proposed recast). Thus, Article 8(2) stipulates that '[w]here the applicant is an unaccompanied minor who has a relative legally present in another Member State who can take care of him or her, that Member State shall be responsible for examining the application, provided that this is in the best interests of the minor.' These provisions constitute a substantial improvement on the family reunification provisions of the current DR.

The prospects for enhanced family reunification rights for refugee children and for the creation of a right to family reunification for the child beneficiary of international protection are less clear. At the time of writing, the Family Reunification Directive is the subject of a Green Paper and public consultation, the aim of which is to inform an eventual Commission decision about whether to retain the existing directive, issue interpretative guidelines or propose amendments to the directive.[59] However, it is too early to predict if or how the Family Reunification Directive might be amended.

59 European Commission, 'Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC)', COM (2011) 735 final, section 4.1. The Green Paper identifies certain 'questions for stakeholders'. One such question is whether the rules on eligible family members are adequate and broad enough to take into account the different definitions of family existing other than that of the nuclear family. Possibly this will prompt a debate on the definition of family from the point of view of the refugee child. Another question is whether beneficiaries of subsidiary protection should be brought within the personal scope of the directive.

In sum, the proposed recast DR expands the opportunities for family reunification of unaccompanied minor asylum seekers within the EU. There is currently no proposal to amend the Family Reunification Directive although such a proposal may be made in the medium term. In the meantime, there will continue to be a disconnect between the family reunification rights of child refugees and beneficiaries of international protection.

5.3 THE PROTECTION AND CARE OF THE UNACCOMPANIED AND SEPARATED CHILD

Having explored the right of the asylum seeking/refugee child to family unity, which is the principal means of ensuring the protection and care of the child, this section turn to the protection and care of the asylum seeking/refugee child who is unaccompanied or separated and therefore bereft of family.

5.3.1 The right of the child without family to special protection and assistance

It will be recalled that Article 22(2) CRC imposes an obligation on States to assist in efforts to trace the members of the child's family with a view to family reunification. The final sentence of that provision provides that '[i]n cases where no parents or other members of the family can be found, the child shall be accorded the same protection and care as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.' In turn, Article 20 CRC provides:

> (1) A child temporarily or permanently deprived of his or her family environment, or in whose best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State;
> (2) States Parties shall in accordance with their national laws ensure alternative care for the child;
> (3) Such care could include, *inter alia*, foster placement, *kafalah* of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

The right of the child without family to special protection and assistance is well established in international and regional human rights law. For example, it is implicit in Article 24 ICCPR relating to the right of the child to special

measures of protection,[60] and is found in the Revised European Social Charter.[61] In extreme cases, inadequate care and protection of an unaccompanied child may amount to inhuman treatment contrary to Article 3 ECHR.[62] Furthermore, there is a large body of soft-law guidance about the right of the child without family to special protection and assistance in general,[63] and about its specific application to unaccompanied minors.[64] Three questions arise in relation to this right: a) What child is entitled to special protection and assistance? b) Who should oversee the special protection and assistance? c) What alternative care must be provided for the child? In answering these questions, the normative content of the right will be sketched.

5.3.1.1 Identification of the child entitled to special protection and assistance

This first issue relates to the personal scope of Article 20 CRC, taken in conjunction with Article 22 CRC. Article 20 refers to the child 'who has been temporarily or permanently deprived of his or her family environment'. Article 22 refers to the child who is without 'parents or other members of the family'. The issue to be resolved is whether the right to special protection and assistance is limited to the child who is without any relatives whatsoever (i.e. the child who is unaccompanied or totally alone) or extends to the child who is without parents or other primary care-givers but is in the company of other adult family members (i.e. the separated child). The answer to this question is of considerable consequence because a narrow interpretation means that the State is not primarily responsible for the separated child.

In its General Comment No. 6 on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin, the Committee RC adopts a pragmatic middle ground: Article 20 applies to both groups but in the case of the separated child, guardianship should regularly be assigned to the accompanying adult family member 'unless there is an indication that it would

60 Thus the Human Rights Committee in its General Comment 17 on Article 24 ICCPR 'considers it useful that reports by States parties should provide information on the special measures of protection adopted to protect children who are abandoned or deprived of their family environment in order to enable them to develop in conditions that most closely resemble those characterizing the family environment.' U.N. Doc HRI/GEN/1/Rev.1 (1994) at 23, para. 6.

61 Article 17 of the Revised European Social Charter establishes an obligation to 'provide protection and special aid […] for children and young persons temporarily or definitively deprived of their family's support.'

62 See ECtHR, *Mayeka v Belgium*, Appl. No. 13178/03, Judgment of 12 October 2006 and ECtHR, *Rahimi v Greece*, Appl. No. 8687/08, Judgment of 5 April 2011.

63 For the most recent guidance see U.N. General Assembly, 'Guidelines for the Alternative Care of Children', A/RES/64/142 (2010). Hereinafter, 'General Assembly Guidelines 2010'.

64 For a cross-section of guidance, see Separated Children in Europe Programme (SCEP), 'Statement of Good Practice', 4th Revised ed. (2009) (hereinafter 'SCEP Statement of Good Practice'); Committee RC, General Comment No. 6, *supra* n. 26; UNHCR, 'Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum' (1997).

not be in the best interests of the child to do so'[65] and the child should live with the accompanying adult family member 'unless such action would be contrary to the best interests of the child'.[66] Hence day-to-day protection and assistance are generally delegated to relatives but subject to state oversight. It follows that when a child is accompanied by a relative who is not a parent or primary care-giver, a process must be put in place to establish the nature of the relationship and the suitability and willingness of the relative to continue to care for the child.[67] This raises the larger issue of identification of unaccompanied minors.

Article 20 presupposes a mechanism for identifying whether a child is deprived of his or her family environment. Although there is no article in the Convention explicitly establishing such a mechanism, Article 8(1) is of relevance in this regard, providing: 'States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.' Although originally intended to relate to 'disappeared' children,[68] the Committee RC considers that Article 8(1) extends to a duty to identify separated or unaccompanied children upon arrival at ports of entry or as soon as their presence in the country becomes known to the authorities.[69] This 'prioritized identification' process includes age assessment, prompt registration by means of an initial interview to collect bio-data and ascertain identity and on-going recording of further information including information pertaining to international protection needs. As regards age assessment, the Committee recommends that it:

> […] should not only take into account the physical appearance of the individual, but also his or her psychological maturity. Moreover, the assessment must be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity; and, in the event of remaining uncertainty, should accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, she or he should be treated as such.[70]

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65 Committee RC, General Comment No. 6, *supra* n. 25. para. 34.

66 *Ibid*, para. 40. The SCEP Statement of Good Practice goes further, requiring the appointment of an *independent* guardian (para. D3.1) and stating that '[w]here children live with or are placed with relatives, these relatives must be assessed for their ability to provide suitable care and undergo necessary recruitment checks' SCEP (2009) *supra* n. 64, § D8.1.1.

67 UNHCR's 1997 Guidelines provide practical guidance on how to carry out this assessment in Annex II. *Supra* n. 64. See also, EctHR, *Rahimi v Greece,* Appl. No. 8687/08, Judgment of 5 April 2011 in which the ECtHR reprimanded the government for failing to establish any mechanisms for verifying the relationship between a 15 year old boy and his supposed cousin. Paras. 70-73.

68 See Jaap Doek, *supra* n. 17.

69 Committee RC, General Comment No. 6, *supra* n. 25, para. 31.

70 *Ibid*, para. 31(i).

In short, the child who is entitled to special protection and assistance in the CRC is the child who is separated from his/her parents or primary care-givers, notwithstanding that the child may be with other relatives. There must be a mechanism for identifying such children, since otherwise the right to special protection and assistance would be largely deprived of application.

5.3.1.2 Oversight of care and protection

It follows from the personal scope of Article 20 that special protection and assistance has a surrogate function: it should, in so far as possible, take the place of parental protection and assistance. Accordingly, legal responsibility for the child should be vested in a designated individual who has the right and responsibility to make decisions *in lieu* of the parents. This suggests the appointment of a guardian. Surprisingly, in view of the many references in the CRC to the concept of guardianship, the Convention contains no provision on when a guardian should be appointed to a child.

However, Article 18(2) provides that '[f]or the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.' The Committee RC considers that this provision, in conjunction with Article 20(1), forms the basis of an obligation to appoint a guardian or adviser to the unaccompanied or separated child.[71] According to the Committee, the guardian or adviser should have the necessary expertise in the field of childcare so as to ensure that the interests of the child are safeguarded and that the child's legal, social, health, psychological, material and educational needs are appropriately covered. Thus, the guardian's role is essentially to ensure that in all actions concerning the child, the best interests of the child is a primary consideration. This follows from Article 18(1) CRC which provides that '[p]arents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. They best interests of the child will be their basic concern.'

Moreover, in view of the pivotal role of the guardian in securing the child's protection and assistance, the Committee RC considers that the exercise of guardianship should be regularly monitored.[72] This obligation derives from Article 3(3) CRC which provides that 'States Parties shall ensure that the institu-

71 *Ibid*, paras. 33-38. Article 3(2) CRC is also of relevance in this regard: 'States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.'

72 *Ibid*, para. 35.

tions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and *suitability* of their staff, as well as *competent supervision*.'[73]

Finally, it should be noted that the obligation to appoint a guardian to secure the protection and assistance of unaccompanied minors may be classified as part of the state's positive obligations under Article 3 ECHR. In *Mayeka Mitunga v Belgium*, in which a five year old unaccompanied minor was detained for two months in an adult detention centre, the Court reprimanded the government for the haphazard care it provided to the child stating that '[t]he fact that the [child] received legal assistance, had daily telephone contact with her mother or uncle and that staff and residents at the centre did their best for her cannot be regarded as sufficient to meet all her needs as a five-year-old. The Court further considers that the uncoordinated attention she received was far from adequate.'[74] Although the Court did not expressly refer to a guardian, it is clear on the facts that the 'uncoordinated attention' that the child received was the result of not having been appointed one. In *Rahimi v Greece*, a case concerning the detention and subsequent abandonment by the state of a 15 year old unaccompanied minor, the Court was less circumspect on the issue of guardianship.[75] It found that the failure of the Greek authorities to appoint a guardian to the child with the result that he was left homeless and destitute until he happened to be taken charge of by an NGO constituted inhuman and degrading treatment contrary to Article 3 ECHR.

To summarize, special protection and assistance under Article 20 is surrogate parental protection. As such, it should principally be delegated to a guardian or adviser who has the right and responsibility to oversee the child's best interests. The exercise of guardianship should itself be overseen. The failure to appoint a guardian or adviser may lead to a situation amounting to inhuman and degrading treatment.

5.3.1.3 The provision of alternative care

Article 20(1) establishes that the child deprived of his/her family environment is entitled to special protection and care, while paragraphs two and three set out the requirement to provide alternative care for the child. But what, in practical terms, is the nature of the alternative care that must be provided? The answer lies in the scheme of Article 20 itself.

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73 Emphasis added.

74 ECtHR, *Mayeka Mitunga v Belgium*, Appl. No. 13178/03, Judgment of 12 October 2006, para 52.

75 ECtHR, *Rahimi v Greece*, Appl. No. 8687/08, Judgment of 5 April 2011.

Discussions about alternative care for unaccompanied minors often focus on the *type* of care arrangement that should be put in place.[76] But Article 20 CRC does not mandate any particular type of care arrangement. In this regard it can be observed that the obligation in Article 20 diminishes in strength from paragraph (1) (the child 'shall be entitled to special protection and assistance provided by the state'), through paragraph 2 (States Parties 'shall' ensure alternative care but 'in accordance with their national laws') to paragraph 3 ('Such care could include foster placement, *kafalah* of Islamic law, adoption or if necessary placement in suitable institutions for the care of children'). Hence, there is a right to special protection and assistance, there is a right to some form of alternative care, but there is no right to any specific modality of care placement. In this regard, the Committee RC notes that:

> A wide range of options for care and accommodation arrangements exist and are explicitly acknowledged in Article 20(3) […] When selecting from these options, the particular vulnerabilities of such a child, not only having lost connection with his or her family environment, but further finding him or herself outside of his or her country of origin, as well as the child's age and gender, should be taken into account.[77]

Consequently, it is permitted and indeed appropriate to provide different care arrangements for different children, according to their protection needs, age, gender and so forth.[78] What is most important – and this applies regardless of the type of care arrangement – is that the placement should be identified following a best interests assessment, including soliciting the views of the child and giving those views due weight in accordance with the child's age and maturity. There are a number of soft-law guidelines on choosing alternative care arrangements in the best interests of the child.[79] Notwithstanding the individualized nature of a best interests assessment, certain general observations can be made about what is in the best interests of children when it comes to alternative care. For example, it is generally in the best interests of children

76 See, for example, the SCEP Statement of Good Practice, *supra* n. 64.

77 Committee RC, General Comment No. 6, para. 40, p. 13, *supra* n. 25. In a similar vein, the General Assembly Guidelines 2010 provide that 'States should ensure the availability of a range of alternative care options, consistent with the general principles of the present Guidelines, for emergency, short-term and long-term care.' *Supra* n. 63, para. 54.

78 Hence, the claims that are sometimes made, that children must be placed in families or that it is prohibited to place older children in adult accommodation, cannot be sustained. For example, according to the SCEP Statement of Good Practice, '[e]very separated child should have the opportunity to be placed within a family if it is in their best interests to do so. […] Separated children over 16 years of age who are not placed within families should be found appropriate residential placements and must not be treated as 'de facto' adults and placed in an adult hostel or reception center settings.' Here the gulf between best practice and the minimum requirements of the CRC is apparent. *Supra* n. 64, § D8.1.

79 See, most notably, General Assembly Guidelines 2010, *supra* n. 63, Section VI – Determination of the most appropriate form of care.

that changes of residence be kept to a minimum and that siblings be kept together. This follows from the second sentence of Article 20(3) mandating continuity in the child's upbringing and due regard to the child's ethnic, religious, cultural and linguistic background.

A further, related requirement is that, whatever the type of care arrangement identified for the child, it must serve to protect the child. This requirement derives from a schematic interpretation of Article 20 as a whole: the right to alternative care in paragraphs 2 and 3 is a functional expression of the broader right to protection (and assistance) in paragraph 1. Indeed, the term 'protection' links Article 20 with a cluster of CRC rights that relate to child protection and the prevention of abuse. Article 19(1) is particularly important in this regard, providing:

> States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parents(s), legal guardians or any other person who has the care of the child.[80]

While the guardian has an important role in overseeing the child's protection, in reality, whether the child is protected on a day to day basis will depend on the care placement allocated to the child. In this regard, any such placement must ensure that the child is protected from threats in the wider environment as well as threats that emanate from the care placement itself. As regards the latter, it is necessary that persons working in the care placement be qualified to care for children and that care arrangements be monitored and regularly reviewed.[81] This follows from the requirements of Article 3(3) CRC regarding standards and supervision of child care services. Accordingly, the Committee notes that:

> Irrespective of the care arrangements made for unaccompanied or separated children, regular supervision and assessment ought to be maintained by qualified persons in order to ensure the child's physical and psychosocial health, protection

80 Other relevant rights are established in Article 32 (right of the child to be protected from exploitation), Article 33 (right of the child to be protected against the illicit use of narcotic drugs), Article 34 (the right of the child to protection from sexual exploitation and abuse), Article 35 (the obligation to prevent the abduction of, sale of or traffic in children), Article 36 (the right of the child to protection against all other forms of exploitation) and in the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.

81 The General Assembly Guidelines 2010 insist on pre-screening, training and monitoring of staff. *Supra* n. 63, paras. 113, 115 and 128 respectively. For a compelling account of what happens when states fail to ensure the protective dimension of the care placement, see Siobhan Mullally, 'Separated Children in Ireland, Responding to 'Terrible Wrongs', *International Journal of Refugee Law* 23, no. 4 (2011): 632-655.

against domestic violence or exploitation, and access to educational and vocational skills and opportunities.[82]

In summary, while Article 20(2) and (3) do not mandate any particular type of care arrangement, they do require that the child placement follows a best interests assessment. Furthermore, the care arrangement must protect the child, both from without and from within. This has implications for staff training and monitoring.

5.3.2 Phase One CEAS: compliance with the right of the child to special protection and assistance

Of all the child-rights issues that arise in the asylum process, the rights of unaccompanied minor have been most thoroughly researched and subject to policy and legislation.[83] This is due not only to the extreme vulnerability of unaccompanied minors but also to the perception that this group constitutes a 'problem' population.[84] This sub-section explores whether this scrutiny has led to a convergence between the treatment of unaccompanied minors and their rights. The relevant instruments of the CEAS are the RCD and the QD.

5.3.2.1 Identification of the child entitled to special protection and assistance

It is the child who is separated from his/her parents or primary caregivers as well as the child who is totally alone that is entitled to special protection and assistance. There must be a mechanism for the identification of such children. To what extent are these requirements met in the RCD and QD?

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82 Committee RC, General Comment No. 6, *supra* n. 25. para. 40, p. 14.

83 For recent research, see Frontex, 'Unaccompanied Minors in the Migration Process' (2010) (hereinafter 'Frontex report'); European Migration Network, 'Policies on Reception, Return and Integration arrangements for, and numbers of, Unaccompanied Minors – an EU comparative study' (2010) (hereinafter, 'EMN report'); EU Agency for Fundamental Rights, 'Separated, asylum-seeking children in European Union Member States, Report' (2010); and Eurasylum, 'The Protection of the rights and special needs of irregular minors and asylum seeking children, A thematic discussion paper prepared for the EU Agency for Fundamental Rights' (2008). For policy initiatives see Communication from the Commission to the European Parliament and the Council, 'Action Plan on Unaccompanied Minors (2010-2014)', COM (2010) 213 final (hereinafter, 'Commission Action Plan on Unaccompanied Minors 2010') and 'Council Conclusions on Unaccompanied Minors' (3018th Justice and Home Affairs Council meeting, Luxembourg, 2010). As regards legislation, in the area of unaccompanied minors seeking asylum it can be observed that more provisions of the CEAS are devoted to unaccompanied minors than any other child-rights issue.

84 For example, the Frontex report opens with the following observation: 'The phenomenon of unaccompanied minors claiming asylum in the EU has become a more visible problem. The increasing extent and weight of the problem was also identified in the Frontex, 'Annual Risk Assessment (ARA) 2009.' *Ibid*, Executive summary, p. 3.

Beginning with the RCD, unaccompanied minors are defined in Article 2(h) as 'persons below the age of eighteen who arrive in the territory of the Member State unaccompanied by an adult responsible for them whether by law or by custom, and for as long as they are not effectively taken into the care of such a person; it shall include minors who are left unaccompanied after they have entered the territory of Member States.' The key provision of the directive relating to the protection and assistance of unaccompanied minors is Article 19. Article 19(1) obliges Member States to 'as soon as possible take measures to ensure the necessary representation of unaccompanied minors' while Article 19(2) entitles the unaccompanied minor who makes an application for asylum to be placed in one of four care placements 'from the moment they are admitted to the territory'.

At first glance, the definition of 'unaccompanied minor' can be criticized for excluding the concept of the separated child.[85] This is because the term 'unaccompanied minor' strongly suggests a child who is not in the company of anybody, in other words, a child who is totally alone. However, on closer scrutiny, it is not clear that Article 2(h) in conjunction with Article 19 RCD does exclude the concept of the separated child. Firstly, Article 2(h) refers to the child 'unaccompanied by an adult responsible for them whether by law or by custom', a formulation that suggests a verification of the relationship between the child and the accompanying adult. Further, the child will be considered unaccompanied 'for as long as they are not effectively taken into the care of such a person', the term 'effectively' indicating an oversight process. Secondly, one of the four care placements listed in Article 19(2) is a placement with adult relatives. This implies that some unaccompanied minors at least are separated, as opposed to being totally alone. Therefore, although the RCD uses the terminology 'unaccompanied minors', on closer scrutiny it encompasses separated children too.

An arguably bigger problem with the Article 19 RCD is that, despite the hints at verification and oversight, it does not establish any mechanism for identifying unaccompanied minors. Since the scope of the directive is limited to persons who lodge an application for asylum, chronologically, the issue of identification is something that should be addressed in the APD.[86] However that directive also fails to establish any mechanism for identifying unaccompanied minors.[87] Thus, the issue is left entirely to the discretion of Member

85 For such criticism, see Annamaria Enenajor, 'Rethinking Vulnerability: European Asylum Policy Harmonisation and Unaccompanied Asylum Seeking Minors', *Childhoods Today* 2, no. 2 (2008) (Online Journal): 1-24.

86 Article 3 RCD provides, *inter alia*, '[t]his Directive shall apply to all third country nationals and stateless persons who make an application for asylum'.

87 Article 6 on access to the procedure simply provides at paragraph 5: 'Member States shall ensure that authorities likely to be addressed by someone who wishes to make an application for asylum are able to advise that person how and where he/she may make such an

States.[88] This lacuna in the CEAS has a knock-on effect on *when* the unaccompanied minor asylum seeker becomes entitled to special protection and assistance. Article 19(1) of the RCD establishes an obligation to appoint a representative 'as soon as possible', while Article 19(2) requires Member States to secure a care placement for unaccompanied minors who make an application for asylum 'from the moment they are admitted to the territory'. But these provisions are inconsistent with each other (an application for asylum is often predicated on having a representative and hence cannot be made the moment the unaccompanied minor is admitted to the territory)[89] and inconsistent with reality (unaccompanied minors do not always present at the border for the purposes of being admitted to the territory).

A related omission from the RCD is any reference to age assessment. Indeed the only reference to the concept of age assessment is made in Article 17(5) of the APD which provides that 'Member States may use medical examinations to determine the age of unaccompanied minors within the framework of the examination of an application for asylum.' This raises the question of why age assessment is perceived as useful in the context of status determination of unaccompanied minors but not in the context of special protection and assistance for unaccompanied minors. It is hard to avoid the conclusion that it is perceived as an exclusionary rather than inclusionary tool. This impression is reinforced by the reference in Article 17(5) of the APD to medical examinations. Medical examinations cover a range of age assessment techniques, such as bone density tests, assessment of dental age and anthropometric measurements which, apart from being of scientifically dubious merit, fall foul of the Committee RC's requirement of safeguards in relation to age assessment.[90] The lack of any mechanism for identifying unaccompanied minors is inconsistent with Article 20 CRC in conjunction with Article 8(1).

As for the QD, Article 30 relating to unaccompanied minors contains similar provisions relating to the special protection and assistance of this group. The definition of 'unaccompanied minor' in Article 2(i) QD is the same as in the RCD. Article 30(1) establishes that unaccompanied minors must be appointed a guardian or representative 'as soon as possible after the granting of refugee or subsidiary protection status'. Article 30(3) provides that Member States shall ensure a care placement for the unaccompanied minor, but no reference is made to when this should be done. However, these provisions do not give

application and/or may require these authorities to forward the application to the competent authority.'

88 For a description of the different approaches of Member States, see the EMN Report, *supra* n. 83.

89 Thus Article 6(4)(b) APD permits Member States to determine in national legislation the circumstances in which an application for asylum by an unaccompanied minor has to be lodged by a representative.

90 See further, Heaven Crawley, *When is a Child Not a Child? Asylum, Age Disputes and the Process of Age Assessment* (Immigration Law Practitioners' Association, 2007).

rise to the same problem of identification as arose under the RCD, since unaccompanied minors will already have been identified (or not) under the latter.

To sum up, while both directives make provision for the special protection and assistance of unaccompanied minors, neither establishes any mechanism for identifying such children. This is problematic in the context of the RCD because clearly, if unaccompanied minors are not identified as such, they cannot benefit from the rights afforded to them under the directives.

5.3.2.2 Oversight of care and protection

Special protection and assistance for the unaccompanied minor necessitates the appointment of a guardian or adviser who acts in the best interests of the child and whose role is overseen by a higher authority. Failure to appoint a guardian or adviser may lead to a situation that amounts to inhuman or degrading treatment.

The first thing to note is that both the RCD and the QD oblige Member States to appoint a guardian or representative to the unaccompanied minor. Consequently, there is no question of a possible violation of Article 3 ECHR. The issues raised by the guardianship provisions of the directives are more nuanced, relating to the quality of the arrangements envisaged.

As regards the RCD, Article 19(1) provides that 'Member States shall as soon as possible take measures to ensure the necessary representation of unaccompanied minors by legal guardianship or, where necessary, representation by an organization which is responsible for the care and well-being of minors, or by any other appropriate representation. Regular assessments shall be made by the appropriate authorities'. The difficulty with this provision is that it is drafted at such a broad level of generality that it is unclear who the representative is or what his/her role involves.

Thus, as regards the identity of the representative, it can be observed that there is potentially a big difference between being represented by a legal guardian and by an artificial entity (i.e. an organization). Given the lack of common ground between the two, it follows that the meaning of 'any other appropriate representation' is unclear. Unsurprisingly, in view of the ambiguity about the identity of the representative, no criteria are laid down about the necessary qualifications of the representative. However, the reference in Article 19(1) to 'regular assessments by the appropriate authorities' mitigates this omission somewhat.

As for the role of the representative, while it is possible to deduce from the reference in Article 19(1) RCD to an organization for the care and well-being of minors that the guardian/representative's role relates to the care and well-being of minors, there is no more detailed guidance on the role of the guardian/representative in the specific context of the RCD. Indeed, State practice indicates a marked lack of harmonization between Member States

on the issue of the guardian/representative.[91] The lack of clarity about the role of the representative is evident in the Commission evaluation of the RCD, which confuses the representative with a legal representative.[92] While unaccompanied minors are *also* entitled to a legal representative during the asylum process (as outlined in Chapter 4), this is separate from the right to a guardian or adviser. Consequently, although the RCD provides for the appointment of a representative, it is ambiguous about the identity, qualifications and role of the representative.

As for the QD, Article 30 provides that the representation must be by legal guardianship, by an organization responsible for the care and well-being of minors 'or by any other appropriate representation *including that based on legislation or Court order.*'[93] The italicized provision, which does not appear in the corresponding provision of the RCD, establishes that the representative may be appointed in a more formal manner. It is submitted that this is an appropriate reflection of the fact that the unaccompanied minor is now a beneficiary of international protection who is entitled to a durable solution. Although the QD does not supply any guidance about the qualifications of the representative, Article 30(2) does clarify the role of the representative, providing that 'Member States shall ensure that the minor's needs are duly met in the implementation of this Directive by the appointed guardian or representative. The appropriate authorities shall make regular assessments.' Put differently, the representative's role is to ensure that the minor benefits from all the rights to which he is entitled under the directive.

In sum, both the RCD and the QD quite correctly mandate the appointment of a representative to the unaccompanied minor. However, the RCD, in particular, is ambiguous about the representative and silent on his/her proper role as an over-seer of the child's care and protection.

5.3.2.3 The provision of alternative care

Although Article 20(2) and (3) CRC do not mandate any particular type of care arrangement, they do require that the child placement follow a best interests assessment, while the various protection rights in the Convention require that

91 For example, in its report into separated children seeking asylum in the EU, the Fundamental Rights Agency found that 'most of the children interviewed were not fully aware of whether they had a guardian, who that person was or which responsibilities were attached to the guardianship function.' Fundamental Rights Agency, *supra* n. 83, p.33. See further, Defence for Children International-ECPAT The Netherlands, 'Core Standards for Guardians of Separated Children in Europe: Goals for Guardians and Authorities' (2011).

92 'Report from the Commission to the Council and to the European Parliament on the Application of Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers', COM (2007) 745 final, § 3.5.2, p.9. Hereinafter, 'Commission evaluation of the RCD'.

93 Emphasis added.

the placement serve to protect the child. This necessitates staff training and monitoring. How do the relevant provisions of the RCD and the QD measure up in this regard?

As regards the RCD, Article 19(2) and (4) are the relevant provisions. Article 19(4) states that

> '[t]hose working with unaccompanied minors shall have had or receive appropriate training concerning their needs, and shall be bound by the confidentiality principle as defined in the national law, in relation to any information they obtain in the course of their work.'

Article 19(2) provides:

> Unaccompanied minors who make an application for asylum shall, from the moment they are admitted to the territory to the moment they are obliged to leave the host Member State in which the application for asylum was made or is being examined, be placed:
> a) With adult relatives;
> b) With a foster family;
> c) In accommodation centres with special provision for minors;
> d) In other accommodation suitable for minors.
> Member States may place unaccompanied minors aged 16 or over in accommodation centres for adult asylum seekers. As far as possible, siblings shall be kept together, taking into account the best interests of the minor concerned and, in particular, his or her age and degree of maturity. Changes of residence of unaccompanied minors shall be limited to a minimum.

The range of care placements for unaccompanied minors in Article 19(2), together with the references in the second sub-paragraph to various aspects of a best interests assessment (i.e. siblings kept together, changes of residence limited to a minimum) correspond broadly with Article 20(2) and (3) CRC. However, the optional derogation whereby Member States can opt to place minors aged 16 or over in accommodation centres for adult asylum seekers has elicited much criticism from NGOs and academic commentators on principle, although in practice, only three Member States use the derogation.[94] Nevertheless, it is submitted that the derogation is not *necessarily* contrary to

94 For NGO criticism see, for example, ECRE, 'Comments from the European Council on Refugees and Exiles on the Amended Commission Proposal to recast the Reception Conditions Directive (COM (2011) 320 final)' (2011), 25. For academic criticism see, Eva Zschirnt, 'Does Migration Status Trump the Best Interests of the child? Unaccompanied Minors in the EU Asylum System', *Journal of Immigration Asylum and Nationality Law* 25, no. 1 (2011): 34-55. Zschirnt argues at p. 46 that the derogation provision 'still conflicts with the CRC's provision that children should be separated from adults in their accommodation.' However, while there is a provision in the CRC that the child should be separated from adults in *detention* (Article 37(c)), there is no obligation in the CRC to separate children from adults in accommodation generally.

the requirements of Article 20 CRC and other relevant protection articles of the Convention, provided it is applied subject to a best interests assessment. Article 18 of the directive (Minors) looks promising in this regard, stipulating that '[t]he best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Directive that involve minors'. Since the derogation provision undisputedly involves minors, it follows that the best interests of the child must be a primary factor in deciding whether or not to apply the provision to any given minor.

Less positively, however, Article 19(2) RCD is weak on the protective function of the care placement. The lack of any reference to child protection is unfortunate, especially in light of the well established trend across the EU of disappearances of unaccompanied minors from care.[95] Furthermore, Article 19(2) is silent on the requirement that alternative care be subject to regular supervision and assessment. Article 19(1) relating to representation of unaccompanied minors does provide that 'regular assessments shall be made by the appropriate authorities', but these assessments are *of* the representative; they are not assessments of the care placement *by* the representative – a point not fully understood in the evaluation process.[96] In fact, there is nothing in the text of Article 19(1) to suggest that the representative is empowered to exercise a supervisory role over the care placement, to challenge the quality of care provided in the placement or, if necessary, to remove the child from that placement and secure for him/her an alternative placement. There is a requirement in Article 19(4) RCD that persons 'working with unaccompanied minors shall have had or receive appropriate training concerning their needs'. While this is an important acknowledgement of the need for suitably qualified staff, the fact that the training could be a one-off or take place after appointment casts doubt on the seriousness of this provision.

As regards the QD, Article 30(3) contains the same list of possible placements that are outlined in the RCD but with an explicit obligation to take the views of the child into account in accordance with age and maturity and without any derogation provision in respect of over 16s. Like the RCD, Article

95 All recent reports and policy documents on unaccompanied minors report on this phenomenon. *Supra* n. 83. The Committee RC has expressed its concern in its concluding observations to Nordic countries, in particular, at the disappearance of unaccompanied minors from care. See Committee RC, Concluding Observations to Denmark in 2011, U.N. Doc. CRC/C/DNK/CO/4, para 58; to Norway in 2010, U.N. Doc. CRC/C/NOR/CO/4, para. 50; to Norway in 2005, U.N. Doc. CRC/C/15/Add.262, para. 41; and to Sweden in 2005, U.N. Doc. CRC/C/15/Add.248, § 7.

96 For example, the Odysseus Report, which fed into the Commission's evaluation of the RCD, states: 'It has not been possible to gather sufficient information concerning the question of finding out whether enough monitoring is effected by legal guardians in conformity with the requirements of Article 19(1) of the Directive'. Academic Network for Legal Studies on Immigration and Asylum in Europe, 'Comparative Overview of the Implementation of the Directive 2003/9 of 27 January 2003 laying down Minimum Standards for the Reception of Asylum Seekers in the EU Member States' (2006), 83.

30(4) iterates the desirability of keeping siblings together, subject to the best interests of the child and his or her age and degree of maturity, and of limiting changes of residence to a minimum. This is all consistent with the requirements of the CRC. However, like the RCD, the QD makes no reference to the child protection in the context of the care placement and contains the same weak provision on training for those working with unaccompanied minors.[97]

In short, while the RCD and QD provide for a range of care placements for unaccompanied minors and contain provisions that implicitly relate to the best interests of the child, both directives fail to articulate the protective function of the care placement. This is unsatisfactory in view of the well known dangers that care placements pose for unaccompanied minors.

5.3.3 Phase Two CEAS: prospects for enhanced compliance

5.3.3.1 Identification of the child entitled to special protection and assistance

Although identification of the unaccompanied minor does not arise in the context of the QD, the lack of an identification mechanism is problematic in the context of the RCD. In this regard, the proposed recast RCD introduces no new mechanism for the identification of such children. There is, however, a new article relating to the identification of the special reception needs of vulnerable persons, but this is of little assistance in the context of unaccompanied minors (notwithstanding that it includes unaccompanied minors in its illustrative list of vulnerable persons) because it provides that identification mechanisms 'shall be initiated within a reasonable time *after* an application for international protection is made.'[98] Obviously, it is necessary to identify the unaccompanied minor before that point or conceivably an application for international protection will not be made. An enhanced provision of the proposed recast APD relating to the identification of applicants in need of special procedural guarantees is also of little benefit because it simply refers back to the identification mechanism in the RCD.[99]

The failure to introduce a mechanism for the identification of unaccompanied minors is puzzling. It is acknowledged in the Commission's Action Plan on Unaccompanied Minors that, 'EU legislation does not provide for the appointment of a representative from the moment an unaccompanied minor is detected by the authorities, namely before the relevant instruments [e.g.

97 Article 30(6).

98 Article 22. Emphasis added.

99 Article 24(1) of the proposed recast APD provides: 'Member States shall ensure that applicants in need of special procedural guarantees are identified in due time. To that end, Member States may use the mechanism provided for the in the [RCD].'

the RCD] are triggered.'[100] It is further stated that, '[w]henever unaccompanied minors are detected, they should be separated from adults, to protect them and sever relations with traffickers or smugglers and prevent (re)victimization. From the first encounter, attention to protection is paramount, as is early profiling of the type of minor […].'[101] However, when it comes to legislative action, the action plan simply states that:

> The EU should adopt higher standards of protection for unaccompanied minors by completing negotiations on the revision of the asylum acquis […]. The Commission will ensure that EU legislation is correctly implemented and, on the basis of an impact assessment, evaluate whether it is necessary to introduce targeted amendments or a special instrument setting down common standards on reception and assistance for all unaccompanied minors […].[102]

While it may well be the case that a special instrument governing all unaccompanied minors (those seeking international protection and otherwise) is needed – an issue that is beyond the scope of the present work – it is unclear why, in the meantime, phase two CEAS is not used to improve the position of unaccompanied minors at the identification stage. The reference to the revision of the asylum *acquis* is misleading in this regard.

In sum, neither the proposed recast RCD nor the proposed recast APD contains any new mechanism for the identification of unaccompanied minors. The omission constitutes a significant practical barrier to the enjoyment by unaccompanied minors of applicable rights.

5.3.3.2 Oversight of care and protection

On a more positive note, a considerable improvement is made to the provisions of the RCD relating to the representative. A new paragraph in the article on definitions supplies a definition of a representative as follows:

> '[R]epresentative' means a person or organization appointed by the competent bodies to act as a legal guardian in order to assist and represent an unaccompanied minor in procedures provided for in this Directive with a view to ensuring the child's best interests and exercising legal capacity for the minor where necessary. Where an organization acts as a representative, it shall appoint a person responsible for carrying out the duties of the legal guardian in respect of the minor, in accordance with this Directive.[103]

100 European Commission, *supra* n. 83, § 4.1, p. 9.
101 *Ibid*.
102 *Ibid*, pp. 9 & 10.
103 Article 2(j).

Furthermore, the first paragraph of the article relating to unaccompanied minors (now Article 24) is significantly amended and now reads:

> Member States shall as soon as possible take measures to ensure that a representative represents and assists the unaccompanied minor to enable him/her to benefit from the rights and comply with the obligations provided for in this Directive. The representative shall have the necessary expertise in the field of childcare and shall perform his/her duties in accordance with the principle of the best interests of the child […].

Together, these two provisions address the concern outlined earlier that the identity, qualifications and role of the representative are not adequately delineated.

Inconsistently, no similar changes relating to the representative were proposed by the Commission for the recast QD and hence there is no definition of 'representative' in the recast QD and no similar description of his/her role.

5.3.3.3 The provision of alternative care

Article 19(2) RCD has attracted criticism because it authorizes Member States to derogate from the obligation to accommodate unaccompanied minors over the age of 16 separately from adults. However, it was considered that, providing the derogation provision is subject to a best interests assessment (as it seems to be under Article 18 of the directive) the derogation is unproblematic. The real difficulty with the RCD – one that is also apparent in the QD – is the lack of any reference to the protective function of the care placement. The proposed recast RCD, in particular, envisages some significant changes in this regard.

Article 24(2) of the proposed recast RCD on unaccompanied minors provides that the derogation from the obligation to secure a child placement for over 16s can only be used 'if it is in their best interests, as prescribed in Article 23(2)'. Thus the derogation provision is expressly subject to a best interests assessment. Article 23(2), in turn, provides that in assessing the best interests of the child, due account must be taken of, *inter alia*, safety and security considerations. This goes some way towards integrating a protective dimension into the care placement. Unfortunately, there is still no reference to the need for supervision and monitoring of the care placement. A slight improvement is, however, made to the provision requiring training of staff working with unaccompanied minors. Such staff must have had 'and shall continue to receive' appropriate training concerning the needs of unaccompanied minors – a recognition of the need for previous *and* on-going training.

The recast QD makes no reference to the protective dimension of the care placement. However, an identically worded provision to Article 23(2) of the proposed recast RCD on assessing the best interests of the child appears in a

recital to the QD.[104] Like the proposed recast RCD, there is still no reference to supervision or monitoring of the care placement but the training provision is amended in the recast QD to include an on-going dimension.[105]

In sum, the proposed recast RCD and recast QD take some steps towards strengthening the protective dimension of the care placement, although both stop short of an explicit acknowledgement of the need for protection in care or of establishing an oversight mechanism.

5.4 Synthesis of findings

This chapter dealt with two rights: the right of the child to family unity and the right of the child without family to special protection and assistance by the state. In the case of the former, the normative content of the right was delineated along three lines: the concept of derived rights, the prohibition on separating a child from his/her parents against their will and the right of the child to family reunification. The question for resolution was whether the relevant CEAS legislation complies with these dimensions of the right. Taking the Phase One instruments first, it emerged that compliance varies according to instrument. However, allowing for variations between instruments, it was found that the instruments generally acknowledge the major attributes of the right to family unity. However, they curtail the scope of the family unity provisions by defining the child and/or the family in a rigidly narrow way. This is compounded by differential treatment of beneficiaries of subsidiary protection and by expressly or impliedly permitting aspects of the right to family unity to be derogated from. In Phase Two, the definition of the child and the family is broadened somewhat, with the result that there is a modest gain in terms of who benefits from the rights associated with family unity. Moreover, the differential treatment of beneficiaries of subsidiary protection is removed in respect of derived rights, although not in respect of the right to family reunification, and the right to family unity is less amenable to express or implied limitations generally. Therefore, Phase Two CEAS constitutes a qualified improvement on Phase One in terms of the right of the child to family unity.

