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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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## 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'.<sup>1</sup> Two other international human rights instruments expressly recognize the principle – the 1979 Convention on the Elimination of Discrimination Against Women<sup>2</sup> and the 2006 Convention on the Rights of Persons with Disabilities<sup>3</sup> – while the International Covenant on Civil and Political Rights implicitly recognizes the concept.<sup>4</sup> 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,<sup>5</sup> and recently extended the scope of application of the best interests principle beyond the Article 8 context.<sup>6</sup> Significantly, the best interests principle is one of three rights of the child listed in Article 24 of the EU Charter

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- 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.<sup>7</sup> 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.’<sup>8</sup> 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’<sup>9</sup> (as opposed to a right or duty), an ‘open concept with no definite content’,<sup>10</sup> and even ‘a vehicle for the furtherance of the interests or ideologies of others, not of the interests of children’.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> Such absolutist

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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?<sup>14</sup> Are they interests as identified by the child or by the

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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 *verbatim* 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.<sup>15</sup>

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.<sup>16</sup> 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, its meaning seems either to have been taken for granted or to have been considered unimportant.'<sup>17</sup>

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.<sup>18</sup> 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.<sup>19</sup>

Thus, the best interests principle was criticized as providing 'the illusion rather than the reality of legislative guidance'.<sup>20</sup> Worse still, it was accused of being 'a convenient cloak for bias, paternalism and capricious decision-making'.<sup>21</sup> 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

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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.<sup>22</sup> 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?'<sup>23</sup> 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'.<sup>24</sup> 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

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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.'<sup>25</sup>

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<sup>26</sup> and secondary legislation,<sup>27</sup> 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.<sup>28</sup>

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.<sup>29</sup>

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.<sup>30</sup>

#### 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,<sup>31</sup> and the ECtHR.<sup>32</sup> Perhaps the clearest illustration of this dynamic is the inter-relationship between the best interests of the child and

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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.<sup>33</sup>

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.'<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup> 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

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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.<sup>37</sup>

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.<sup>38</sup> 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.<sup>39</sup>

### 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 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.'<sup>40</sup> 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.'<sup>41</sup> Similarly, in the asylum context, UNHCR states that 'the term "best interests" broadly describes the well-being of a child'.<sup>42</sup>

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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.<sup>43</sup> 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.<sup>44</sup>

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 fourth 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.<sup>45</sup> 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.'<sup>46</sup>

#### 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

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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.<sup>47</sup> 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.<sup>48</sup> 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.<sup>49</sup> 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-

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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'.<sup>50</sup> 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 extend 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.'<sup>51</sup> 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.<sup>52</sup> 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',<sup>53</sup> having 'an impact on',<sup>54</sup> 'relevant to',<sup>55</sup> and simply 'for'<sup>56</sup> 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.<sup>57</sup>

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'.<sup>58</sup> 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.<sup>59</sup> 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.<sup>60</sup> 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.<sup>61</sup> 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 et 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.'<sup>62</sup> 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.'<sup>63</sup> 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

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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',<sup>64</sup> 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',<sup>65</sup> 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.'<sup>66</sup>

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

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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).<sup>67</sup>

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'.<sup>68</sup> 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.<sup>69</sup>

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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.<sup>70</sup>

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.<sup>71</sup>

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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.

<sup>70</sup> 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.

<sup>71</sup> 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*',<sup>72</sup> in its seminal case on child rights – *European Parliament v Council* – the Court appeared to be satisfied with a much lesser degree of scrutiny.<sup>73</sup> 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.<sup>74</sup> 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

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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.<sup>75</sup>

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.'<sup>76</sup> 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.<sup>77</sup> A child's need for family unity does.<sup>78</sup> 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

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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.<sup>79</sup> 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.<sup>80</sup> 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*.'<sup>81</sup> 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.'<sup>82</sup>

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

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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.<sup>83</sup> 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 paramouncy.<sup>84</sup> 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.<sup>85</sup> 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.’<sup>86</sup> 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

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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',<sup>87</sup> nevertheless, it does signal a departure from precedent.<sup>88</sup>

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.<sup>89</sup> 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.<sup>90</sup> 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.*'<sup>91</sup>

### 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.<sup>92</sup> This subsection synthesizes recent guidance from a number of sources: UNHCR's Guidelines on Determining the Best Interests of the Child from 2008;<sup>93</sup> Executive Committee Conclusion No. 107 from 2007;<sup>94</sup>

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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' (4<sup>th</sup> 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.<sup>95</sup>

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.'<sup>96</sup>

### 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).<sup>97</sup> 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.<sup>98</sup> Similarly, the Committee RC frequently iterates the need for research and training for professionals on the best interests

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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.<sup>99</sup> 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.<sup>100</sup> 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.<sup>101</sup> This endorsement indicates that the guidelines have a broader application.<sup>102</sup>

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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*'.<sup>103</sup> 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.

<sup>104</sup> 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.<sup>105</sup> 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

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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'.<sup>106</sup> The UNHCR BID Guidelines from 2008 are more much specific with chapters on setting up a BID procedure, including establishing an interdisciplinary 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.<sup>107</sup>

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

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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).<sup>108</sup> 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.

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<sup>108</sup> 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.<sup>109</sup> 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

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<sup>109</sup> 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 is 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.<sup>110</sup> 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.<sup>111</sup>

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

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<sup>110</sup> 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*.

<sup>111</sup> 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.<sup>112</sup> 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.'<sup>113</sup> 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.<sup>114</sup> 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

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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.'<sup>115</sup> 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.<sup>116</sup> 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

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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.<sup>117</sup> 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 bringing the best interests principle to bear on all the provisions of the directive when they are applied to children.

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<sup>117</sup> 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 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).<sup>118</sup> 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

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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.'<sup>119</sup> 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

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<sup>119</sup> 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 accompanied, 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.<sup>120</sup> 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 pre-conditions 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.

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<sup>120</sup> 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,<sup>121</sup> the detention of minors (prohibited unless it is in the best interests of the child),<sup>122</sup> family unity,<sup>123</sup> 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’).<sup>124</sup> 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.<sup>125</sup> 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.<sup>126</sup> This will be elaborated on in subsection 2.5.2 below on the conduct of the assessment.

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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.'<sup>127</sup> This is the boldest endorsement of all the recasts of the proper scope of the best interests principle.<sup>128</sup> 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.'<sup>129</sup> However, as regards the latter provision, it should be noted that the original Commission proposal for

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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'.<sup>130</sup> 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.<sup>131</sup> 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.<sup>132</sup> 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,<sup>133</sup> and the application of the con-

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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 those relatives who are not family members as defined

cept of internal protection to unaccompanied minors.<sup>134</sup> 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.<sup>135</sup>

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.<sup>136</sup> However, the proposal does contain some new quality control provisions that are of general application<sup>137</sup> 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.'<sup>138</sup> Unfortunately, there are ample opportunities, express and implied, in the proposed recast APD for Member States to derogate from these standards.<sup>139</sup> 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.<sup>140</sup> 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,<sup>141</sup> the admissibility procedure,<sup>142</sup> the border pro-

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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<sup>143</sup> and various 'safe country' procedures, so-called.<sup>144</sup> 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.<sup>145</sup> 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

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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.

