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

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

3.1 Introduction

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

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

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

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

3.2 THE RIGHT OF THE CHILD TO SEEK INTERNATIONAL PROTECTION

3.2.1 The right of the child to seek asylum

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

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

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

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

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

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

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

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

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

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

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

> Where the parents or the caregiver seek asylum based on a fear of persecution for their child, the child normally will be the principal applicant even when accompanied by his/her parents. In such cases, just as a child can derive refugee status from the recognition of a parent as a refugee, a parent can, *mutatis mutandis*, be granted derivative status based on his/her child's refugee status. In situations where both the parent(s) and the child have their own claims to refugee status, it is preferable that each claim be assessed separately. […] Where the child's experiences, nevertheless, are considered part of the parent's claim rather than independently, it is important to consider the claim also from the child's point of view.[8]

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

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

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

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

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

8 UNHCR, 'Guidelines on International Protection, Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees', HCR/GIP/09/08 (2009), para. 9.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.2.3 Phase Two CEAS: prospects for enhanced compliance

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

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

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

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

14 Emphasis added.

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

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

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

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

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

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

17 Section IV, Article 40(6).

18 *Ibid*.

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

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

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

3.3 THE RIGHT OF THE CHILD TO QUALIFY FOR INTERNATIONAL PROTECTION

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

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

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

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

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

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

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

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

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

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

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

26 UNHCR, *supra* n. 8.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Deprivation of economic, social and cultural rights, thus, may be as relevant to the assessment of a child's claim as that of civil and political rights. It is important not to automatically attribute greater significance to certain violations than to others but to assess the overall impact of the harm on the individual child.[36]

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

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

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

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

37 *Ibid*.

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

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

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

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

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

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

3.3.2.1 The refugee definition

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

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

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

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

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

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

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

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

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

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

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

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

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

44 See UNHCR, 'Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the status of refugees to victims of trafficking and persons at risk of being trafficked', HCR/GIP/06/07 (2006).

> The trafficking of a child is a serious violation of a range of fundamental rights and, therefore, constitutes persecution. These rights include the right to life, survival and development, the right to protection from all forms of violence, including sexual exploitation and abuse, and the right to protection from child labour and abduction, sale and trafficking, as specifically provided for by Article 35 of the CRC.[45]

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

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

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

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

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

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

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

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

> [U]nderage recruitment (including of girls for sexual services or forced marriage with the military) and direct or indirect participation in hostilities constitutes a serious human rights violation and thereby persecution, and should lead to the granting of refugee status where the well-founded fear of such recruitment or participation in hostilities is based on "reasons of race, religion, nationality, membership of a particular social group or political opinion" (article 1A(2), 1951 Refugee Convention).'[50]

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

Reasons for persecution

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

58 Emphasis added.

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

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

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

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

60 UNHCR rather blurs the issue in its guidelines on child asylum claims in which it states: 'As with adult claims to refugee status, it is necessary to establish whether or not the child's well-founded fear of persecution is linked to one or more of the five grounds listed in Article 1A(2) of the 1951 Convention. It is sufficient that the Convention ground be a *factor relevant to the persecution*, but is not necessary that it be the sole, or even dominant, cause.' Emphasis added. UNHCR (2009), *supra* n. 8, para. 40.

61 It is interesting to note that the courts in no less than 10 Member States have ruled that the nexus requirement is also fulfilled where there is a connection between the acts of persecution and the absence of protection against such acts. See 'Report from the Commission to the European Parliament and the Council on the Application of Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection, COM (2010) 314 final', § 5.2.1, p. 8. Hereinafter, 'Commission evaluation of the QD'.

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

3.3.2.2 The definition of 'serious harm'

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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67 Paras. 35 and 43.

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

69 See paras. 37-39.

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

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

3.3.2.3 Sources of harm and protection

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

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

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

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

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

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

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

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

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

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

75 *Ibid*, §5.1.4, p. 6.

3.3.2.4 Internal protection

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

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

76 For example, UNHCR advocates a two-pronged approach which explores the *relevance* of applying the internal flight alternative in the circumstances of the case and the *reasonableness* of requiring an applicant to relocate internally. However, the reasonableness leg can be criticized because its legal antecedents are unclear: reasonableness is not an element in determining whether there is an international protection need; and if there is no international protection need, then the applicant can be obliged to relocate internally even if it is unreasonable. UNHCR, 'Guidelines on International Protection: 'Internal Flight or Relocation Alternative' Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, HCR/GIP/03/04' (2003). For criticism see James Hathaway and Michelle Foster, 'Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination' in *Refugee Protection in International Law, UNHCR's Global Consultations on International Protection*, eds. Erika Feller, Volker Türk and Frances Nicholson (Cambridge: Cambridge University Press, 2003), 357-417 and Ninette Kelley, 'Internal Flight/Relocation/Protection Alternative: Is It Reasonable?', *International Journal of Refugee Law* 14, no. 1 (2002): 4-44.

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

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

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

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

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

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

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

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

willing to look after him/her? If not, who will provide the alternative care and assistance to which the child is entitled? On the last question, UNHCR observes that '[i]f the only available relocation option is to place the child in institutional care, a proper assessment needs to be conducted of the care, health and educational facilities that would be provided and with regard to the long-term life prospects of adults who were institutionalized as children.'[80] In terms of the three-step approach advocated here, this follows from the requirement to assess any risk of persecution or serious harm that could arise as a result of the relocation as well as the requirement of sustainability.

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

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

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

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

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

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

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

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

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

3.3.2.5 Country of origin information

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

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

81 § 5.1.5, p. 7.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

87 *Ibid*. p. 15.

88 *Ibid*, p. 35.

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

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

3.3.2.6 Cessation

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

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

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

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

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

3.3.2.7 Exclusion

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

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

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

92 *Ibid*, para 76.

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

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

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

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

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

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

> In the case of a child, the exclusion analysis needs to take into account not only general exclusion principles but also the rules and principles that address the special status, rights and protection afforded to children under international and national law at all stages of the asylum procedure. In particular, those principles related to the best interest of the child, the mental capacity of children and their ability to understand and consent to acts that they are requested or ordered to undertake needs to be considered.[96]

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

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

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

96 UNHCR, *ibid*, para. 63.

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

98 *Ibid* para. 93.

99 *Ibid* para. 96.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.3.3.1 The refugee definition

Acts of persecution

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

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

109 Emphasis added.

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

Reasons for persecution

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

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

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

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

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

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

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

3.3.3.2 The definition of 'serious harm'

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

3.3.3.3 Sources of harm and protection

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

3.3.3.4 Internal protection

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

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

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

3.3.3.5 Country of origin information

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

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

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

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

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

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

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

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

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

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

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

3.3.3.6 Cessation

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

114 Article 11(3).

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

3.3.3.7 Exclusion

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

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

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

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

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

3.4 Synthesis of findings

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

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