As regards the right of the child without family to special protection and assistance, it was found that this right comprises three essential elements: the right of the unaccompanied or separated child to be identified as such, to be appointed a guardian or adviser to oversee the child's best interests and to be provided with alternative care. The second two elements are provided for in the Phase One instruments but not the first, with the result that the unaccompanied or separated child may not get to benefit from the rights to which

104 Recital 18.
105 Article 31(6).

he/she is entitled under the instruments. Furthermore, the provisions of the instruments relating to the guardian or representative lack the specificity necessary to communicate the role and essential attributes of that person. Finally, while the instruments outline a range of care placements for unaccompanied minors, they fail to make clear that the central role of the placement is to protect the child. Consequently, the existence of detailed provisions relating to the protection and care of unaccompanied minors in Phase One CEAS belies the fact that the standards they contain do not conform to international standards. Some improvements were discerned in Phase Two. Notably, the provisions of the instruments relating to the role and qualities of the guardian are much improved and the protective dimension of the care placement is indirectly strengthened, although still no explicit reference is made to protection in the context of care. However, these improvements are undermined by a continued failure in Phase Two to establish a mechanism for the identification of the unaccompanied or separated child. In sum, Phase Two CEAS constitutes a modest improvement on Phase One in terms of the right of the child without family to special protection and assistance.

6 Certain socio-economic rights of the child

6.1 INTRODUCTION

This chapter explores the conformity of the CEAS with three key socio-economic rights: the right of the child to health, to an adequate standard of living and to education. Like the previous chapter, these rights also fall under the general rubric of Article 22(1) CRC (the right of the asylum seeking and refugee child to protection and assistance in the enjoyment of applicable Convention rights) but it is appropriate to deal with them as a discrete category. This is because they are socio-economic rights, a fact which poses, if not a problem, then a complication for the assessment. This is because of the nature of the legal obligation relating to socio-economic rights. Article 4 CRC provides:

> States Parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention. *With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources* and, where needed, within the framework of international cooperation.[1]

It is well established, if increasingly open to challenge, that there is a difference between the legal obligation inherent in most socio-economic rights, as compared with most civil and political rights.[2] While the latter are generally immediately realizable, socio-economic rights are generally progressively realizable.[3] Article 4 CRC reflects this distinction, conceiving of socio-economic

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1 Emphasis added.

2 The mantra of 'indivisibility' has been part of the UN rhetoric on rights at least since the Vienna World Conference on Human Rights in 1993.

3 For example, Article 2(1) of the ICESCR provides: 'Each State Party to the present Covenant undertakes *to take steps*, individually and through international assistance and co-operation, especially economic and technical, *to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant* by all appropriate means, including particularly the adoption of legislative measures.' Emphasis added. Similarly, the EU Charter of Fundamental Rights maintains the distinction between the two sets of rights. Thus Article 52(5) provides that 'principles' (as distinct from rights or freedoms) are to be 'implemented by legislative and executive acts of the Union and acts of Member States when implementing Union law' and are 'judicially cognizable only in the interpretation of such acts and in the ruling on their legality'. The general assumption in the literature is that 'principles' correspond to socio-economic rights and that the legal

rights in the Convention in maximal terms as goals to be achieved progressively.[4] At any given moment, they are determined by the amount of available resources. By contrast to the maximal standards of the socio-economic rights in the CRC, the CEAS establishes minimum standards, at least in its first phase. So how is it possible to measure the latter by the former?

A number of observations may be made on this dilemma. First, it is submitted that it is not within the gift of the EU legislator to curtail the definition of socio-economic rights according to presumptions about resources in Member States when it has no jurisdiction over those resources. Accordingly, it is argued that the standards regarding socio-economic rights established in the CEAS should correspond to the standards established in international human rights law, while of course, leaving a margin of discretion to Member States to sculpt those rights in accordance with available resources. Indeed, the CEAS is characterized by the large amount of discretion it leaves to Member States in the wording and derogation provisions of its instruments. Second, discretion must know some bounds. Just because a right is socio-economic in nature cannot mean that there is no absolute minimum entitlement. Indeed, efforts have been on-going for at least 25 years to identify the minimum entitlement inherent in socio-economic rights, in the absence of which there is a violation.[5] These efforts have centred around identifying the 'core content' of socio-economic rights, the term 'core' being understood as the essence of a right that is impervious to resource constraints and immediately realizable. It is submitted that in its discretionary and derogation provisions, the CEAS must conform to the 'core content' of the right in question.

Accordingly, while this chapter is structured along the lines of the previous chapters, with a first sub-section devoted to outlining the content of the right in question and a second and third sub-section devoted to a critique of the CEAS instruments in its two phases, the first section outlines not just the norm-

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effect of Article 52(5) is to make such rights non-justiciable. See Groussot and Pech, 'Fundamental Rights Protection in the EU Post Lisbon Treaty', *Foundation Robert Schuman Policy Paper*, European Issue No. 173 (2010).

4 McGoldrick has pointed out a subtle textual difference between Article 2(1) ICESCR and Article 4 CRC, noting: '[w]ith respect to economic, social and cultural rights, article 4 clearly indicates that they are not immediate obligations but the absence of any reference to 'achieving progressively' as in article 2 of the ICESCR may imply that the relevant obligations are of a more immediate nature if the resources are demonstrably available.' Dominic McGoldrick, 'The United Nations Convention on the Rights of the Child, *International Journal of Law and the Family* 5 (1991): 138.

5 For an early initiative, see 'The Limburg Principles on the Implementation of the International Covenant on Economic Social and Cultural Rights', U.N. Doc E/CN.4/1987/17, Annex; and *Human Rights Quarterly* 9 (1987): 122-135. See also 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights', *Human Rights Quarterly* 20, no. 3 (1998) and *Netherlands Quarterly of Human Rights* 15, no. 2 (1997). The Committee on Economic, Social and Cultural Rights has delineated the core content of many of the rights in the ICESCR in its general comments and will have further opportunities to do so once the 2008 Optional Protocol relating to a complaints procedure enters into force.

ative content of the right, but also the 'core content'. The thesis is that the provisions of the CEAS instruments should generally conform to the former, but in their discretionary and derogation provisions, should conform at least to the latter. Section 6.2 deals with health, section 6.3 with standard of living and section 6.4 with education.

6.2 HEALTH

6.2.1 The right of the child to health

The right of the child to health is set out in Article 24 CRC, which provides in relevant part:

> 1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.
> 2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:
> […] (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care; […]

Article 24 CRC builds on the right to health in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which sets out the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and includes among the steps necessary for the realization of the right the provision for the healthy development of the child.[6] Furthermore, at the regional level, a number of instruments explicitly or implicitly protect the right to health.[7]

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6 Article 12 ICESCR: '1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. 2. The steps to be taken by the States Parties to the present Convenant to achieve the full realization of this right shall include those necessary for: (a) the provisions of the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child; (b) the improvement of all aspects of environmental and industrial hygiene; (c) the prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) the creation of conditions which would assure to all medical service and medical attention in the event of sickness.'

7 A right to protection of health and to medical assistance are provided in Articles 11 and 13 respectively of the Revised European Social Charter and a right to health care is provided in Article 35 of the EU Charter of Fundamental Rights. Health issues may also arise in the context of Article 2 and 3 ECHR. See respectively ECtHR, *Cyprus v Turkey*, Appl. No. 25781/94, Judgment of 10 May 2001and ECtHR, *Pretty v UK*, Appl. No. 2346/02, Judgment of 29 April 2002.

Also of relevance to the right of the child to health is Article 39 CRC which provides:

> States parties shall take all appropriate measures to promote physical and psychological recovery and reintegration of a child victim of: any form of neglect, exploitation or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

This right of the child victim to recovery and reintegration is novel in international and regional human rights law, finding no equivalent, for example, in the ICESCR or in the Convention Against Torture.[8]

6.2.1.1 The normative content of the right

Beginning with Article 24 CRC, it is useful, given the complexity of the article, to analyze it according to its constituent elements.

The first sentence of Article 24(1) can be divided into three elements. The first establishes the right of the child to 'the highest attainable standard of health'. A similar provision is found in Article 13 ICESCR, but explicitly relates to both physical and mental health. However, nothing should be made of the omission in the CRC as the Committee RC interprets the right to health as pertaining both to physical and mental health.[9] The Committee on Economic, Social and Cultural Rights has elaborated on the normative content of the right to health in its General Comment 14.[10] It notes that the right to health is not confined to the right to *health care*, but rather embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the *underlying determinant of health*, such as food and

8 The closest equivalent in the Convention Against Torture is Article 14(1) which provides: 'Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. […]' Also of note is the obligation – often couched in 'soft' or conditional terms – in international and regional law governing anti-trafficking to facilitate the rehabilitation of victims of trafficking. See, for example, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organised Crime, 2000, Article 6.

9 See Committee RC, General Comment No. 4, 'Adolescent health and development in the context of the Convention on the Rights of the Child', U.N. Doc. CRC/GC/2003/4 (2003), para. 39(c) & (i); Committee RC, General Comment No. 6, 'Treatment of unaccompanied and separated children outside their country of origin', U.N. Doc. CRC/GC/2005/6 (2005), para. 48; Committee RC, General Comment No. 9, 'The right of children with disabilities', U.N. Doc. CRC/C/GC/9 (2007), para. 51; Committee RC, General Comment No. 13, 'Article 19: The right of the child to freedom from all forms of violence', U.N. Doc. CRC/C/GC/13 (2011), para. 52.

10 Committee on Economic, Social and Cultural Rights (Committee ESCR), General Comment 14, 'The right to the highest attainable standard of health', U.N. Doc. E/C.12/2000/4 (2000).

nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.[11] As a result of this broad understanding of the right to health, States Parties are required, not only to provide health care facilities, goods and services, but to meet other rights relevant to creating the conditions precedent to the highest attainable standard of health, such as the right to an adequate standard of living and the right to education, both of which are dealt with in subsequent sections of this chapter.

The next element relates to 'facilities for the treatment of illness'. This provision derives from Article 12(2)(d) of the ICESCR which obliges States Parties to take steps to create conditions 'which would assure to all medical service and medical attention in the event of sickness.' However, the Committee on Economic, Social and Cultural Rights does not consider such facilities to be limited to curative facilities. According to General Comment 14, the obligation 'includes the provision of equal and timely access to basic preventive, curative [and] rehabilitative health services and health education; regular screening programmes; appropriate treatment of prevalent diseases, illnesses, injuries and disabilities, preferably at community level; the provision of essential drugs; and appropriate mental health treatment and care.'[12]

The third element relates to facilities for the 'rehabilitation of health'. There is no corresponding provision of the ICESCR, although the above extract from General Comment 14 makes it clear that the Committee on Economic, Social and Cultural Rights considers rehabilitation to be an integral part of medical service/attention in the event of sickness. The fact that rehabilitation of health is expressly mentioned in Article 24 CRC can be explained by the fact that childhood ill-health can affect a child's development and consequently have long-term or permanent effects.[13] Also of relevance to the question of rehabilitation of health is Article 39 CRC, which will be analyzed below.

The second sentence of Article 24(1) obliges States Parties to strive to 'ensure that no child is deprived of his or her right of access to such health care services'. The *travaux préparatoires* of the CRC show that the purpose of this provision was to ensure that no child would be deprived of his or her right of access to health care because of a lack of ability to pay.[14] However, a broader contemporary interpretation of the right of access to health care is given by the Committee on Economic, Social and Cultural Rights. General Comment No. 14 provides that access to health care encompasses not only

11 For more on the terminology of the right to health, see Virginia Leary, 'The Right to Health in International Human Rights Law, *Health and Human Rights* 1, no. 1 (1999): 25-56.

12 *Supra* n. 10, para. 17.

13 On this point see Asbjorn Eide and Wenche Barth Eide, *A Commentary on the United Nations Convention on the Rights of the Child, Article 24 The Right to Health* (Leiden/Boston: Martinus Nijhoff Publishers, 2006), para. 31.

14 *Ibid*, para. 32.

economic accessibility but also non-discrimination, physical accessibility, and information accessibility.[15]

Article 24(2) sets out the measures a State Party must take to pursue the full implementation of the right of the child to health. Article 24(2)(b) establishes that States Parties must ensure 'the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care'. There are two aspects to this obligation: first, the provision of necessary medical assistance and health care; and second, the development of primary health care. The wording makes clear that the second is a necessary but not sufficient condition for the first. The most comprehensive definition of primary health care is provided in the Declaration of Alma Ata on Primary Health Care 1979.[16] The Declaration establishes that primary health care is 'primary' in the sense of being essential health care, the first level of contact with the national health system and the first element of a continuing health care process. It addresses the main health problems in the community, providing promotive, preventive, curative and rehabilitative services accordingly. And it includes *at least*, among other services, child health care. As to what, other than primary health care, constitutes *necessary* medical assistance and health care, this can be identified by a process of elimination. The emphasis placed on primary health care suggests that resources should not be spent on tertiary health care (i.e. high tech, high cost institutions, which are highly equipped and staffed but which benefit only a small number of people).[17] What remains is secondary health care by a hospital or physician following referral by a primary health care worker and emergency hospital treatment. Where such health care is 'necessary', it falls within the parameters of Article 24(2)(b).

Moving now to Article 39 CRC, which obliges states to promote physical and psychological recovery and reintegration of a child victim of various types of ill-treatment. Apart from the novelty of this provision in international law, Article 39 is interesting because of the way it conceives of recovery and reintegration. State Parties are obliged to 'take all appropriate measures to promote physical and psychological recovery and reintegration […] in an environment which fosters the health, self-respect and dignity of the child'. Two aspects of this are noteworthy. First, the *psychological* as well as physical recovery and reintegration of the child is required. Hence the mental health aspect of recovery and reintegration is placed on a par with the physical aspect, with obvious implications for the provision of psychological services, counselling and so forth. Second, in line with the broad understanding of the right to health discussed above, Article 39 CRC adopts a holistic, as distinct

15 Committee ESCR, General Comment 14, s*upra* n. 10, para. 12(b).

16 International Conference on Primary Health Care, Alma-Ata, USSR, 6-12 September 1978. Endorsed by UN General Assembly Resolution 34/43 of 19 November 1979.

17 On this point see Asbjorn Eide and Wenche Barth Eide, *supra* n. 13, para. 58.

from a strictly 'sickness' approach to recovery and reintegration. Thus, States Parties are required to take *all appropriate measures* – including but not confined to medical ones – to promote recovery and reintegration. Moreover, the recovery and reintegration must take place in an environment that fosters the health, self-respect and dignity of the child. This holistic approach recognizes the fact that the psycho-social well-being of the child is as important to recovery and reintegration as medical intervention. It also recognizes the linkages between recovery and the right of the child to an adequate standard of living i.e. one that promotes self-respect and dignity. In this regard, it is interesting to note that the CRC provides in Article 27(1) that the child has a right to a standard of living 'adequate for the child's physical, mental, spiritual, moral and social development.' Therefore, the right of the child to rehabilitation and recovery in Article 39 CRC is likely to be frustrated if the right to an adequate standard of living as defined in Article 27(1) CRC is not fulfilled.[18] This linkage will be taken up in the section on the right to an adequate standard of living, below.

In sum, the normative content of the right of the child to health comprises the fulfilment of the underlying determinants of health as well as a right to health care. The right to health care covers preventive, curative and rehabilitative health services, with an emphasis on primary health care. No child should be denied access to such health care services. Furthermore, the right of the child victim of various types of ill-treatment to recovery and reintegration requires states to take positive and holistic measures to facilitate that recovery and reintegration.

6.2.1.2 The 'core content' of the right

Having explored the normative content of the right of the child to health, the question arises as to whether and to what extent the right is susceptible to limitation. A number of observations should be made in this regard.

First, neither Article 24 nor Article 39 CRC contains a limitation clause such as is found in relation to the civil and political rights in the Convention.[19] Nor does the CRC contain a general (i.e. horizontal) limitation clause such as

18 The Committee RC made this link in its Concluding Observations to Lithuania in 2006, U.N. Doc. CRC/C/LTU/CO/2, when it recommended the State party at § 8 to '[t]ake urgent measures to further improve the reception conditions for families and in particular children seeking asylum in Lithuania by, *inter alia*, providing psychosocial and recovery services for traumatized children and children arriving from armed conflicts *as well as* by improving the environment of the reception facilities.' Emphasis added.

19 See, for example, Article 13(2) which imposes limitation on the right of the child to freedom of expression, Article 14(3) which imposes limitations on the right of the child to freedom of thought, conscience and religion and Article 15(2) which imposes limitations on the right of the child to freedom of association and assembly.

is found in Article 4 ICESCR.[20] However, it does not necessarily follow that the right to health provisions of the CRC are absolute. For a start, a certain elasticity of obligation is introduced by way of the phrasing of the legal obligation. Article 24 in particular contains a number of phrases designed to afford a measure of discretion to states in deciding how to give effect to the right to health, phrases such as 'strive to ensure' and 'take appropriate measures'.[21] But of greater import, being a socio-economic right, the right of the child to health is not subject to full immediate realization. Thus, as previously indicated, Article 4 CRC on the nature of the legal obligation in the Convention provides that '[w]ith regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources'. Consequently, the scope of the socio-economic rights in the CRC is determined by the amount of available resources. In this regard, resource constraints act as a kind of deferral mechanism, a functional limitation, on socio-economic rights. The question of whether middle and high income countries – such as the EU Member States which have adopted the CEAS – can reasonably argue a lack of resources is complex and beyond the scope of this work.[22] However, it is an inescapable fact that such countries have proven strongly resistant in practice to extending the full gamut of socio-economic rights to non-nationals (including children). In this context, it is necessary to identify the 'core content' of the right of the child to health, the term 'core' being understood as the essence of the right that is impervious to resource constraints and hence not susceptible of limitation on economic grounds. According to General Comment No. 3 of the Committee on Economic, Social and Cultural Rights on the nature of States Parties obligations, every socio-economic right contains two 'core' obligations: the immediate duty to 'take steps' towards the goal of full realization thereby ensuring minimum essential

20 Article 4 ICESCR provides: 'The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitation as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.'

21 For more on this question see Cynthia Price Cohen, 'Elasticity of Obligation and the Drafting of the Convention on the Rights of the Child' *Connecticut Journal of International Law* 72, no. 3 (1987-88): 71-109.

22 In this regard, it is interesting to note that the CRC contains no equivalent of Article 2(3) of the ICESCR which states that '[d]eveloping countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.' The Committee RC has interpreted the omission to mean that developing countries are not permitted to limit the Convention rights of non-nationals. The same must be true *a fortiori* of developed countries. See Committee RC, General Comment No. 6, *supra* n. 9, para. 16. On the other hand, the Committee ESCR has acknowledged 'the realities of the real world and the difficulties involved for *any* country in ensuring the full realization of economic, social and cultural rights.' Committee ESCR, General Comment 3, 'The nature of States parties obligations (Art. 2, par.1)', HRI/GEN/1/Rev.6 at 14 (1990), para. 9 (emphasis added).

levels of the right; and the undertaking to guarantee the right without discrimination.

The minimum essential obligation

In its General Comment No. 3 on the nature of States Parties obligations, the Committee on Economic, Social and Cultural Rights states that the undertaking in Article 2(1) ICESCR 'to take steps' is not qualified or limited by other considerations.[23] Thus while the full realisation of the relevant rights may be achieved progressively, steps towards that goal must be taken immediately. These steps correspond to the minimum essential obligation. Although the term 'measures' rather than steps is used in corresponding Article 4 CRC, it is submitted that there is no practical difference between the terms.[24] Both make a distinction between what are known (following the work of the International Law Commission) as obligations of conduct and obligations of result.

In terms of the right of the child to health, it is clear that Article 24(1) corresponds to the obligation of result and that Article 24(2) corresponds to the obligation of conduct. Accordingly, pursuant to Article 24(2)(b) immediate steps must be taken 'to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care'. Since the emphasis must be placed on the latter, the provision of primary health care constitutes the minimum core of the right of the child to health. This is also the position adopted by the Committee on Economic, Social and Cultural Rights in relation to the general right to health. Thus General Comment No. 3 provides that:

> […] [a] minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State Party. Thus for example, a State Party in which any significant number of individuals is deprived of essential foodstuffs, of *essential primary health care*, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant.[25]

Similarly, General Comment 14 of the Committee on Economic, Social and Cultural Rights on the right to health states that the Alma-Ata Declaration on Primary Health Care provides 'compelling guidance' on the core obligations arising from the right to health, which include at least the obligation '[t]o ensure reproductive, maternal (pre-natal as well as post-natal) and *child health care*'.[26] Consequently, it is not permissible to limit the right of the child to

23 Committee ESCR, General Comment 3, *ibid,* para. 2.

24 Indeed, in the Spanish version of the ICESCR, the obligation in Article 2(1) 'to take steps' is 'a adopter medidas' (to adopt measures).

25 *Supra* n. 22, para. 10 (emphasis added).

26 Committee ESCR, General Comment 14, s*upra* n. 10, para. 44 (emphasis added).

health below the level of primary health care in all its promotive, preventive, curative and rehabilitative dimensions.

As regards Article 39 CRC relating to the right of the child to rehabilitation and recovery, since this right is *sui generis* in international human rights law, it is inappropriate to classify it according to the civil and political/ economic, social and cultural dichotomy. Consequently, Article 4 CRC relating to the progressive realization of socio-economic rights in the Convention does not apply. Therefore, it is necessary to analyze the terms of Article 39 itself to establish whether it permits of limitation. In this regard, it is noteworthy that the language relating to the obligation ('States Parties shall take') is one of the strongest formulations used in international human rights law. These words constitute, according to Price Cohen, 'emphatic words of universal scope' and place 'the strongest possible obligation upon States Parties.'[27] Consequently, the legal obligation is one of full immediate realization, albeit that some degree of latitude is given to states in deciding on what are 'appropriate measures'. However, even this discretion is qualified by the absolute requirement that '[s]uch recovery and reintegration *shall* take place in an environment which fosters the health, self-respect and dignity of the child'. Accordingly, there is no scope for limitation of the right.

The prohibition of discrimination

Any limitation on the right of the child to health, in addition to respecting the minimum essential obligation, must not be discriminatory. A prohibition of discrimination is part of the normative content of the right of the child to health. This is evident from two clauses of Article 24 CRC. Article 24(1) second sentence provides 'States Parties shall strive to ensure that *no child is deprived of his or her right of access* to such health care services', while Article 24(2)(b) requires States Parties to 'ensure the provision of necessary medical assistance and health care to *all children*'. Furthermore, Article 2 CRC establishes a prohibition of discrimination as a cross-cutting general principle of the Convention, providing:

> 1. States Parties shall respect and ensure the rights set forth in the present Covenant to each child within their jurisdiction without distinction of any kind, irrespective of the child's or his or her parent's or legal guardian's race colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
> 2. States Parties shall take all appropriate measure to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians or family members.

27 Cynthia Price Cohen, *supra* n. 21, p. 76.

The first paragraph of Article 2 CRC is a standard 'auxiliary' non-discrimination provision, prohibiting discrimination in relation to other rights in the Convention, like the right to health. Like other such provisions in international human rights law, it prohibits discrimination on a number of grounds, including 'other status'. Following the initiative of other treaty monitoring bodies[28] and indeed the ECtHR in relation to Article 14 ECHR,[29] 'other status' has been interpreted by the Committee RC as extending to nationality and even protection status. Thus the Committee has stated that '[t]he principle of non-discrimination […] prohibits any discrimination on the basis of the status of a child as being unaccompanied or separated, or being a refugee, asylum seeker or migrant'.[30] Interestingly, Article 2(2) CRC is an 'autonomous' non-discrimination provision, prohibiting discrimination or punishment in any matter (including but not limited to the enjoyment of Convention rights) on the basis not only of the status but also, *inter alia*, of the *activities* of the child's parents, legal guardians or family members.[31]

Hence, discrimination against or between children seeking or enjoying international protection is clearly prohibited. However, this does not mean that every difference in health treatment between, for example, children seeking and children enjoying international protection, or either of those groups and national children offends against the prohibition of discrimination. There is a well-established international legal 'formula' for assessing claims of discrimination, which contains a number of hurdles that have to be overcome before a distinction will be classified as discrimination. This formula starts from the premise that not every difference in treatment amounts to discrimination because, in the words of ECtHR, 'the competent national authorities are frequently confronted with situations and problems which, on account of difference inherent therein, call for different legal solutions; moreover, certain legal inequalities tend only to correct factual inequalities.[32] Consequently, the alleged victim of discrimination must show that he/she is less favourably

28 Committee ESCR, General Comment 20, 'Non-discrimination in economic, social and cultural rights (art. 2, para. 2 of the International Convenant on Economic, Social and Cultural Rights)', U.N. Doc E/C.12/GC/20 (2009), para. 30; Committee on the Elimination of Racial Discrimination, General Recommendation 30, 'Discrimination against Non-citizens', U.N. Doc CERD/C/64/Misc 11/rev. 3 (2004), particularly paras. 29 and 36 which relate to discrimination in relation to the right to health; Human Rights Committee, General Comment 15, 'The position of aliens under the Covenant', U.N. Doc. HRI/Gen/Rev.1 at 18 (1994), para. 2.

29 ECtHR, *Gaygusuz v Austria*, Appl. No. 17371/90, Judgment of 16 September 1996; (1997) 23 EHRR 90.

30 Committee RC, General Comment No. 6, *supra* n. 9, para. 18.

31 For analysis of this innovative provision in international law see Samantha Besson 'The Principle of Non-Discrimination in the Convention on the Rights of the Child', *International Journal of Children's Rights* 13, no. 4 (2005): 433-461.

32 ECtHR, *Belgian Linguistics* case, Appl. Nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, Judgment of 23 July 1968, para. 9.

treated as compared with similarly-situated persons. If this hurdle is overcome and a *prima facie* case of discrimination is made out, the burden of proof shifts to the state to show that the differential treatment is justified. The Committee on Economic, Social and Cultural Rights has stated in General Comment 20 on Non-discrimination in economic, social and cultural rights:

> Differential treatment on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures of omissions and their effects.[33]

In sum, the question of whether the child seeking or benefiting from international protection is discriminated against in the enjoyment of his/her right to health turns on a comparator test and thereafter, on whether the difference in treatment is justifiable. This cannot be determined in the abstract but requires a contextual assessment which will be undertaken below.

6.2.2 Phase One CEAS: compliance with the right of the child to health

Having set out the normative and core content of the right of the child to health, this sub-section explores whether the relevant CEAS instruments are consistent with both or at least the minimum standard. The relevant CEAS instruments are the RCD and the QD. Given the complexity of the provisions on health care in each directive, it is convenient to devote a subsection to each directive.

6.2.2.1 The Reception Conditions Directive

Article 15 of the RCD relating to health care provides as follows:

> (1) Member States shall ensure that applicants receive the necessary health care which shall include, at least, emergency care and essential treatment of illness.
> (2) Member States shall provide necessary medical or other assistance to applicants who have special needs.

Hence, a general standard of health care is established in paragraph 1, while a specific standard is established in paragraph 2 regarding persons with special

33 Committee ESCR, General Comment 20, *supra* n. 28, para. 13.

needs. Taking the general standard first, it can be observed that paragraph 1 actually sets two different standards: a higher standard i.e. *necessary* health care, which implies access to the full range of primary health care services as well as access to secondary health care services where they are needed, and a lower standard i.e. *emergency* care and *essential* treatment of illness, which suggests emergency hospital and curative care. It can be observed that while the higher standard conforms to both the normative and the core content of the right of the child to health, the lower standard conforms to neither.

The effect of paragraph 2 is to insulate applicants who have special needs from the lower standard established in paragraph 1, since such applicants must be provided with *necessary* medical or other assistance. But there is confusion about the scope of paragraph 2 *ratione personae*. Who are persons who have special needs? Some light is shed on this question in Chapter IV on Provisions for Persons with Special Needs. This chapter includes an article on minors (Article 18), unaccompanied minors (Article 19) and victims of torture and violence (Article 20). It establishes a 'general principle' in Article 17 for dealing with 'vulnerable persons' according to which Member States are required to take their specific situation into account in the national legislation implementing the provisions relating to material reception conditions and health care. An illustrative list of such persons is provided and includes minors and unaccompanied minors alongside other groups such as persons who have subjected to torture, rape or other serious forms of psychological, physical or sexual violence. But the general principle only applies if such persons are 'found to have special needs after an individual evaluation of their situation.' It is unclear whether this provision mandates an individual screening process to identify persons with special needs, or whether the absence of such screening at the national level could vitiate the obligation. Related to this, it is unclear whether being a minor or unaccompanied minor *per se* is enough to qualify a child as being a person with special needs or whether some further vulnerability must be demonstrated. The Commission evaluation of the RCD reflects these ambiguities.[34]

Chapter III RCD is also relevant to the question of the level of health care provision. It allows for the reduction, withdrawal and even outright refusal of reception conditions in certain situations in an effort to counteract abuse of the reception system. Article 16(1) provides that where the asylum seeker

34 Thus, according to the evaluation, '[a]lthough the majority of Member States recognize [persons with special needs] by listing all the groups mentioned in the Directive or by using an open clause, some do not cover the full list in Article 17 or do not address persons with special needs at all (SK, FR, HU, LT, MT, PL, LV, EE and some regions of AT). Furthermore, in some Member States (UK, DE, BE, LU, EL, IT, SK, SI) no identification procedure is in place.' 'Report from the Commission to the Council and to the European Parliament on the Application of Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers', COM (2007) 745 final, §. 3.5.1, p.9. Hereinafter, 'Commission evaluation of the RCD'.

abandons the place of residence, fails to comply with reporting duties or requests for information, fails to appear for personal interview, has already lodged a previous application or has concealed financial resources, the Member State may reduce or withdraw reception conditions. Pursuant to Article 16(2), Member States may refuse (outright) reception conditions 'where an asylum seeker has failed to demonstrate that the asylum claim was made as soon as reasonably practicable after arrival in that Member State.' However, Article 16(4) establishes that 'Member States shall under all circumstances ensure access to emergency health care'. Consequently, it is not possible to refuse the right to health care outright, or reduce or withdraw it beyond this minimum level. Nevertheless, the level is considerably below the 'core content' of the right of the child to health, namely, access to the full range of primary health care services.

Article 16(4) further provides that '[d]ecisions shall be based on the particular situation of the person concerned, especially with regard to persons covered by Article 17 [i.e. the general principle on persons with special needs], taking into account the principle of proportionality.' This provision establishes that minors and unaccompanied minors are not exempted from having their health care under the directive reduced or withdrawn, although their special needs must be taken into account in assessing proportionality. This raises the question of whether such treatment could ever be proportionate when the object of the treatment is a child. The normative content of the right of the child to health draws attention to the vulnerability of the child to ill-health and its attendant consequences for development.[35] Children seeking international protection are widely regarded as being more vulnerable than children in the host population.[36] This vulnerability means that the impact of reduced health care on the child is likely to be more profound than in respect of someone who does not have special needs. In the context, it is submitted that Article 16(4) of the directive is unworkable and bound to be defeated by its own requirement of proportionality.

Furthermore, where, as in the case of derived rights, the child's access to health care is reduced, withdrawn or refused because of the parents' 'abuse' of the reception system, this falls foul of the prohibition of discrimination in Article 2(2) CRC which forbids 'all forms of discrimination *or punishment* on

35 In this regard, the Committee RC notes in General Comment No. 13 that '[a]t a universal level all children aged 0-18 years are considered vulnerable until the completion of their neural, psychological, social and physical growth and development.' *Supra* n. 9, para. 72(f), p. 27.

36 The Committee RC has identified refugee and asylum seeking young children (of pre-school age) and adolescents experiencing all types of migration as vulnerable groups. See respectively, Committee RC, General Comment No. 7, 'Implementing child rights in early childhood', U.N. Doc. CRC/C/GC/7/Rev.1 (2006), para. 24 and Committee RC, General Comment No. 4, *supra* n. 9, para. 38.

the basis of the status, *activities*, expressed opinions, or beliefs of the child's parents, legal guardians or family members.'[37]

To sum up, the main provision on health care in the RCD, namely Article 15(1), contains two possible standards of health care, the lower of which conforms to neither the normative or core content of the right of the child to health. This is mitigated somewhat by the reference to necessary medical assistance for persons with special needs, but it is unclear whether minors or unaccompanied minors fall within the personal scope of this provision. Furthermore, Chapter III RCD allows for the reduction and withdrawal of health care, subject to the floor of emergency health care. This minimum level offends against the core content of the right of the child to health.

Turning now to the right of the child victim of ill-treatment to recovery and reintegration under Article 39 CRC, two articles of the RCD are of note. Article 20 on the victims of torture and violence provides that 'Member States shall ensure that, if necessary, persons who have been subjected to torture, rape and other serious acts of violence receive the necessary treatment of damages caused by the aforementioned acts.' The rather redundant use of the words 'if necessary' aside, it should be noted that this provision also applies to minor victims of torture and sexual and other violence.

But of even greater significance, Article 18 RCD relating to minors provides:

> Member States shall ensure access to rehabilitation services for minors who have been victims of any form of abuse, neglect, exploitation, torture or cruel, inhuman and degrading treatment, or who have suffered from armed conflicts, and ensure that appropriate mental health care is developed and qualified counselling is provided when needed.

The RCD is the only CEAS instrument to contain a provision specifically directed to 'incorporating' Article 39 CRC. The inclusion of this provision in the directive, with its specific reference to appropriate mental health care and qualified counselling, is praiseworthy. However, it does not accurately reflect the terms of Article 39 CRC. Notably the references to 'all appropriate measures' and to 'an environment which fosters the health, self-respect and dignity of the child' are omitted. This is not a question of squabbling over wording; these omissions are significant. The holistic approach advanced in Article 39 CRC is essential in the context of traumatized child asylum seekers where it is well established that the medical or 'sickness' model of rehabilitation is a limited one.[38] First, the medical model pathologises responses to trauma rather than

37 Emphasis added.

38 See for example, M.E. Kalverboer, A.E. Zijlstra and E.J. Knorth, 'The Developmental Consequences for Asylum- seeking Children Living With the Prospect for Five Years or More of Enforced Return to Their Home Country', *European Journal of Migration and Law* 11 (2009): 41-67 and Margaret McCallin, 'The Convention on the Rights of the Child as

understanding such responses as normal reactions to situations of extreme stress. Second, it flounders on the almost inevitable under-funding of mental health care and consequent shortage of mental health professionals and qualified counselling. In this regard, it is unsurprising that the Commission evaluation of the RCD found that 'adequate access to health care has its limitations, e.g. no effective access to medical care, lack of specific care (in particular for victims of torture and violence) and insufficient cost cover.'[39] And third, it fails to recognize that a contributory factor to a child's trauma is his/her current living conditions.

A further problem with Article 18 RCD is that it fails to provide a mechanism for identifying minors who have been victims of the listed ill-treatment, an obligation arguably implicit in Article 39 CRC. Thus, the Committee RC has referred to the duty to identify such children in its General Comment No. 6[40] and in a number of concluding observations made to States Parties in relation to asylum seeking children.[41] The lack of a mechanism for identifying persons with special needs in general has already been commented on.

In sum, the right of the child victim of various types of ill-treatment to recovery and reintegration is reflected in the RCD, albeit imperfectly.

6.2.2.2 The Qualification Directive

The QD establishes five distinct 'streams' of access to healthcare.

First, Article 29(1) provides that beneficiaries of international protection have access to health care under the same eligibility conditions as nationals. Thus equal access to the full range of health care services available to nationals is implied.

Second, however, an exception is crafted in Article 29(2) in respect of beneficiaries of subsidiary protection, whose right to health care may be limited to 'core benefits', which must nevertheless be provided 'at the same levels and under the same eligibility conditions as nationals'.

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an Instrument to Address the Psychosocial Needs of Refugee Children' *International Journal of Refugee Law* 3, no. 1 (1991): 82-99.

39 § 3.5.2, p. 9.

40 Paragraph 47 provides that in ensuring the access of separated and unaccompanied children to facilities for the treatment of illness and rehabilitation of health, 'States must *assess* and address the particular plight and vulnerabilities of such children' (emphasis added). Committee RC, General Comment No. 6, *supra* n. 9

41 For example, in its concluding observations to Norway in 2010, the Committee expressed its concern 'at the cursory identification of children affected by armed conflict'. U.N. Doc. CRC/C/NOR/CO/4. Similarly in its concluding observations to Finland in 2000, the Committee recommended 'that the State party ensure that every effort is made to identify [asylum seeking and refugee] children who require special support upon their arrival in the State party, as well as consider providing adequate psychological assistance to them and their parents.' U.N. Doc. CRC/C/15/Add.132.

Third, Article 29(3) provides that 'adequate health care' under the same eligibility conditions as nationals must be provided to beneficiaries of international protection who have special needs. It provides an illustrative list of persons with special needs which includes 'minors who have been victims of any form of abuse', although not minors or unaccompanied minors *per se*. By contrast, Article 20 which establishes general rules relating the rights of refugees and beneficiaries of subsidiary protection provides in paragraph 3 that Member States shall 'take into account' the specific situation of vulnerable persons such as minors and unaccompanied minors when implementing such rights. However, paragraph 4 clarifies that this applies 'only to persons found to have special needs after an individual evaluation of their situation.' This formulation raises the same confusion as discussed above in relation to Article 17 of the RCD. The relationship between Article 29(3) and Article 20 QD is unclear.

Fourth, as regards family members of beneficiaries of international protection, the general rule established under the principle of family unity in Article 23 is that family members 'are entitled to claim the benefits referred to in Articles 24-34' which includes the right to health care in Article 29. However, again, an exception is crafted regarding family members of beneficiaries of subsidiary protection status: per Article 23(2), 'Member States may define the conditions applicable to such benefits [as health care]'.

Finally, Article 20 which establishes the general rules regarding the rights of refugees and beneficiaries of subsidiary protection provides in paragraphs 6 and 7 that where a refugee or beneficiary of subsidiary protection obtained that status 'on the basis of activities engaged in for the sole or main purpose of creating the necessary conditions for being recognized', Member States may reduce such rights, albeit within the limits set out by the Geneva Convention and international obligations of Member States, respectively. In respect of the Geneva Convention, it should be noted that no provision of that Convention relates to health care. However, in respect of the international obligations of Member States, this clearly includes obligations under the right to health articles of the CRC. Consequently, Article 20 is not as restrictive as it first appears.

In sum, under the QD, refugees and their family members are entitled to the *full range of public health care services* available to nationals; beneficiaries of SP are entitled, at a minimum, to *core benefits* while *conditions* may be imposed on their family members' access to health care; persons with special needs, which may or may not include minors and unaccompanied minors, are entitled to *adequate health care*; and persons who gained recognition in bad faith may have their right to health care *reduced* but within the limits set by international refugee and human rights law.

There are two major problems with these streams of access to healthcare from the point of view of the right of the child to health. First, the terminology (e.g. 'core benefits', 'conditions', 'adequate', 'reduced') does not map easily

onto the terminology used in Article 24 CRC, making it difficult to assess whether the various streams conform to either the normative or core content of the right of the child to health. Second, the permitted differential treatment of different groups raises the question of discrimination and consequently of whether there is a violation of the core content of the right of the child to health. Of particular concern is the differential treatment of refugees as compared with beneficiaries of subsidiary protection and of family members of refugees as compared with family members of beneficiaries of subsidiary protection. The extent to which Member States do actually differentiate between these groups is hard to ascertain from the Commission evaluation of the QD, which provides somewhat inconsistently:

> Only LT and MT appear to apply the possibility provided by Article 29(2) to reduce the access of beneficiaries of subsidiary protection to healthcare to core benefits. In AT, due to the federal system, the level of benefits granted to beneficiaries of subsidiary protection depends on the region they are hosted by. In DE, in cases of subsidiary protection, there is no access to some specific benefits concerning medical treatment.[42]

On principle, it is worth exploring whether this treatment constitutes discrimination. The reasoning pursued here follows the international legal 'formula' for assessing claims of discrimination.

First, on the issue of comparability, it is hard to sustain the charge that children from different protected groups are incomparable to one another. Of course, as Westen observes, the determination of whether two people are alike for purposes of the equality principle flounders on the truism that no two people are alike in every respect and all people are alike in some respect.[43] To have meaning, the comparator principle must refer to people who are alike in respect of a right requiring certain treatment. Therefore, the purpose of comparison is to establish whether there is a *relevant* difference between, for example, a child beneficiary of subsidiary protection and a child refugee viz. à viz. the right to health. Since all children are vulnerable to ill-health and its attendant consequences for their development, is submitted that there is no relevant difference between the groups.

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42 'Report from the Commission to the European Parliament and the Council on the Application of Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons a Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection', COM (2010) 314 final, § 5.5.1.2, p. 14. Hereinafter, 'Commission evaluation of the QD'.

43 Peter Westen 'The Empty Idea of Equality', *Harvard Law Review* 95, no. 3 (1982): 544. For a succinct analysis of the difficulties in using comparability to assess claims of discrimination, see Anne Baysfsky, 'The Principle of Equality or Non-Discrimination in International Law', *Human Rights Law Journal* 11, nos. 1-2 (1990): 1-34.

