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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 inter-governmental 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 analogy, *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 Interests 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

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*.

ECHR.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' in 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.

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.