Second, on the issue of the legitimate aim, economic justifications or justifications relating to protection status are arguably harder to make out when the child is the subject of equality. As for economic justifications, the Committee on Economic, Social and Cultural rights has underlined the fact that 'even in times of severe resources constraints whether caused by a process of adjustment, or economic recession, or by other factors the vulnerable members of society can and indeed must be protected […]'.[44] Similarly, the Committee RC has stated that (even scarce) economic resources must be mobilized to meet the rights of particularly vulnerable children, such as separated and unaccompanied children.[45] Equally, children enjoying international protection (whether accompanied or unaccompanied) can be regarded as a vulnerable group, as has already been argued.

As for justifications relating to protection status, one can anticipate, for example, an argument that child beneficiaries of subsidiary protection have an inherently temporary status and consequently it is justified to limit their health care accordingly. A number of counter-arguments can be made. First, there is no correlation between temporariness as it corresponds to stability of status and temporariness in the temporal sense. Indeed, it is well known that beneficiaries of subsidiary protection may require indefinite protection, depending on the situation in the country of origin.[46] Indeed, all or a large part of a childhood can be spent under a supposedly temporary status. Second, given that children are in the critical process of developing, even a temporary diminution in health care can be critical.

This segues with the third part of the international legal 'formula' for assessing discrimination – the question of proportionality. The reader is referred back to the discussion on proportionality in the analysis of the RCD. Accordingly, it is submitted that the 'streams' of entitlement to health care in the QD constitute discrimination and thus are contrary to the core content of the right of the child to health.

As regards the right of the child victim of ill-treatment to recovery and reintegration, the QD refers, in Article 29(3) on health care, to 'minors who have been victims of any form of abuse, neglect, exploitation, torture, cruel, inhuman and degrading treatment or who have suffered from armed conflict' – a list that is clearly derived from Article 39 CRC. However, rather than

44 Committee ESCR, General Comment 3, *supra* n. 22 at para.12.

45 Committee RC, General Comment No. 6, *supra* n. 9 at para. 16.

46 Indeed the Commission has noted in this regard: 'When subsidiary protection was introduced, it was assumed that this status was of a temporary nature. As a result, the Directive allows Member States the discretion to grant them a lower level of rights in certain respects. However, practical experience acquired so far has shown that this initial assumption was not accurate.' Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted, COM (2009) 551, p.8.

establishing a right to recovery and reintegration of children in such situations, Article 29(3) requires Member States to provide such children (along with other beneficiaries of international protection with special needs), with more generic assistance, namely 'adequate health care'. Furthermore, unlike the RCD, the QD does not contain any general provision on victims of torture or violence. Both omissions are regrettable.

To conclude, some, at least, of the different streams of access to healthcare provided for in the QD offend against the minimum essential obligation inherent in the right of the child to health and against the prohibition of discrimination. Therefore, the core content of the right of the child to health is not consistently met in the QD. The directive also fails to secure the right of the child victim of various forms of ill-treatment to recovery and re-integration, *pace* Article 39 CRC.

6.2.3 Phase Two CEAS: prospects for enhanced compliance

6.2.3.1 The proposed recast Reception Conditions Directive

Article 19 of the proposed recast RCD on health care provides:

> 1. Member States shall ensure that applicants receive the necessary health care which shall include at least emergency care and essential treatment of illness or post traumatic disorders.
> 2. Member States shall provide necessary medical or other assistance to applicants who have special reception needs, including appropriate mental health care where needed.

Compared to Article 15 of the existing directive, the reference in paragraph one to post-traumatic disorders and in paragraph two to appropriate mental health care for applicants with special reception needs should be noted. The proposed recast RCD also clarifies the vexed issue about the identity and identification of persons with special needs. Chapter IV, now re-titled 'Provisions for vulnerable persons', reiterates in Article 21 the general principle that Member States must take into account the specific situation of vulnerable persons such as minors and unaccompanied minors in the national implementing legislation. However, the scope of the principle is no longer restricted to persons found to have special needs after an individual evaluation of their situation. It follows that minors and unaccompanied minors can be automatically considered to be vulnerable. Even if they are not, new Article 22(1) on the identification of the special reception needs of vulnerable persons is relevant, providing:

> Member States shall establish mechanisms with a view to identifying whether the applicant is a vulnerable person and, if so, has special reception needs, also indi-

> cating the nature of such needs. Those mechanisms shall be initiated within a reasonable time after an application for international protection is made. Member States shall ensure that these special reception needs are also addressed, in accordance with the provisions of this Directive, if they become apparent at a later stage in the asylum procedure.

Article 22(1) also obliges Member States to ensure 'adequate support for persons with special reception needs throughout the duration of the asylum procedure and [to] provide for appropriate monitoring of their situation.' If minors and unaccompanied minors are not automatically considered to be vulnerable, then the identification mechanism should pick this up. This means that children are not susceptible to the problematic lower standard of health care in Article 19(1) but are brought squarely within the scope of the higher standard of health care in Article 19(2), which, in turn, conforms to the normative content of the right of the child to health.

Chapter III relating to reduction or withdrawal of reception conditions subsists in the proposed recast, but with two important amendments. First, whereas the existing directive provides that emergency health care must be provided even in cases of reduction, withdrawal or refusal of reception conditions, the proposed recast effectively insulates the right to health care from the scope of application of Chapter III. Thus, new Article 20(3) provides that 'Member States shall under all circumstances ensure access to health care *in accordance with Article 19* [emphasis added].' Second, and this is something of a moot point in the light of the foregoing, the possibility of refusing outright reception conditions where the applicant did not make the application as soon as reasonably practicable after arrival is deleted.

Finally, whereas the existing RCD makes no reference to the right to health care of applicants in detention, new Article 11 of the proposed recast relating to the detention of vulnerable persons and persons with special needs, provides in paragraph 1:

> In all cases, vulnerable persons shall not be detained unless it is established that their health, including their mental health, and well-being, will not significantly deteriorate as a result of the detention.
> Where vulnerable persons are detained, Member States shall ensure regular monitoring and adequate support taking into account their particular situation including their health.

Further provisions which relate to the detention of minors and unaccompanied minors will be critiqued in Chapter 7. However, Article 11(1) is interesting in the context of the right to health, since it predicates the detention of vulnerable persons (a category which, according to Article 21, includes/may include minors and unaccompanied minors) on their state of health and implicitly provides for their release in the event of a significant deterioration of their health.

The provision of the proposed recast RCD on victims of torture and violence (Article 25 which corresponds to Article 20 of the present directive) contains two innovations. In addition to the 'necessary treatment of damages', paragraph 1 adds that victims of torture and violence are entitled to receive 'in particular access to rehabilitation services that should allow for obtaining medical and psychological treatment.' A new second paragraph establishes a training and confidentiality requirement for those working with victims of torture, rape or other serious acts of violence. Regrettably, the proposed recast makes no attempt to better align the provision on the right of the child victim of various forms of ill-treatment to recovery and reintegration with the wording of Article 39 CRC.[47]

Notwithstanding the last point, the proposed recast RCD, as it relates to minors and unaccompanied minors, can now be considered to conform broadly to both the core and the normative content of the right of the child to health.

6.2.3.2 The recast Qualification Directive

As regards the recast QD, the major question is whether it removes the confusing plethora of streams of entitlement to healthcare that currently exist. Some important improvements should be noted in this regard.

First, Article 30(1) reiterates that beneficiaries of international protection have access to health care under the same eligibility conditions as nationals.

Second, the exception in the existing directive providing that the health care entitlements of beneficiaries of subsidiary protection may be limited to core benefits is deleted. Thus, there is no distinction in the level of health care afforded to refugees and beneficiaries of subsidiary protection.

Third, Article 30(2) reiterates the obligation to provide 'adequate health care' to beneficiaries of international protection who have special needs, but adds a stipulation that this includes the 'treatment of mental disorders when needed'. The reference to mental disorders, with its suggestion of psychiatric illness, contrasts negatively with the reference to mental health care in the proposed recast RCD.[48] Moreover, no new mechanism is introduced to identify persons with special needs. And the general rules on the content of international protection in Article 20(3) which obliges Member States to 'take into account' the situation of vulnerable persons such as minors and unaccompanied minors in the national implementing legislation is still subject to the

47 Article 18(2) of the current directive is reproduced without amendment in Article 23(4) of the proposed recast.

48 In the Commission proposal for a recast QD, the reference was to mental health care. This was replaced by the phrase 'treatment of mental disorders' during negotiations. See Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted, COM (2009) 551, Article 30(2).

limitation, now in Article 20(4), that this only applies to 'persons found to have special needs after an individual evaluation of their situation.' It can be observed that the recast QD is out of kilter with the improvements made in this regard in the proposed recast RCD, raising concerns about whether the higher standards in the RCD will survive the legislative process.

Fourth, as regards family members of beneficiaries of subsidiary protection, it is no longer open to Member States to define the conditions applicable to their derived rights. Consequently, they are entitled to health care under the same eligibility conditions as nationals.

Finally, the provisions of the existing directive authorising Member States to reduce the rights of refugees and beneficiaries of subsidiary protection who obtained their status in bad faith is deleted.

In sum, the various streams of access to healthcare are removed in the recast QD, bringing the healthcare provisions broadly into line with the normative content of the right of the child to health. However, it is still unclear whether minors or unaccompanied minors are persons with special needs and thereby entitled to 'the treatment of mental disorders'. This could be significant if such treatment is not generally provided to nationals. Moreover, the recast QD fails to add a provision corresponding to Article 39 CRC or any specific provision on victims of torture or violence.

6.3 STANDARD OF LIVING

6.3.1 The right of the child to an adequate standard of living

Article 27 CRC provides, *inter alia*:

> 1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
> 2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
> 3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

Article 27 CRC is based on, but goes significantly beyond a comparable provision in Article 11 ICESCR.[49] A number of regional human rights instruments also address the right to an adequate standard of living.[50]

6.3.1.1 The normative content of the right

Article 27(1) sets out an obligation of result: the right of the child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. In order to understand the meaning of this provision, it is useful to first examine the 'template' right to an adequate standard of living set out in the ICESCR. Article 11(1) of the Covenant provides, *inter alia*, '[t]he States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.' The reference to adequate food, clothing and housing establishes that the right to an adequate standard of living is aimed at fulfilling the most basic human needs. However, the Committee ESCR has stressed that this does not mean that the normative content of the right is a minimal one. Thus, in its General Comment 4 on The Right to Adequate Housing, the Committee states that 'the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity.'[51] Similarly, in its General Comment 12 on the Right to Adequate Food, the Committee notes that:

> The right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement. The right to adequate food shall

49 Article 11(1) ICESCR provides, *inter alia*: 'The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right […].' Furthermore, Article 10(1) of the Covenant is also of relevance: 'The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children […].'

50 Article 17 of the Revised European Social Charter and Article 34 of the Charter of Fundamental Rights of the EU. Issues relating to the right to an adequate standard of living may also arise under various articles of the ECHR, notably Articles 6, 8 and P1-1 in conjunction with Article 14. In extreme cases Article 3 ECHR may be of relevance. See ECtHR, *MSS v Belgium and Greece*, Appl. No. 30696/09, Judgment (GC) of 21 January 2011 and ECtHR, *Rahimi v Greece*, Appl. No. 8687/08, Judgment of 5 April 2011.

51 Committee ESCR, General Comment 4, 'The right to adequate housing', U.N. Doc E/1992/23 (1991), annex III at 114, para. 7.

> therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients.[52]

Nevertheless, the definition of the right to an adequate standard of living in terms of such basic commodities as food, clothing and housing does indicate that the right is rather narrow in scope. By contrast, Article 27 CRC does not limit the right to physical determinants of well-being, but rather refers to a standard of living adequate for the 'child's physical, mental spiritual, moral and social development'. Thus Asbjorn Eide observes that '[t]he right of the child to an adequate standard of living goes beyond the purely material aspects of living such as food and housing. […] It goes beyond the right of the child to survive by having the basic needs safeguarded. This child is entitled to enjoy conditions which facilitate its development into a fully capable and well functioning adult person.'[53] Hence, economic adequacy – in the sense of having enough (income) to secure material well being – is a necessary but not sufficient condition for the attainment of the right of the child to an adequate standard of living. What the further conditions are is not clear from the text of Article 27 itself and, in attempting to attribute meaning to the right, commentators have attempted to link Article 27 to anti-poverty concepts from the social sciences, such as the concept of social exclusion, which understands poverty as a relative, as opposed to an absolute phenomenon.[54] This appears also to be the position of the Committee RC which notes in General Comment No. 7 that '[g]rowing up in relative poverty undermines children's well-being, social inclusion and self-esteem and reduces opportunities for learning and development.'[55]

Furthermore, the Committee RC links the right to an adequate standard of living with a host of other rights in the Convention such as the right of the child to social security (Article 26), the right of the child to such care and protection as are necessary for well-being (Article 3(2)), the right of the child to development (Article 6(2)), the right of the child to health (Article 24), the right of the child to education (Article 28) and the right of the child to 'rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts' (Article 31).[56] In this regard it may be observed that the rights in the CRC are truly

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52 Committee ESCR, General Comment 12, 'The right to adequate food', U.N. Doc E/C.12/1999/5 (1999), para. 6.

53 Asbjorn Eide, *Article 27, The Right to an Adequate Standard of Living, A Commentary on the United Nations Convention on the Rights of the Child* (Leiden/Boston:Martinus Nijhoff Publishers, 2006), 17.

54 See, for example, Gerry Redmond, 'Child Poverty and Child Rights: Edging Towards a Definition', *Journal of Children and Poverty* 14, no. 1 (2008): 63-82.

55 Committee RC, General Comment No. 7, 'Implementing child rights in early childhood', U.N. Doc. CRC/C/GC/7/Rev.1 (2006) at para. 26.

56 *Ibid*, para. 10.

(as opposed to rhetorically) indivisible and interdependent and consequently it is not possible to address the child's right to an adequate standard of living in isolation of these other rights.

In sum, therefore, the right of the *child* to an adequate standard of living is broader and more comprehensive than the right to an adequate standard of living in general human rights law.

However, a distinction must be made between the state's obligation and the parents' obligation regarding the right of the child to an adequate standard of living. It is clear from paragraphs 2 and 3 of Article 27 that the primary responsibility to secure for the child an adequate standard of living falls to the child's parents, with the state assuming a secondary responsibility. This delineation of responsibility provides further insight into the normative content of the right. Commenting on Article 18 of the CRC, which also deals with the respective responsibilities of parents and the state, Sharon Detrick observes that the term 'primary responsibility' was intended to achieve two aims:

> On the one hand, it was meant to protect parents, or, as the case may be, other persons responsible for the child against excessive state intervention. On the other hand, it was meant to indicate that parents […] could not expect the state always to intervene, because the provision of the conditions of living necessary for the child's development is primarily their responsibility. That being said, the use of the term 'primary responsibility' […] implies that a secondary responsibility to secure the conditions of living necessary for a child's development lies with the state.[57]

It is worth pointing out that the division of responsibility between the parents and the state is redundant in the context of unaccompanied minors, where there are no parents. In such situations, the primary responsibility to secure the child's right to an adequate standard of living falls entirely to the state. Thus, the Committee RC notes that '*States* should ensure that separated and unaccompanied children have a standard of living adequate for their physical, mental, spiritual and moral development.'[58]

As for the secondary responsibility of the state, the precise contours of this responsibility are set out in Article 27(3) according to which the state has a positive obligation to firstly, take appropriate measures to assist parents in discharging their duty and secondly, 'in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.' As regards the duty to assist parents in discharging their duty, the Committee RC recommends indirect interventions such as taxation and benefits, adequate housing and health services as well as more direct inter-

57 Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (The Hague/Boston/London: Martinus Nijhoff Publishers, 1999), 459.

58 Committee RC, General Comment No. 6, *supra* n. 9, para. 44 (emphasis added).

ventions such as parenting education, parent counselling and other parent and family supports.[59] The Committee also observes that:

> Situations which are most likely to impact negatively on young children include […] parenting under acute material or psychological stress or impaired mental health; […] The Committee urges States Parties to take all necessary steps to ensure that parents are able to take primary responsibility for their children; to support parents in fulfilling their responsibilities, including by reducing harmful deprivations, disruptions and distortions in children's care.[60]

This observation is of particular resonance in the asylum context as a growing body of research shows that asylum-seeking families tend to be more dysfunctional and the parents at greater risk of suffering from mental-health problems than families even in deprived sections of the host population.[61] This is considered to be due to past trauma coupled with current living conditions and uncertainty about status. Consequently, the duty to assist parents has important ramifications for the *parents'* right to an adequate standard of living and associated rights. Thus, the Committee observes that 'realising children's rights is in large measure dependent on the well-being and resources available to those with responsibility for their care. Recognising these interdependencies is a sound starting point for planning assistance and services to parents, legal guardians and other caregivers.'[62]

As regards material assistance and support in case of need, whether a family seeking or enjoying international protection is needy in this sense will depend on whether the adults are able to work (i.e. eligible to work, capable of working and successful in finding work) and receive adequate remuneration. Where they are not, the state must provide the material aspects of living. Furthermore, in such situations, arguably the delineation of responsibility between the parents' and the state shifts, with the state becoming primarily responsible for securing the child's standard of living. Thus, the Committee ESCR underlines that 'States Parties are obliged to fulfil (provide) a specific right contained in the Covenant when individuals or groups are unable for reasons beyond their control to realise the right themselves by the means at their disposal.'[63]

In sum, the right of the child to an adequate standard of living is pitched higher than the corresponding right in general human rights law. However, the right is to be primarily met by the child's parents, with the state exercising a secondary responsibility. The state's responsibility involves supporting

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59 Committee RC, General Comment No. 7, *supra* n. 55, para. 20.
60 *Ibid* at para. 18.
61 See, for example, Kalverboer, Zijlstra and Knorth, *supra* n. 38.
62 Committee RC, General Comment No. 7, *supra* n. 55, para. 20.
63 Committee ESCR, General Comment 13, 'The right to education', U.N. Doc. E/C.12/1999/10 (1999), para. 47.

parents in discharging their responsibility (which raises the issue of the parents' right to an adequate standard of living) and providing material assistance and support in cases of need.

6.3.1.2 The 'core content' of the right

The minimum essential obligation

Being a socio-economic right, the right of the child to an adequate standard of living is subject to resource constraints per Article 4 CRC. Indeed, the issue of resource constraints is expressly factored into the obligation of conduct in Article 27(3) which obliges states to act 'in accordance with national conditions and within their means'. As such, resource constraints operate as a functional limitation on the right of the child to an adequate standard of living. In this context, the question arises as to the permissible limits of the limitation, or, in other words, the minimum absolute obligation.

Recalling that the minimum obligation corresponds with the duty to take steps towards the full realisation of the right, it can be observed that Article 27(3) envisages two steps: 1) to take appropriate measures to assist parents to implement the right; and 2) to provide in case of need material assistance and support programmes, particularly with regard to nutrition, clothing and housing. As regards the first, the term 'appropriate' leaves a large measure of discretion to States Parties about which measures they take to assist parents. Nevertheless, demonstrable measures must be taken. As regards the second, there is no leeway (c.f. 'shall in case of need provide'). Consequently States Parties are under an obligation to provide for basic human needs. Any erosion of the right beyond this level would be incompatible with human dignity. This is consistent with the approach of the Committee on Economic, Social and Cultural Rights which states in General Comment No. 3:

> […] [a] minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State Party. Thus for example, a State Party in which any significant number of individuals is deprived of *essential foodstuffs*, of essential primary health care, *of basic shelter and housing*, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant [emphasis added].[64]

This is also consistent with the approach of the ECtHR in two recent cases in which the Court found a violation of Article 3 ECHR because the respondent state failed to ensure the most basic standard of living for the applicant asylum seekers with the result that there were homeless and destitute. In *M.S.S. v Belgium and Greece*, the Court revised its earlier case-law that Article 3 ECHR does not entail any general obligation to give refugees financial assistance to

64 *Ibid* at para. 10

enable them to maintain a certain standard of living.[65] The Court seemed to consider that because Greece is bound by the minimum standards of the RCD, this brought the issue of a minimum standard of living within the material scope of Article 3 ECHR.[66] It follows that the minimum standard of living in the RCD must itself be compatible with Article 3 ECHR. In *Rahimi v Greece*, the Court found that the abandonment by the state of a 15 year old unaccompanied minor until he happened to be taken care of by a local NGO constituted a violation of Article 3 ECHR.[67] In both cases the Court noted the extreme vulnerability of the applicants as members of an 'underprivileged and vulnerable population', an observation that applied *a fortiori* to the unaccompanied minor.[68]

In conclusion, the minimum essential obligation inherent in the right of the child to an adequate standard of living is the duty to assist parents in their fulfilment of the obligation and, in cases of need, to provide for basic levels of nutrition, clothing and housing. Anything less than this is likely to constitute inhuman and degrading treatment.

The prohibition of discrimination

Unlike the right to health, the right to an adequate standard of living does not contain an express prohibition of discrimination. However, the two concepts are intimately connected. The prohibition of discrimination is designed to tackle relative as opposed to absolute deprivation as is clear from the first part of the 'formula' for assessing discrimination, namely, the question of whether the alleged victim is less favourably treated as compared with similarly situated persons. Similarly, the right to an adequate standard of living is interpreted as countering social exclusion, which focuses on relative as well as absolute poverty. In any event, a prohibition of discrimination is part of the 'core content' of each and every right in the CRC as a result of the general principle of non-discrimination in Article 2.

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65 ECtHR, *M.S.S. v Belgium and Greece*, Appl. No. 30696/09, Judgment of 21 January 2011.

66 *Ibid*, see in particular para. 250 of the judgment.

67 ECtHR, *Rahimi v Greece* Appl. No. 8687/08, Judgment of 5 April 2011.

68 One should also mention the decision of the European Committee of Social Rights in the case of *Defence for Children International v the Netherlands*. The Committee found that children unlawfully present in the Netherlands a) came within the personal scope of Article 31(2) of the Revised ESC relating to the right to shelter despite the express wording of the Charter limiting its scope to lawful residents; and b) had been denied their right to shelter. What is interesting about this case from our perspective is not the jurisdictional issue (the rights in the CRC applying, per Article 2, to every child within the jurisdiction of a State Party), but to the role of human dignity (and vulnerability to violations of human dignity) in ring-fencing a core content of rights that can neither be excluded *ratione personae* nor – it follows logically – limited. European Committee of Social Rights, Complaint No. 47/2008, Decision on the merits, 29 October 2009.

6.3.2 Phase One CEAS: compliance with the right of the child to an adequate standard of living

6.3.2.1 The Reception Conditions Directive

Article 13 RCD establishes general rules on material reception conditions and health care. Material reception conditions are defined as including 'housing, food and clothing, provided in kind, or as financial allowances or in vouchers, and a daily expenses allowance'.[69] Article 13(2) provides that:

> Member States shall make provisions on material reception conditions to ensure a standard of living *adequate for the health of applicants and capable of ensuring their subsistence*. Member States shall ensure that *that* standard of living is met in the specific situation of persons who have special needs, in accordance with Article 17.[70]

Article 17, in turn, obliges Member States to 'take into account the specific situation of vulnerable persons such as minors [and] unaccompanied minors [...] in the national legislation implementing the provisions [...] relating to material reception conditions and health care.' However, according to the second paragraph of Article 17, this 'shall apply only to persons found to have special needs after an individual evaluation of their situation.' The obliqueness of this caveat has previously been discussed. Hence, there is an awareness that concepts such as health and subsistence have a subjective, variable dimension and that in order to meet the minimum standard of living, more may need to be done for minors and unaccompanied minors. But the objective standard established in the directive is the same for everyone. Thus, once a minor can subsist and his/her health is adequate, the standard is reached. While the standard may conform to the right to an adequate standard of living in general human rights law, it does not properly reflect the more robust right of the child to an adequate standard of living in the CRC, namely, one adequate for the child's physical, mental, spiritual, moral and social development.

Article 14 RCD elaborates on the standard of living established in the directive. It relates to 'modalities for material reception conditions' – standards that must be met when housing is provided in kind (i.e. direct provision). It sets out the possible types of housing and the rights applicants have in such housing, which include protection of their family life and family unity of minor children with their parents. However, it contains a derogation provision in paragraph 8, according to which Member States are permitted to 'exceptionally set modalities for material reception conditions different from those provided in this Article, for a reasonable period, which shall be as short as possible'

69 Article 2(j).
70 Emphasis added.

in four situations, including when the asylum seeker is in detention or confined to border posts.[71] In such cases, the different conditions 'shall cover in any case basic needs.' Of course, Article 14 is still subject to the general rule in Article 13 requiring Member States to ensure a standard of living 'adequate for the health of applicants and capable of ensuring their subsistence.' Hence, basic needs are regarded as being not incompatible with an adequate standard of living – an interesting insight into the meaning of the latter term. It seems clear that 'basic needs' correspond to the core but not the normative content of the right of the child to an adequate standard of living.

There is no corollary to Article 14 on how material reception conditions are to be met in situations other than direct provision. Article 13(5) does stipulate that '[w]here Member States provide material reception conditions in the form of financial allowances or vouchers, the amount thereof shall be determined in accordance with the principles set out in this Article.' In other words, the minimum standard of living established in the directive applies. However, no benchmarks are established regarding the amount of financial allowances or vouchers. Nor is any reference made to a right to social security. In light of the fact that under Article 11 of the directive Member States can (and according to the Commission evaluation, do) prohibit access to the labour market for a period of at least one year and thereafter can impose conditions on asylum seekers' access to the labour market, this is a significant omission. Unsurprisingly, the Commission found in its evaluation of the RCD that:

> The main problems concerning application of the Directive were discovered in Member States where asylum seekers are given financial allowances. These allowances are very often too low to cover subsistence (CY, FR, EE, AT, PT, SI). The amounts are only rarely commensurate with the minimum social support granted to nationals, and even when they are, they might still not be sufficient, as asylum seekers lack family and/or other informal kinds of support.[72]

The standard of living that results from Article 13(5) suggests that neither component of the core content of the right of the child to an adequate standard of living is met when asylum seekers are given financial allowances. Thus, it seems that the minimum essential obligation is not adequately met (i.e. material assistance in case of need and support to parents) *and* asylum seeking children are discriminated against as compared with similarly situated national children (i.e. national children dependent on state assistance).

Chapter III of the RCD relating to the reduction or withdrawal (and refusal) of reception conditions is also relevant to the question of the right to an

71 The other three situations are: 1) when an initial assessment of the specific needs of the applicant is required; 2) when the types of accommodation outlined in the article are not available in a certain geographical area; 3) when housing capacities normally available are temporarily exhausted.

72 Commission evaluation of the RCD, *supra* n. 34 at p. 6

adequate standard of living. As previously outlined, Article 16 allows for the reduction, withdrawal and even outright refusal of reception conditions in certain situations in an effort to counteract abuse of the reception system. Thus, where the asylum seeker abandons the place of residence, fails to comply with reporting duties or requests for information, fails to appear for personal interview, has already lodged a previous application or has concealed financial resources, the Member State may reduce or withdraw reception conditions. Moreover, Member States may refuse (outright) reception conditions 'where an asylum seeker has failed to demonstrate that the asylum claim was made as soon as reasonably practicable after arrival in that Member State.' Persons with special needs, such as minors and unaccompanied minors, are fully susceptible to the operation of Article 16, although their particular situation must be taken into account in assessing the proportionality of the measure. The only 'floor' established in reducing, withdrawing or refusing reception conditions relates to access to emergency health care.

Two objections to this chapter of the RCD were made in the section on the right of the child to health, namely, that the proportionality requirement is bound to be defeated in the case of children and that to reduce, withdraw or refuse reception conditions to a child on the basis of the parents' behaviour offends against Article 2(2) CRC which forbids 'all forms of discrimination or *punishment* on the basis of the status, *activities*, expressed opinions, or beliefs of the child's parents, legal guardians or family members'.[73] These arguments apply equally here and a further one can be added. Since the only floor relates to health care, this means that all other reception conditions can conceivably be reduced to a level well below not only the normative content of the right of the child to an adequate standard of living but also the core content of the right, and indeed, be withdrawn or refused altogether, resulting in an outright violation of the right and in treatment that is inhuman or degrading.

Overall, it cannot be said that the right of the child to an adequate standard of living is met in the RCD. The general standard of living in the directive is pitched at the standard in general, but not child-specific, human rights law. Moreover, while the core of the child right seems to be met when asylum seekers are in direct provision, it is unmet when asylum seekers are given financial allowances. The option to reduce, withdraw or refuse reception conditions without limitation in certain cases could constitute an outright violation of the right of the child to an adequate standard of living and possibly to a violation of Article 3 ECHR.

73 Emphasis added.

6.3.2.2 The Qualification Directive

The QD does not establish a general minimum standard of living, the inference being that the rights afforded to beneficiaries of international protection (e.g. access to employment, education, social assistance, health care, accommodation and integration facilities) imply a reasonable standard of living. However, given the restrictions on many of the rights of beneficiaries of subsidiary protection, this cannot be taken for granted. Thus, Member States are permitted to impose restrictions on access to employment, social assistance, health care and integration facilities when it comes to beneficiaries of subsidiary protection. For example, while refugees are entitled to necessary social assistance on the same basis as nationals, Member States may limit the social assistance granted to beneficiaries of subsidiary protection to 'core benefits', which must then be provided at the same levels and under the same eligibility conditions as nationals.[74] However, some insight into the question of the minimum standard of living for beneficiaries of subsidiary protection can be gleaned from the entitlements of their family members. Article 23 provides for the concept of derived rights for family members of beneficiaries of international protection, subject to the exception that, in respect of family members of beneficiaries of subsidiary protection, Member States 'may define the conditions applicable to such benefits'. However, '[i]n these cases, Member States shall ensure that any benefits provided guarantee an adequate standard of living'. *A fortiori*, this standard must be met in respect of beneficiaries of subsidiary protection themselves. To the extent that this standard is less than the standard of living afforded to refugees, it can be regarded as discriminatory according to the same logic used to analyze the compliance of the QD with the right to health in § 6.2.2.2 above. As such, it is contrary to the core content of the right of the child to an adequate standard of living.

6.3.3 Phase Two CEAS: prospects for enhanced compliance

6.3.3.1 The proposed recast Reception Conditions Directive

The proposed recast RCD contains a number of important amendments of relevance to the right of the child to an adequate standard of living. The general standard of living, now set out in Article 17, is still established as one adequate for health and subsistence, but health is said to encompass physical *and* mental health. Again, that standard must be met in the specific situation of vulnerable persons but the procedures for identifying such persons are greatly improved, as previously discussed.

74 Article 28(2).

Moreover, a number of important new provisions are added to the article on minors (now Article 23). Firstly and of greatest importance, paragraph one, in addition to specifying the best interests obligation, provides that 'Member States shall ensure a standard of living adequate for the minor's physical, mental, spiritual, moral and social development.' This brings the RCD into line with the CRC as regards the right of the child to an adequate standard of living. Interestingly, if this provision is interpreted, as it should be, in the light of Article 27 CRC, this is likely to have a knock-on effect on the standard of living of the parents of accompanied children, given the intimate connection between the child's and the parents' standard of living.

Secondly, paragraph three obliges Member States to 'ensure that minors have access to leisure-activities, including play and recreational activities appropriate to their age within [direct provision] premises and accommodation centres'. This provision, which reflects the terms of Article 31 CRC, is a welcome addition. Unfortunately, it does not extend to children in 'private houses, flats, hotels or other premises adapted for housing applicants'. While it is accepted that the state could not guarantee such a right in privately-sourced accommodation, this argument does not apply when such accommodation is provided by the state. Therefore, if a distinction is to be introduced, it should be between state-sourced and privately-sourced accommodation, not between *types* of accommodation.

Thirdly, the right of minors to family unity with their parents or adult responsible for them is moved from the article on modalities for material reception conditions (i.e. the direct provision article) to Article 23 on minors. The consequence of this move is that it is no longer subject to the derogation provision in the former article. Furthermore, the right is made subject to a best interests assessment.

As regards the article on modalities for material reception conditions (now Article 18), a new paragraph provides that 'Member States shall take into consideration gender and age-specific concerns and the situation of vulnerable persons in relation to applicants within the premises and accommodation centres' but again, with the regrettable exception of 'private houses, flats, hotels or other premises adapted for housing applicants'. Article 18 still establishes a derogation clause, but it can only be deployed in 'duly justified cases' and the list of circumstances in which the derogation can be applied are reduced from four to two, namely, when an initial assessment of the specific needs of the applicant is required and when housing capacities normally available are temporarily exhausted. The requirement that in such situation, the reception conditions 'shall in any event cover basic needs' subsists.

As regards reception conditions in situations other than direct provision, a new provision (Article 17(5)) provides:

> Where Member States provide material reception conditions in the form of financial allowances and vouchers, the amount thereof shall be determined on the basis of

> the point(s) of reference established by the Member State concerned either by law or practice to ensure adequate standards of living for nationals, such as the minimum level of social welfare assistance. Member States may grant less favourable treatment to asylum applicants compared to nationals in this respect, where it is duly justified.

This provision of the 2011 proposed recast RCD differs markedly from the equivalent provision in the 2008 version, which proved to be too radical for Member States. That version pegged the value of material reception conditions to the amount of social assistance granted to nationals and specified that 'any differences in this respect shall be duly justified.'[75] The sub-national standard of material reception conditions means that the problem of discrimination subsists. However, the problem is mitigated somewhat by new rules regarding access to the labour market. New Article 15 obliges Member States to grant access to the labour market no later than 6 months after lodging an application, a period than can be extended to a year in cases where the first instance procedure is delayed either because of the large number of applicants at a given time or due to obstruction on the part of the applicant. Member States may still impose conditions on access to the labour market according to their national law but these conditions cannot impede effective access to the labour market.

Finally, the provisions of Chapter III relating to the reduction or withdrawal of reception conditions remain largely intact. No exemption for minors or unaccompanied minors is introduced. However, the provision relating to the outright refusal of reception conditions where an asylum seeker fails to make a claim as soon as reasonably practicable after arrival is deleted.

In sum, the revised article on minors establishes a standard of living for children that is consistent with – indeed, based on – Article 27 CRC. The article relating to accommodation in kind is also improved from a child-rights perspective. However, the article on reception conditions in situations other than direct provision is still arguably discriminatory when compared with the situation of similarly-situated national children and it remains possible under Chapter III to reduce or withdraw reception conditions of minors below the minimum essential obligation inherent in the right of the child to an adequate standard of living. It is unclear how these provisions interact with the broad statement of principle in the revised article on minors. Therefore, the standard of living for most, but not all, asylum seeking children is improved under the proposed recast.

75 COM (2008) 815 final, Article 17(5).

6.3.3.2 *The recast Qualification Directive*

The recast QD also contains a number of amendments that impact on the implicit standard of living established in the directive. These amendments are geared towards a greater equalization of treatment of refugees and beneficiaries of subsidiary protection. Thus, beneficiaries of subsidiary protection are to be granted access to employment, health care and integration facilities on the same basis as refugees. Moreover, the provision on access to employment-related education is enhanced and a new article (28) is devoted to access to procedures for recognition of qualifications – the lack of which hitherto constituted a significant practical barrier to access to employment. However, the distinction between refugees and beneficiaries of subsidiary protection is retained in terms of the right to social welfare: the social welfare entitlements of beneficiaries of subsidiary protection may still be limited to 'core benefits' under Article 29.[76] Hence the recast QD constitutes a modified improvement on the QD in terms of the right of the child to an adequate standard of living.

6.4 EDUCATION

6.4.1 The right of the child to education

Article 28(1) of the CRC provides:

> States Parties recognize the right of the child to education and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
> (a) Make primary education compulsory and available free to all;
> (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
> (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
> (d) Make educational and vocational guidance available and accessible to all children;
> (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.[77]

76 This provision was deleted in the Commission proposal but the European Parliament reinstated the limitation during negotiations with the result that it reappears in the recast QD.

77 Article 28 also contains a second paragraph which relates to school discipline and a third paragraph which relates to international cooperation in education. These are not relevant to the present inquiry.

Furthermore, Article 29 CRC relates to the aims of education. Paragraph 1 provides that the education of the child is to be directed to the development of the child's abilities to their fullest potential; to respect for human rights; to respect for the child's family, cultural identity, language and values, for the national values of the country in which he/she is living, for the country from which he or she may originate, and for different civilizations; to the preparation of the child for responsible life in a free society; and to respect for the natural environment. Paragraph 2 provides:

> No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of the present article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the state.

The right 'of everyone' to education is also established in Article 13 of the ICESCR, which is very similar in content to Article 28 and 29 CRC.[78] The right to education is further protected under a number of European regional instruments.[79]

6.4.1.1 The normative content of the right

It is proposed to analyze the right of the child to education according to a conceptual framework first developed by the Special Rapporteur on Education and then taken up by the Committee ESCR in relation to the right to education in the ICESCR.[80] Accordingly, in its General Comment 13 on the right to education, the Committee ESCR defines the scope and attributes of the right to

78 Article 13(2) ICESCR which corresponds to Article 28(1) CRC provides: 'The States Parties to the present Covenant recognized that, with a view to achieving the full realization of this right: (a) primary education shall be compulsory and available free to all; (b) secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible by evey appropriate means, and in particular by the progressive introduction of free education; (c) higher education shall be made equally accessible to all, on the basis of capacity by every appropriate means, and in particular by the progressive introduction of free education; (d) fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education; (e) the development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.' Furthermore, Article 13(1) relates to the aims of education, Article 13(3) to the liberty of parents in their choice of education for their children and Article 13(4) to freedom of educational establishment.

79 Article 17(1) of the Revised European Social Charter, Article 14 of the EU Charter of Fundamental Rights and Protocol 1 Article 2 ECHR.

80 Preliminary Report of the Special Rappoteur on the Right to Education, Ms. Kararina Tomasevski, U.N. ESCOR, Commission on Human Rights., 55th sess., ¶ ¶ 50-74, U.N. Doc. E/CN.4/1999/49 (1999).

education under the rubric of the 4 'A's' – availability, accessibility, acceptability and adaptability.[81] This applies to education in all its forms and at all levels. While the Committee RC has not yet explicitly endorsed this framework, the analysis below directly links each of the concepts to the language of the CRC in order to demonstrate the applicability of the framework to the right of the child to education in the CRC.[82]

'Availability' requires that functioning educational institutions and programmes – in other words, an education infrastructure – be available in sufficient quantity within a state to cope with the needs of the population. What they require to function depends on, among other factors, the developmental context of the particular state. There are, however, minimum facilities which are required in all countries such as school buildings, sanitation facilities for both sexes, trained teachers and so forth. In terms of the CRC, the availability requirement is explicitly mentioned in the sub-paragraphs of Article 28(1) relating to primary and secondary education and educational and vocational guidance. Although the sub-paragraph relating to higher education refers only to accessibility, according to Verhyde, the availability requirement is implicit since both concepts are interlinked.[83]

'Accessibility' relates to the requirement of equal access to education. According to the Committee ESCR, the notion has three overlapping dimensions: 1) education has to be accessible to all, especially the most vulnerable groups, in law and in fact, without discrimination on any of the internationally prohibited grounds; 2) education has to be physically accessible to all, even those in remote locations; and 3) education has to be economically accessible to all, in the sense of being affordable, though not necessarily free. In terms of the CRC, the accessibility requirement is mentioned in the sub-paragraphs of Article 28(1) relating to second and higher level education and vocational education and guidance. Although the sub-paragraph on primary education is silent on the issue of accessibility, it is implicit in the idea of *free compulsory* primary education.

Quite apart from the textual references to accessibility, the concept of equality in education pervades both Article 28(1) and 29 CRC. Thus, the chapeau of Article 28(1) establishes that the right of the child to education is subject to progressive realization but subjects that caveat to the requirement of equal opportunity. Hence, the idea of equality is built into the normative

81 Committee on Economic, Social and Cultural Rights, General Comment 13, *supra* n. 63, para. 6.

82 This is done in response to scholarly criticism of attempts to conceptualise the right to education without tying the concepts to relevant treaty provisions. See Sital Kalantry, Jocelyn Getgen and Steven Arrigg Koh, 'Enhancing Enforcement of Economic, Social and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR', *Human Rights Quarterly* 32 no. 2 (2010): 253-310.

83 Mieke Verheyde, *A Commentary on the United Nations Convention on the Rights of the Child, Article 28, The Right to Education* (Leiden: Martinus Nijhoff Publishers, 2006), para. 11.

content of the right to education. This is in view of the possible subversion of education as a tool of discrimination and also the potential of education to counteract discrimination. Thus Verheyde comments:

> Because education can serve these two mutually contradictory purposes, the drafters of the CRC decided to put a strong emphasis on equality in education by reconfirming the general non-discrimination principle of Article 2(1) of the CRC in the chapeau of Article 28(1) and hence making all other aspects of the right to education dependent upon it.[84]

Subsequent sub-paragraphs outlining the right to education at the various levels reinforce this obligation, referring to education for 'all', 'every child' or 'all children'. The reference in the chapeau to 'equal opportunity', a term synonymous with positive measures (or 'positive discrimination'/ 'affirmative action', depending on the parlance), is significant and will be elaborated on below in the section on non discrimination. Sub-paragraph (e) relating to measures to encourage school attendance and the reduction of drop-out rates also relates to the question of equality, since children at most risk of dropping out tend to come from the groups generally discriminated against in society. This provision is an implicit positive action provision since it obliges states to actively address the root causes of poor school attendance and early school drop-out rates.

As for Article 29, guidance on its link with equality can be gleaned from the Committee RC's General Comment No. 1 on the Aims of Education.[85] The Committee notes that the requirement in Article 29(1) that education be directed to the development of the child's fullest potential is an implicit prohibition of discrimination in education, whether it be in the curriculum, in pedagogical methods or the learning environment. Moreover, on a larger scale, the Committee highlights:

> [T]he links between article 29(1) and the struggle against racism, racial discrimination, xenophobia and related intolerance. Racism and related phenomena thrive where there is ignorance, unfounded fears of racial, ethnic, religious, cultural and linguistic or other forms of difference, the exploitation of prejudices, or the teaching or dissemination of distorted values. A reliable and enduring antidote to all of these failings is the provision of education which promotes an understanding and appreciation of the values reflected in article 29(1), including respect for differences, and challenges all aspects of discrimination and prejudice.[86]

84 *Ibid*, para. 28.
85 Committee RC, General Comment No. 1, 'The Aims of Education', U.N. Doc. CRC/GC/2001/1 (2001).
86 *Ibid*, para. 11.

'Acceptability' means that the form and substance of education have to be relevant, culturally appropriate and of good quality. In terms of the CRC, this requirement derives from Article 29(1) relating to child-centred education to the development of respect for the child's own cultural identity, language and values, for the national values of the country in which the child is living and the country from which he or she may originate. Thus, the Committee RC observes that 'the curriculum must be of direct relevance to the child's social, cultural, environmental and economic context and to his or her present and future needs'.[87] The 'acceptability' requirement can also be linked to the freedom of educational establishment in Article 29(2). This freedom is also provided for in Article 13(4) ICESCR and the Committee ESCR has noted that '[u]nder article 13(4), everyone, *including non-nationals*, has the liberty to establish and direct educational institutions [emphasis added]'.[88] The freedom of educational establishment in the CRC encompasses an implicit obligation to respect the liberty of parents to choose to send their children to schools other than public schools – an obligation that is explicitly established in Article 13(3) ICESCR[89] and also implicit in the requirement in Protocol 1 Article 2 ECHR of respect for the right of parents to ensure that their children are taught in conformity with their own religious and philosophical convictions.[90]

Finally, 'adaptability' means that education has to be flexible so that it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings. In the context of the CRC, this requirement derives from both Article 28(1) and 29. Thus, Article 28(1)(b) obliges States Parties to develop different forms of secondary education, sub-paragraph (d) establishes an obligation to provide educational and vocational guidance and sub-paragraph (e) requires States Parties to take measures to encourage regular attendance at school and reduce drop-out rates. The absence of any of these measures would likely signal an inflexible education system. In terms of Article 29, the adaptability requirement can be linked to the aims of education set out in the first paragraph in general and in particular to the references to cultural identity, the national values of

87 *Ibid*, para 9.

88 Committee ESCR, General Comment 13, *supra* n. 63, para. 13. Article 13(4) ICESCR provides: 'No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.'

89 Article 13(3) ICESCR provides: 'The States Parties to the present Covenant undertake to have respect for the liberty of parents and, where applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.'

90 See ECtHR, *Family H. v United Kingdom*, App. No. 10233/83, Decision of 6 March 1984 (1984) 37 DR 105.

the country in which the child is living and the country from he or she may originate.

To conclude, the normative content of the right of the child to education can be divided into four inter-related attributes: availability, accessibility, acceptability and adaptability. An education system meeting all four attributes corresponds with the right of the child to education.

6.4.1.2 The 'core content' of the right: the prohibition of discrimination

It is proposed to focus here on the prohibition of discrimination, rather than also addressing the minimum essential obligation as was done in the previous sections. This is because the minimum essential obligation relates mainly to the question of free education at the different levels, a debate that is not especially relevant to the asylum context.[91]

It has already been established that the concept of equality/non-discrimination is built into the normative content of the right of the child to education. However, in order to get a sense of what discrimination in education *means*, it is useful to have recourse to the definition of discrimination in the UNESCO Convention against Discrimination in Education (1960).[92] The various elements of the definition will be explored through the lens of a recent trilogy of cases to come before the ECtHR on Article 14 in conjunction with Protocol 1 Article 2 (P1-2) which provides, *inter alia*, that '[n]o person shall be denied the right to education'.

Article 1 of the UNESCO Convention against Discrimination in Education provides:

> For the purposes of this Convention, the term 'discrimination' includes any distinction,
> exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular:
> (a) Of depriving any person or group of persons of access to education of any type or at any level;
> (b) Of limiting any person or group of persons to education of an inferior standard;
> (c) Subject to the provisions of Article 2 of this Convention, of establishing or maintaining separate educational systems or institutions for persons or groups of persons; or

91 For pioneering, although by now somewhat outdated attempts to identify the core of the right to education, see Fons Coomans, 'Clarifying the Core Elements of the Right to Education', *SIM Special* 18, and by the same author (1997) 'Identifying Violations of the Right to Education', *SIM Special* 20 (1995).

92 Adopted by the General Conference at its eleventh session, Paris, 14 December 1960.

(d) Of inflicting on any person or group of persons conditions which are incompatible with the dignity of man.

The UNESCO definition, while somewhat out-dated on the grounds of discrimination is of enduring relevance in a number of respects.

The first relevant aspect of the UNESCO definition is the reference in the chapeau to 'purpose or effect'. This indicates that both direct discrimination (i.e. distinctions that are overtly made in the basis of a suspect ground) and indirect discrimination (i.e. facially neutral distinctions, perhaps without any discriminatory intent, that have a differential impact) are contemplated in the definition of discrimination. International human rights law has long accepted that the prohibition of discrimination encompasses the concept of indirect discrimination,[93] and EU law has also been pioneering in the field of indirect discrimination.[94] Interestingly, the ECtHR, which had been somewhat out of kilter with the international consensus on indirect discrimination, recently acknowledged that indirect discrimination against Roma children in education falls under the rubric of Article 14 ECHR in conjunction with P1-2. In *D.H. and Others v the Czech Republic*[95] and *Oršuš and Others v Croatia*,[96] the Court held that where statistics or other means of proof indicate a *prima facie* case of indirect discrimination, the burden of proof shifts to the state to justify the differential treatment.

93 The 'purpose or effect' formula is used in Article 1(1) of the Convention on the Elimination of Racial Discrimination, Article 1 of the Convention on the Elimination of Discrimination Against Women and Article 2 of the Convention on the Rights of Persons with Disabilities. Although it is omitted from the definition of discrimination in the ICESCR, the ICCPR and the CRC, the general comments of the treaty monitoring bodies indicate that the concept of indirect discrimination is read into the definition of discrimination. See, respectively, Committee ESCR, General Comment 20, 'Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the ICESCR)', U.N. Doc. E/C.12/GC/20 (2009), at para. 10; Human Rights Committee, General Comment 18, 'Non-discrimination', U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994) at para. 7; Committee RC, General Comment No. 1, 'The aims of education', U.N. Doc. CRC/CGC/2001/1 (2001) at para. 10.

94 For an early case on indirect discrimination see *O'Flynn v Adjudication Officer*, Case C-237/94, Judgment of 23 May 1996 and for early legislation on indirect discrimination see Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex. Indirect discrimination is currently defined in EU anti-discrimination legislation as occurring 'where an apparently neutral provision, criterion or practice would put persons [characterised by an impugned ground] … at a particular disadvantage compared with [other persons], unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving the aim are appropriate and necessary.' See, for example, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal treatment of men and women in matters of employment and occupation (recast), Article 2(b).

95 ECtHR, *D.H. and Others v the Czech Republic*, Appl. No. 57325/00, Judgment of 13 November 2007.

96 ECtHR, *Oršuš and Others v Croatia,* Appl. No. 15766/03, Judgment (GC) of 16 March 2010.

The second relevant aspect of the UNESCO definition is that Article 1(c) in conjunction with Article 2, to which it is subject, constitutes an early recognition of the need to take positive action to counteract discrimination.[97] Article 2 establishes the general permissibility of single sex education or separate educational systems for religious or linguistic reasons if the different systems offer equivalent access to and quality of education. This is because separate systems may be needed to ensure equality in education. Positive discrimination is based on the Aristotlean concept of equality as treating equals equally.[98] If people are not in an equal situation to begin with, then treating people equally (i.e. formal or *de jure* equality) is unlikely to lead to equality of outcome (i.e. substantive or *de facto* equality). Consequently, where a marginalized group of people is at issue, substantive equality may require a period of differential treatment. While this offends against the prohibition of discrimination (i.e. treating people strictly the same), it may be regarded as an exception to the rule. Thus, in its General Comment 13 on the right to education, the Committee ESCR states:

> The adoption of temporary special measures intended to bring about *de facto* equality for men and women and for disadvantaged groups is not a violation of the right to non-discrimination with regard to education, *so long as such measures do not lead to the maintenance of unequal or separate standards for different groups and provided they are not continued after the objectives for which they were taken have been achieved*.[99]

It should be noted that some forms of positive action in some contexts are so narrowly construed as to provide little apparent added-value. For example, in the EU anti-discrimination law context the Court has adopted a very cautious approach to the interpretation of legislation authorizing positive discrimination

97 The 1966 Convention on the Elimination of Racial Discrimination (CERD) is generally regarded as the source, at the international level, of the concept of positive discrimination. Article 1.4 CERD provides: 'Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.'

98 Aristotle said: 'Equality in morals means this: things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unalikeness.' *Ethica Nicomachea*, Volume 3, 1131a-1131b (W. Ross translation 1925); *Metaphysica*, I.5.1056b (W. Ross translation, 2nd ed. 1928).

99 Para. 32 (emphasis added).

on grounds of sex.[100] However, positive discrimination – prioritizing a member of a disadvantaged group over a member of a non-disadvantaged group in the allocation of a resource for which they are competing – is a particularly controversial form of positive action. Other forms of positive action are less so, provided they are closely linked to the realization of the aim of substantive equality.

The issue of the proper delineation between positive and negative discrimination was explored by the ECtHR in *Orsus.* Here, the applicants alleged that their placement in segregated classes for Roma children for some or all of their primary school education, which covered a reduced curriculum, constituted indirect discrimination. The government argued that any difference in treatment was justified because the purpose of the segregated classes was to enable the Roma children to gain a sufficient command of the Croatian language to be able to participate in mainstream education. The Court accepted this argument *in principle*, holding:

> The Court considers that temporary placement of children in a separate class on the grounds that they lack an adequate command of the language is not, as such, automatically contrary to Article 14 of the Convention. It might be said that in certain circumstances such placement would pursue the legitimate aim of adapting the education system to the specific needs of the children. However, when such a measure disproportionately or even, as in the present case, exclusively affects members of a specific ethnic group, then appropriate safeguards have to be put in place.[101]

As to what the appropriate safeguards are, the Court examined four core issues. Firstly, whether the initial placement of the applicants in separate classes was based on a clear and specific legal basis and a specifically designed method of language-testing. Secondly, whether the adapted curriculum was designed to improve language proficiency as opposed to simply omitting aspects of the regular curriculum. In this regard, the Court held:

> Since, as indicated by the Government, teaching in the schools in question was in Croatian only, the state in addition had the obligation to take appropriate positive measures to assist the applicants in acquiring the necessary language skills in the

100 For example, see *Kalanke v Hansestadt Bremen*, Case C-450/93, Judgment of 17 October 1995 and *Badeck*, Case C-158/97, Judgment of 28 March 2000 in which the Court gave a narrow interpretation of Article 2(4), the positive discrimination provision, of Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. For commentary see Daniela Caruso, 'Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives', *Harvard International Law Journal* 44, no. 2 (2003): 331-386.

101 ECtHR, *Oršuš and Others v Croatia,* Appl. No. 15766/03, Judgment (GC) of 16 March 2010, para. 157.

> shortest time possible, notably by means of special language lessons, so that they could be quickly integrated into mixed classes.[102]

Thirdly, whether there was a monitoring and transfer procedure which would ensure the immediate transfer to a mixed class of children whose Croatian reached an adequate level. Fourthly, whether, in view of the poor attendance and high drop-out rate among Roma children, positive measures were adopted, for example, to raise awareness of the importance of education among the Roma population and to assist the applicants with any difficulties they encountered in following the school curriculum. On the facts, the Court found all four of these safeguards to be missing in the instant case.

Another contentious issue relating to positive discrimination is whether it is permitted or obliged by the equality principle. The reference in Article 28(1) CRC to equality of opportunity – a term synonymous with substantive equality – indicates a positive obligation. This is consistent with the positive nature of some of the safeguards listed by the ECtHR in the *Orsus* case. Indeed *Orsus* followed an earlier ECtHR judgment in the case of *Sampanis v Greece*, in which the obligation to take positive measures to facilitate the education of vulnerable groups such as Roma children was forcefully articulated by the Court:

> Il ressort enfin de la jurisprudence de la Cour que la vulnérabilité des Rom/Tsiganes implique la nécessité d'accorder une attention spécial à leurs besoins et à leur mode de vie propre, tant dans le cadre réglementaire considéré que lors de la prise de décision dans des cas particulièrs […] Ils ont dès lors besoin d'une protection spéciale. […] La présente affaire mérite donc une attention particulière, d'autant qu'au moment de la saisine de la Cour les personnes concernées étaient des enfants mineurs pour qui le droit à l'instruction revêtait un intérêt primordial.[103]

The third relevant aspect of the UNESCO definition is that it establishes that discrimination in education is not limited to an outright denial of access to education (although this is provided for in the concept of exclusion in the chapeau and in the reference to deprivation of access in 1(a)) but extends to limiting educational opportunities, for example by confining someone to education of an inferior standard, or providing segregated education or education that is inimical to dignity. The recent trilogy of ECHR cases illustrates these various modes of discrimination.

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102 *Ibid*, para 165. This finding constitutes a development of ECHR case-law as the Court's previous line was simply that there is no obligation to provide instruction in languages other than the official languages of the State. See ECtHR, *Belgian Linguistic* case, Appl Nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, Judgment of 23 July 1968.

103 ECtHR, *Sampanis v Greece* Appl. No. 32526/05, Judgment of 5 June 2008, para. 72.

DH v the Czech Republic concerned the practice of placing Roma children, following psychological testing, in 'special' schools for children with intellectual difficulties.[104] The special schools followed a simplified curriculum and effectively led to long-term disadvantage. Statistical evidence showed that Roma children in a particular school district were 27 times more likely to be placed in such schools than non-Roma children. The Court held that the statistics created a rebuttable presumption of discrimination that the state had to justify. The Court rejected the contention that the psychological tests constituted objective and reasonable justification for the difference in treatment as the tests themselves were designed for the majority population and were not adapted to take Roma characteristics into account. *Sampanis v Greece* concerned the segregation of Roma children into special preparatory classes in a separate building annexed to the school.[105] Although the government argued that this was done to help the children attain the right level so that they could transfer into mainstream classes, this argument was rejected on the grounds that the segregation was not based on any suitable tests or criteria and no children were ever transferred to mainstream classes. Furthermore, there was evidence that, in segregating the Roma children, the school authorities were responding to pressure from non-Roma parents. Finally, *Orsus v Croatia* concerned the practice of placing Roma children in Roma-only classes because they lacked sufficient command of the Croatian language to participate in mainstream classes.[106] The special classes followed a reduced curriculum, possibly by up to 30%, pursued no particular Croatian language programme and failed to lead to a transfer into mixed classes as soon as the students met the language proficiency requirement. These cases reveal how insidious discrimination can be in practice.

To summarize, the prohibition of discrimination in education encompasses both direct and indirect discrimination. It has a positive as well as a negative dimension, in the sense that equality in education requires that temporary special measures may need to be adopted in favour of a disadvantaged group in order to achieve substantive equality. As this conflicts with the cardinal rule of formal equality, namely, treating all persons the same, care must be taken to ensure that supposed positive discrimination is not a guise for discrimination. Finally, discrimination in education is not limited to an outright denial of access to education but encompasses other acts that limit educational opportunities.

104 ECtHR, *DH v the Czech Republic,* Appl. No. 57325/00, Judgment of 13 November 2007.
105 ECtHR, *Sampanis v Greece* Appl. No. 32526/05, Judgment of 5 June 2008.
106 ECtHR, *Orsus v Croatia,* Appl. No. 15766/03, Judgment (GC) of 16 March 2010.

6.4.2 Phase One CEAS: compliance with the right of the child to education

6.4.2.1 The Reception Conditions Directive

Of the relevant CEAS instruments, the RCD contains the most elaborate, but arguably also the most restrictive, provisions relating to the right to education. Article 10 titled 'Schooling and education of minors' provides:

> 1. Member States shall grant to minor children of asylum seekers and to asylum seekers who are minors access to the education system under similar conditions as nationals of the host Member State for so long as an expulsion measure against them or their parents is not actually enforced. Such education may be provided in accommodation centres. The Member State concerned may stipulate that such access must be confined to the state education system. Minors shall be younger than the age of legal majority in the Member State in which the application for asylum was lodged or is being examined. Member States shall not withdraw secondary education for the sole reason that the minor has reached the age of majority.
> 2. Access to the education system shall not be postponed for more than three months from the date the application of asylum was lodged by the minor or the minor's parents. This period may be extended to one year where specific education is provided in order to facilitate access to the education system.
> 3. Where access to the education system as set out in paragraph 1 is not possible due to the specific situation of the minor, the Member State may offer other education arrangements.

There are five problematic aspects of Article 10 RCD when considered in the light of the right of the child to education.

First, certain children may be denied access to education outright. Article 10(3) establishes that where access to the education system is not possible due to the specific situation of the minor, the Member State is permitted, but not compelled (c.f. 'may') to offer other education arrangements. The option not to offer other education arrangements constitutes a violation of the right of the child to education (specifically, the availability and accessibility requirements) and may also, depending on the profile of the children affected, constitute indirect discrimination. Moreover, the Commission's evaluation of the RCD indicates that detained minors in a significant number of member States are denied access to education.[107] Although the Commission considers this to be a violation of the directive, arguably the failure to allow detained children to access the education system falls under the rubric of Article 10(3) (i.e. where

107 Thus, the Commission notes that '[c]ontrary to the provisions of the Directive, many Member States deny detained minors access to education or make it impossible or very limited in practice (AT, BE, FI, FR, HU, IT, PL,SK, SI, UK, NL). Only in a few Member States is this right recognized or special classes organized in detention centers (LV, CZ, LT, SE).' Commission evaluation of the RCD, § 3.4.4, p. 8, *supra* n. 34.

access is not possible due to the specific situation of the minor) and accordingly can be construed as being *permitted* by the directive. Such an interpretation is bolstered by the dearth of provisions in the directive relating to detention in general and the conditions of detention of minors in particular – an issue that will be taken up in Chapter 7.

Second, access by the asylum-seeking child to the education system may be unduly delayed at the beginning of the process and terminated prematurely at the end, also offending against the accessibility requirement. Thus, Article 10(2) RCD provides that access to the education system can be postponed for 3 months which runs from the date on which the application for asylum was lodged. This may be problematic in the context of unaccompanied minors because, under the APD, an unaccompanied minor may not be authorized to lodge an asylum application him/herself but may be required to have one lodged on his/her behalf by a representative.[108] In turn, the decision about whether or not to lodge an application on behalf of an unaccompanied minor is a complex one, requiring a period of information gathering and assessment. Furthermore, as outlined in Chapter 5, there are few mechanisms for identifying unaccompanied minors as such with the result that there may be a significant delay before it becomes apparent (if it does at all) that the individual is an unaccompanied minor. In the meantime, the clock has not been started for the purposes of the 3 month time-limit.[109]

At the other end, Article 10(1) RCD first sentence requires Member States to grant asylum seeking children access to the education system 'for so long as an expulsion measure against them or their parents is not actually enforced'. The terminology here is somewhat unclear. If the wording of this provision is read in the light of the Returns Directive, then an 'expulsion measure' is equivalent to a 'return decision' and the term 'enforced' is equivalent to removal (and not to the issuance of a return decision).[110] This much is unproblematic. However, the Returns Directive envisages that removal may be postponed in a number of circumstances.[111] It is important that in such

108 Article 6(4)(a) and (b) APD.

109 According to the Commission evaluation of the RCD, delays in access to education regularly occur. Thus the Commission reports that '[w]hile access to primary schools is not a problem, secondary education is often dependent on places available or decisions of local authorities (AT, SI, FI, HU). In a few Member States, minors might be granted access to schooling only at particular times in the school year, which might in practice cause delays (PL, FR).' *Supra* n. 34, § 3.4.4, p. 8,

110 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals. See in particular Articles 3, 8 and 9.

111 Article 9 (Postponement of removal) provides that removal *shall* be postponed if it would violate the principle of *non-refoulement* or for as long as a suspensory effect is granted pending a review of the return decision. It further provides that Member States *may* postpone removal owing to the specific circumstances of the individual case such as the

circumstances, the expulsion measure is not regarded as being enforced, otherwise the child subject to the measure could be denied access to education for the period of the postponement.

Third, a number of provisions of Article 10 RCD, on an ordinary reading of their terms, appear to permit the establishment of segregated education for asylum seeking children. Thus, paragraph one first sentence refers to access to the education system under 'similar' conditions as nationals while the second sentence provides that '[s]uch education may be provided in accommodation centres'. Paragraph two authorizes the postponement of access to the education system for a period of one year 'in order to facilitate access to the education system'. And paragraph three permits Member States to offer 'other education arrangements' apparently indefinitely where access to the education system is 'not possible due to the specific situation of the minor'. It will be recalled that segregated education constitutes a form of discrimination in education (per the UNESCO definition) unless the segregation is itself a temporary special measure in order to achieve substantive equality.

It may be observed that where Member States educate asylum seeking children in accommodation centres – as a great many do – the reason is not generally linked to the attainment of substantive equality, but rather to administrative convenience and an unspoken policy of discouraging integration of asylum seekers, the majority of whom will not be recognized as refugees. Moreover, the Committee RC has criticized States Parties on several occasions for providing sub-standard education in accommodation centres.[112]

As for the year-long postponement of access to the education system 'in order to facilitate access to the education system', it is accepted that this could be construed as a temporary special measure in order to achieve substantive equality. However, following *Orsus and Others v Croatia*, where the temporary segregation of children affects a particular ethnic group (or, it follows from the internationally prohibited grounds of discrimination, a group identified by a particular status, such as asylum seekers), then appropriate safeguards have to be put in place. These safeguards include: a) a clear, reliable and individualized method of testing of the need for separate education; b) a curriculum that pursues the aim of eventual integration into mainstream

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third country national's physical state or mental capacity or technical reasons, such as lack of transport capacity or failure to remove due to lack of identification.

112 For example, in its Concluding Observations to Denmark in 2011, the Committee noted that 'the majority of asylum-seeking child of school-going age receive education in separate schools where the quality of the education is significantly lower than that of mainstream Danish schools, and […] these schools do not grant academic credits which qualify the children for further education.' U.N. Doc. CRC/C/DNK/CO/4, para. 57(d). Similar concerns have been expressed by the Committee in its Concluding Observations to the Netherlands in 2004 (U.N. Doc. CRC/C/15/Add.227, para. 53), to Greece in 2002 (U.N. Doc CRC/C/15/Add. 170, para. 68(g)), to Spain in 2002 (U.N. Doc. CRC/C/15/Add. 185, para 44(d)), to the United Kingdom in 2002 (U.N. Doc. CRC/C/15/Add.188, para. 49) and to Norway in 2000 (U.N. Doc. CRC/C/15/Add. 126, para.50).

education; c) a monitoring and transfer procedure that would ensure the immediate transfer into mainstream education of children who attain the requisite level. Consequently, an interpretation of Article 10(2) that would permit the blanket channelling of asylum-seeking children into a separate system for the duration of a year would constitute discrimination.

As regards the provision authorizing Member States to offer 'other education arrangements' where access to the education system is 'not possible due to the specific situation of the minor', it would be difficult to construe this as a temporary special measure. For a start, the indefinite nature of the provision is incompatible with the requirement of temporariness integral to the concept of positive discrimination. Moreover, if a child was unable to transfer to mainstream education after a year of special education, this would be a serious indictment of the system of special education and a signal that the safeguards established in *Orsus* were not being followed.

Fourth, Article 10 arguably fails to establish the positive obligation of states to take special measures to enable the vulnerable group that is asylum-seeking children to enjoy their right to education. The fact that Member States are permitted to exclude an asylum seeking child from mainstream education because access is 'not possible' due to the specific situation of the child, but are not required to provide alternative education for the child speaks forcefully to this point. Similarly, the possibility of postponing access to mainstream education for up to one year in order to facilitate access to the education system falls short of imposing a positive *obligation* on Member States to assist asylum seeking children in gaining access to the education system. Article 10(1) fourth sentence is also relevant in this regard. It provides that '[m]inors shall be younger than the age of legal majority in the Member State in which the application for asylum was lodged or is being examined'. The disjunctive nature of this formulation (c.f. 'or') means that, where the applicant has been transferred under the DR, the responsible Member State has potentially two ages of legal majority to choose from in order to exclude the individual from education. On the one hand, it is difficult to argue that this provision is discriminatory since national children are unlikely to enter the education system at this late stage, and hence are arguably not in a comparable position. On the other hand, it is precisely because the education of asylum seeking children is likely to have been disrupted that they may need to continue in education beyond the usual school-leaving age. In this regard, that provision of Article 10 RCD offends against the positive obligation inherent in the prohibition of discrimination as well as the requirement deriving from the normative content of the right to education that education be adaptable.

Fifth, the permissive provision in Article 10(1) which allows Member States to 'stipulate that such access [to the education system] must be confined to the state education system' conflicts with the requirement of accessibility and, more particularly, freedom of educational establishment with its implicit requirement to respect the liberty of parents to choose to send their children

to schools other than public schools. If an asylum seeking child meets the entrance requirements for such a school, including the ability to pay a fee if there is one, then it is hard to justify a denial of access on the grounds that he/she is an asylum seeker.

In sum, the education provision of the RCD is highly problematic from the point of view of the right of the child to education. It falls foul of aspects of the normative content of the right to education and appears to sanction discriminatory practices.

6.4.2.2 The Qualification Directive

The QD provides in Article 27(1) that 'Member States shall grant full access to the education system to all minors granted refugee or subsidiary protection status, under the same conditions as nationals.' This conforms to the prohibition of discrimination in education.

However, the QD contains no recognition that owing to their particular vulnerability, child beneficiaries of international protection may require positive measures in order to benefit from substantive equality in education. Whether there is a deficiency in this regard cannot be gleaned from the Commission's evaluation of the directive because it fails to evaluate Article 27(1). The only provision of the directive that touches on the question of positive measures is Article 33 on access to integration facilities. It provides:

> 1. In order to facilitate the integration of refugees into society, Member States shall make provisions for integration programmes which they consider to be appropriate or create pre-conditions which guarantee access to such programmes.
> 2. Where it is considered appropriate by Member States, beneficiaries of subsidiary protection status shall be granted access to integration programmes.

The term 'appropriate' in both paragraphs signals a level of deference to Member States that is arguably incompatible with the positive obligation to secure substantive equality. Furthermore, the distinction between refugees and beneficiaries of subsidiary protection is itself discriminatory, as has been argued in previous sections.[113]

113 Unsurprisingly, the Commission evaluation of the QD is rather vague on Article 33, providing that '[a]t least 16 Member States do not differentiate between refugees and beneficiaries of subsidiary protection with respect to access to integration facilities. However, the integration programmes provided for are sometimes very limited and may cover only language training or financial loans. In HU, access of beneficiaries of international protection to integration programmes is reported to be granted on a discretionary basis and to be ineffective due to the absence of implementation measures. Legal provisions in BG are vague and do not guarantee sustainability of the programmes. Several Member States (e.g. EE, IE, LV) do not formally provide for integration programmes for beneficiaries of international protection. However, both protection groups are reported to have access to integration facilities in some of them (e.g. IE).' *Supra* n. 42, § 5.5.1.4, p. 15.

In *toto*, the QD conforms to the negative prohibition of discrimination in education and hence is strong on the formal aspect of equality but contains little by way of positive measures to facilitate the education of child beneficiaries of international protection and hence is weak from the perspective of substantive equality.

6.4.3 Phase Two CEAS: prospects for enhanced compliance

6.4.3.1 The proposed recast Reception Conditions Directive

The proposed recast of the RCD contains a number of important amendments to the education provision. Two provisions are deleted: the provision requiring minors to be younger than the age of legal majority in the Member State in which the application for asylum was lodged or is being examined and the provision extending postponement of access to the education system for up to a year where specific education is provided in order to facilitate access. This latter provision is replaced by a new requirement that '[p]reparatory classes including language classes shall be provided to minors where it is necessary to facilitate their access and integration into the national education system.' Finally, the discretionary provision whereby Member States *may* offer alternative educational arrangements where access to the education system is not possible due to the specific situation of the minor, is amended. Now the obligation is mandatory: in such circumstances 'Member States shall offer other educational arrangements in accordance with national law and practices.' These are significant improvements, although it must be noted that minors are still not granted access to the education system on the same basis as nationals and segregated education is still permissible. Therefore, the education provision of the proposed recast RCD is still amenable to being applied in a discriminatory manner.

6.4.3.2 The recast Qualification Directive

As regards the recast QD, no changes are made to the education provision. However, the integration provision (now Article 34) is amended. The differential treatment of refugees and beneficiaries of subsidiary protection is removed. Now all beneficiaries of international protection must be 'ensured access' to such integration programmes as Member States 'consider to be appropriate so as to take into account the specific needs of beneficiaries of international protection'. A new paragraph is added, stipulating that 'those integration programmes could include introduction programmes and language training tailored as far as possible to the needs of beneficiaries of international protection.' Hence beneficiaries of subsidiary protection are no longer discriminated against in their access to whatever integration programmes are in

existence, but there is still no mandatory direction to Member States on the content of such programmes.

6.5 SYNTHESIS OF FINDINGS

This chapter explored the extent to which the CEAS in both phases complies with three key socio-economic rights of the child: the right to health, to an adequate standard of living and to education. It was posited that the CEAS instruments should generally conform to the normative content of these rights, but where the instruments allow for Member States flexibility in the form of discretionary and derogation provisions, they should conform at least to the core content of the rights.

As regards the right to health, neither the RCD nor the QD was found to conform clearly to either the normative or the core content of the right. The essential problem in the RCD is that although the general standard of health it establishes must be levelled up in the case of persons with special needs, it is uncertain whether minors and unaccompanied minors fall into this category. Furthermore, the directive allows for the reduction and withdrawal of health care to a minimum level that is less than the core content of the right of the child to health. However, the RCD does provide for rehabilitation and recovery for child victims of various types of ill-treatment, although identification of such children remains a problem and the relevant provision is not an accurate reflection of the relevant right in the CRC. In the proposed recast, most of these various problems are addressed, such that it can be considered to conform broadly with both the core and the normative content of the right of the child to health. As regards the QD, the essential problem is that it fails to establish one basic standard of health care for everyone but rather creates different streams of entitlement. This offends against the prohibition of discrimination and therefore violates the core content of the right of the child to health. Furthermore, the directive fails to establish a right of the child victim of various forms of ill-treatment to recovery and reintegration. The first but not the second problem is addressed in the recast QD, with the result that it cannot be stated that the recast fully conforms to the right of the child to health.

As regard the right of the child to an adequate standard of living, the normative content of the right is not met in the RCD because the general standard of living in the directive is pitched at the standard in general, not child-specific, human rights law. As regards the 'core content' of the right, this is unmet when asylum seekers are given financial allowances and where Member States avail of the option to reduce, withdraw or refuse reception conditions. As for the proposed recast, a new provision establishes a separate, and child-rights compliant, standard of living for minors but the other problems persist and it is unclear, in the mix, whether the right of all children to

an adequate standard of living will be met. As regards the QD, while the right of the child refugee to an adequate standard of living appears to be secured, the right of the child beneficiary of subsidiary protection may be limited. As this differentiation appears to offend against the prohibition of discrimination, it follows that the core content of the right is unmet. In the recast QD, some rights relating to the standard of living of beneficiaries of subsidiary protection are levelled up, but there is still a differentiation in the matter of social welfare. Consequently, the recast QD does not fully comply with the core content of the right of the child to an adequate standard of living.

Finally, the RCD does not meet either the normative or core content of the right of the child to education, mainly because it sanctions various discriminatory practices such as segregated education. Some but not all of these practices are eliminated in the proposed recast, with the result that there is still a problem of compliance. The QD, on the other hand, does comply with the right of the child to education, although it can be criticized from a substantive equality perspective. Some modest improvements are made in the recast regarding access to integration programmes but considerable discretion is still left to Member States regarding the content and scope of such programmes. Nevertheless, the core of the right of the child to education is certainly met in both the current and recast QD.

7 The right of the child to liberty

7.1 Introduction

This chapter explores the compliance of the CEAS with the right of the child to liberty. Unfortunately, a great many children seeking international protection in the EU – both accompanied and unaccompanied – are detained.[1] Sometimes the detention is said to be justified on the grounds that it is protective detention.[2] But generally, detention of children is regarded as being inimical to the protection and care of children. For this reason, the CRC has developed stringent standards for the detention of minors to ensure that they are protected *from* detention and, if detained, that they are protected *in* detention. This short chapter follows the structure of previous chapters, albeit in simplified form, since just one right is involved. Thus, section 7.2 sets out the right of the child to liberty in its various dimensions; section 7.3 scrutinizes whether the relevant Phase One instruments are compliant with the right of the child to liberty; finally, section 7.4 assesses the prospects for enhanced compliance in Phase Two. The relevant CEAS instruments are the RCD and the APD.

7.2 The right of the child to liberty

The administrative detention of asylum seekers is situated at the juncture of international human rights and international refugee law. On the one hand,

1 In its evaluation of the RCD, the Commission found that 'most of [the Member States] authorize the detention of minors and many of them even authorize the detertion of unaccompanied minors.' 'Report from the Commission to the Council and to the European Parliament on the application of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, COM (2007) 745 final', § 3.5.2, p. 9. Hereinafter, 'Commission evaluation of RCD'.

2 For example, in the Explanatory Memorandum to the proposed recast RCD it is stated that '[d]iscussions in the Council revealed that in certain circumstances it is in the best interests of unaccompanied minors to be kept in detention facilities, in particular to prevent abductions which reportedly do occur in open centers.' Amended proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers (recast), COM (2011) 320 final, § 3.1.2, p. 6.

refugee law establishes a presumption against the detention of asylum seekers,[3] while on the other, human rights law, while not prohibiting such detention outright, subjects it to a series of criteria and safeguards in view of the importance of liberty. Thus, at the international level, Articles 9 and 10 ICCPR relate respectively to safeguards against arbitrary or unlawful detention and minimum standards regarding conditions of detention.[4] At the regional level, Article 5 ECHR, while it permits in paragraph 1(f) administrative detention to prevent unauthorized entry and to effect deportation, requires that such detention must be lawful and amenable to judicial review.[5] In cases where the conditions of detention are very poor, Article 3 ECHR may also be engaged.[6] Finally, Article 6 of the EU Charter of Fundamental Rights establishes a right to liberty and security.[7]

The detention of minor asylum seekers is more problematic than that of adults because the impact of detention on a child's rights are more profound – the right of the child to development, family unity and education being cases in point – and the child is more susceptible to abuse, victimization and violation of his/her protection rights while in detention than adults generally. For

3 See Article 31 1951 Convention relating to the Status of Refugees, UNHCR Excom. Conclusion No. 44 (XXXVII) 1986, *Detention of Refugees and Asylum Seekers*, and UNHCR, *Guidelines on Applicable Standards and Criteria relating to the Detention of Asylum Seekers* (1999).

4 Art 9 ICCPR provides, *inter alia*: '1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law. 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. […] 4. Anyone who is deprived of liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.' Article 10(1) ICCPR provides: 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.'

5 Article 5 ECHR provides in relevant part: '1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure proscribed by law: […] (f) the lawful arrest or detention of a person to prevent his effecting the unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition. 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him. […] 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention in not lawful. […].'

66 See ECtHR, *Mayeka Mitunga v Belgium*, Appl. No. 13178/03, Judgment of 12 October 2006; ECtHR, *Muskhadzhiyeva v Belgium*, Appl. No. 41442/07, Judgment of 19 January 2010; ECtHR, *Rahimi v Greece*, Appl. No. 8687/08, Judgment of 5 April 2011; ECtHR, *Kanagaratnam and Others v Belgium,* Appl. No. 15297/09, Judgment of 13 December 2011; and ECtHR, *Popov v France*, Appl. No. 39472/07 and 39474/07, Judgment of 19 January 2012. These cases are all discussed at § 5.2.2 *infra*.

7 Article 6 reads: 'Everyone has the right to liberty and security of person.'

this reason, a number of specific criteria and guarantees apply to the detention of minors under Article 37(b)-(d) CRC, which provides:

> (b) No child shall be deprived of his/her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law, used only as a measure of last resort and for the shortest appropriate period of time.
> (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person and in a manner which takes into account the needs of persons of his/her age. In particular, every child deprived of liberty shall be separated from adults, unless it is considered in the child's best interests not to do so and shall have the right to maintain contact with his/her family through correspondence and visits, save in exceptional circumstances.
> (d) Every child deprived of his/her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his/her liberty before a court or other competent independent and impartial authority and to a prompt decision on any such action.

In short, Article 37(b) relates to permissible detention, Article 37(c) to conditions of detention and Article 37(d) to procedural protection. The subsequent analysis proceeds under these headings.

7.2.1 Permissible detention

Let us consider first Article 37(b), which deals with the situations in which a child may legitimately be deprived of his or her liberty. The first sentence encapsulates the dual requirements of lawfulness and non-arbitrariness that are common to most prohibitions of deprivation of liberty in international human rights law.

The requirement of lawfulness is the most straightforward, pertaining to the need for detention to be prescribed by law, in the sense of having a legal basis that is accessible, precise and foreseeable. The case-law of the ECtHR on the question of lawfulness is instructive. In *Amuur v France*, the Court rejected the contention that a number of disparate administrative decrees and circulars provided a legal basis for the detention of a group of Somali asylum seekers in the international transit zone of the airport for 20 days.[8] Among the problems with the various documents was that they failed to contain any due process guarantees, permit judicial review, place time-limits on detention or make provision for legal, humanitarian or social assistance. In *Abdolkhani and Karimnia v Turkey*, the Court held that a law that required non-nationals without valid travel documents to reside at designated places did not provide

8 ECtHR, *Amuur v France*, Appl. No. 19776/92, Judgment of 25 June 1996.

a sufficiently clear legal basis for the detention of non-nationals pending deportation.[9] The Court noted that:

> These provisions do not refer to a deprivation of liberty in the context of deportation proceedings. They concern the residence of certain groups of foreigners in Turkey, but not their detention. Nor do they provide any details as to the conditions for ordering and extending detention with a view to deportation, or set time-limits for such detention. The Court therefore finds that the applicants' detention […] did not have a sufficient legal basis.[10]

Hence, in order to be lawful, the administrative detention must be explicitly provided for by law, as must the permitted length of detention and the rights of detainees associated with judicial review.

The requirement of arbitrariness is more complicated, and in this regard two different approaches to the question of arbitrariness can be discerned in international human rights law. On the one hand, there is the approach of the Human Rights Committee under Article 9 ICCPR. In considering whether a detention is arbitrary, the Committee will inquire into whether the individual detention is justified, in the sense of being reasonable, necessary and proportionate in the circumstances of the particular case.[11] Detention will be considered to be arbitrary if an alternative to detention could have been used in the case.[12] Consequently, mandatory immigration detention will always be found to be arbitrary as it does not allow for an individualized assessment of arbitrariness. As regards the detention of minors, the Committee will consider the best interests of the child in its individualized assessment of arbitrariness.[13] In this regard, the Committee is facilitated by Article 24(1) ICCPR which provides that 'Every child shall have, without any discrimination

9 ECtHR, *Abdolkhani and Karimnia v Turkey*, Appl. No. 30471/08, Judgment of 22 September 2009.

10 *Ibid* at para. 133.

11 Human Rights Committee, *A v Australia*, Communication No. 560/1993, U.N. Doc CCPR/C/59/D/560/1993 (1997), Views of 3 April 1997. The Committee stated that 'remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context.' At para. 9.2.

12 Human Rights Committee, *C v Australia*, Communication No 900/1999, U.N. Doc CCPR/C/76/D/900/1999, Views of 28 October 2002. The Committee held that 'the State party has not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with State Party's immigration policies, by, for example, the imposition of reporting obligation, sureties or other conditions […]'. At para. 8.2. According to UNHCR, alternatives to detention include monitoring requirements, provision of a guarantor/surety, release on bail and the use of open centers. UNHCR, *supra* n. 3, Guideline 4.

13 See Human Rights Committee, *Bahktiyari v Australia*, CCPR, Communication No. 1069/2002, Views of 6 November 2003, para. 9.6 and Human Rights Committee, *Samba Jollah v The Netherlands*, CCPR, Communication No. 794/1998, Views of 15 April 2002.

[...] the right to such measures of protection as are required by his status as a minor ...', a provision the Committee has interpreted as encompassing the best interests principle.[14]

By contrast, Article 5 ECHR does not contain any express prohibition of arbitrariness, but rather contains an exhaustive list of permissible grounds of detention, including ground (f) – the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition. If the detention does not fall under one of the permissible grounds, it is *prima facie* considered to be arbitrary. Conversely, if the detention does fall under one of the permissible grounds, it will be presumed not to be arbitrary. Although the Court has 'read down' a proportionality requirement in respect of some of the grounds of detention foreseen by Article 5(1), it has traditionally declined to do so in respect of Article 5(1)(f).[15] Thus, states are not required to show that the detention was necessary, reasonable or proportionate in the individual circumstances of the case.[16] Detention must be reasonably justified *in general terms*, detention with a view to deportation must proceed with 'due diligence'[17] and detention to prevent unauthorized entry must be closely connected to the purpose of preventing unauthorized entry and should not be unreasonably prolonged.[18] But no individualized assessment is required. When followed to its logical conclusion, this approach does not permit a best interests assessment to be factored into the question of the permissibility of detaining a child *per se*, although it may feature, as we shall see, in the assessment of the conditions of detention – but this is a separate issue.

The question is, which approach to the question of arbitrariness is taken in Article 37(b) CRC? Here the second sentence of Article 37(b) is instructive. The fact that detention can be used only as a measure of last resort and for the shortest appropriate period of time clearly indicates that an individual assessment of arbitrariness is required, *per* the ICCPR and *pace* the ECHR. Put differently, it would be impossible to show that detention was a measure of last resort if alternatives to detention for the particular individual had not be

14 *Ibid* (*Bakhtiyari v Australia)*.

15 In a number of recent cases, the Court did, expressly or impliedly 'read down' a proportionality test into Article 5(1)(f). See ECtHR, *Jusic v Switzerland*, Appl. No. 4691/06, Judgment of 2 December 2010, paras. 71-73 and ECtHR, *Raza v Bulgaria*, Appl. No. 31465/08, Judgment of 11 February 2010, para. 74. However, subsequent cases reaffirmed the Court's traditional stance that Article 5(1)(f) does not demand that detention be reasonably considered necessary. See, for example, ECtHR, *M and others v Bulgaria*, Appl. No. 41416/08, Judgment of 26 July 2011, para. 61 and ECtHR, *Rahimi v Greece*, Appl. No. 8687/08, Judgment of 5 April 2011, para. 107. Consequently, it is premature to infer a general change of attitude by the Court to Article 5(1)(f).

16 ECtHR, *Chahal v The United Kingdom,* Appl. No. 22414/93, Judgment (GC) of 15 November 1996.

17 ECtHR, *Conka v Belgium*, Appl. No. 51564/99, Judgment of 5 February 2002.

18 ECtHR, *Saadi v UK*, Appl. No. 13229/03, Judgment (GC) of 29 January 2008.

explored; and it would be impossible to show that detention was for the shortest appropriate period of time, if appropriateness was not assessed in relation to the individual. Consequently, Article 37(b) implicitly prohibits the mandatory detention of children and requires an individualized assessment of the need for detention in each case. Since the best interests of the child is a general principle of relevance to the interpretation and application of all the rights in the Convention, including Article 37(b), the individualized assessment must encompass a best interests assessment.

When applied to the asylum context, Article 37(b) establishes a strong presumption against the administrative detention of asylum seeking children. Accordingly, UNHCR considers that minors should not, as a general rule, be detained. In the case of accompanied minors, '[c]hildren and their primary caregivers should not be detained unless this is the only means of maintaining family unity',[19] and in the case of unaccompanied minors '[w]here possible they should be released into the care of family members who already have residency within the asylum country. Where this is not possible, alternative care arrangements should be made by the competent child care authorities for unaccompanied minors to receive adequate accommodation and appropriate supervision.'[20]

Similarly, the Committee RC has stipulated that:

> [U]naccompanied or separated children should not, as a general rule, be detained. Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof.' [Where detention is exceptionally justified under Article 37(b)] all efforts, including acceleration of relevant processes, should be made to allow for the immediate release of unaccompanied or separated children from detention and their placement in other forms of appropriate accommodation.[21]

The combined influence of Article 37(b) and 3 CRC has begun to make itself felt in the approach of the ECtHR to Article 5(1)(f) ECHR. In the recent ground-

19 UNHCR, *supra* n. 3, p. 10.

20 *Ibid*.

21 Committee RC, General Comment No. 6, 'Treatment of unaccompanied and separated children outside their country of origin', U.N. Doc CRC/GC/2005/6 (2005), p. 18. The immigration detention of minors has been a consistent theme of the Committee RC in its concluding observations to States Parties which are EU Member States. See Committee RC, Concluding Observations to Greece in 2002, UN Doc. CRC/C/15/Add.170, paras. 68 & 69; to The United Kingdom in 2002, U.N. Doc. CRC/C/15/Add.188, para. 50; to the Czech Republic in 2003, U.N. Doc. CRC/C/15/Add.201, para. 56; to Italy in 2003, U.N. Doc. CRC/C/15/Add.198, para. 45; to Romania in 2003, U.N. Doc. CRC/C/15/Add.199, para. 55; to The Netherlands in 2004, U.N. Doc. CRC/C/15/Add.227, para. 54; to Latvia in 2006, U.N. Doc. CRC/C/LVA/CO/2, para. 53; to Lithuania in 2006, U.N. Doc. CRC/C/LTU/CO/2, § 8; to The United Kingdom in 2008, U.N. Doc. CRC/C/GBR/CO/4, para. 71; to Spain in 2010, U.N. Doc. CRC/C/ESP/CO/3-4, para. 59; and to Belgium in 2010, U.N. Doc. CRC/C/BEL/CO/3-4, paras. 76 & 77.

breaking case of *Rahimi v Greece*, which involved the detention prior to expulsion of a 15 year old unaccompanied Afghan boy, the Court reiterated its established position that detention does not have to be reasonably considered necessary in the circumstances of the case, but then went on to reprimand the Greek authorities for automatically applying the law on detention to the boy without taking into consideration his particular situation as an unaccompanied minor.[22] The Court noted the requirements of Article 3 and 37 CRC and the fact that the best interests principle is reiterated in the RCD, which the impugned domestic law transposed. The Court further noted that it had already recognized in its Article 8 jurisprudence that there is a wide consensus that in all decisions concerning children the best interests of the child must be a primary consideration. Consequently, it held:

> Or, en l'occurrence, en ordonnant la mise en détention du requérant les authorités nationales ne se sont aucunement penchées sur la question de son intérêt superieur en tant que mineur. De plus, elles n'ont pas recherché si le placement du requérent dans le centre de rétention […] était une mesure de dernier ressort et si elles pouvaient lui substituer une autre mesure moins radicale afin de garantir son expulsion. Ces éléments suscitent des doutes aux yeux de la Cour, quant à la bonne foi des autorités lors de la mise en oeuvre de la mesure de détention.[23]

In finding a violation of Article 5(1)(f), the Court effectively established an exception for unaccompanied minors to its established position that no proportionality test is required by sub-paragraph (f).[24] In the subsequent case of *Popov v France*, the Court extended the exception for unaccompanied minors to minors who are accompanied by their parents.[25] These developments bring

22 ECtHR, *Rahimi v Greece*, Appl. No. 8687/08, Judgment of 5 April 2011.

23 *Ibid*, para. 109.

24 This new position of the Court was already signalled in *Mayeka Mitunga*, a case which involved the detention of a 5 year old unaccompanied minor. The Court stated that 'in the absence of any risk of the second applicant's seeking to evade the supervision of the Belgian authorities, her detention in a closed centre for adults was unnecessary. Other measures could have been taken that would have been more conducive to the higher interest of the child guaranteed by Article 3 of the Convention on the Rights of the Child. These included her placement in a specialized center or with foster parents.' Appl. No. 13178/03, Judgment of 12 October 2006 at para. 83. It is too early to say whether the new approach to the detention of minors presages a general re-think by the Court of its refusal to 'read down' a proportionality test in Article 5(1)(f), but there are some tentative indications of a change of attitude. For example, in *Raza v Bulgaria*, a case involving an adult, the Court noted that following the applicant's release from detention, he was required to report to his local police station at regular intervals, a fact that 'shows that the authorities had at their disposal measures other than the applicant's protracted detention to secure the enforcement of the order for his expulsion'. Appl. No. 31465/08, Judgment of 11 February 2010, para. 74.

25 ECtHR, *Popov v France*, Appl. Nos. 39472/07 and 39474/07, Judgment of 19 January 2012. See in particular paras. 119 and 120.

the approach of the ECtHR on the permissibility of detaining minors into line with the approach of the CRC.

In sum, the international legal position is now that mandatory immigration detention of children is not permitted. Detention of minors can only follow an individualized assessment, including a best interests assessment, and must comply with the principle of last resort. Hence liberty is the rule, with detention as the (exceptional) exception.

7.2.2 Conditions of detention

International human rights law establishes strict requirements regarding conditions of detention, which have been expanded on in various soft-law documents.[26] Thus, explicit criteria relating to conditions of detention are established in Article 10 ICCPR,[27] and while no equivalent criteria are specified in Article 5 ECHR, the ECtHR deals with the issue as part of the requirement of lawfulness in Article 5(1)(f).[28] Very poor conditions of detention may also constitute inhuman or degrading treatment contrary to Article 3 ECHR.[29] These basic criteria establish that persons deprived of their liberty should be treated with humanity and with respect for their dignity. This is also the point of departure of Article 37(c) CRC, but with the additional requirements that treatment in detention must a) take into account the needs of persons of his/her age; b) that every child deprived of liberty must be separated from adults unless this is contrary to the child's best interests; and c) that the child has the right to maintain contact with his/her family through correspondence and visits 'save in exceptional circumstances'.

Taking first the requirement that every child deprived of liberty must be treated in accordance with the needs of persons of his/her age, Helmut Sax, in his commentary on Article 37 CRC considers that this 'conveys the message

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26 See, for example, 'UN Standard Minimum Rules on the Treatment of Prisoners', adopted in 1955, approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977; 'Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment', GA Res. 43/173, 9 December 1988; 'United Nations Rules for the Protection of Juveniles Deprived of their Liberty', GA Res. 45/113 of 14 December 1990.

27 Article 10 ICCPR comprises three paragraphs of which only the first relates to detention generally, as opposed to detention in the criminal justice context. Article 10(1) provides: 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.'

28 For example, the Court stated in *Mayeka Mitunga v Belgium* that 'the fact that the second applicant's detention came within paragraph (f) of Article 5§1 does not necessarily mean that it was lawful within the meaning of this provision, as the Court's case-law requires that there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention.' Appl. No. 13178/03, Judgment of 12 October 2006 at para 102.

29 *Ibid*.

that children should not be regarded as one homogenous group but instead that the conditions and the treatment of the young persons have to be constantly monitored and flexibly adapted due to their personal developments.'[30] Thus, for example, conditions of detention that are adequate for older teenagers, may not be suitable for younger children. Moreover, age cannot be the only determining criterion in this regard, since the general principle of the best interests of the child must a primary consideration. The individualized assessment of best interests allows factors such as degree of maturity, stage of development and personal circumstances to be taken into account in determining whether the conditions of detention are appropriate. It follows that, at a minimum, the conditions of detention of young children cannot be the same as conditions of detention of adults.

A trilogy of recent ECHR cases involving Belgium speak clearly to this last requirement. In *Mayeka Mitunga v Belgium*, the Court held that the detention of a 5 year old unaccompanied minor for nearly two months in a closed centre for adults constituted inhuman or degrading treatment contrary to Article 3 ECHR and a violation of the requirement under Article 5(1)(f) that the detention be lawful.[31] In arriving at its decision the Court took note of the applicant's extreme vulnerability and in particular of the fact that she was detained in a centre that had initially been designed for adults, that no one was assigned to look after her even though she was unaccompanied by her parents, and that no measures were taken to ensure that she received proper counselling and educational assistance from qualified personnel specially mandated for that purpose.

The Court applied the same reasoning and reached the same conclusions in *Muskhadzhiyeva v Belgium*, a case concerning the detention for one month of four children all under the age of six, at least two of whom were shown to be suffering from post-traumatic stress disorder, in the same detention centre as in the *Mitunga* case but accompanied by their mother.[32] The Court declined to attach any significance to the fact that they were accompanied holding, 'cet élément ne suffit pas à exempter les authorités de leur obligation de protéger les enfants et d'adopter des mesures adéquates au titre des obligations positives découlant [de la Convention].'[33]

The Court confirmed its decision in *Miskhadzhiyeva* and extended its scope in *Kanagaratnam and Others v Belgium*, where three children were detained with their mother in the same detention centre as in the previous two cases.[34] The

30 William Schabas and Helmut Sax, *A Commentary on the United Nations Convention on the Rights of the Child, Article 37, Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty* (Leiden/Boston: Martinus Nijhoff Publishers, 2006), 89.

31 ECtHR, *Mayeka Mitunga v Belgium*, Appl. No. 13178/03, Judgment of 12 October 2006.

32 ECtHR, *Muskhadzhiyeva v Belgium,* Appl. No. 41442/07, Judgment of 19 January 2010.

33 *Ibid*, para. 58.

34 ECtHR, *Kanagaratnam and Others v Belgium,* Appl. No. 15297/09, Judgment of 13 December 2011.

Court was not persuaded by the government's argument that the children were older than in *Miskhadzhiyeva* and that no evidence has been submitted regarding their psychological state. In view of the principle of the best interests of the child in Article 3 CRC, the Court held that the state should have operated on the assumption that the children were vulnerable *qua* children and because of their personal history as asylum seekers. The Court also noted the comparatively long period of detention – four months. By contrast, in *Rahimi*, the Court held that the detention of a 15 year old unaccompanied minor in an overcrowded detention centre for adults, with 'deplorable' hygiene standards, no contact with the outside world and no possibility of fresh air or leisure, even though it was only for two days, constituted a violation of Article 5(1)(f) and Article 3 ECHR.[35]

Another way of stating the requirement in Article 37(c) that every child deprived of liberty must be treated in accordance with the *needs* of persons of his/her age, is that every child detainee must be treated in accordance with his/her *rights* as established in the CRC, since a reliable indication of the needs of the child are his/her rights. Thus, notwithstanding detention, the child is entitled to all the Convention rights with the exception of those few which are incompatible with detention itself, such as the right to liberty, freedom of movement or freedom of association and assembly. Indeed, the majority of rights in the CRC apply regardless of whether the child is in detention or at liberty. Consider, for example, the right of the child deprived of his/her family environment to special protection and assistance including alternative care, the right of the child seeking or enjoying refugee status to *appropriate* protection and humanitarian assistance, the right of the child to family unity, the right of the child to education, the right of the child to health-care, the right of the child to rest, leisure, play and recreation and the right of the child who has been victim of any sort of violence or abuse to recovery and reintegration. Such rights are not placed in abeyance because the child is in detention.

Indeed, many of the 'protection' rights in the Convention are of particularly urgent application in the context of detention, for example, the right of the child in Article 19 CRC to protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse. Various soft law instruments establish how, precisely, these rights should be given effect to in detention.[36] But the most important point to establish here is that detained children are entitled to these rights on an equal basis to non-detained children. Any denial of these rights to a child who is in detention is likely to offend against the non-discrim-

35 ECtHR, *Rahimi v Greece*, Appl. No. 8687/08, Judgment of 5 April 2011. See further, ECtHR, *Popov v France*, Appl No. 39472/07 and 39474/07, Judgment of 19 January 2012.

36 The most comprehensive soft law instrument in this regard is the 1990 'UN Rules for the Protection of Juveniles Deprived of their Liberty', GA Res. 45/113 (14 December 1990).

ination provision in Article 2(1) CRC, a general principle of the Convention which provides, 'States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's [...] status.' The status of relevance here is the child's detention status.

Next, there is the requirement that every child deprived of liberty be separated from adults, 'unless it is considered in the child's best interests not to do so'. Sax, referring to the 1957 UN Standard Minimum Rules for the Treatment of Prisoners, notes that the norm that children should be kept separately from adults ranks among the oldest of UN standards in the field of criminal justice.[37] Indeed, two similar provisions relating to accused and convicted juvenile offenders are contained in Article 10(2) and (3) ICCPR respectively.[38] The purpose in the criminal justice context is two-fold: to prevent criminal contagion and to protect the minor from exploitation and abuse by adults. While the latter consideration applies equally to immigration detention, the former is an additional argument for not detaining asylum-seeking children in prison accommodation. Notably, the only exception to the rule requiring segregation of children and adults in detention is where such segregation is not in the best interests of the child. Accordingly, any failure to separate child detainees from adults due to other considerations, such as a lack of space or resources, will offend against Article 37(c). Moreover, any decision contemplating detaining a child with adults must be based on an individualized assessment of best interests, which requires that due weight be given to the views of the child in accordance with the child's age and maturity.

A related point, but one which does not receive specific mention in the context of Article 37, is the question of detention of accompanied children and their right not to be separated from their parents against their will, as established in Article 9(1) CRC.[39] As was discussed in Chapter 5, Article 9(1) establishes the best interests principle as the paramount – indeed, the only – consideration. Moreover, in determining the best interests of the child, only considerations personal to the child and his or her relationship with the parents are determinative. Consequently, children who are accompanied by their

37 William Schabas and Helmut Sax, *supra* n. 30.

38 Article 10(2)(b) ICCPR reads: 'Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.' Article 10(3) ICCPR provides, *inter alia*, 'Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.'

39 Article 9(1) CRC reads: 'States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.'

parents and who are placed in detention, must be detained together with their parents, unless it is contrary to their best interests. However, this is not to suggest that detention of children for the purposes of family unity with their parents dispenses with the need for a rigorous assessment of the justification of the detention of the minor under Article 37(b). In fact, if the detention of the child cannot be justified under Article 37(b), then Article 9(1) poses a compelling argument for the release of the whole family.[40]

This contention is supported by a recent judgment of the ECtHR. In *Popov v France*, a six month old baby and three year old infant were detained with their parents in the 'family zone' of a detention centre for 15 days prior to expulsion.[41] The family zone amounted to a wing reserved for families and single women which nevertheless had barred and barbed-wire windows, no facilities for leisure or education, no children's furniture and few toys, and no access to the open-air. Furthermore, announcements were made over a tannoy, the general atmosphere was described as anguished and stressed, and the behaviour of the inmates was characterized by promiscuity and tension. Unsurprisingly, the court found that the conditions of detention were contrary to Article 3 and 5(1)(f) ECHR in the case of the children. However, in an unprecedented move, the Court went on to find a violation of Article 8 ECHR in the case of the whole family, holding that 'elle est d'avis que l'intérêt supérieur de l'enfant ne peut se limiter à maintenir l'unité familiale mais que les autorités doivent mettre en oeuvre tous les moyens nécessaries afin de limiter autant que faire se peut la détention de familles accompagnées d'enfants et préserver effectivement le droit à une vie familiale.'[42] In particular, the state failed to thoroughly explore whether alternatives to detention for the family, who were not a flight risk, were possible.

As to the final provision of Article 37(c), namely, the right of the child to maintain contact with his/her family through correspondence and visits, save in exceptional circumstances, the Committee RC has elaborated on this obliga-

40 Thus, in its Concluding Observations to Belgium in 2010, the Committee RC expressed 'concern that in spite of a decision by the Minister of Migration Policy and Asylum that families with children would no longer be detained in closed centers as of 1 October 2008, some children and their parents are still being detained in precarious conditions in facilities unsuitable for children.' The Committee RC urged 'the State party to put an end to the detention of children in closed centers [and] to create alternatives to detention for asylum seeking families'. U.N. Doc. CRC/C/BEL/CO/3-4, paras. 76 & 77.

41 ECtHR, *Popov v France*, Appl. No. 39472/07 and 39474/07, Judgment of 19 January 2012.

42 *Ibid*, para. 147. *Popov* signals a development on *Muskhadzhiyeva*, previously discussed, in which the Court found no violation of Article 8 ECHR on the basis that the mother and the children had been detained together. However, the Court did find a violation of Article 3 and 5(1)(f) in respect of the conditions in which the children were detained, Therefore, *Muskhadzhiyeva* already hints that release of the entire family is the only way to avoid both a violation of Article 8 and Articles 3 and 5(1)(f) ECHR. For commentary, see (2010) 'Case Comment, *Muskhadzhiyeva v Belgium* (Application No. 41442/07): detention of asylum seekers – accompanied minors', *European Human Rights Law Review*, 3, 338-342.

tion in the context of unaccompanied minors, providing that detention 'facilities should not be located in isolated areas where culturally appropriate community resources and access to legal aid are unavailable. Children should have the opportunity to make regular contact and receive visits from friends, relatives, religious, social and legal counsel and their guardian.'[43]

To sum up, Article 37(b) CRC relating to conditions of detention requires that the child detainee must be treated in accordance with the needs and rights of persons of his/her age, must be separated from adults unless this is contrary to the child's best interests, must be kept together with his/her family if the family is detained and must be allowed to communicate with relatives if the child is separated or unaccompanied.

7.2.3 Procedural protection

Article 37(d) establishes the right of the child who is detained to prompt access to legal and other appropriate assistance and the right to challenge the legality of the detention and to a prompt decision on any such action. The right to mount a legal challenge of detention is also established under Article 9(4) ICCPR[44] and Article 5(4) ECHR[45] and both the Human Rights Committee and the ECtHR have developed a sophisticated jurisprudence on safeguards relating to judicial review of detention. These include the requirement that the review be: clearly prescribed by law, by an independent and impartial judicial body, of sufficient scope and possessed of sufficient powers to be effective, consistent with standards of due process and prompt.[46] These requirements also follow from Article 37(d) CRC. However, what is unique about Article 37(d) is the explicit reference to the right to legal and other appropriate assistance. While the ECtHR has found that access to legal advice may, depending on the facts of the case, be necessary in order that the detention meet the requirement of legality,[47] Article 37(d) establishes that access to legal and other appropriate assistance is a requirement in each case. In the context of unaccompanied minors, the Committee RC has interpreted the reference to legal *and* other

43 Committee RC, General Comment No. 6, *supra* n. 21, p.19.

44 'Anyone who is deprived of liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.'

45 'Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.'

46 For a general discussion of the case-law of the ECtHR and Human Rights Committee establishing these requirements, see International Commission of Jurists Practitioners' Guide No. 6, *Migration and International Human Rights Law* (2011), Chapter 4, Migrants in Detention, Section IV, Procedural Protection.

47 For example, ECtHR, *Öcalan v Turkey*, Appl. No. 46221/99, Judgment (GC) of 12 May 2005, para. 70.

appropriate assistance in Article 37(d) as mandating the assignment of a legal representative as well as a guardian or adviser tasked with ensuring the child's best interests.[48]

Finally, one omission from Article 37(d) should be noted. Whereas Article 9 ICCPR and Article 5(2) ECHR provide that anyone who is arrested must be informed promptly of the reasons for the arrest, Article 37 is silent on the issue. However, such an obligation is implicit in the right to challenge the legality of the detention in Article 37(d) and in Article 12(1) CRC, a general principle of the Convention which provides that the child has the right to express views freely in all matters affecting the child. Notably, the right of the child to express views presupposes that the child has access to information about his/her situation. Interestingly, the ECtHR has held that the right to be informed must not only be in a language that the person understands – an explicit requirement of Article 5(2) ECHR – but must also be in a form that takes account of his/her level of education.[49] Implicitly, this establishes a requirement that information be provided to detained minors in an age-appropriate manner.

In brief, in addition to the usual procedural guarantees to which a detained person is entitled under general human rights law, detained children are entitled to legal assistance and the assistance of a guardian or adviser. Furthermore, the child detainee must be informed of the reasons for his/her detention in a manner appropriate to his/her age.

7.3 PHASE ONE CEAS: COMPLIANCE WITH THE RIGHT OF THE CHILD TO LIBERTY

Just two of the phase one CEAS instruments contain provisions relating to detention: the RCD and the APD. While both directives were subject to a Commission impact evaluation, only the provisions of the RCD relating to detention were reported on;[50] unhelpfully, the provisions of the APD relating to detention did not feature in the evaluation of that directive.[51]

48 Committee RC, General Comment No. 6, *supra* n. 21, para. 36.

49 ECtHR, *Nasrulloyev v Russia*, Appl. No. 656/06, Judgment of 11 October 2007, para. 77. Strangely, in *Rahimi v Greece*, while the Court reprimanded the Greek authorities for providing written information in Arabic to a 15 year old Afghan unaccompanied minor who spoke only Farsi, the Court omitted to address the fact that the boy was illiterate and consequently would not have understood the written information even if it were in Farsi. Appl. No. 8687/08, Judgment of 5 April 2011, see paras. 8 and 120.

50 Commission evaluation of the RCD, *supra* n. 1.

51 'Report from the Commission to the European Parliament and the Council on the Application of Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, COM (2010) 465 final'. Hereinafter, 'Commission evaluation of the APD'.

7.3.1 Permissible detention

In terms of when detention of asylum seekers is permissible, Article 7 of the RCD (Residence and freedom of movement) provides in paragraph 3 that, '[w]hen it proves necessary, for example for legal reasons or reasons of public order, Member States may confine an applicant to a particular place in accordance with their national law.' Although the title of the article and the wording of paragraph 3 give the impression that (mere) restrictions on freedom of movement are envisaged, later provisions, which are dealt with below, relate more explicitly to detention. This suggests that Article 7 is actually an oblique reference to detention. Article 18 of the APD (Detention) provides in paragraph 1 that 'Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum'. *A contrario*, Article 18 implicitly establishes that detention is permissible if there is any other reason for it.

Neither directive contains a provision exempting minors or unaccompanied minors from detention, with the resulting inference that both minors and unaccompanied minors are fully susceptible to detention. This interpretation is reinforced by Article 35 of the APD which relates to border procedures. Article 35(3), which relates to a border-entry procedure which Member States may maintain on the basis of a stand-still clause, provides in sub-paragraph (f) for the right of an unaccompanied minor who is being dealt with in such a procedure to a representative. This provision implicitly establishes that unaccompanied minors are subject to such a procedure. At a minimum, border-entry procedures involve restrictions on freedom of movement. However, the case-law of the ECtHR indicates that the dividing line between restrictions on freedom of movement and detention is a question of fact, depending on such issues as the length of the deprivation of liberty and the conditions in which the person is confined.[52] In this regard, Article 35(4) envisages a time-limit of 4 weeks. Such a length clearly corresponds to detention.[53] The applicability of border-entry procedures to unaccompanied minors confirms that the latter are indeed susceptible to detention.

Are these provisions compatible with the requirements of Article 37(b) CRC? Recall that Article 37(b) encompasses a requirement of lawfulness and non-arbitrariness.

On the requirement of lawfulness, it is doubtful that the provisions of Article 7(3) of the RCD or Article 18(1) of the APD, taken alone or together, meet the requirement of lawfulness. Article 7(3) of the RCD which permits detention if it 'proves necessary […] for legal reasons or reasons of public order' is

52 ECtHR, *Abdolkhani and Karimnia v Turkey*, Appl. No. 30471/08, Judgment of 22 September 2009.

53 In the *Saadi* case, it was not disputed that the applicant, who had been held in a closed 'reception centre' for 7 days to facilitate a fast-track asylum process, has been deprived of his liberty. ECtHR, *Saadi v UK*, Appl. No. 13229/03, Judgment (GC) of 29 January 2008.

entirely circular: detention is legal if there is a legal reason for it. It tells us nothing about the type of legal reasons or reasons of public order which might give rise to a need for detention in the asylum context. Moreover, the euphemistic clause permitting Member States to 'confine an applicant to a particular place' falls foul of the judgment of the ECtHR in *Abdolkhani and Karimnia v Turkey*.[54] As for Article 18(1) APD, which prohibits detention on the sole ground of being an asylum seeker, it can be observed that this article tacitly sanctions the detention of asylum seekers for any other immigration-related or, indeed, non-immigration-related reason. A typical example of an immigration-related reason for detention is: entering or attempting to enter the state irregularly or without the proper documentation. Therefore, the minimum standards established in the directives do not appear to conform to the requirement that the law on detention be 'accessible, precise and foreseeable'.

On the requirement of non-arbitrariness, the key issue is whether the provisions mandate an individualized assessment of the need for detention. In this regard, it is interesting to note that, in its evaluation of the RCD, the Commission states that, '[g]iven that according to the Directive detention is an exception to the general rule of free movement, which might be used only when 'it proves necessary', automatic detention without any evaluation of the situation of the person in question is contrary to the Directive'.[55] It is submitted that this is a rather reaching interpretation by the Commission of the wording of Article 7(3) RCD since it is open to Member States to define the legal reasons or reasons of public order for detention at a broad level of generality. Unsurprisingly, the Commission evaluation reports that:

> Detention is foreseen by all Member States on numerous grounds (from exceptional circumstances – Germany –to the general practice of detention of all asylum seekers illegally entering the Member State except for those with special needs – Malta). Similarly, the length of detention varies from 7 days (PT) to 12 months (MT, HU) or even an undefined period (UK, FI).[56]

As for the APD, the Art 18(1) prohibition of detention on the sole ground of being an applicant for asylum does not infer an individualized assessment since detention could conceivably apply, for example, to all asylum applicants who enter or attempt to enter the state irregularly or without the proper documentation, as indicated above.

Finally, neither Article 7(3) RCD nor Article 18(1) APD states that detention of minors is a measure of last resort and for the shortest appropriate period of time. However, in its evaluation of the RCD, the Commission seems to

54 ECtHR, *Abdolkhani and Karimnia v Turkey*, Appl. No. 30471/08, Judgment of 22 September 2009.

55 Commission evaluation of the RCD, *supra* n. 1, § 3.4.1, p. 7.

56 *Ibid*.

consider that various *other* provisions of the directive establish this requirement, such as the best interests requirement, the classification of minors as vulnerable persons or the right of the unaccompanied minor to alternative care.[57] Again, however, it is submitted that it is expecting rather too much of Member States to join the dots in this way, in the absence of an explicit statement of the principle of last resort. In this regard, it comes as no surprise that the Commission found in its evaluation of the RCD that 'most of [the Member States] authorize the detention of minors and many of them even authorize the detention of unaccompanied minors.'[58]

In conclusion, the provisions of the RCD and APD relating to detention do not conform to standards established in Article 37(b) CRC regarding when the detention of minors is permissible.

7.3.2 Conditions of detention

The APD is silent on conditions of detention. However, Article 13(2) RCD is relevant to the issue of conditions of detention, providing:

> Member States shall make provision on material reception conditions to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence. Member States shall ensure that that standard of living is met in the specific situation of persons who have special needs [...] as well as in relation to the situation of persons who are in detention.

Futhermore, Article 14 RCD, which relates to modalities for material reception conditions (i.e. accommodation and associated rights), contains a number of potentially useful provisions. Paragraph 2 provides that where applicants are provided with housing in kind, they must be assured protection of their family life and the possibility of communicating with relatives, legal advisers, representatives of UNHCR and recognized NGOs. Paragraph 2 further establishes that 'Member States shall pay particular attention to the prevention of assault within the premises and accommodation centres […]'. Paragraph 3 provides that 'Member States shall ensure, if appropriate, that minor children of applicants or applicants who are minors are lodged with their parents or with the adult family member responsible for them whether by law or custom.' However, Member States are permitted to derogate from their obligations under Article 14. Thus Article 14(8) establishes that Member States 'may exceptionally set modalities for material reception conditions different from those provided for in this article, for a reasonable period which shall be as

57 *Ibid*, § 3.5.2, p. 10.
58 *Ibid*, § 3.5.2, p. 9.

short as possible, when [...] the asylum seeker is in detention or confined to border posts. These different conditions shall cover in any case basic needs.'

Are these provisions consistent with Article 37(c) CRC, which mandates that 1) detained minors be treated in a manner that takes account of the needs (and implicitly) rights of persons of their age; 2) that they be separated from adults unless contrary to their best interests; 3) that accompanied children should not be separated from their parents while in detention; and 4) that unaccompanied children should have contact with their relatives?

The absence of any specific guarantees relating to the detention of minors, coupled with the express permission to derogate from the obligation to prevent assault and from such rights as family unity and the right to communicate with relatives etc., strongly indicates that the requirements of Article 37(c) are not met. In this context, the broad *proviso* in Article 13(2) of the RCD – that Member States must ensure that the minimum standard of living established in the directive is met in detention – is of limited benefit, since it relates only to health and subsistence and fails to encompass the myriad other rights of the child that are implicated by detention, such as the right to education or the right of the child to protection from all forms of ill-treatment or violence. In any event, the minimum standard of living alluded to in Article 13(2) falls well short of the minimum standard of living to which the child is entitled – regardless of whether he is at liberty or in detention: as outlined in Chapter 6, Article 27 CRC entitles the child to a standard of living adequate for his/her *physical, mental, spiritual, moral and social development*.

In this regard, it is hardly surprising that 'serious problems' were reported by the Commission in its evaluation of the RCD in terms of the applicability of the directive in all premises hosting asylum seekers. It found that as many as seven Member States (UK, BE, IT, NL, PL, LU, CY) do not apply the directive in detention centres, while other Member States (e.g. AT) do not apply it in transit zones. Since, as the Commission noted, the level of reception conditions in detention inevitably drops, 'it is hard to imagine how the special needs of vulnerable persons (especially minors) might be met' in detention.[59] More specifically, the Commission found that, '[c]ontrary to the provisions of the Directive, many Member States deny detained minors access to education or make it impossible or very limited in practice (AT, BE, FI, FR, HU, IT, PL,SK, SI, UK, NL). Only in a few Member States is this right recognized or special classes organized in detention centres (LV, CZ, LT, SE).'[60]

In sum, therefore, the few provisions of the RCD that relate to conditions of detention do not conform to the requirements of Article 37(c) CRC.

59 Commission evaluation of the RCD, *supra* n. 1, § 3.5.2, p. 9.
60 *Ibid*, § 3.4.4, p. 8.

7.3.3 Procedural protection

Article 7(3) of the RCD which tacitly sanctions detention contains no provision for procedural protection. However, Article 21 on appeals is of utmost relevance in this regard, providing:

> 1. Member States shall ensure that […] decisions taken under Article 7 which individually affect asylum seekers may be the subject of an appeal within the procedures laid down in the national law. At least in the last instance the possibility of an appeal or review before a judicial body shall be granted.
> 2. Procedures for access to legal assistance in such cases shall be laid down in national law.

Paragraph 1 establishes that detention decisions must be amenable to some sort of appeal but does not establish any requirements regarding the appeal body (except at last instance), the scope of the appeal, due process guarantees or time-frame. While paragraph 2 appears to mandate the provision of some sort of legal assistance to detainees, this is tempered by the fact that restrictions may be placed on access to places of detention by legal representatives. Thus, as previously noted, the right in Article 14(2) of applicants who are provided with housing in kind to communicate with legal advisers and the obligation in Article 14(7) to grant legal advisors access to accommodation centres and housing facilities can be derogated from under Article 14(8) when the asylum seeker is in detention or confined to border posts.

As for the APD, Article 18(2) provides that '[w]here an applicant for asylum is held in detention, Member States shall ensure that there is a possibility of speedy judicial review.' Thus the appeal body (a court) and time-frame (speedy) are specified. However, no standards are established regarding the scope of the judicial review or due process guarantees. Although Article 18 is silent on the right to legal assistance for the purpose of challenging the legality of detention, other articles of the directive may be of relevance. Notably, Article 10(1) establishes a right to information, to the services of an interpreter and to communicate with UNHCR, while Articles 15 and 16 establish a right to legal assistance and representation. Moreover, Article 16(2) guarantees that 'the legal adviser or other counsellor who assists or represents an applicant for asylum has access to closed areas, such as detention facilities and transit zones, for the purpose of consulting the applicant.' However, when interpreted in their context, these rights appear to be guaranteed only with respect to the asylum application.

It can be observed that the inter-play of the provisions of the RCD and the APD on detention leads to rather a bizarre outcome. Under the RCD, a detainee has some sort of right to legal assistance in order to challenge the detention but no guarantee that the legal adviser will be granted access to the place of detention, while under the APD, the legal adviser must be granted access to the place of detention but the detainee has no express right to legal assistance

for the purposes of challenging the detention. This inconsistency does not sit well with the right of the child under Article 37(d) to legal assistance. Moreover, while both directives provide for the appointment of a representative to the unaccompanied minor, neither directive has anything to say about the role of the representative when the unaccompanied minor is in detention.[61]

Therefore, it can be concluded that both directives only partially conform to the requirements of Article 37(d) CRC. Regrettably, the issue of procedural protection while in detention is not addressed in the Commission's evaluation of either directive.

7.4 Phase Two CEAS: prospects for enhanced compliance

The proposed recast RCD contains four entirely new and detailed articles relation to the detention of applicants for international protection, covering grounds of detention (Article 8), guarantees for detained persons (Article 9), conditions of detention (Article 10) and detention of vulnerable persons and persons with special needs (Article 11). These provisions are cross-referenced in the proposed recast APD[62] and are either substantially mirrored or cross-referenced in the proposed recast DR which provides for the first time for the detention of applicants who are subject to a Dublin transfer and who are considered to be at risk of absconding.[63] Consequently, the analysis below is of the provisions of the proposed recast RCD.

7.4.1 Permissible detention

Article 8 of the proposed recast RCD is undoubtedly a vast improvement on the existing directive. Article 8 provides that detention of applicants for international protection must be provided for by law and outlines four exhaustive grounds on which such detention may be permitted under national law.[64]

61 Article 19(1) RCD and Article 17(1) APD. Article 19(1) RCD is silent on the role of the representative but Article 17(1) APD provides that the role of the representative is to 'represent and/or assist the unaccompanied minor with respect to the examination of the application' which suggests that the representative has no role regarding the detention of the minor.

62 Article 26.

63 Article 27.

64 The grounds in Article 8 are: '(a) in order to determine or verify [the applicant's] identity or nationality; (b) in order to determine, within the context of a preliminary interview, the elements on which the application for international protection is based which could not be obtained in the absence of detention; (c) in the context of a procedure to decide on the right to enter the territory; (d) when protection of national security or public order so requires.' According to the Commission, these grounds are based on the Recommendation of the Committee of Ministers of the Council of Europe, 'On Measures of Detention of

It states that detention must only be resorted to when it proves necessary on an individual basis and if alternatives to detention – which must be laid down in national law – cannot be applied. Article 9 establishes that detention must be for as short a period as possible. Article 11(2) states *inter alia*:

> Minors shall not be detained unless it is established in an individual case that it is in the minor's best interests, as prescribed in Article 23(2).
> Detention of minors shall be a measure of last resort, after having established that other less coercive alternative measures cannot be applied effectively. It shall be for as short a period as possible and all efforts shall be made to release the detained minors and place them in accommodation suitable for minors.
> Detention of unaccompanied minors shall be resorted to only in particularly exceptional cases.

While the provision in Article 11(2) relating to the detention of unaccompanied minors is something of a retrograde step from the equivalent provision in the 2008 proposed recast (which exempted unaccompanied minors from detention altogether), nevertheless, it is submitted that Articles 8, 9 and 11 of the 2011 proposed recast are broadly consistent with Article 37(b) CRC.

7.4.2 Conditions of detention

Article 10 of the proposed recast RCD lays down minimum standards relating to conditions of detention. It establishes in paragraph 1 that applicants for international protection can only be detained in specialized detention facilities, as opposed to prison. However, this is subject to a derogation in paragraph 6(a) where accommodation in specialized detention facilities is temporarily not available. In such circumstances, detention in prison accommodation is permitted provided that applicants are accommodated separately from prisoners. An exemption is made from this derogation for unaccompanied, though not accompanied, minors. The failure to exempt minors in general from the derogation must be regarded as falling foul of the injunction in Article 37(c) CRC to treat the minor detainee in a manner that takes account of his/her age. It is highly questionable whether administrative detention in a *prison* is appropriate for anyone under the age of 18.

As regards the rights of the minor detainee, including the right not to be discriminated against in the enjoyment of his/her rights viz. a viz. non-detained children, there is no express statement of equality of treatment or full applicability of the rights established in the directive generally to situations

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Asylum Seekers' and on UNHCR's 1999 Guidelines. See, Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers, Explanatory Memorandum, COM (2008) 815 final, p. 6.

of detention. However, Article 11(2) does introduce an obligation that detained minors be given possibility to engage in leisure activities, including play and recreational activities appropriate to their age. This provision, which reflects Article 31 CRC, is an important innovation in the proposed recast.[65] Unfortunately, however, it is subject to derogation in Article 11(5) 'in duly justified cases and for a reasonable period which shall be as short as possible' when the applicant is detained at a border post or in a transit zone for purposes other than an accelerated or admissibility procedure. Surprisingly, in view of the finding in the Commission evaluation of the RCD that 'many Member States deny detained minors access to education or make it impossible or very limited in practice',[66] no mention is made of the right to education. It is submitted that the partial nature of the commitment to child rights while in detention signals a deviancy from the requirements of Article 37(c).

As for the right of detained children to be separated from adults unless contrary to their best interests and to be kept together with their parents unless contrary to their best interests, Article 11(2) provides that '[w]here unaccompanied minors are detained, Member States shall ensure that they are accommodated separately from adults', while Article 11(3) establishes that detained families must be accommodated separately in conditions guaranteeing them adequate privacy. However, the latter provision is subject to the derogation provision in Article 11(5), previously outlined. In the light of the judgment of the ECtHR in *Popov v France*, it seems highly likely that any derogation from the right to family life while in detention would fall foul of Article 8 ECHR.[67] In this regard, the proposed recast RCD has already been overtaken by developments in human rights law. Furthermore, neither Article 11(2) nor Article 11(3) mentions the best interests of the child.

Finally, Article 10(3) and (4) provide that UNHCR, legal advisors and family members have the right to communicate with and be granted access to detained applicants. This is consistent with the right in Article 37(c) CRC to maintain contact with family members and others.

Overall, the proposed recast RCD contains some improvements in the conditions of detention of minors but these are piece-meal and often subject to derogation and consequently do not reflect the requirements of Article 37(c) CRC.

65 Article 31 CRC provides in paragraph 1: 'States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and in the arts.'

66 Commission evaluation of the RCD, *supra* n. 1, § 3.4.4, p. 8.

67 ECtHR, *Popov v France*, Appl. No. 39472/07 and 39474/07, Judgment of 19 January 2012.

7.4.3 Procedural protection

It will be recalled that pursuant to Article 37(d) CRC minors have right to legal and other appropriate assistance in challenging their detention, while the jurisprudence of the ECtHR establishes a requirement that information relating to the detention and how to challenge it should be in a format appropriate to the particular detainee.

Article 9(5) of the proposed recast RCD provides that '[i]n cases of an appeal or review of the detention order, Member States shall ensure that asylum seekers have access to free legal assistance and representation, where they cannot afford the costs involved and in so far as it is necessary to ensure their effective access to justice.' Although the final clause suggests a limitation of the right, it is submitted that since access to legal assistance and representation is a *sine qua non* for the effective access of a minor to justice, this provision meets the requirements of Article 37(d).

On the issue of a representative for the unaccompanied minor in detention, although the provisions on detention in the proposed recast RCD are silent on the role of the representative in the detention context, the revised definition of the representative in Article 2(j) states that the role of the representative is 'to assist and represent an unaccompanied minor in procedures provided for in this Directive with a view to ensuring the child's best interests'. Since Article 11(2) establishes that minors can only be detained if it is in their best interests, it follows that the representative has an important role to play in any decision to detain.

Finally, as regards the requirement of age-appropriate information, Article 9(3) provides that '[d]etention shall be ordered in writing. The detention order shall state the reasons in fact and in law on which it is based and the procedures laid down in national law for challenging it, in a language the asylum seeker understands or is reasonably supposed to understand. It shall immediately be provided to the detained asylum seeker.' This provision can be criticized for failing to establish that the information should be clear, in a language that the asylum seeker actually does understand and, preferably, in an age-appropriate form.

In sum, the proposed recast RCD better secures the right of the detained child to procedural protection than the existing directive, although access to information is still problematic, a problem that is likely to be compounded in the case of a child.

7.5 Synthesis of findings

This chapter explored whether the relevant CEAS instruments comply with the right of the child to liberty. The right was delineated along three main lines, all suggested by the wording of Article 37(b)-(d) CRC: permissible de-

tention, conditions of detention and procedural protection. It was found that the relevant Phase One CEAS instruments do not fully comply with *any* of the elements of the right of the child to liberty. Thus, the directives fail to establish any general, much less age-specific, criteria relating to lawfulness or non-arbitrariness. They contain weak provisions relating to the conditions of detention, which fail to acknowledge that where children are detained they must be detained in conditions appropriate to their age and, indeed, rights. The directives also contain weak procedural guarantees for challenging the legality of detention which do not appear to conform with the right of the detained child to legal assistance. Phase Two is a vast improvement on Phase One in one area: establishing that the detention of minors is only permitted in exceptional circumstances, subject to the principle of last resort and the best interests of the child. In the area of conditions of detention, some improvements can be noted, but these are neither systematic nor absolute. The same can be said of procedural protection. Consequently, some important improvements are contained in the proposed Phase Two recasts but these stop short of securing full compliance with the right of the child to liberty.

8 Conclusion

> Even something as apparently solid as the United Nations Convention cannot but raise further issues, about how far such rights are legitimately circumscribed by adult interpretation, the availability of accessibility of social and economic resources, and the ways in which childhood is understood and socially constructed.[1]

This study has attempted to identify the rights of the child in the CRC that are most relevant to the asylum context, to ascribe meaning to those rights in the asylum context and to systematically examine whether the provisions of the CEAS instruments (Phase One and Two) comply with those rights. In so doing, this study has been forced to confront the complex issues referred to above. This final chapter brings the findings of the study together and offers some reflections on meaning and compliance. Section 8.1 discusses the meaning of the rights of the child explored in this thesis. Section 8.2 provides an answer to the question of whether Phase One CEAS is compliant with the rights of the child. Section 8.3 assesses the prospects for enhanced compliance in Phase Two CEAS. Finally, section 8.4 attempts to draw from the findings of the study some conclusions on possible factors which inhibit full compliance with the rights of the child in the CEAS and on how these might be overcome.

8.1 The meaning of the rights of the child

This study identified six key rights areas, each consisting of a right or group of related rights, which are particularly relevant to the situation of asylum-seeking and refugee children in the EU. It then identified the major attributes of each right in the asylum context. What has been implicit in the findings and that is worth making explicit now is the *lex specialis* nature of the rights of the child examined. More than half of the rights that were examined are rights that are also found in general (i.e. non child-specific) human rights law: the right to seek asylum, the right to be heard, the cluster of rights relating to family unity, the socio-economic rights and the right to liberty. However, what this study has shown is that the normative content of the child-specific version of these rights is qualitatively different from that in general human

1 Carole Smith, 'Children's Rights: Judicial Ambivalence and Social Resistance', *International Journal of Law, Policy and the Family* 11 (1997): 105.

rights law. The remaining rights that were examined in this study are exclusive to children. These are: the principle of the best interests of the child, the right of the child to have his/her rights as a child recognised as refugee-relevant and the right of the child without family to special protection and assistance. All of the above rights will be briefly re-visited in order to draw out their specificity and uniqueness.

As regards the right of the child to seek asylum, the issue is not so much that children are entitled to a qualitatively different version of this right but, rather, that children are *equally* entitled to this right. The fact that Article 22 CRC establishes the right of the child to appropriate protection and humanitarian assistance in the enjoyment of applicable rights in other international human rights and humanitarian instruments challenges the legality of denying the child the possibility of making an asylum application.

As regards the child to be heard, it was found that this right was initially conceived as an alternative to the (adult) right to a fair hearing. However, as the resistance to the idea of procedural rights for children has diminished, the right of the child to be heard may be regarded as establishing an additional rather than an alternative set of guarantees for children. Thus, the child, like the adult, has a right to be heard. In facilitating the exercise by the child of this right, he/she has the right to a representative, the right to have any hearing adapted so that it is fit for purpose and the right to have his/her views given due weight in accordance with age and maturity. Each of these requirements has significant implications in the asylum context. For example, such staple features of the asylum procedure as negative credibility inferences are likely to be inconsistent with the 'due weight' requirement.

As for the right to family unity, it was observed that the source of this right in general human rights law is the right to private and family life. By contrast, there are multiple sources of the right to family unity in child-rights law, such as the right of the child not to be separated from his/her parents against their will. The near-absolute nature of some of the 'source' rights combined with their cumulative effect strengthens the imperative to keep the family together and to reunite the family that has become separated.

As regards the socio-economic rights, while everyone is entitled to such rights, the socio-economic rights of the child in the CRC are pitched at a higher level than in general human rights law owing to the special developmental needs of the child and his/her vulnerability. Thus, the right of the child to health is centred around the concept of primary health care and consequently cannot be reduced, as in the case of adults, to access to emergency or curative health care. Furthermore, the child has an associated right that finds no equivalent in general human rights law, namely, the right of the child victim of various types of ill-treatment to rehabilitation and recovery. Similarly, the right of the child to an adequate standard of living is qualitatively different from its 'adult' counterpart. Without being too reductionist, the latter is aimed at ensuring that everyone lives above the subsistence level whereas the former

aims at ensuring the child's physical, mental, spiritual, moral and social development. Admittedly, this right falls principally to the parents to fulfil (another example of the importance of family unity to the child), but the state's supporting role is still arguably greater than in the case of adults. As for the right to education, this right pertains mainly to children in general human rights law as it is largely taken up with the right to primary and second level education. In this regard, much of the normative content of the (general) right to education is child-specific.

Everyone enjoys a right to liberty but the right of the child to liberty contains additional safeguards and guarantees to protect the child from being arbitrarily detained and to protect the child while in detention. This was seen clearly in the comparative analysis of Article 37(b)-(d) CRC and the right to liberty in general human rights law. Nonetheless, it was observed that even the general right to liberty is being increasingly interpreted by treaty monitoring bodies and courts in light of the requirements of the CRC when the litigant is a child.

Moving now to the rights of the child that are wholly unique to children, it seems hardly necessary to point out the *lex specialis* nature of these rights. However, what this study has shown is that, when applied to the asylum context, these rights have potentially transformative consequences. Thus, the right of the child to have his/her rights as a child recognised as potentially refugee-relevant has transformative consequences, not only for the meaning of key eligibility concepts in refugee law but also for the number of child asylum seekers that are likely to be recognised.

Likewise, the right of the child without family to special protection and assistance has a clear application to unaccompanied and separated children who seek asylum. It has transformative consequences for the system of reception of asylum seekers and refugees: special measures must be taken to identify such children, to appoint a guardian or representative to oversee their protection and care and to provide for them a suitable care placement.

However, the right with arguably the greatest transformative potential is the principle of the best interests of the child. It was found that the principle has two dimensions: an individual dimension and a collective dimension. As regard the former, decisions taken about the individual child in the asylum context must be informed by the best interests concept. When it is considered that the principle is a short-hand way of talking about the rights of the child and that the principle carries significant weight, it follows that the principle has the potential to 'level up' actions that are governed by sub-optimal (in human rights terms) legislative standards. As regards the collective dimension of the principle, this requires the legislator to child-rights proof policy options to ensure that legislation is in the best interest of children. There is no comparable explicit duty in general human rights law.

In sum, this study has found that the differences between child-rights law and general human rights law, at least in so far as the rights in this study and

their attributes in the specific asylum context are concerned, are not small differences of nuance or gradation but rather radical differences of content, scope and import. It follows that if the CEAS is to be in compliance with the rights of the child, the way it deals with children must also be radically different from how it deals with adults.

8.2 Phase One CEAS: compliance with the rights of the child

If a simple answer is required to the question of whether the CEAS complies with the rights of the child, then the answer is 'no'. However, this study reveals some interesting findings that are lost in that bivalent answer, namely, that the CEAS reflects some rights of the child but not others and of those it reflects, the level of protection it affords is not necessarily commensurate with standard established in international child-rights law. Put differently, the EU legislator has selected among the rights of the child that are relevant to the asylum context, legislating for some but not others, and of the chosen rights, has selected among the attributes of the right, legislating for some attributes but not others.

The rights of the child that are reflected *in some way* in the relevant CEAS instruments are:

- The principle of the best interests of the child
- The right of the child to have his/her rights recognised as refugee-relevant
- The right of the child to family unity
- The right of the child without family to special protection and assistance
- The socio-economic rights of the child

The rights of the child that are not reflected in the relevant CEAS instruments are:

- The right of the child to seek international protection
- The right of the child to be heard
- The right of the child to liberty

It is hard to draw any definitive conclusions about why some rights of the child are reflected in the CEAS instruments and others are not. However, section 8.4 makes some general observations that may shed some light on the issue.

As to the level of protection afforded to the rights of the child that *are* reflected in the CEAS instruments, it can be observed that there is not a single instance of complete compliance whereby all the attributes of a given right that are relevant to the asylum context are properly reflected in the legislation. Thus, while the principle of the best interests of the child features in all the CEAS instruments, the scope of the principle is explicitly restricted to the provisions of the instruments that involve minors and the weight of the principle is implicitly restricted by the many provisions of the instruments that

run contrary to the rights of the child. Of greater import, the CEAS as a whole cannot be said to be in the best interests of the child because this would mean that the instruments are broadly compliant with the rights of the child, which this study has shown not to be the case. Similarly, the right of the child to have his/her rights recognised as refugee-relevant is reflected to a limited extent in the relevant instrument. However, the underlying rationale for mandating the recognition of, for example, child-specific forms of persecution, is not carried through to its logical conclusion, which is that all eligibility concepts must be scrutinized for their sensitivity to child rights. The right of the child to family unity is mentioned in the relevant instruments, but the right is undermined by restrictive constructions of the child and the family, by weak statements of commitment to the concept of family unity which are further compromised by derogation provisions and by a failure to legislate for a right to family reunification of the child beneficiary of subsidiary protection. Likewise, the right of the child without family to special protection and assistance is established in the relevant CEAS instruments, but the key obligation to identify unaccompanied and separated children is missing, making the right devoid of application in some cases at least. Furthermore, the provisions relating to the appointment of a guardian or adviser are vague and the care placement for unaccompanied minors lacks a protective dimension. The socio-economic rights of the child – to health, standard of living and education – are reflected in the relevant CEAS instruments but the distinct normative requirements of the child version of the rights are patently missing. Therefore, in sum, where the CEAS instruments do reflect a certain degree of child-rights awareness, they nevertheless fail to establish standards that are commensurate with the requirements of child-rights law.

8.3 Phase Two CEAS: prospects for enhanced compliance

The prospects for enhanced compliance with the rights of the child in Phase Two CEAS are good. Notable improvements are made to the provisions of the proposed recasts that impact, directly or indirectly, on all the rights of the child under scrutiny.

Thus, as regards the principle of the best interests of the child in the CEAS instruments, improvements are made to the stated scope of the principle in all the proposed and actual recasts and much-needed direction is provided on the factors to be taken into consideration in assessing best interests in individual cases in most recasts. Although the right of the child to seek international protection is not categorically established in the proposed recast APD, if the child does manage to make an asylum application, his/her right to have his/her rights as a child recognised as refugee-relevant is broadly, subject to a few exceptions, met in the recast QD. As regards the right of the child to be heard, some improvements are made with regard to the adaptation of the

hearing for all minors. As for the right of the child to family unity, there are some modest changes to the definition of the child and the family in recast QD and proposed recast RCD and the family unity provisions of the latter are drafted more robustly and are less susceptible to derogation than currently. Various changes are made to the provisions that relate to protection and care of unaccompanied minors. Most notably, the provisions of the instruments that relate to the role and qualities of the guardian are enhanced. As regards the socio-economic rights, the health care provisions of the proposed recast RCD can now be regarded as being in compliance with the right of the child to health, the right of the child to an adequate standard of living in that instrument is unambiguously pegged at the level in the CRC and some of the more objectionable existing provisions from the point of view of the right to education are removed. Some of the attributes of the right of the child to liberty find expression, for the first time, in Phase Two CEAS. Of particular note, mandatory detention of asylum seeking children is no longer tacitly permitted under the proposed recast RCD and the principle of last resort and of the best interests of the child are explicitly stated. In sum, if the Commission proposals are not significantly revised downwards during negotiations, then Phase Two CEAS will be a marked improvement on Phase One from the point of view of the rights of the child.

However, there is a difference between *enhanced* compliance, which is a relative question, and *full* compliance, which is an absolute question. Despite all the changes, some of which are quite far-reaching, there is still not a single right of the child that is fully and accurately reflected in every instrument in which it arises.

Thus, as regards the principle of the best interests of the child, the proposed recast APD, unlike the other proposed and actual recasts, provides no direction on the factors to be taken into consideration in assessing the best interests of the child. Furthermore, some of its provisions are still blatantly contrary to the best interests of the child, such as the provisions which retain or introduce extraordinary procedures. While unaccompanied minors are exempted from some of these procedures, they are not exempted from all of them and accompanied minors are exempted from none. As has already been pointed out above, the right of the child to seek international protection is not clearly established in the proposed recast APD. While the recast QD amends many of the provisions that were objectionable for being insensitive to the rights of the child, a small number still remain, such as the double-test for 'membership of a particular social group'. As regards the right of the child to be heard, one could quite easily read the proposed recast APD without ever realizing that the child has such a right, notwithstanding some incidental improvements to provisions of the proposed recast that impact on the right of the child to be heard. As for the right of the child to family unity, the changes to the definition of the child and the family arguably just tinker around the edges of what, from a child-rights perspective, are objectionable constructs. As

regards the right of the child without family to protection and care, the various positive changes that are made are undermined by the continued failure to establish a mechanism for the identification of the unaccompanied or separated child. As for the socio-economic rights of the child, the right of the child to health is still unmet in the recast QD because that directive lacks any provision on the right of the child victims of various forms of ill-treatment to recovery and reintegration. The right of the child to an adequate standard of living seems at first to be met in both relevant recasts, but on closer scrutiny, an adequate standard of living for asylum seekers on financial allowances is not secured in the proposed recast RCD and the recast QD permits Member States to limit the social welfare entitlements of beneficiaries of subsidiary protection to a level arguably incompatible with the right of the child to an adequate standard of living. The educational entitlements in the recast QD are more or less consistent with the right of the child to education but those in the proposed recast RCD are still arguably discriminatory. Although the new provisions of the proposed recast RCD on liberty are a vast improvement on the impoverished provisions of the existing directive, some attributes of the right of the child to liberty, namely, those relating to conditions of detention and specific procedural guarantees are not completely reflected in the proposed recast. In sum, therefore, while proposed Phase Two CEAS better complies with the rights of the child than Phase One, there is still little evidence of any attempt to systematically and thoroughly integrate the rights of the child into relevant provisions of the instruments. Consequently, it cannot be said that the proposed and actual recasts are in the best interests of children.

8.4 Factors inhibiting compliance

This section attempts to draw from the findings of the study some conclusions on possible factors which inhibit full compliance with the rights of the child. Three possible causes are addressed: the fact that the child-rights agenda is overwhelmed by the larger migration-control agenda which drives the CEAS; the fact that the EU legislator may lack the child-rights capacity necessary to effectively integrate a child-rights perspective into the CEAS; and the possibility that the failure of the CEAS to fully comply with the rights of the child is symptomatic of a larger unresolved question, namely, the precise relationship between EU law and fundamental rights. These possible causes are also avenues for future research.

The policy decision by the EU legislator to integrate the rights of the child into the CEAS has not occurred in a vacuum. Rather, it is a sub-policy within the broader policy agenda that has driven the creation and development of the CEAS. That broader policy agenda is complex and justice cannot be done here to its many facets. But it is well established that the broader policy agenda has a significant deterrent component, whereby the aim is to harmonise policy

to a standard that is just high enough to comply with the requirements of general human rights law but still low enough to make the asylum process unpleasant and unfruitful, to encourage asylum seekers to seek protection in the region of origin, to discourage secondary movements of refugees from those regions and to detect and punish 'abuse' of the asylum system.[2] When the child-rights policy agenda is situated in this broader policy context, it is easy to see how the former becomes compromised. In this study, the compromise is seen in two key ways.

First, it is seen in the act of giving to the child asylum seeker/refugee with one hand and taking from asylum seekers/refugees generally with the other, such that the latter action cancels out the former. The proposed recast APD is probably the starkest illustration of this. On the one hand, the proposed recast reiterates the guarantee that the personal interview of the unaccompanied minor (where there is one) must be conducted by a person with the necessary knowledge of the special needs of minors and that the decision by the determining authority must be prepared by a similarly knowledgeable official and adds to these guarantees by establishing higher and in some cases child-specific standards in relation to staff competence and training, the examination of the applications and the personal interview. On the other hand, the proposed recast retains or introduces possibilities to derogate, directly or indirectly, from these standards in a host of circumstances. The derogations are sweeping – not directed at minors *per se*, but taking in minors nonetheless. The net result is that there is no necessary improvement to the situation of minors.

Second, the compromise is seen in an ambivalent attitude towards the child, whereby the legislation variously constructs an image of the child as needy and vulnerable and prioritises the child's status as a child over and above his/her migration status and an image of the child as being just an adult in miniature, possibly even an adult in fact and prioritizing the child's migration status over and above his/her status as a child. The first image is apparent in the many additional guarantees in the CEAS relating to the care of unaccompanied minors and the increasing tendency to designate minors as 'persons with special needs' alongside persons with a disability and persons who have been subjected to psychological, physical or sexual violence. It is apparent in the references to the 'special needs' of unaccompanied minors and in the

2 For a cross section of the considerable scholarly literature on this subject, see: Cathryn Costello, 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrance, Deflection and the Dismantling of International Protection?', European Journal of Migration and Law 7 (2005): 35-69; Catherine Teitgen-Colly, 'The European Union and Asylum: An Illusion of Protection' Common Market Law Review 34 (2006): 1303-1566; Helene Lambert, 'The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom and International Law', *International and Comparative Law Quarterly* 55 (2006): 161-192; and Jari Pirjola, 'European Asylum Policy – Inclusions and Exclusions Under the Surface of Universal Human Rights Language', *European Journal of Migration and Law* 11 (2009): 347-366.

assumption that accompanied minors lack the capacity to make an asylum application in their own right and that it is therefore justified to subsume their claims to protection into those of their parents.

The second image is apparent in the equivocation about the dividing line between childhood and adulthood. Thus, in the case of the accompanied child, the proposed recast RCD and the recast QD still impose various restrictions on the married child, the sub-text being that marriage makes a child an adult. In the case of the unaccompanied child, the lack of any mechanism in the directives for identifying such children reveals an assumption that such children will self-present, just like adults do. Moreover, the provisions in the proposed recast APD on age assessment, although an improvement on the current provisions, signal that there are real doubts about whether unaccompanied minors are actually minors at all. Even when age is not in dispute, certain provisions of the directives betray an assumption that older unaccompanied minors can legitimately be treated like adults. Thus the proposed recast APD retains the derogation from the obligation to appoint a representative where the unaccompanied minor is likely to 'age out' and the proposed recast RCD retains the derogation from the obligation to provide a special placement where the unaccompanied minor is over the age of 16, albeit subject to the best interests of the child. This tendency to blur the line between minority and adulthood has been noted in the literature as creating situations 'when a child is not a child'.[3]

This contradictory image of the child (needy and vulnerable versus able and knowing) may also reflect a less than full understanding of the tensions within child rights law. The CRC attempts to maintain a delicate balance between acknowledging and providing for the special developmental and protection needs of the child, on the one hand, and the fact that the child is a rights-bearer, a decision-maker, an agent, on the other. This so-called welfare-agency dichotomy is part and parcel of child-rights law and, moreover, is not simply a question of balancing competing rights, but also of balancing the dichotomy within rights, as the discussion on the best interests principle made clear. The challenge for any legislator is to maintain this balance, accommodating the child's agency *and* providing for the child's protection, without the child's agency being used as an excuse for diminished protection. As Bhabha vividly puts it, 'there is an acute tension between the infantilisation of autonomous youth making decisions in suboptimal situations and the dereliction of duty towards exceedingly vulnerable child populations liable to severe abuse'.[4] It is evident from this study that the EU legislator has struggled with this challenge, oscillating between paternalism and skepticism. This raises the

3 Heaven Crawley *When is a Child Not a Child? Asylum, Age Disputes and the Process of Age Assessment* (ILPA Research Report, 2007).

4 Jaqueline Bhabha, 'Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights?', *Human Rights Quarterly* 31 (2009): 439.

question of the capacity of the EU legislator in the complex area of child-rights law.

The previous section ended by noting that there is little evidence of any attempt to systematically and thoroughly integrate the rights of the child into relevant provisions of the CEAS instruments. Most provisions are of the instruments 'age-neutral', but only in the sense that they do not mention age. Many of them have a disproportionate negative impact on children precisely because they do not mention age, the provisions of the proposed recast RCD on conditions of detention being a case in point. Some provisions of the instruments are 'age-specific', being geared explicitly to children. But often they are geared, not to all children, but only to a particular sub-set of children, namely, unaccompanied minors. Of course, the situation of unaccompanied minors is particularly perilous and demands special safeguards and guarantees. But the distinct impression created in both Phase One and proposed Phase Two CEAS is that the EU legislator has fastened onto the theme of unaccompanied minors to the detriment of accompanied minors. Thus, accompanied minors do not always fall within the personal scope of the best interests principle, are not necessarily entitled to lodge an asylum application on their own behalf, are not entitled to a representative, are more susceptible to detention, are more likely to be detained under conditions contrary to the needs/rights of a child and are not exempt from any of the extraordinary asylum procedures or the concepts that restrict inclusion.

Furthermore, the age-specific provisions of the directive are not necessarily guided by rights-based considerations. For example, the proposed recast APD exempts unaccompanied minors from the accelerated/manifestly unfounded procedure, from a finding of inadmissibility on the grounds of coming from a safe third country, from the application of the safe third country concept itself and from border procedures. No child-rights advocate would quibble with these exceptions *per se*. But what is the underlying principle? It cannot be the principle that exceptional procedures are not suitable for unaccompanied minors, since unaccompanied minors remain fully susceptible to the admissibility procedure on grounds other than safe third country, the procedure for subsequent applications and the re-introduced European safe third country procedure. Focusing just on the exemption from the safe third country concept, this cannot be based on a principled objection to applying safe-country concepts to unaccompanied minors, since they are still susceptible to the first country of asylum concept, the European safe third country concept and, indeed, the DR. Finally, the exemptions cannot be based on the principle that such procedures are in some way contrary to the rights of the child (which various chapters of this thesis have shown them to be) since only unaccompanied minors are exempted. One is forced to conclude that the exemptions are *ad hoc*, random, lacking in transcendent principle.

Two deductions can be made. The first is that the EU is not effectively 'mainstreaming' the rights of the child into relevant legislation, contrary to

stated policy.[5] It has not been the work of this study to probe the mechanisms by which the EU legislator attempts to integrate the rights of the child into EU legislation generally or the CEAS in particular. However, other commentators have pointed to the poverty of its mechanisms, noting that while the EU institutions regularly state their commitment to mainstreaming child rights, they have produced very little by way of a methodology for so doing.[6] Further research is needed into the issue of child-rights mainstreaming in the EU and the CEAS could be an interesting study in this regard. The second, more radical, deduction is that the problem lies with mainstreaming itself. Section 8.1 on the meaning of the rights of the child concluded that the rights of the child examined in this study are radically different from the rights in general (i.e. adult) human rights law and consequently that the way that the CEAS deals with children must be radically different from the way that it deals with adults. Mainstreaming is based on the premise that integration, as opposed to segregation, is the best way to ensure compliance with the target rights. However, it cannot be ruled out that a better way to ensure compliance with the rights of the child in the CEAS is to establish a parallel but separate regime for children, possibly in the form of a discrete directive. This idea, which is only beginning to be considered in the literature, may well be politically unfeasible but it is nonetheless worthy of further research in the context of the CEAS.[7]

The final question to be addressed is the possibility that the failure of the CEAS to fully comply with the rights of the child is symptomatic of a larger unresolved question, namely, the precise relationship between EU law and fundamental rights. The drafting and entry into force of the Charter of Fundamental Rights of the EU and the plans for accession by the EU to the ECHR have kept alive this debate. Without wishing at this stage to enter into the merits of the debate, it can be noted that a key unresolved question is whether, when the EU legislator exercises a Treaty competence, it is under an obligation to respect (i.e. not violate) fundamental rights or to actively promote (i.e. fulfil) fundamental rights. Traditionally the EU has adopted a negative, violations approach to the protection of fundamental rights, untroubled by the debate in international human rights law in the 1980s about the duty to respect,

5 The seminal Commission Communication, 'Towards an EU Strategy on the Rights of the Child', identifies a key objective as 'mainstreaming children's rights in EU actions'. COM (2006) 367 final. As follow-up to this outline strategy, the Commission published in early 2011 'An EU Agenda for the Rights of the Child', the purpose of which was 'to reaffirm the strong commitment of all EU institutions and of all Member States to promoting, protecting and fulfilling the rights of the child in all relevant EU policies and to turn it into concrete results.' COM (2011) 60 final, p.3.

6 Eleanor Drywood, '"Child-Proofing" EU Law and Policy: Interrogating the Law-Making Processes Behind European Asylum and Immigration Provision', *International Journal of Children's Rights* 19, (2011): 405-428.

7 *Ibid*.

protect and fulfil.[8] However, the Charter refers not only to a duty to respect rights but also to the duty to 'promote the application thereof', which suggests a more positive obligation.[9] Indeed some provisions of the Charter, not least Article 24 relating to the principle of the best interests of the child, appear to require positive action. Whether the Charter will serve as a line in the sand, marking the distinction between the traditional negative approach and a new positive approach to fundamental rights in EU law remains to be seen. However, recalling the typology of the rights of the child advanced in Chapter 3 (see Annex), it can be appreciated that only one third, roughly, of the rights of the child in the CRC correspond to civil and political rights – rights which are best protected by a negative approach. The other two-thirds of the rights in the CRC correspond to socio-economic rights and child-specific protection rights, both of which require active measures of promotion. Until the EU is fully committed to promoting as well as respecting fundamental rights, then regardless of policy commitments to the rights of the child or a professed allegiance to the best interests of the child, most of the rights of the child will be beyond the reach of the legislator.

8 The classification of the human rights legal obligation into duties to respect, protect and fulfill was first articulated by Asbjorn Eide, the UN Commission on Human Rights Special Rapporteur on Food in the 1980s. See 'Asbjorn Report on the Right to Adequate Food as a Human Right', UN Doc. E/CN.4/Sub.2/1987/23. This classification was taken up by the Committee on Economic, Social and Cultural Rights in several of its General Comments on specific ICESCR rights and later by the UN Committee on the Elimination of Discrimination against Women. For a contemporary discussion of the shift from a 'violations' approach to human rights to a more positive approach see Eva Brems, 'Human Rights: Minimum and Maximum Perspectives', *Human Rights Law Quarterly* 9, no. 3 (2009): 349-372.

9 Article 51 of the Charter of Fundamental Rights of the EU.

Samenvatting

Het Gemeenschappelijke Europese Asielsysteem en de rechten van het kind: een verkenning naar betekenis en naleving

Dit onderzoek gaat over de vraag of het Gemeenschappelijk Europees Asielsysteem (GEAS) in overeenstemming is met de rechten van het kind. Twee zaken worden tegenover elkaar gesteld: de internationaalrechtelijke normen van de rechten van het kind en de regels van het GEAS voor de bescherming van kinderen die asielzoeker of vluchteling zijn. Speciaal die aspecten van de rechten van het kind zijn eruit gelicht, die het meest van belang zijn in de context van asiel. Systematisch wordt onderzocht of en in hoeverre die aspecten terugkomen in het bestaande GEAS en de voorgestelde herziening ervan.

Inleiding

Hoofdstuk I is de inleiding tot de studie. Allereerst wordt de achtergrond van het onderzoek beschreven, te beginnen met de ontwikkeling van het GEAS en de belangrijkste instrumenten ervan. Die instrumenten zijn: de zogenoemde Dublin Verordening (DV), de Opvangrichtlijn (OR), de Procedurerichtlijn (PR), en de Kwalificatierichtlijn (KR). Op het moment van schrijven werd gewerkt aan de herziening van de eerste drie instrumenten en was de herziening van het vierde voltooid. Men kan derhalve spreken van een ontwikkeling naar een 'Fase II GEAS'. Elk van die instrumenten bevat specifieke bepalingen voor kinderen, in hun hoedanigheid van minderjarigen, niet-begeleide minderjarigen en kwetsbare personen. Maar het is de vraag, of de kind-specifieke en algemene bepalingen van die instrumenten in overeenstemming zijn met de rechten van het kind. Die vraag is des te meer van belang omdat zich een duidelijke legislatieve en beleidsmatige betrokkenheid van de EU met de rechten van het kind heeft ontwikkeld in de periode tussen Fase I en Fase II van het GEAS. De tamelijk gecompliceerde relatie tussen enerzijds het VN-Verdrag van de Rechten van het Kind (VRK), waarvan de mogelijkheden nog niet ten volle zijn ontgonnen, en anderzijds het recht van de EU, wordt beschreven. Daarbij ligt de nadruk op de juridische betekenis van de kinderrechtenbepaling van het Handvest van de Fundamentele Rechten. Betoogd wordt dat dit een goed moment is om de eerbiediging van de rechten van het kind door het GEAS te

onderzoeken, waarbij Fase I dient als het uitgangspunt van beschouwing en Fase II om de geboekte vooruitgang te meten.

Vervolgens worden de doelstellingen van de studie gepresenteerd. Zoals de titel al aangeeft zijn er twee doelen: de betekenis te analyseren van de relevante rechten van het kind en te toetsen of die rechten worden geëerbiedigd in de instrumenten van het GEAS. Wat het eerste betreft: veel rechten van het kind blijken op zich omstreden te zijn, of blijken onhelder te zijn als het gaat om asiel. Dus moet de betekenis van de relevante rechten van het kind scherper worden omlijnd, zowel in het algemeen en als de context van asiel. Wat het tweede doel betreft – te beoordelen of de GEAS instrumenten de relevante rechten van het kind in acht nemen – wordt uitgangspunt gehuldigd dat het niet toereikend is als die instrumenten kunnen worden uitgelegd op een wijze die overeenkomt met de rechten van het kind. Het criterium is of zij *zichtbaar* de inachtneming van de rechten van het kind bevorderen.

De reikwijdte en de begrenzingen van de studie worden omschreven. Met het GEAS wordt gedoeld op de vier instrumenten die nu operationeel zijn en niet op de Richtlijn Tijdelijke Bescherming die nooit is geactiveerd en waarvan ook geen herziening is gepland. Het onderzoek richt zich op de instrumenten zelf en niet op de wijze waarop de instrumenten in de lidstaten zijn overgezet en geïmplementeerd, ofschoon wel wordt verwezen naar de statenpraktijk. Maatstaf vormen de rechten van het kind. Hoewel volgens artikel 2 VRK alle rechten van het Verdrag in beginsel van toepassing zijn op alle kinderen, is uit praktische overwegingen een principiële selectie gemaakt. Op basis van een 'spiegelend evenwicht' tussen de rechten van het kind in het VRK en de bepalingen van het GEAS, zijn de volgende rechten gekozen als de meest kritieke – in EU-context - voor het gros van de kinderen die asiel zoeken of vluchteling zijn:

- het beginsel van de beste belangen van het kind (*'best interests of the child'*)
- het recht van het kind asiel te zoeken en te genieten
- het recht van het kind te worden gehoord
- het recht op dagelijkse bescherming en zorg van het asielzoekende kind en het vluchtelingkind, begeleid of niet-begeleid
- essentiële socio-economische rechten van het kind
- het recht van het kind op vrijheid

Aan elk van deze rechten is een hoofdstuk gewijd. Alle hoofdstukken hebben een eendere structuur: een eerste deel omschrijft de normatieve betekenis van het recht, een tweede deel beoordeelt of de relevante bepalingen van het GEAS met dat recht in overeenstemming zijn, en een derde deel beoordeelt de vooruitzichten voor een betere nakoming in Fase II GEAS.

De bronnen en de methodologie van het onderzoek worden uiteengezet. Zoals gezegd, is het eerste doel van deze studie, scherper te omlijnen wat de betekenis is en wat de juridische vereisten zijn van de relevante kinderrechten. Bij elk kinderrecht dat men wil begrijpen moet men allereerst uitgaan van de

wijze waarop dat recht in het VRK is geformuleerd. Alle gebruikelijke bronnen voor de uitleg van een internationale conventie zijn daarvoor dienstig. Maar het internationale recht met betrekking tot de rechten van het kind is niet beperkt tot het VRK. Andere mensenrechtelijke instrumenten die niet speciaal voor kinderen zijn geschreven kunnen eveneens verhelderend zijn. Zo zijn rechten in het VRK vaak versies van algemene rechten van de mens die zijn toegesneden op kinderen. Een analyse van het algemene recht kan nuttig blijken te zijn, niet alleen voor het leveren van de context maar ook als een contrapunt waartegen de specificiteit en uniciteit van het kinderrecht kan worden afgebakend. Daarom is bij het verklaren van de betekenis van een recht in het VRK óók gekeken naar andere mondiale en regionale (met name Europese) mensenrechteninstrumenten en de jurisprudentie van hun toezichthoudende organen of rechters. Daarnaast is gebruik gemaakt van wetenschappelijke literatuur over kinderrechten - in het algemeen en in samenhang met asiel.

Het tweede doel van het onderzoek is, te beoordelen in welke mate het GEAS, in de eerste en tweede fase, de rechten van het kind naleeft. Ten aanzien van Fase I van het GEAS begint de beoordeling steeds met een tekstuele analyse van de bewoordingen van de instrumenten, met inachtneming van de zich ontwikkelende rechtspraak van het Hof van Justitie over het GEAS. Verwezen wordt ook naar de evaluaties door de Commissie van de implementatie door de lidstaten van de verschillende instrumenten en naar empirisch onderzoek van de statenpraktijk door UNHCR en anderen. Ten aanzien van Fase II begint de beoordeling met een tekstuele analyse van de bewoordingen van de herziening (bij de Kwalificatierichtlijn) dan wel de laatste versie van de herziening (bij de andere drie instrumenten). Vervolgens wordt gekeken naar aanvullende documenten, zoals *explanatory memoranda*, *impact assessments*, gedetailleerde toelichtingen op de voorstellen, eerdere Commissievoorstellen, etc. teneinde de betekenis van bepaalde artikelen te kunnen begrijpen. Ook is melding gemaakt van commentaren van non-gouvernementele organisaties op de gebieden van asiel, mensenrechten en kinderrechten die waren opgesteld om de koers van Fase II van het GEAS te beïnvloeden.

Het beginsel van de beste belangen van het kind

Hoofdstuk 2 onderzoekt de betekenis en de juridische vereisten van het beginsel van de beste belangen van het kind zoals neergelegd in artikel 3 VRK en toetst of de GEAS instrumenten in beide fasen dit principe naleven

Het principe van de beste belangen van het kind is een van de meest aangehaalde en, naar wordt betoogd, minst begrepen beginselen van de kinderrechten. Het hoofdstuk begint met twee heersende benaderingen tegenover elkaar te stellen, benaderingen die beogen aan dat beginsel betekenis te geven. Het gaat om de op 'welzijn-georiënteerde benadering' (*'welfare-oriented approach'*) en de 'rechten-georiënteerde' benadering (*'rights-based approach'*).

De eerste benadering ziet de beste belangen van het kind als een functie van het welzijn van het kind zoals dat wordt vastgesteld door de besluitnemer. De tweede benadering beschouwt de beste belangen van het kind objectiever, als een functie van de rechten van het kind, waarbij de relevante concrete rechten dienen om het begrip betekenis te verlenen. Het verschil in benaderingen van twee Europese hoven (het Hof van Justitie EU en het Europese Hof van de Rechten van de Mens) wordt beschreven en de rechten-georiënteerde benadering wordt krachtig bepleit. Vervolgens wordt de aard van de juridische verplichting onderzocht. De uitkomst is, dat het beginsel een brede strekking heeft, in die zin dat het van toepassing is op alle acties die invloed hebben, direct of indirect, op kinderen, ondernomen door elke actor, individueel of collectief, die iets doet met betrekking tot een kind of kinderen. Ook wordt een analyse gegeven van het gewicht dat bij het nemen van besluiten moet worden gehecht aan de beste belangen van het kind en van de toenemende aan '*soft law*' te ontlenen aanwijzingen voor de manier waarop in individuele gevallen een vaststelling van de beste belangen van het kind kan plaatsvinden.

Na de betekenis, reikwijdte, weging en toepassing van het 'beste belangen' beginsel te hebben vastgesteld, onderzoekt Hoofdstuk 2 of de GEAS instrumenten in de beide fasen dit beginsel naleven. Eigenlijk kunnen hier twee onderzoeksvragen worden gesteld. Ten eerste: zijn de richtlijnen aan de lidstaten zoals die in elk van de GEAS instrumenten zijn gegeven in overeenstemming met de normatieve vereisten van dit beginsel? Alle 'beste belangen' bepalingen in de DV, OR, PR en KR zijn onderzocht. De uitkomst is, dat alle instrumenten weliswaar het belang onderstrepen van de beste belangen van het kind bij het nemen van beslissingen, maar dat zij doorgaans het bereik van het beginsel beperken tot acties die expliciet of exclusief op kinderen zijn gericht. Verder is weliswaar het primaire belang van dit beginsel in de wetgeving onder woorden gebracht, maar, of aan de beste belangen van het kind het vereiste gewicht wordt toegekend hangt ervan af of alle *andere* bepalingen van het instrument verenigbaar zijn met de relevante kinderrechten. Immers, als dat niet zo is, kunnen de beste belangen van het kind niet worden verzekerd. En dat valt nog te bezien. Tenslotte bevat het GEAS geen waarborgen dat een vaststelling van de beste belangen van het kind ('*best interests determination*') wordt verricht zoals die in '*soft law*' is voorzien. Duidelijke tekenen van verbetering, in alle opzichten, kunnen worden waargenomen in Fase II, opmerkelijk genoeg met uitzondering van de voorgestelde herziening van de PR die niet de juiste reikwijdte van het beginsel in acht neemt en evenmin voorziet in een vaststelling van de beste belangen.

De tweede vraag die kan worden gesteld is, of het GEAS als geheel in het beste belang van kinderen is. Nu wij hebben gezien dat er een nauw verband bestaat tussen de beste belangen van het kind en zijn rechten, komt deze vraag erop neer of het GEAS de rechten van het kind naleeft. Dat is een vraag die moet worden beantwoord in de rest van dit onderzoek.

Het recht van het kind om internationale bescherming te zoeken en daarvoor in aanmerking te komen

Hoofdstuk 3 behandelt twee onderwerpen: het eerste deel gaat over het recht van het kind om internationale bescherming te *zoeken* en het tweede gaat over het recht van het kind om *in aanmerking te komen* voor internationale bescherming.

Het recht van het kind om internationale bescherming te zoeken (samen met of onafhankelijk van zijn of haar ouders), neergelegd in artikel 22 VRK, wordt tamelijk gedetailleerd uiteengezet. Vervolgens verschuift de aandacht naar de PR – de belangrijkste richtlijn voor de indiening van een asielverzoek – en naar de vraag of de richtlijn voldoet aan het recht van het kind om internationale bescherming te zoeken. De bevinding is, dat begeleide minderjarigen geen recht hebben een onafhankelijk asielverzoek in te dienen en geen gewaarborgd recht om met de aanvraag van iemand anders te mogen meedoen. Omgekeerd, lijken niet-begeleide minderjarigen wel in staat om een aanvraag via hun vertegenwoordigers in te dienen, maar is er in dat opzicht enige tweeslachtigheid. De voorgestelde herziening van de PR is in dat opzicht een verbetering omdat daarin is neergelegd dat minderjarigen hetzij zelf een onafhankelijke aanvraag moeten kunnen indienen, hetzij een aanvraag namens hen moeten kunnen laten indienen, en dat een vertegenwoordiger het recht heeft een aanvraag in te dienen namens een niet-begeleide minderjarige. Er is echter geen duidelijke aanwijzing dat het kind degene is die een recht heeft om een aanvraag in te dienen.

Het recht van een kind om in aanmerking te komen voor internationale bescherming, wordt in dit hoofdstuk als volgt uitgelegd: zo'n recht vloeit niet voort uit het kind-zijn als zodanig, maar een kind heeft, net als ieder ander, een recht om in aanmerking te komen als hij of zij voldoet aan de insluitingscriteria (of niet voldoet aan de beëindigingscriteria of uitsluitingscriteria). Echter, de criteria voor kwalificatie zijn niet neutraal doch weerspiegelen doorgaans een verborgen vooringenomenheid uit het gezichtspunt van volwassenen. Om deze vooringenomenheid tegen te gaan moet worden aanvaard dat de rechten van het kind *als zodanig* potentieel relevant zijn om een behoefte aan internationale bescherming te genereren. De kwalificatiecriteria moeten dus openstaan voor de rechten van het kind. Dit hoofdstuk onderzoekt of de kwalificatiecriteria, die hoofdzakelijk voorkomen in de KR, gevoelig zijn voor de rechten van het kind, waarbij de aandacht wordt gericht op:

- de vluchtelingdefinitie
- de definitie van 'ernstige schade'
- de bronnen van schade en bescherming
- binnenlandse bescherming
- informatie over landen van herkomst
- beëindiging (cessation)
- uitsluiting (exclusion)

· het begrip 'veilig land van herkomst' als een voorbeeld van begrippen die insluiting (inclusion) beperken

De KR blijkt in sommige opzichten tamelijk progressief te zijn door een kinderrechtenperspectief in zijn definities in te sluiten – althans niet uit te sluiten, gezien de gekozen formulering. Maar in andere opzichten lijkt de KR een kinderrechtenperspectief uit te sluiten, bij voorbeeld in de constructie van de betekenis van nationale bescherming en de voorzichtige definitie van 'ernstige schade' met het oog op subsidiaire bescherming. Vervolgens wordt de herziening van de KR bekeken. De herziening blijkt de meeste geïdentificeerde problemen, zo niet alle, te corrigeren, wat leidt tot de conclusie dat de herziene KR in grote lijnen in overeenstemming is met de rechten van het kind om te kwalificeren voor internationale bescherming.

Het recht van het kind om te worden gehoord

Het vorige hoofdstuk ging over het recht van het kind om internationale bescherming te zoeken en daarvoor in aanmerking te komen. Maar ook als wordt aangenomen dat het kind toegang krijgt tot de procedure en dat de criteria om voor bescherming in aanmerking te komen open staan voor de rechten van het kind, dan nog is er een probleem: de gangbare asielprocedure is niet ontworpen voor kinderen. Daarom opent Hoofdstuk 4 met de vraag, welke rechten kinderen hebben die ertoe kunnen leiden dat de op volwassenen georiënteerde procedure meer ontvankelijk en toegankelijk is voor kinderen. Het belangrijkste recht van het kind in dit opzicht is het in artikel 12 VRK neergelegde recht om te worden gehoord. Het hoofdstuk onderzoekt het recht langs drie lijnen: het recht op een gehoor; rechten met betrekking tot de wijze waarop een gehoor wordt gehouden zoals het recht op een vertegenwoordiger en het recht op aanpassing van de zitting op zo'n manier, dat het kind zijn of haar visie vrijelijk tot uitdrukking kan brengen; en het recht van een kind, dat aan zijn of haar opmerkingen bij het nemen van de beslissing passend gewicht wordt gehecht in overeenstemming met leeftijd en rijpheid. Steeds wordt aandacht besteed aan de vraag hoe het recht tot uitdrukking komt in de speciale context van asiel.

Nadat de betekenis en de juridische vereisten van het recht van het kind om te worden gehoord in de asielcontext is vastgesteld, gaat Hoofdstuk 4 verder met de toetsing of de PR – de richtlijn die het duidelijkst te maken heeft met het recht van het kind om te worden gehoord – het recht naleeft. De uitkomst is, dat de PR geen enkele van de belangrijkste elementen van het recht van het kind om te worden gehoord, nakomt. Zo is het aan de lidstaten overgelaten te bepalen of een kind al dan niet recht heeft op een persoonlijk onderhoud. En, zelfs als nationaal recht toestaat dat een kind wordt gehoord, staat de richtlijn het de lidstaten toe het persoonlijk onderhoud achterwege te laten op tal van gronden, waarvan sommige kunnen worden toegepast ten

nadele van kinderen of juist voor kinderen nadelig zijn. Niet begeleide minderjarigen hebben, anders dan begeleide, recht op een vertegenwoordiger maar de rol van de vertegenwoordiger is onduidelijk en er kan in verschillende situaties van dat recht worden afgeweken. Als er een persoonlijk onderhoud plaatsvindt, bepaalt de richtlijn dat rekening moet worden gehouden met de 'behoeften' van de niet-begeleide minderjarigen – opnieuw niet met die van de begeleide minderjarigen. Tenslotte, wat betreft het gewicht dat moet worden gehecht aan de zienswijze van het kind, laat de richtlijn niet alleen na dit te regelen, maar bevat de richtlijn bovendien verschillende bepalingen met betrekking tot bewijslast, veilig land begrippen en het voordeel van de twijfel, die de zienswijze van het kind lijken te veronachtzamen. Kort gezegd: Fase I van het GEAS voldoet niet aan het recht van het kind om te worden gehoord.

In de herziene versie van de PR kunnen sommige verbeteringen worden waargenomen. Maar de verbeteringen zijn doorgaans op de een of andere manier aan beperkingen gebonden. Zo zijn de mogelijkheden van lidstaten om het gehoor weg te laten beknot, maar het kind heeft nog steeds geen recht op een persoonlijk onderhoud; een algemeen recht op een zitting in beroep is geïmpliceerd maar niet duidelijk omschreven; significante verbeteringen zijn aangebracht met betrekking tot de vertegenwoordiger van de niet begeleide minderjarige, maar er is nog steeds geen bepaling die rekening houdt met de mogelijkheid dat een begeleide minderjarige een vertegenwoordiger nodig zou hebben; aanmerkelijke voortgang is geboekt met betrekking tot de aanpassing van het persoonlijk onderhoud voor alle minderjarigen maar aan die verbeteringen wordt afbreuk gedaan door dat de voorgestelde herziening is besprenkeld met afwijkingsmogelijkheden, expliciet en impliciet; sommige wijzigingen vergroten de kans dat 'passend gewicht' zal worden gehecht een de zienswijze van het kind maar die zijn noch op alle kinderen toepasselijk, noch op alle begrippen waartegen bezwaar bestaat. Samengevat, Fase II is relatief beter dan Fase I wat betreft het recht van het kind om te worden gehoord, maar voldoet, op zichzelf beschouwd, niet aan de vereisten van dat recht.

Het recht van het kind op dagelijkse bescherming en zorg

Het kind heeft een recht op dagelijkse bescherming en zorg, en veel bepalingen in het VRK zijn gewijd aan het omlijnen van de juridische verplichtingen in dit opzicht. Hoofdstuk 5 spitst zich toe op de vraag: wie is primaire degene die het kind beschermt en verzorgt? In het normale geval worden kinderen beschermd en verzorgd door hun ouders. Daarom is het belangrijk te kijken naar de rechten in het Verdrag die betrekking hebben op het bijeenhouden van het gezin – gezinseenheid, dus. Het is echter in asielsituaties niet ongewoon dat kinderen van hun ouders gescheiden raken. In zulke gevallen moet de staat ingrijpen en de rol van de ouders overnemen. Daarom is het belangrijk te kijken naar rechten in het Verdrag over vervangende bescherming en zorg.

Dienovereenkomstig heeft het eerste materiële deel van het hoofdstuk betrekking op het begrip gezinseenheid. Het onderzoekt de verschillende rechten van het kind in verband met gezinseenheid, waarbij de nadruk valt op het begrip van afgeleide rechten, het verbod om een kind van zijn of haar ouders te scheiden tegen hun wil, en het recht van het kind op gezinshereniging. Het hoofdstuk gaat vervolgens na of de relevante instrumenten van het GEAS met de rechten van het kind in verband met gezinseenheid in overeenstemming zijn. De relevante instrumenten zijn de OR, de KR en tot op zekere hoogte de DV. De naleving blijkt te variëren per instrument. Maar als men variaties tussen de instrumenten toelaat, is de bevinding dat de instrumenten in het algemeen de belangrijkste attributen van het recht op gezinseenheid erkennen. Zij beperken echter de strekking van de bepalingen over gezinseenheid door kind en/of gezin in enge zin uit te leggen. Dit wordt verergerd doordat uitdrukkelijk of impliciet wordt toegestaan dat van aspecten van het recht op gezinseenheid wordt afgeweken en doordat een gedifferentieerde behandeling wordt toegestaan van degenen die in aanmerking komen voor subsidiaire bescherming, wanneer het gaat om afgeleide rechten en gezinshereniging. In de instrumenten zoals die eruitzien in voorgestelde Fase II zijn de definities van kind en gezin enigszins uitgebreid, met als resultaat een bescheiden winst ten aanzien van degenen die in aanmerking komen voor rechten die samenhangen met gezinseenheid. Bovendien is het recht op gezinseenheid in het algemeen minder vatbaar voor uitdrukkelijke of impliciete beperkingen en is de gedifferentieerde behandeling van subsidiair beschermden geschrapt ten aanzien van afgeleide rechten, zij het niet voor gezinshereniging. Om die redenen is Fase II een beperkte verbetering ten aanzien van Fase I ten aanzien van de rechten van het kind op gezinseenheid.

Het tweede materiële deel van het hoofdstuk gaat over het recht van het kind zonder gezin op bijzondere bescherming en zorg. Dit recht, neergelegd in artikel 20 VRK, bevat drie wezenlijke elementen: het recht van het niet-begeleide of gescheiden kind om als zodanig te worden geïdentificeerd, om een voogd of adviseur toegewezen te krijgen om de beste belangen van het kind in het oog te houden, en om alternatieve zorg te ontvangen. In Fase I worden de laatste twee elementen geregeld, maar het eerste niet, met als gevolg dat het niet-begeleide of gescheiden kind mogelijk de rechten niet krijgt waarop hij of zij ingevolge de instrumenten recht heeft. Voorts ontberen de bepalingen van de instrumenten over de voogd of de vertegenwoordiger de precisie die nodig is om de rol en de essentiële attributen van die persoon duidelijk te maken. Tenslotte maken de instrumenten niet duidelijk dat de centrale functie van de zorgplaatsing de bescherming van het kind is, ook al worden in die instrumenten diverse zorgplaatsingen voor niet-begeleide minderjarigen geregeld. In Fase II kunnen enkele verbeteringen worden waargenomen. Met name zijn de bepalingen in de instrumenten met betrekking tot de rol en de hoedanigheid van de voogd flink verbeterd en is het beschermingsaspect van de zorgplaatsing indirect versterkt, hoewel nog steeds geen expliciete melding

wordt gemaakt van bescherming in de context van zorg. Die verbeteringen worden evenwel ondergraven doordat ook Fase II in gebreke blijft een mechanisme vast te stellen voor de identificatie van een niet-begeleid of gescheiden kind.

Bepaalde socio-economische rechten van het kind

Hoofdstuk 6 onderzoekt in hoeverre het GEAS drie wezenlijke socio-economische rechten nakomt: het recht van het kind op gezondheid, op een adequate levensstandaard en op onderwijs. Hier wordt een andere benadering gebruikt om de inhoud van deze rechten te duiden wegens de andersoortige juridische verplichting die in herent is aan socio-economische rechten (d.w.z. progressieve verwezenlijk in plaats van volle en onmiddellijke verwezenlijking). Kort gezegd, de normatieve en de 'kern'inhoud van elk recht zijn beschreven op grond van het uitgangspunt dat de relevante instrumenten van het GEAS in het algemeen aan het eerste moet voldoen, maar dat zij in elk geval aan de laatste moeten voldoen als de instrumenten flexibiliteit aan de lidstaten gunnen in de vorm van beleidsvrijheid en de mogelijkheid om af te wijken. De 'kern' van elk recht bevat de minimale essentiële verplichting en het verbod van discriminatie. De relevante instrumenten van het GEAS zijn de OR en de KR.

Het recht van elk kind op gezondheid is neergelegd in de artikelen 24 en 39 VRK. De normatieve inhoud van het recht omvat het vervullen van de onderliggende beslissende voorwaarden voor gezondheid en ook een recht op gezondheidszorg. Het recht op gezondheidszorg omvat preventie, genezing en revalidatie, met een nadruk op primaire gezondheidszorg. Verder vergt het recht op herstel en herintegratie van het kind dat slachtoffer is van diverse soorten mishandeling, dat staten positieve en organische maatregelen nemen om dat herstel en die herintegratie te bevorderen. De kerninhoud van het recht omvat het recht op primaire gezondheidszorg, herstel en herintegratie en het verbod van discriminatie. Noch de OR noch de KR blijkt duidelijk te voldoen aan de normatieve inhoud dan wel de kerninhoud van het recht. Het wezenlijke probleem van de OR is, dat weliswaar de daar omschreven algemene standaard van gezondheid moet worden verhoogd in het geval van kwetsbare personen, maar dat onzeker is of minderjarigen en niet-begeleide minderjarigen binnen deze categorie vallen. Voorts staat de richtlijn toe dat gezondheidszorg wordt verminderd en teruggetrokken tot een niveau dat minder is dan de kerninhoud van het recht van het kind op gezondheid. Maar, de OR regelt wel de revalidatie en het herstel voor kinderen die slachtoffer zijn van diverse soorten mishandeling, hoewel de identificatie van zulke kinderen een probleem blijft en de betrokken bepaling geen accurate weerspiegeling is van het relevante recht in het VRK. In de voorgestelde herziening worden de meeste van deze problemen aangepakt, zodanig dat gezegd kan worden dat de richtlijn in grote lijnen in overeenstemming is met zowel de kern als de normatieve inhoud van het recht van het kind op gezondheid. Bij de KR is het essentiële probleem

dat deze geen bodemstandaard voor gezondheidszorg voor iedereen bevat maar verschillende stromen van gerechtigdheid creëert. Verder blijft de richtlijn in gebreke een recht op herstel en herintegratie neer te leggen voor het kind dat slachtoffer is van diverse vormen van mishandeling. Het eerste probleem is wel aangepakt in de herziening van de KR, maar het tweede niet, met als gevolg dat de richtlijn niet kan worden gezegd volledig overeen te stemmen met het recht van het kind op gezondheid.

Wat het recht van het kind op een adequate levensstandaard betreft, dit recht is omschreven in artikel 27 VRK en is, opmerkelijk genoeg, op een hoger niveau gesteld dan het corresponderende recht in de algemene mensenrechten. Maar het recht moet in de eerste plaats worden verwezenlijkt door de ouders van het kind, met een secundaire rol voor de staat. De verantwoordelijkheid van de staat omvat steun aan de ouders bij het nakomen van hun verplichting (wat de vraag oproept in hoeverre de ouders een recht hebben op een adequate levensstandaard) en materiële hulp te bieden in gevallen van nood. De kerninhoud van het recht komt neer op een plicht om ouders bij te staan in de nakoming van hun verplichting en, in noodgevallen, te zorgen voor een basisniveau van voeding, kleding en huisvesting. Alles wat minder is dan dat, lijkt neer te komen op onmenselijke en vernederende behandeling. Een andere dimensie van de kerninhoud is het verbod van discriminatie. In de OR is de normatieve inhoud van dit recht niet nagekomen, aangezien de algemene levensstandaard in de richtlijn is gekoppeld aan algemene, niet kindspecifieke, mensenrechten. De kern van het recht is niet nageleefd wanneer asielzoekers financiële uitkeringen krijgen en waar lidstaten de optie hebben om de opvang te verminderen, in te trekken of te weigeren. De herziening kent een nieuwe bepaling met een afzonderlijke levensstandaard voor minderjarigen die voldoet aan de rechten van het kind, maar de andere problemen blijven bestaan en, alles bijeengenomen, is het onduidelijk of de rechten van alle kinderen op een adequate levensstandaard zijn geborgd. In de KR lijkt het recht van het kind dat vluchteling is op een adequate levensstandaard weliswaar te zijn verzekerd, maar het recht van het kind dat in aanmerking komt voor subsidiaire bescherming kan worden beperkt. Aangezien deze differentiatie in strijd lijkt te zijn met het discriminatieverbod, is derhalve de kerninhoud van het recht niet nageleefd. In de herziening van de KR zijn sommige rechten met betrekking tot de levensstandaard van subsidiair beschermden naar een hoger niveau getild, maar er is nog steeds een onderscheid ten aanzien van sociale bijstand. Dientengevolge voldoet de herziening van de KR niet volledig aan de kerninhoud van het recht van het kind op een adequate levensstandaard.

Het recht van het kind op onderwijs is neergelegd in artikel 28 VRK en de normatieve inhoud ervan is omschreven in de vier 'A's' : availability, accessibility, acceptability and adaptability' (beschikbaarheid, toegankelijkheid, aanvaardbaarheid en aanpassingsmogelijkheid). Het belangrijkste aspect van de kerninhoud is het verbod van discriminatie bij onderwijs, hetgeen zowel de directe als de indirecte discriminatie omvat en naast een positieve dimensie

ook een puur negatieve dimensie kent. Discriminatie bij onderwijs doet zich niet alleen voor bij een regelrechte weigering van toegang tot onderwijs, maar omvat ook andere handelingen die de mogelijkheden tot onderwijs beperken. De OR voldoet noch aan de normatieve noch aan de kerninhoud van het recht van het kind op onderwijs, hoofdzakelijk omdat de richtlijn diverse discriminatoire praktijken, zoals gescheiden onderwijs, toelaat. Sommige van deze praktijken worden in de voorgestelde herziening uitgebannen, maar niet alle, met als gevolg dat de nakoming door de richtlijn van dit recht nog steeds problematisch is. Aan de andere kant voldoet de KR aan het recht van het kind op onderwijs, maar er is reden voor kritiek uit het oogpunt van materiële gelijkheid. In de herziening zijn enkele bescheiden verbeteringen aangebracht met betrekking tot toegang tot integratieprogramma's maar de lidstaten houden aanmerkelijke beleidsvrijheid ten aanzien van de inhoud en omvang van dergelijke programma's. Desalniettemin is de KR, zowel in de huidige vorm als in de herziening, stellig in overeenstemming met de kern van het recht van het kind op onderwijs.

Het recht van het kind op vrijheid

Hoofdstuk 7 toetst of het GEAS de rechten van het kind op vrijheid nakomt. Dit is een belangrijke kwestie omdat heel veel kinderen – begeleid of niet begeleid – die internationale bescherming zoeken in de EU, worden gedetineerd. Het recht van het kind op vrijheid is neergelegd in artikel 37 VRK en is afgebakend langs drie hoofdlijnen: toegelaten detentie, detentieomstandigheden en procedurele bescherming. In termen van 'toegelaten detentie' is de positie naar internationaal recht, dat dwingend voorgeschreven detentie van kinderen niet is toegestaan. Detentie van minderjarigen moet altijd zijn voorafgegaan door een geïndividualiseerde beoordeling, waaronder een beoordeling van de beste belangen, en moet voldoen aan het beginsel van het laatste middel. Vrijheid is dus de regel en detentie is de (uitzonderlijke) uitzondering. De positie ten aanzien van de detentieomstandigheden is, dat een gedetineerd kind moet worden behandeld in overeenstemming met de behoeften en rechten van personen van zijn of haar leeftijd, moet worden gescheiden van volwassenen, tenzij dat in strijd is met de beste belangen van het kind, moet samenzijn met het gezin als het gezin is gedetineerd, en in staat moet worden gesteld te communiceren met verwanten als het kind gescheiden is of niet-begeleid is. Tenslotte heeft het gedetineerde kind recht op alle gebruikelijke procedurele waarborgen van de algemene mensenrechten ten aanzien van detentie. Bovendien moet het kind worden ingelicht over de redenen voor zijn of haar detentie op een wijze die passend is bij zijn of haar leeftijd, en heeft het kind recht op juridische bijstand en de bijstand van een voogd of adviseur.

Slechts twee van de instrumenten van het GEAS bevatten bepalingen over detentie: de OR en de PR. Geen van beide voldoet volledig aan enig element van het recht van het kind op vrijheid. De richtlijnen blijven in gebreke alge-

mene criteria vast te stellen, laat staan naar leeftijd gespecificeerde criteria, waarin staat wanneer detentie toelaatbaar is. Zij bevatten zwakke bepalingen met betrekking tot de omstandigheden van detentie, waarin wordt nagelaten te erkennen dat detentieomstandigheden van kinderen in overeenstemming moeten zijn met hun leeftijd en – inderdaad – hun rechten. De richtlijnen bevatten ook zwakke procedurele waarborgen voor het aanvechten van de wettigheid van detentie, die niet in overeenstemming lijken te zijn met het recht van het gedetineerde kind op juridische bijstand. De voorgestelde herzieningen van de twee instrumenten in Fase II behelzen een aanmerkelijke verbetering op één gebied, nu wordt vastgesteld dat detentie van minderjarigen alleen is toegelaten in uitzonderlijke omstandigheden, onderworpen is aan het beginsel van het laatste middel en dat van de beste belangen van het kind. Ten aanzien van de detentieomstandigheden kunnen enige verbeteringen worden genoteerd, maar die zijn minimaal en vaak voor afwijking vatbaar. Hetzelfde kan van de procedurele waarborgen worden gezegd. Derhalve: Fase II bevat enkele belangrijke verbeteringen maar die verzekeren niet dat de rechten van het kind op vrijheid ten volle worden nageleefd.

Conclusie

Hoofdstuk 8 begint met enkele algemene beschouwingen over de betekenis van de rechten van het kind die voor deze studie zijn geselecteerd, en gaat dan over tot de centrale onderzoeksvraag: leeft het GEAS de rechten van het kind na? Het eenvoudige antwoord op deze vraag is 'nee'. Sommige rechten van het kind worden in het GEAS weerspiegeld, andere niet, en de wel weerspiegelde rechten krijgen niet noodzakelijkerwijs het beschermingsniveau dat overeenkomt met de standaard van het internationale recht ten aanzien van de rechten van het kind. Anders gezegd, de EU wetgever heeft een selectie gemaakt uit de rechten van het kind die relevant zijn in de context van asiel, waarvan sommige zijn geregeld en andere niet, en ten aanzien van de gekozen rechten een selectie gemaakt uit de aspecten van dat recht, waarvan sommige zijn geregeld en andere niet. Maar de vooruitzichten voor verbeterde naleving met de rechten van het kind in Fase II zijn goed. Duidelijke voortgang is geboekt ten aanzien van de bepalingen van de herzieningen die direct of indirect invloed hebben op alle in de beschouwing betrokken rechten van het kind. Doch er is verschil tussen de beoordeling van verbeterde naleving - een relatieve kwestie - en die van volledige naleving – een absolute kwestie. In weerwil van alle veranderingen in de voorstellen van Fase II, waarvan sommige tamelijk ver strekkend zijn, is er geen enkel recht van het kind dat ten volle en accuraat tot zijn recht komt in ieder instrument waar het aan de orde is. Nu de centrale vraag van deze dissertatie is beantwoord, sluit Hoofdstuk 8 af met het maken van enkele gevolgtrekkingen uit de bevindingen van de studie ten aanzien van mogelijke factoren die in de weg staan aan een volledige naleving van de rechten van het kind. Drie potentiële oorzaken worden ge-

noemd: het feit dat de kinderrechten agenda wordt overschaduwd door de grotere agenda van de migratiebeheersing die het GEAS voortstuwt; het feit dat de EU-wetgever mogelijk niet de kinderrechtelijke capaciteit heeft die nodig is om het kinderrechtperspectief doeltreffend in het GEAS te integreren; en de mogelijkheid, dat het in gebreke blijven van het GEAS om ten volle de rechten van het kind na te leven symptomatisch zou kunnen zijn voor een grotere onopgeloste kwestie, namelijk de precieze relatie tussen Unierecht en fundamentele rechten. Die mogelijke oorzaken zijn thema's voor verder onderzoek.

Bibliography

Ahmed, T. and de Jesús Butler, I., 'The European Union and Human Rights: an International Law Perspective'. *European Journal of International Law* 17 (2006): 771-801.

Alston, P. 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights. *International Journal of Law and the Family* 8 (1994): 1-25.

Archard, D. and Skivenes, M. 'Balancing a Child's Best Interests and a Child's Views'. *International Journal of Children's Rights* 17 (2009): 1-21.

Aries, P. *Centuries of Childhood*. New York: Vintage Books, 1962.

Backstrom, K. 'The International Human Rights of the Child: Do They Protect the Female Child?'. *George Washington Journal of International Law and Economics* 30 (1996-1997): 541-582.

Bayefsky, A. 'The Principle of Equality or Non-Discrimination in International Law'. *Human Rights Law Journal* 11, nos. 1-2 (1990): 1-34.

Besson, S. 'The Principle of Non-Discrimination in the Convention on the Rights of the Child'. *International Journal of Children's Rights* 13, no. 4 (2005):433-461.

Bhabha, J. and Young, W. 'Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines'. *International Journal of Refugee Law* 11, no. 1 (1999): 84-125.

Bhabha, J. 'Minors or Aliens? Inconsistent State Intervention and Separated Child Asylum-Seekers'. *European Journal of Migration and Law* 3 (2001): 283-314.

Bhabha, J. 'Demography and Rights: Women, Children and Access to Asylum'. *International Journal of Refugee Law* 16 (2004): 227-243.

Bhabha, J. 'Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights?'. *Human Rights Quarterly* 31 (2009): 410-451.

Bierwirth, C. 'The Protection of Refugee and Asylum Seeking Children, the Convention on the Rights of the Child and the Work of the Committee on the Rights of the Child'. *Refugee Survey Quarterly* 24, no. 2 (2005): 98-124.

Boccardi, I. *European and Refugees – Towards an EU Asylum Policy.* The Hague: Kluwer Law International, 2002.

Brems, E. 'Human Rights: Minimum and Maximum Perspectives'. *Human Rights Law Quarterly* 9, no. 3 (2009): 349-372.

Brownlie, I. *Principles of Public International Law.* 6th ed. Clarendon: Oxford University Press, 2003.

Byrne, R., Noll, G. and Vedsted Hansen, J. 'Understanding Refugee Law in an Enlarged European Union'. *European Journal of International Law* 15, no. 2 (2004):355-379.

Campbell, T. 'The Rights of the Minor: As Person, As Child, As Juvenile, As Future Adult'. *International Journal of Law and the Family* 6 (1992): 1-23.

Campbell, T. 'Really Equal Rights? Some Philosophical Comments on "Why Children Shouldn't Have Equal Rights" by Laura M. Purdy'. *International Journal of Children's Rights* 2 (1994): 259-263.

Caruso, D. 'Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives'. *Harvard International Law Journal* 44, no. 2 (2003): 332-386.

Chandhi, P. *Blackstone's International Human Rights Documents*. 5th ed. Clarenden: Oxford University Press, 2006.

Charlesworth, H., Chinkin, C., and Wright, S. 'Feminist Approaches to International Law' in *International Rules: Approaches from International Law and International Relations*, edited by R. Beck, A. Arend, and R. Vander Lugt. Clarendon: Oxford University Press, 1996.

Coomans, F. 'Clarifying the Core Elements of the Right to Education'. *SIM Special* 18 (1995).

Coomans, F. 'Identifying Violations of the Right to Education'. *SIM Special* 20 (1997).

Costello, C. 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?' *European Journal of Migration and Law* 7 (2005): 35-69.

Costello, C. 'The European Asylum Procedures Directive in Legal Context'. *New Issues in Refugee Research*, UNHCR Research Paper No. 134 (2006).

Crawley, H. *Refugees and Gender, Law and Process.* Bristol: Jordan Publishing, 2001.

Crawley, H. *When is a Child not a Child? Asylum, Age Disputes and the Process of Age Assessment.* Immigration Law Practitioners' Association, 2007.

Denman, D. 'The Charter of Fundamental Rights'. *European Human Rights Law Review* 4 (2010): 349-359.

De Schutter, O. 'The Implementation of the EU Charter of Fundamental Rights Through the Open Method of Coordination'. *Jean Monnet Working Paper* 07/04 (2004).

Detrick, S. *The United Nations Convention on the Rights of the Child, A Guide to the Travaux Préparatoires*. Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1992.

Detrick, S. *A Commentary on the United Nations Convention on the Rights of the Child*. The Hague: Martinus Nijhoff Publishers, 1999.

Diop, M. 'Unaccompanied Minors' Rights Within the European Union, Is the EU Asylum and Immigration Legislation in Line with the Convention on the Rights of the Child?'. *Legal paper presented under the supervisions of Philippe de Bruycker and Rebecca O'Donnell*, Odysseus Network (2008-09) (on file with author).

Doek, J. *A Commentary on the United Nations Convention on the Rights of the Child, Article 8, The Right to Preservation of Identity and Article 9, The Right Not to be Separated from his or her Parents*. Leiden/Boston: Martinus Nijhoff Publishers, 2006.

Dolgin, J. 'Why Has the Best Interest Standard Survived?: The Historic and Social Context'. *Child Legal Rights Journal* 16, no. 2 (1996) Special Report.

Douglas-Scott, S. 'A tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis'. *Common Market Law Review* 42 (2006): 629-665.

Drywood, E. 'Challenging Concepts of the "Child" in Asylum and Immigration Law: the Example of the EU'. *Journal of Social Welfare and Family Law* 32, no. 3 (2010): 309-323.

Drywood, E. '"Child-Proofing" EU Law and Policy: Interrogating the Law-Making Processes Behind European Asylum and Immigration Provision'. *International Journal of Children's Rights* 19 (2011): 405-428.

Dunn, M., Clare, I., Holland, A. and Gunn, M. 'Constructing and Reconstructing 'Best Interests': An Interpretative Examination of Substitute Decision-making under the Mental Capacity Act 2005'. *Journal of Social Welfare and Family Law* 29, no. 2 (2007): 117-133.

Durieux J.F. 'Protection Where? – or When? First Asylum, Deflection Policies and the Significance of Time'. *International Journal of Refugee Law* 21, no. 1 (2009): 75-80.

Edwards, A. 'Age and Gender Dimensions in International Refugee Law'. In *Refugee Protection in International Law, UNHCR's Global Consultations on International Protection,* edited by E. Feller, V. Türk and F. Nicholson. Cambridge University Press, 2003, 46-80.

Eekelaar, J. 'The Emergence of Children's Rights'. *Oxford Journal of Legal Studies* 6 (1986): 161-182.

Eekelaar, J. 'The Importance of Thinking That Children Have Rights'. *International Journal of Law and the Family* 6 (1992): 221-235.

Eekelaar , J. 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism'. *International Journal of Law and the Family* 8 (1994): 42-61.

Eide, A. and Eide W.B. *A Commentary on the United Nations Convention on the Rights of the Child, Article 24 The Right to Health*. Leiden/Boston: Martinus Nijhoff Publishers, 2006.

Eide, A. *Article 27, The Right to an Adequate Standard of Living, A Commentary on the United Nations Convention on the Rights of the Child*. Leiden/Boston: Martinus Nijhoff Publishers, 2006.

Enenajor, A. 'Rethinking Vulnerability: European Asylum Policy Harmonisation and Unaccompanied Asylum Seeking Minors'. *Childhoods Today* 2, no. 2 (2008): 1-24. Online Journal.

Engel, C. 'The European Charter of Fundamental Rights, A Changed Political Opportunity Structure and its Normative Consequences'. *European Law Journal* 7, no. 2 (2001):151-170.

Errera, R. 'The CJEU and Subsidiary Protection: Reflections on Elgafaji – and After'. *International Journal of Refugee Law* 23, no. 1 (2010):93-112.

Evans, C. 'Refugee Status Determination and the Limits of Memory'. *International Journal of Refugee Law* 22, no. 4 (2010): 469-511.

Freeman, M. *Article 3 The Best Interests of the Child, A Commentary on the United Nations Convention on the Rights of the Child*. Leiden: Martinus Nijhoff Publishers, 2007.

Gallagher, M., S.J. 'Soldier Boy Bad: Child Soldiers, Culture and Bars to Asylum'. *International Journal of Refugee Law* 13, no. 3 (2001): 310-353.

Gil-Bazo, M. 'The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law'. *Refugee Survey Quarterly* 27, no. 3 (2008): 33-52.

Gomien, D. 'Whose Right (and Whose Duty) Is It? An Analysis of the Substance and Implementation of the Convention on the Rights of the Child'. *New York Law School Journal of Human Rights* 7 (1989-1990): 161-175.

Goodwin-Gill, G. 'Unaccompanied Refugee Minors, the Role and Place of International Law in the Pursuit of Durable Solutions'. *International Journal of Children's Rights* 3 (1995): 405-416.

Goodwin Gill, G. *The Refugee in International Law*. 2nd ed. Clarendon: Oxford University Press, 1996.

Grahl-Madsen, A. *The Status of Refugees in International Law*. Leyden: Sijthoff, 1972.

Groussot, X. and Pech, L. 'Fundamental Rights Protection in the EU Post Lisbon Treaty'. *Foundation Robert Schuman Policy Paper*, European Issue No. 173 (2010).

Gutierrez, F. 'Psychological Evaluation of Children and Families in the Immigration Context'. *Children's Legal Rights Journal* 19, no. 3 (1999): 17-25.

Halvorsen, K. 'Report: Separated Children in Europe Programme Workshop on Age Assessment and identification'. Bucharest, 2003 (on file with author).

Hathaway, J. and Foster M. 'Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination'. In *Refugee Protection in International Law. UNHCR's Global Consultations on International Protection, edited by* E. Feller, V. Türk and F. Nicholson. Cambridge: Cambridge University Press, 2003.

Hodgkin, R. and Newell, P. *Implementation Handbook for the Convention on the Rights of the Child*. 3rd ed. UNICEF, 2007.

Houlgate, L. *The Child and the State: A Normative Theory of Juvenile Rights*. John Hopkins University Press, 1980.

Kalantry, S., Getgen, J. and Arrigg Koh, S. 'Enhancing Enforcement of Economic, Social and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR'. *Human Rights Quarterly* 32, no. 2 (2010): 253-310.

Kalverboer, M., Zijlstra, A. and Knorth, E. 'The Developmental Consequences for Asylum-seeking Children Living with the Prospect of Five Years or More of Enforced Return to Their Home Country'. *European Journal of Migration and Law* 11 (2009): 41-67.

Kelley, n. 'Internal Flight/Relocation/Protection Alternative: Is It Reasonable?'. *International Journal of Refugee Law* 14, no. 1 (2002): 4-44.

Keselman, O. et al. 'Mediated Communication with Minors in Asylum-Seeking Hearings'. *Journal of Refugee Studies* 21, no. 1 (2008): 103-116.

Kilkelly, U. 'The Best of Both World's for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child'. *Human Rights Quarterly* 23 (2001): 308-326.

Krappmann, L. 'The Weight of the Child's View (Article 12 of the Convention on the Rights of the Child)'. *International Journal of Children's Rights* 18 (2010): 501-513.

Lambert, H. 'The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom and International Law'. *International and Comparative Law Quarterly* 55 (2006): 161-192

Leary, V. 'The Right to Health in International Human Rights Law. *Health and Human Rights* 1, no. 1 (1999): 25-56.

Lücker-Babel, M. 'The Right of the Child to Express Views and be Heard: An Attempt to Interpret Article 12 of the UN Convention on the Rights of the Child'. *International Journal of Children's Rights* 3 (1995): 391-404.

Margulies, P. 'Children, Parents and Asylum'. *Georgetown Immigration Law Journal* 15 (2000-01): 289-317.
McAdam, J. 'Seeking Asylum under the Convention on the Rights of the Child: A Case for Complementary Protection'. *International Journal of Children's Rights* 14 (2006): 251-274.
McCallin, M. 'The Convention on the Rights of the Child as an Instrument to Address the Psychosocial Needs of Refugee Children'. *International Journal of Refugee Law* 3, no. 1 (1991):82-99.
McGillivray, A. 'Why Children Do Have Equal Rights: In Reply to Laura Purdy'. *International Journal of Children's Rights* 2 (1994): 243-258.
McGoldrick, D. 'The United Nations Convention on the Rights of the Child. *International Journal of Law and the Family* 5 (1991): 132-169.
Mnookin, R. 'Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy'. *Law and Contemporary Problems* 39, no. 3 (1975): 226-293.
Mullally, S. 'Separated Children in Ireland, Responding to 'Terrible Wrongs'. *International Journal of Refugee Law* 23, no. 4 (2011): 632-655.

Noll, G. 'Evidentiary Assessment in Refugee Status Determination and the EU Qualification Directive'. *European Public Law* 12, no. 2 (2006): 295-317.
Noll, G. (ed.) *Proof, Evidentiary Assessment and Credibility in Asylum Law*. Leiden/Boston: Martinus Nijhoff Publishers, 2005.

Olsen, F. 'Children's Rights: Some Feminist Approaches to the United Nations Convention on the Rights of the Child'. *International Journal of Law and the Family* 6 (1992): 192-220.
O'Donnell, D. 'The Right of Children to be Heard: Children's Right to Have Their Views Taken into Account and to Participate in Legal and Administrative Proceedings'. *Innocenti Working Paper*. UNICEF, 2009.
O'Neill, O. 'Children's Rights and Children's Lives'. *International Journal of Law and the Family* 6 (1992): 24-42.

Parker, S. 'The Best Interests of the Child – Principles and Problems'. *International Journal of Law and the Family* 8 (1994): 26-41.
Pirjola, J. 'European Asylum Policy – Inclusions and Exclusions Under the Surface of Universal Human Rights Language'. *European Journal of Migration and Law* 11 (2009): 347-366.
Price Cohen, C. 'Elasticity of Obligation and the Drafting of the Convention on the Rights of the Child'. *Connecticut Journal of International Law* 72, no. 3 (1987-88): 71-109.
Purdy, L. 'Why Children Shouldn't Have Equal Rights'. *International Journal of Children's Rights* 2 (1994): 223-241.
Purdy, L. 'Why Children Still Shouldn't Have Equal Rights'. *International Journal of Children's Rights* 2 (1994): 395-398.

Quennerstedt, A. 'Children, But Not Really Humans? Critical Reflections on the Hampering Effect of the "3 p's"'. *International Journal of Children's Rights* 18 (2010): 619-635.

Redmond, G. 'Child Poverty and Child Rights: Edging Towards a Definition'. *Journal of Children and Poverty*, 14, no. 1 (2008): 63-82.
Rodham, H. 'Children Under the Law'. *Harvard Education Review* 43, no. 4 (1973): 487-514.

Schabas, W. and Sax, H. *A Commentary on the United Nations Convention on the Rights of the Child, Article 37, Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty*. Leiden/Boston: Martinus Nijhoff Publishers, 2006.
Schiratzki , J. 'The Best Interests of the Child in the Swedish Aliens Act'. *International Journal of Law, Policy and the Family* 14 (2000): 206-225.
Spijkerboer, T. 'Structural Instability: Strasbourg Case Law on Children's Family Reunion'. *European Journal of Migration and Law* 11 (2009): 271-293.
Smith, C. 'Children's Rights: Judicial Ambivalence and Social Resistance'. *International Journal of Law, Policy and the Family* 11 (1997): 103-139.
Smith, G. 'Considerations When Interviewing Children'. *Children's Legal Rights Journal* 12, no. 2 (1991):1-7, Special Report
Smyth, C. 'Refugee Status Determination of Separated Children: International Developments and the Irish response, Part II – The Asylum Procedure'. *Irish Journal of Family Law* 2 (2005): 21-27.
Stalford, H. 'The Citizenship Status of Children's in the European Union'. *International Journal of Children's Rights* 8 (2000): 101-131.
Stalford ,H. and Drywood, E. 'Coming of age? Children's Rights in the European Union'. *Common Market Law Review* 46 (2009): 143-172.
Stalford, H. and Schuurman, M. 'Are We There Yet? The Impact of the Lisbon Treaty on the EU Children's Rights Agenda'. *International Journal of Children's Rights* 19 (2011): 381-403.
Stalford, H. 'Constitutionalising Equality in the EU: A Children's Rights Perspective'. *International Journal of Discrimination and the Law* 8, nos. 1-2 (2005): 53-73.
Stevens, D. 'Asylum-Seeking Families in Current Legal Discourse: a UK Perspective'. *Journal of Social Welfare and Family Law* 32, no. 1 (2010): 5-22.

Taefi , n. 'The Synthesis of Age and Gender: Intersectionality, International Human Rights Law and the Marginalisation of the Girl-Child'. *International Journal of Children's Rights* 17 (2009): 345-367.
Teitgen-Colly, C. 'The European Union and Asylum: An Illusion of Protection'. *Common Market Law Review* 43,(2006): 1503-1566.
Thomas, n. 'Towards a Theory of Children's Participation'. *International Journal of Children's Rights* 17 (2007): 199-218.
Tobin, J. 'The International Obligation to Abolish Harmful Traditional Practices Harmful to Children's Health: What Does It Mean and Require of States?'. *Human Rights Law Review* 9, no. 3 (2009): 373-396.

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees', HCR/IP/4/Eng/REV.1 (1979) Re-edited, Geneva, January 1992.
UNHCR, 'Refugee Children: Guidelines on Protection and Care', 1994, available at: http://www.unhcr.org/refworld/docid/3ae6b3470.html [accessed 29 April 2012]

UNHCR, 'Working with Unaccompanied Children: A Community-Based Approach', 1996, available at: http://www.unhcr.org/refworld/docid/4a54bc24d.html [accessed 29 April 2012].

UNHCR, 'Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum' 1997, available at: http://www.unhcr.org/refworld/docid/3ae6b3360.html [accessed 29 April 2012]

UNHCR, 'Note on Determination of Refugee Status under International Instruments', 1997, EC/SCP/5, available at: http://www.unhcr.org/refworld/docid/3ae68cc04.html [accessed 14 February 2012].

UNHCR, 'Guidelines on Applicable Standards and Criteria relating to the Detention of Asylum Seekers', 1999, available at: http://www.unhcr.org/refworld/docid/3c2b3f844.html [accessed 29 April 2012]

UNHCR, 'Guidelines on International Protection: "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', 2002, HCR/GIP/02/02.

UNHCR, 'Guidelines on International Protection: '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', 2003, HCR/GIP/03/04.

UNHCR, 'Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees', 2003, HCR/GIP/03/05.

UNHCR, UNICEF, ICRC, IRC, Save the Children (UK) and World Vision International , 'Inter-Agency Guiding Principles on Unaccompanied and Separated Children', 2004.

UNHCR, 'Guidelines on International Protection: 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', 2006, HCR/GIP/06/07.

UNHCR, 'Guidelines on Determining the Best Interests of the Child', 2008, available at: http://www.unhcr.org/refworld/docid/48480c342.html [accessed 29 April 2012]

UNHCR, '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', 2009, HCR/GIP/09/08.

UNHCR, 'Improving Asylum Procedures, Comparative Analysis and Recommendations for Law and Practice', 2010.

UNHCR, 'Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum Seekers Fleeing Indiscriminate Violence', A UNHCR Research Project, 2011.

Van Bueren, G. *The International Law on the Rights of the Chi*ld. The Hague/ Boston/ London: Martinus Nijhoff Publishers, 1998.

Verheyde, M. *A Commentary on the United Nations Convention on the Rights of the Child, Article 28, The Right to Education*. Leiden: Martinus Nijhoff Publishers, 2006.

Westen, P. 'The Empty Idea of Equality'. *Harvard Law Review* 95, no. 3 (1982): 537-596.

Woolf, M. 'Coming of Age? – The Principle of "The Best Interests of the Child"'. *European Human Rights Law Review* 2 (2003): 205-221.

Wouters, K. *International Legal Standards for the Protection from Refoulement*. Intersentia, 2009.

Zermatten, J. 'The Best Interests of the Child Principle: Literal Analysis and Function'. *International Journal of Children's Rights* 18 (2010): 483-499.

Zschirnt, E. 'Does Migration Status Trump the Best Interests of the Child? Unaccompanied Minors in the EU Asylum System'. *Journal of Immigration, Asylum and Nationality Law* 25, no. 1 (2011): 34-55.

Cases and other documents

International Case Law

European Court of Human Rights

- ECtHR, *Belgian Linguistic case*, Appl. Nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, Judgment of 23 July 1968.
- ECtHR, *Golder v UK*, Appl. No. 4451/70, Judgment (Plenary Chamber) of 21 February 1975.
- ECtHR, *Family H. v United Kingdom*, App. No. 10233/83, Decision of 6 March 1984.
- ECtHR, *Abdulaziz, Cabales and Balkandali v The United Kingdom*, Appl No. 9214/80; 9473/81; 9474/81, Judgment (Plenary Court) of 28 May 1985.
- ECtHR, *B v UK*, Appl. No. 9840/82, Judgment of 8 July 1987.
- ECtHR, *Moustaquim v Belgium*, Appl. No. 12313, Judgment of 18 February 1991.
- ECtHR, *Vermeire v Belgium*, Appl. No. 12849/87, Judgment of 29 November 1991.
- ECtHR, *Gül v Switzwerland*, Appl. No. 23218/94, Judgment of 29 February 1996
- ECtHR, *Amuur v France*, Appl. No. 19776/92, Judgment of 25 June 1996.
- ECtHR, *Gaygusuz v Austria*, Appl. No. 17371/90, Judgment of 16 September 1996; (1997) 23 EHRR 90.
- ECtHR, *Chahal v The United Kingdom*, Appl. No. 22414/93, Judgment (GC) of 15 November 1996.
- ECtHR, *Bronda v Italy* (40/1997/824/1030) Judgment of 9 June 1998.
- ECtHR, *T v The United Kingdom*, Appl. No. 24724/94, Judgment of 16 December 1999.
- ECtHR, *Jabari v Turkey*, Appl. No. 40035/98, Judgment of 11 July 2000.
- ECtHR, *Maaouia v France*, Appl. No. 39652/98, Judgment of 5 October 2000.
- ECtHR, *T.I. v United Kingdom*, Appl. No. 43844/98, Decision of 7 March 2000.
- ECtHR, *Sen v the Netherlands*, Appl. No. 31465/96, Judgment of 21 December 2001.
- ECtHR, *Pretty v UK*, Appl. No. 2346/02, Judgment of 29 April 2002.
- ECtHR, *Cyprus v Turkey*, Appl. No. 25781/94, Judgment of 10 May 2001.
- ECtHR, *Conka v Belgium*, Appl. No. 51564/99, Judgment of 5 February 2002.
- ECtHR, *S.C. v The United Kingdom*, Appl. No. 60958/00, Judgment of 15 June 2004.
- ECtHR, *Tuquablo-Teckle v The Netherlands*, Appl. No. 60665/00, Judgment of 1 December 2005.
- ECtHR, *Gebremedhin v France*, 25389/05, Judgment of 26 April 2005.
- ECtHR, *Öcalan v Turkey*, Appl. No. 46221/99, Judgment (GC) of 12 May 2005.
- ECtHR, *Rodrigues da Silva and Hoogkamer v The Netherlands*, Appl. No. 50435/99, Judgment of 31 January 2006.
- ECtHR, *Mayeka and Mitunga v Belgium*, Appl. No. 13178/03, Judgment of 12 October 2006.

- ECtHR, *Salah Sheekh v The Netherlands* Appl. No. 1948/04, Judgment 11 January 2007.
- ECtHR, *Gebremedhin v France*, Appl. No. 25389/05, Judgment of 26 April 2007.
- ECtHR, *Sultani v France*, Appl. No. 45223/05, Judgment of 20 September 2007.
- ECtHR, *Nasrulloyev v Russia*, Appl. No. 656/06, Judgment of 11 October 2007.
- ECtHR, *D.H. and Others v the Czech Republic*, Appl. No. 57325/00, Judgment of 13 November 2007.
- ECtHR, *Saadi v UK*, Appl. No. 13229/03, Judgment (GC) of 29 January 2008.
- ECtHR, *Saadi v Italy*, Appl. No. 37201/06, Judgment of 28 February 2008.
- ECtHR, *N. v The United Kingdom*, Appl. No. 26565/05, Judgment (GC) of 27 May 2008.
- ECtHR, *Sampanis v Greece,* Appl. No. 32526/05, Judgment of 5 June 2008.
- ECtHR, *Maslov v Austria*, Appl. No. 1638/03, Judgment of 23 June 2008.
- ECtHR, *NA. v The United Kingdom*, Appl. No. 25904/07, Judgment of 17 July 2008
- ECtHR, *Güveç v Turkey*, Appl. No. 70337/01, Judgment of 20 January 2009.
- ECtHR, *Abdolkhani and Karimnia v Turkey*, Appl. No. 30471/08, Judgment of 22 September 2009.
- ECtHR, *Muskhadzhiyeva v Belgium*, Appl. No. 41442/07, Judgment of 19 January 2010.
- ECtHR, *Raza v Bulgaria,* Appl. No. 31465/08, Judgment of 11 February 2010.
- ECtHR, *Baysakov and Others v Ukraine*, Appl. No. 54131/08, Judgment of 18 February 2010.
- ECtHR, *R.C. v Sweden*, Appl. No. 41827/06, Judgment of 9 March 2010.
- ECtHR, *A.D. and O.D. v United Kingdom*, Appl. No. 28680/06, Judgment of 16 March 2010.
- ECtHR, *Oršuš and Others v Croatia,* Appl. No. 15766/03, Judgment (GC) of 16 March 2010.
- ECtHR, *Charahili v Turkey*, Appl. No. 46605/07, Judgment of 13 April 2010.
- ECtHR, *M.B. and others v Turkey*, Appl. No. 36009/08, Judgment of 15 June 2010.
- ECtHR, *Ahmadpour v Turkey*, Appl. No. 12717/08, Judgment of 15 June 2010.
- ECtHR, *Neulinger and Shuruk v Switzerland*, Appl. No. 41615/07, Judgment of 6 July 2010.
- ECtHR, *Jusic v Switzerland*, Appl. No. 4691/06, Judgment of 2 December 2010.
- ECtHR, *MSS v Belgium and Greece*, Appl. No. 30696/09, Judgment (GC) of 21 January 2011.
- ECtHR, *Rahimi v Greece*, Appl. No. 8786/08, Judgment of 5 April 2011.
- ECtHR, *E.G. v The United Kingdom*, Appl. No. 41178/08, Judgment of 31 May 2011.
- ECtHR, *Osman v Denmark*, Appl. No. 38058/09, Judgment of 14 June 2011.
- ECtHR, *Nunez v Norway*, Appl. No. 55597/09, Judgment of 28 June 2011.
- ECtHR, *Sufi and Elmi v The United Kindgom*, Appl. nos. 8319/07 and 11449/07, Judgment of 28 June 2011.
- ECtHR, *M. and others v Bulgaria*, Appl. No. 41416/08, Judgment of 26 July 2011.
- ECtHR, *Arvelo Aponte v The Netherlands*, Appl. No. 28770/05, Judgment of 3 November 2011.
- ECtHR, *Kanagaratnam and others v Belgium*, Appl. No. 15297/09, Judgment of 13 December 2011.
- ECtHR, *Popov v France*, Appl. No. 39472/07 and 39474/07, Judgment of 19 January 2012.
- ECtHR, *I.M. v France*, Appl. No. 9152/09, Judgment of 2 February 2012.

· ECtHR, *Antwi and Others v Norway*, Appl. No. 26940/10, Judgment of 14 February 2012.

European Court of Justice/Court of Justice of the European Union

· ECJ, *Alvis v Council*, Case 32/62, Judgment of 4 July 1963.
· ECJ, *Transocean Marine Paint v Commission*, Case 17/74, Judgment of 23 October 1974.
· ECJ, *Nold v Commission*, Case 4/73, Judgment of 14 May 1974.
· ECJ, *Al Jubail Fertilizer v Council*, Case C-49/88, Judgment of 27 June 1991.
· ECJ, *Technische Universität München*, Case C-269/90, Judgment of 21 November 1991.
· ECJ, Opinion 2/94 of the Court, 28 March 1996.
· ECJ, *Echternach and Moritz v Netherlands Minister for Education*, Joined cases 389/87 and 390/87, Judgment of 15 March 1989.
· ECJ, *Wachauf v Bundesamt für Ernährung und Forstwirtschaft*, Case 5/88, Judgment of 13 July 1989.
· ECJ, *ERT v DEP,* Case C-260/89, Judgment of 18 June 1991.
· ECJ, *Baumbast and R v Secretary of State for the Home Department*, Case C-413/99, Judgment of 17 September 2002.
· ECJ, *Schmidberger v Austria,* Case C-112/00, Judgment of 12 June 2003.
· CJEU, *Deticek v Sgueglia*, Case C-403/09, Judgment of 23 December 2003.
· ECJ, *Chen v Secretary of State for the Home Department*, Case C-200/02, Judgment of 19 October 2004.
· ECJ, *Dokter*, Case C-28/05, Judgment of 15 June 2006.
· ECJ, *European Parliament v Council,* Case C- 540/03, Judgment of 27 June 2006.
· ECJ, *European Parliament v Council*, Case C-133/06, Judgment of 6 May 2008.
· ECJ, *Elgafaji v Staatssecretaris van Justitie*, Case C-465/07, Judgment of 17 February 2009.
· CJEU, *Abdulla, Hasan, Adem, Rashi and Jamal v Bundesrepublik Deutschland*, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, Judgment of 2 March 2010.
· CJEU in *Bolbol v Bevándorlási és Állampolgársági Hitvatal*, Case C-31/09, Judgment of 4 March 2010.
· CJEU, *J. McB. v L.E.*, Case C-400/10, Judgment of 5 October 2010.
· CJEU, *Bundesrepublik Deutschland v B and D*, Joined Cases C-57/09 and C-101/09, Judgment of 9 November 2010.
· CJEU, *Mercredi v Chaffe*, Case C-497/10, Judgment of 22 December 2010.
· CJEU, *Zarraga v Pelz*, Case C-491/10, Judgment of 22 December 2010.
· CJEU, *ERG and Others*, Joined Cases C-379/08 and C-380/08, Judgment (GC) of 9 March 2010.
· CJEU, *Zambrano v Office national de l'emploi*, Case C-34/09, Judgment of 8 March 2011.
· CJEU, *Diouf v Ministre du Travail, de l'Emploi and de l'Immigration*, Case C-69/10, Judgment of 28 July 2011.
· CJEU, *Dereci v Bundesministerium für Inneres*, Case C-256/11, Judgment of 15 November 2011.
· CJEU, *N.S. and others v Secretary of State for the Home Department and others,* Joined Case C-411/10 and C-493/10, Judgment (GC) of 21 December 2011
· Opinion of Advocate General Trstenjak, *N.S. v Secretary of State for the Home Department*, Case C-411/10, Opinion delivered on 22 September 2011.

- Reference for a Preliminary Ruling, *K v Bundesasylamt*, Case C-245/11.
- Reference for a Preliminary Ruling, *CIMADE and GISTI v Ministry of the Interior*, Case C-179/11.

Committee on the Rights of the Child

General Comments

- Committee on the Rights of the Child, General Comment No. 1, 'The Aims of Education', UN Doc. CRC/GC/2001/1 (2001).
- Committee RC, General Comment No. 4, 'Adolescent health and development in the context of the Convention on the Rights of the Child', UN Doc. CRC/GC/2003/4 (2003).
- Committee RC, General Comment No. 5, 'General measures of implementation of the Convention on the Rights of the Child', UN Doc CRC/C/GC/2003/5 (2003).
- Committee RC, General Comment No. 6, 'Treatment of unaccompanied and separated children outside their country of origin', UN Doc CRC/GC/2005/6 (2005).
- Committee RC, General Comment No. 7, 'Implementing child rights in early childhood', UN Doc. CRC/C/GC/7/Rev.1 (2006).
- General Comment No. 8, '*The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment*', UN Doc. CRC/C/GC/8 (2006).
- Committee RC, General Comment No. 9, 'The rights of children with disabilities', UN Doc. CRC/C/GC/9 (2007).
- Committee RC, General Comment No. 11, 'Indigenous children and their rights under the Convention', UN Doc. CRC/C/GC/11 (2009).
- General Comment No. 12, 'The right of the child to be heard', UN Doc. CRC/C/GC/12 (2009).
- General Comment No. 13, 'Article 19: the right of the child to freedom from all forms of violence', UN Doc. CRC/C/GC/13 (2011).

Concluding observations

- Committee RC, Concluding Observations to Iraq in 1998, UN Doc. CRC/C/15/Add. 94.
- Committee RC, Concluding Observations to Finland in 2000, UN Doc. CRC/C/15/Add.132.
- Committee RC, Concluding Observations to Norway in 2000 (UN Doc. CRC/C/15/Add. 126.
- Committee RC, Concluding Observations to Georgia in 2000, UN Doc.CRC/C/15/Add. 124.
- Committee RC, Concluding Observations to Denmark in 2001, UN Doc. CRC/C/15/Add 151.
- Committee RC, Concluding Observations to Andorra in 2002, UN Doc. CRC/C/176.
- Committee RC, Concluding Observations to the United Kingdom of Great Britain and Northern Ireland in 2002, UN Doc. CRC/C/15/Add. 188.
- Committee RC, Concluding Observations to Greece in 2002, UN Doc CRC/C/15/Add. 170.

- Committee RC, Concluding Observations to Spain in 2002, UN Doc. CRC/C/15/Add. 185.
- Committee RC, Concluding Observations to Canada in 2003, UN Doc. CRC/C/15/Add.215.
- Committee RC, Concluding Observations to Romania in 2003, UN Doc. CRC/C/15/Add.199.
- Committee RC, Concluding Observations to Canada in 2003, UN Doc. CRC/C/15/Add.215.
- Committee RC, Concluding Observations to the Czech Republic in 2003, UN Doc. CRC/C/15/Add.201.
- Committee RC, Concluding Observations to Italy in 2003, UN Doc. CRC/C/15/Add.198.
- Committee RC, Concluding Observations to The Netherlands in 2004, UN Doc. CRC/C/15/Add.227.
- Committee RC, Concluding Observations to Sweden in 2005, UN Doc. CRC/C/15/Add.248.
- Committee RC, Concluding Observations to Norway in 2005, UN Doc. CRC/C/15/Add.262.
- Committee RC, Concluding Observations to Austria in 2005, UN Doc. CRC/C/15/Add.251.
- Committee RC, Concluding Observations to Latvia in 2006, UN Doc. CRC/C/LVA/CO/2.
- Committee RC, Concluding Observation to Lithuania in 2006, UN Doc. CRC/C/LTU/CO/2.
- Committee RC, Concluding Observations to Benin in 2006, UN Doc. CRC/C/BEN/CO/2.
- Committee RC, Concluding Observations to Kazakhstan in 2007, UN Doc. CRC/C/KAZ/CO/3.
- Committee RC, Concluding Observations to The United Kingdom in 2008, UN Doc. CRC/C/GBR/CO/4.
- Committee RC, Concluding Observations to Belgium in 2010, UN Doc. CRC/C/BEL/CO/3-4.
- Committee RC, Concluding Observations to Norway in 2010, UN Doc. CRC/C/NOR/CO/4.
- Committee RC, Concluding Observations to Spain in 2010, UN Doc. CRC/C/ESP/CO/3-4.
- Committee RC, Concluding Observations to Denmark in 2011, UN Doc CRC/C/DNK/CO/4

Committee on Economic, Social and Cultural Rights

General Comments

- Committee ESCR, General Comment 3, 'The nature of States parties obligations' (Art. 2, para.1 of the Covenant), HRI/GEN/1/Rev.6 at 14 (1990).
- Committee ESCR, General Comment 4, 'The right to adequate housing', UN Doc E/1992/23, annex III at 114 (1991).

- Committee ESCR, General Comment 13, 'The right to education', UN Doc. E/C.12/1999/10 (1999).
- Committee ESCR, General Comment 14, 'The right to the highest attainable standard of health', UN Doc. E/C.12/2000/4 (2000).
- Committee ESCR, General Comment 12, 'The right to adequate food', UN Doc E/C.12/1999/5 (1999).
- Committee ESCR, General Comment 20, 'Non-discrimination in economic, social and cultural rights (art. 2, para. 2 of the International Convenant on Economic, Social and Cultural Rights)', UN Doc E/C.12/GC/20 (2009).

Human Rights Committee

Communications

- Human Rights Committee, *Samba Jollah v The Netherlands*, CCPR, Communication No. 794/1998, Views of 15 April 2002.
- Human Rights Committee, *Bahktiyari v Australia*, CCPR, Communication No. 1069/2002, Views of 6 November 2003.

General Comments

- Human Rights Committee, General Comment 15, 'The position of aliens under the Covenant', UN Doc. HRI/Gen/Rev.1 at 18 (1994).
- Human Rights Committee, General Comment 17, 'Article 24', UN Doc. HRI/GEN/1/REV.1 at 23 (1994).
- Human Rights Committee, General Comment 18, 'Non-discrimination', UN Doc. HRI/GEN/1/Rev.1 at 26 (1994).
- Human Rights Committee, General Comment 19, 'Article 23', UN Doc. HRI/GEN/1/REV.1 at 28 (1994).
- Human Rights Committee, General Comment No. 31, 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN Doc CCPR/C/21/Rev.1/Add.13 (2004).

Committee on the Elimination of Racial Discrimination

- Committee on the Elimination of Racial Discrimination, General Recommendation 30, 'Discrimination against Non-citizens', UN Doc CERD/C/64/Misc 11/rev. 3 (2004).

European Committee of Social Rights

- European Committee of Social Rights, *Defence for Children International (DCI) v The Netherlands*, Complaint No. 47/2008, Decision on the merits, 20 October 2009.

Executive Committee Conclusions

- Excom. Conclusion No. 44 (XXXVII) 1986, *Detention of Refugees and Asylum Seekers.*
- Excom Conclusion No. 47 (XXXVIII), 1987; *Refugee Children.*

- Excom. Conclusion No. 84 (XLVIII), 1997, *Refugee Children and Adolescents.*
- Excom. Conclusion No. 88 (L), 1999, *Protection of the Refugee's Family.*
- Excom. Conclusion No. 98 (LIV), 2003, *Protection from Sexual Abuse and Exploitation.*
- Excom. Conclusion No. 103 (LVI), 2005, *Provision on International Protection Including Through Complementary Forms of Protection.*
- Excom. Conclusion No. 105 (LVII), 2006, *Women and Girls at Risk.*
- Executive Committee Conclusion No. 107 (LVIII) – 2007, *Children at Risk.*

OTHER DOCUMENTS (INSTITUTIONS AS AUTHOR OR NO AUTHOR)

'The Limburg Principles on the Implementation of the International Covenant on Economic Social and Cultural Rights'. UN Doc E/CN.4/1987/17, Annex (1987).

United Nations, 'Asbjorn Report on the Right to Adequate Food as a Human Right'. UN Doc. E/CN.4/Sub.2/1987/23 (1987).

United Nations, 'Impact of Armed Conflict on Children: Report of the expert of the Secretary General, Ms Graça Machel'. Submitted pursuant to General Assembly Resolution 481/157, UN Doc. A/51/306 (1996).

'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights'. *Human Rights Quarterly* 20, no. 3 (1998)

'Preliminary Report of the Special Rappoteur on the Right to Education Ms. Kararina Tomasevski'. UN ESCOR, Commission on Human Rights., 55th sess., §§ 50-74, UN Doc. E/CN.4/1999/49 (1999).

Save the Children UK, 'Working with separated children, Field Guide, Training Manual and Training Exercises'. 1999.

UNHCR, UNICEF, ICRC, IRC, Save the Children (UK) and World Vision International, 'Inter Agency Guiding Principles on Unaccompanied and Separated Children'. 2004.

Academic Network for Legal Studies on Immigration and Asylum in Europe, 'Comparative Overview of the Implementation of the Directive 2003/9 of 27 January 2003 laying down Minimum Standards for the Reception of Asylum Seekers in the EU Member States'. 2006.

European Commission, 'Commission staff working document accompanying the Communication from the Commission – Towards an EU Strategy on the Rights of the Child – Preliminary inventory of EU actions affecting children's rights'. COM (2006) 367 final (2006).

European Commission Communication, 'Towards an EU Strategy on the Rights of the Child'. COM (2006) 367 final (2006).

European Commission, 'Green Paper on the future Common European Asylum System'. COM (2007) 301 final (2007).

European Commission, 'Report from the Commission to the Council and to the European Parliament on the Application of Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers'. COM (2007) 745 final (2007).

Explanations relating to the Charter of Fundamental Rights. 2007/C 303/02 (2007).

Eurasylum, 'The Protection of the rights and special needs of irregular minors and asylum seeking children, A thematic discussion paper prepared for the EU Agency for Fundamental Rights'. 2008.

Immigration Law Practitioners' Association (ILPA), 'Consideration by the European Court of Human Rights of the UN Convention on the Rights of the Child 1989'. 2008.

European Commission, 'Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted'. COM (2009) 551 (2009).

Separated Children in Europe Programme, 'Statement of Good Practice'. 4th revised ed., 2009.

Council of the EU, 'The Stockholm Programme – An open and secure Europe serving and protecting citizens'. Official Journal C 115 (2009).

UN General Assembly, 'Guidelines for the Alternative Care of Children'. A/RES/64/142 (2010).

European Commission, 'Communication from the Commission to the European Parliament and the Council, Action Plan on Unaccompanied Minors (2010-2014)'. COM (2010) 213 final (2010).

Council of the EU, 'Council Conclusions on Unaccompanied Minors'. 3018th Justice and Home Affairs Council meeting, Luxembourg, 3 June 2010.

European Commission, 'Report from the Commission to the European Parliament and the Council on the Application of Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status'. COM (2010) 465 final (2010).

European Commission, 'Report from the Commission to the European Parliament and the Council on the Application of 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'. COM (2010) 314 final (2010).

European Migration Network, 'Policies on Reception, Return and Integration arrangements for, and numbers of, Unaccompanied Minors – an EU comparative study'. 2010.

EU Agency for Fundamental Rights, 'Separated, asylum-seeking children in European Union Member States, Report'. 2010.

European Commission Communication, 'An EU Agenda for the Rights of the Child'. COM (2011) 60 final (2011).

Defence for Children International-ECPAT the Netherlands, 'Core Standards for Guardians of Separated Children in Europe: Goals for Guardians and Authorities'. 2011.

European Council on Refugees and Exiles (ECRE), 'Comments from the European Council on Refugees and Exiles on the Amended Commission Proposal to recast the Reception Conditions Directive (COM (2011) 320 final)'. 2011.

Separated Children in Europe Programme (SCEP), 'Review of current law, policies and practices relating to age assessment in 16 European Countries'. 2011.

European Migration Network, 'Policies on Reception, Return and Integration arrangements for and numbers of Unaccompanied Minors – an EU comparative study'. 2010.

European Commission, 'Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC)'. COM (2011) 735 final (2011),

'Note from Presidency to Council of the EU (Justice and Home Affairs on 26-27 April 2012)'. Brussels, 16 April 2012, 8595/12, ASILE 62, CODEC 938.

European Parliament, Directorate-General for Internal Policies, Policy Department C, 'EU Framework of Law for Children's Rights'. 2012.

Annex

Typology of rights in the Convention on the Rights of the Child

Rights in the CRC	*Civil and Political*	*Economic, Social and Cultural*	*Protection*	*Not a right/ defies tri-partite classification*
Art 1 Definition of child				X
Art 2 Right to non-discrimination (a general principle of the Convention)	X	X	X	
Art 3 Best interests of the child (a general principle of the Convention)	X	X	X	
Art 4 Nature of the legal obligation in the CRC				X
Art 5 Rights and responsibilities of parents, family etc.	X (right to family life)		X (responsibilities of parents)	
Art 6 Right to life, survival and development (a general principle of the Convention)	X	X	X	
Art 7 Name, nationality, right to be cared for by parents	X		X	
Art 8 Preservation of identity, nationality, name, family relations	X		X	
Art 9 Right not to be separated from parents against their will	X		X	
Art 10 Family reunification	X		X	

Rights in the CRC	*Civil and Political*	*Economic, Social and Cultural*	*Protection*	*Not a right/ defies tri-partite classification*
Art 11 Illicit transfer and non-return of children abroad	X		X	
Art 12 Right to be heard (a general principle of the Convention)	X	X	X	
Art 13 Freedom of expression	X			
Art 14 Freedom of thought, conscience and religion	X			
Art 15 Freedom of association and assembly	X			
Art 16 Privacy	X			
Art 17 Mass media	X			
Art 18 Common responsibilities of parents; appropriate assistance to parents		X (appro-priate assistance to parents)	X (common respons-ibilities of parents)	
Art 19 Protection from all types of violence			X	
Art 20 Special protection, assistance and alternative care for children deprived of family environment			X	
Art 21 Adoption			X	
Art 22 Right of asylum seeking/refugee child to appropriate protection and assistance	X	X	X	
Art 23 Rights of the child with disability	X	X	X	
Art 24 Right to health		X		

Rights in the CRC	*Civil and Political*	*Economic, Social and Cultural*	*Protection*	*Not a right/ defies tri-partite classification*
Art 25 Care placement for physical or mental health		X		
Art 26 Right to social security		X		
Art 27 Right to an adequate standard of living		X		
Arts 28 & 29 Right to education		X		
Art 30 Rights of minority children	X	X		
Art 31 Right to rest, leisure, play, recreational activities		X		
Art 32 Protection from economic exploitation		X	X	
Art 33 Protection from illicit use of narcotic drugs			X	
Art 34 Protection from exploitation and sexual abuse			X	
Art 35 & Optional Protocol – Prevention of abduction, sale, traffic in children			X	
Art 36 Protection from all other forms of exploitation			X	
Art 37 Prohibition of torture etc	X			
Art 37 (cont'd) Right to liberty and conditions of detention	X			
Art 38 & Optional Protocol – Prohibition of underage recruitment and participation in hostilities			X	

Rights in the CRC	*Civil and Political*	*Economic, Social and Cultural*	*Protection*	*Not a right/ defies tri-partite classification*
Art 39 Right to recovery and reintegration of child victim of various forms of ill-treatment		X (Right to health)	X	
Art 40 Juvenile justice	X			
Art 41 Guarantee clause				X
Total number	*21*	*16*	*23*	*3*

Curriculum vitae

Ciara Smyth was born in 1970 in Dublin, Ireland. She received a B.A. in Philosophy and Legal Science in 1993 and an LL.B in 1995 from the National University of Ireland Galway. She was awarded an LL.M in Human Rights and Conflict Resolution (with distinction) from Queen's University Belfast in 1999. From 1996-1998 she worked as a volunteer in Cambodia with the Agency for Personal Service Overseas. From 2000-2001 she worked as legal officer for the Irish Commission for Prisoners Overseas. From 2001-2003 she worked as protection assistant with the United Nations High Commissioner for Refugees representation in Dublin where she was responsible for training and capacity building of staff in the newly-created asylum institutions and also focal point for the Separated Children in Europe Programme. She has worked as lecturer in the School of Law of the National University of Ireland Galway since 2003 where she teaches Public International Law, International Human Rights Law, Refugee Law and Immigration Law. She is a board member of the Irish Refugee Council and a member of its sub-committee on children and young people. She contributes regularly to public discussions and legal journalism in Ireland on refugee and immigration issues.

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'The Best Interests of the Immigrant Child in the European Courts: Problems and Prospects'. In *Het Kind in het Immigratierecht,* edited by G. Lodders and P. Rodrigues. The Hague: Publicatiereeks Instituut voor Immigratierecht, 2012, 149.

'Why is it so Difficult to Promote a Rights-Based Approach to Immigration?'. *Irish Human Rights Law Review* 1 (2010): 83.

With O'Connell, D. 'The Irish Citizenship Referendum 2004: A Solution in Search of a Problem?'. In *Migration, Diasporas and Legal Systems*, edited by P. Shah and W. Menski. London and New York: Routledge Cavendish, 2006, 127.

'Refugee Status Determination of Separated Children: International Developments and the Irish Response, Part II – The Asylum Procedure', *Irish Journal of Family Law* 2 (2005): 21.

'Refugee Status Determination of Separated Children: International Developments and the Irish Response, Part I – The Refugee Definition', *Irish Journal of Family Law* 1 (2005): 15.

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2011, 2012 and 2013

MI-189 M.R. Bruning, M.P. de Jong, T. Liefaard, P.M. Schuyt, J.E. Doek & T.A.H. Doreleijers, *Wegwijs in het jeugdsanctierecht. Onderzoek naar het juridisch kader voor de zwaarste jeugdsancties in theorie en praktijk,* Nijmegen: Wolf Legal Publishers 2011, ISBN 978 90 5850 621 4

MI-190 J.P. van der Leun, E.R. Muller, N. van der Schee, P.M. Schuyt & M.A.H. van der Woude, *De vogel vrij. Liber amicorum prof.dr.mr. Martin Moerings*, Den Haag: Boom Lemma Uitgevers 2011, ISBN 978 90 5961 657 7

MI-191 M. den Heijer, *Europe and Extraterritorial Asylum* (diss. Leiden) 2011

MI-192 I. Ievdokymova, *The EU-US SWIFT agreement: which Fate under the Lisbon Data Protection Framework?*, Den Haag: Jongbloed 2011, ISBN 978 90 700 6253 8

MI-193 R.G. Louw, *Het Nederlands hoger onderwijsrecht*, Leiden: Leiden University Press 2011, ISBN 978 90 8728 132 8, eISBN 978 90 0060 050 8

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MI-195 Y.M. van der Vlugt, *De Nationale ombudsman en behoorlijk politieoptreden* (diss. Leiden, Den Haag: Boom Lemma 2011, ISBN 978 90 5931 7 253

MI-196 D. Allewijn, Tussen partijen is in geschil... De bestuursrechter als geschilbeslechter, (diss. Leiden, Den Haag: Sdu uitgevers 2011, ISBN 978 90 12 38728 6

MI-197 M.L. Koemans, *The war on antisocial behaviour. Rationales underlying antisocial behaviour policies. Comparing British and Dutch discourse analyses,* (diss. Leiden), Amsterdam: Ponsen & Looijen 2011, ISBN 978 90 6464 501 3

MI-198 M. Hagens, *Toezicht op menswaardige behandeling van gedetineerden in Europa. Een onderzoek naar de verhouding tussen het EHRM en het CPT bij de effectuering van het folterverbod*, (diss. Leiden), Nijmegen: Wolf Legal Publishers 2011, ISBN 978 90 585 0714 3

MI-199 G.O. Reerink, *Toezicht Tenure security for Indonesia's urban poor, A socio-legal study on land, decentralisation, and the rule of law in Bandung*, (diss. Leiden), Leiden: Leiden University Press 2011, ISBN 978 90 8728 152 6, eISBN 978 94 0060 071 3

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MI-202 K.J.O. Jansen, Informatieplichten. Over kennis en verantwoordelijkheid in contractenrecht en buitencontractueel aansprakelijkheidsrecht, (diss. Leiden), Kluwer 2012, ISBN 978 90 1310 434 9

MI-203 T. Barkhuysen, W. den Ouden & M.K.G. Tjepkema (red.), *Coulant compenseren? Over overheidsaansprakelijkheid en rechtspolitiek*, Deventer: Kluwer 2012, 978 90 1310 377 9

MI-204 A.G. Castermans, K.J.O. Jansen, M.W. Knigge, P. Memelink & J.H. Nieuwenhuis (eds.), *Foreseen and unforseen circumstances*, BWKJ nr. 27, Deventer: Kluwer 2012, ISBN 978 90 1310 959 7, eISBN 978 90 1310 960 3

MI-205 A. Eleveld, *A critical perspective on the reform of Dutch social security law. The case of the life course arrangement*, (diss. Leiden) Leiden University Press 2012, ISBN 978 90 8728 174 8, e-ISBN 978 94 0060 112 3

MI-206 C.P.M. Cleiren, M.J. Kunst, J.L. van der Leun, G.K. Schoep, J.M. ten Voorde, *Criteria voor strafbaarstelling in een nieuwe dynamiek. Symbolische legitimiteit versus maatschappelijke en sociaalwetenschappelijke realiteit*, Den Haag: Boom Lemma Uitgevers 2012, ISBN 978 90 5931 921 9

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MI-213 F.M.J. den Houdijker, *Afweging van grondrechten in een veellagig rechtssysteem. De toepassing van het proportionaliteitsbeginsel in strikte zin door het EHRM en het HvJ EU*, (diss. Leiden), Nijmegen: Wolf Legal Publishers 2012, ISBN 978 90 5850 880 5

MI-214 C.M. Smyth, *The Common European Asylum System and the Rights of the Child: An Exploration of Meaning and Compliance*, (diss. Leiden), Leiden 2013

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