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

Smyth, C.M.

6 Certain socio-economic rights of the child

6.1 INTRODUCTION

This chapter explores the conformity of the CEAS with three key socio-economic rights: the right of the child to health, to an adequate standard of living and to education. Like the previous chapter, these rights also fall under the general rubric of Article 22(1) CRC (the right of the asylum seeking and refugee child to protection and assistance in the enjoyment of applicable Convention rights) but it is appropriate to deal with them as a discrete category. This is because they are socio-economic rights, a fact which poses, if not a problem, then a complication for the assessment. This is because of the nature of the legal obligation relating to socio-economic rights. Article 4 CRC provides:

> States Parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention. *With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources* and, where needed, within the framework of international cooperation.[1]

It is well established, if increasingly open to challenge, that there is a difference between the legal obligation inherent in most socio-economic rights, as compared with most civil and political rights.[2] While the latter are generally immediately realizable, socio-economic rights are generally progressively realizable.[3] Article 4 CRC reflects this distinction, conceiving of socio-economic

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1 Emphasis added.

2 The mantra of 'indivisibility' has been part of the UN rhetoric on rights at least since the Vienna World Conference on Human Rights in 1993.

3 For example, Article 2(1) of the ICESCR provides: 'Each State Party to the present Covenant undertakes *to take steps*, individually and through international assistance and co-operation, especially economic and technical, *to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant* by all appropriate means, including particularly the adoption of legislative measures.' Emphasis added. Similarly, the EU Charter of Fundamental Rights maintains the distinction between the two sets of rights. Thus Article 52(5) provides that 'principles' (as distinct from rights or freedoms) are to be 'implemented by legislative and executive acts of the Union and acts of Member States when implementing Union law' and are 'judicially cognizable only in the interpretation of such acts and in the ruling on their legality'. The general assumption in the literature is that 'principles' correspond to socio-economic rights and that the legal

rights in the Convention in maximal terms as goals to be achieved progressively.[4] At any given moment, they are determined by the amount of available resources. By contrast to the maximal standards of the socio-economic rights in the CRC, the CEAS establishes minimum standards, at least in its first phase. So how is it possible to measure the latter by the former?

A number of observations may be made on this dilemma. First, it is submitted that it is not within the gift of the EU legislator to curtail the definition of socio-economic rights according to presumptions about resources in Member States when it has no jurisdiction over those resources. Accordingly, it is argued that the standards regarding socio-economic rights established in the CEAS should correspond to the standards established in international human rights law, while of course, leaving a margin of discretion to Member States to sculpt those rights in accordance with available resources. Indeed, the CEAS is characterized by the large amount of discretion it leaves to Member States in the wording and derogation provisions of its instruments. Second, discretion must know some bounds. Just because a right is socio-economic in nature cannot mean that there is no absolute minimum entitlement. Indeed, efforts have been on-going for at least 25 years to identify the minimum entitlement inherent in socio-economic rights, in the absence of which there is a violation.[5] These efforts have centred around identifying the 'core content' of socio-economic rights, the term 'core' being understood as the essence of a right that is impervious to resource constraints and immediately realizable. It is submitted that in its discretionary and derogation provisions, the CEAS must conform to the 'core content' of the right in question.

Accordingly, while this chapter is structured along the lines of the previous chapters, with a first sub-section devoted to outlining the content of the right in question and a second and third sub-section devoted to a critique of the CEAS instruments in its two phases, the first section outlines not just the norm-

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effect of Article 52(5) is to make such rights non-justiciable. See Groussot and Pech, 'Fundamental Rights Protection in the EU Post Lisbon Treaty', *Foundation Robert Schuman Policy Paper*, European Issue No. 173 (2010).

4 McGoldrick has pointed out a subtle textual difference between Article 2(1) ICESCR and Article 4 CRC, noting: '[w]ith respect to economic, social and cultural rights, article 4 clearly indicates that they are not immediate obligations but the absence of any reference to 'achieving progressively' as in article 2 of the ICESCR may imply that the relevant obligations are of a more immediate nature if the resources are demonstrably available.' Dominic McGoldrick, 'The United Nations Convention on the Rights of the Child, *International Journal of Law and the Family* 5 (1991): 138.

5 For an early initiative, see 'The Limburg Principles on the Implementation of the International Covenant on Economic Social and Cultural Rights', U.N. Doc E/CN.4/1987/17, Annex; and *Human Rights Quarterly* 9 (1987): 122-135. See also 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights', *Human Rights Quarterly* 20, no. 3 (1998) and *Netherlands Quarterly of Human Rights* 15, no. 2 (1997). The Committee on Economic, Social and Cultural Rights has delineated the core content of many of the rights in the ICESCR in its general comments and will have further opportunities to do so once the 2008 Optional Protocol relating to a complaints procedure enters into force.

ative content of the right, but also the 'core content'. The thesis is that the provisions of the CEAS instruments should generally conform to the former, but in their discretionary and derogation provisions, should conform at least to the latter. Section 6.2 deals with health, section 6.3 with standard of living and section 6.4 with education.

6.2 HEALTH

6.2.1 The right of the child to health

The right of the child to health is set out in Article 24 CRC, which provides in relevant part:

> 1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.
> 2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:
> […] (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care; […]

Article 24 CRC builds on the right to health in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which sets out the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and includes among the steps necessary for the realization of the right the provision for the healthy development of the child.[6] Furthermore, at the regional level, a number of instruments explicitly or implicitly protect the right to health.[7]

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6 Article 12 ICESCR: '1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. 2. The steps to be taken by the States Parties to the present Convenant to achieve the full realization of this right shall include those necessary for: (a) the provisions of the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child; (b) the improvement of all aspects of environmental and industrial hygiene; (c) the prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) the creation of conditions which would assure to all medical service and medical attention in the event of sickness.'

7 A right to protection of health and to medical assistance are provided in Articles 11 and 13 respectively of the Revised European Social Charter and a right to health care is provided in Article 35 of the EU Charter of Fundamental Rights. Health issues may also arise in the context of Article 2 and 3 ECHR. See respectively ECtHR, *Cyprus v Turkey*, Appl. No. 25781/94, Judgment of 10 May 2001and ECtHR, *Pretty v UK*, Appl. No. 2346/02, Judgment of 29 April 2002.

Also of relevance to the right of the child to health is Article 39 CRC which provides:

> States parties shall take all appropriate measures to promote physical and psychological recovery and reintegration of a child victim of: any form of neglect, exploitation or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

This right of the child victim to recovery and reintegration is novel in international and regional human rights law, finding no equivalent, for example, in the ICESCR or in the Convention Against Torture.[8]

6.2.1.1 The normative content of the right

Beginning with Article 24 CRC, it is useful, given the complexity of the article, to analyze it according to its constituent elements.

The first sentence of Article 24(1) can be divided into three elements. The first establishes the right of the child to 'the highest attainable standard of health'. A similar provision is found in Article 13 ICESCR, but explicitly relates to both physical and mental health. However, nothing should be made of the omission in the CRC as the Committee RC interprets the right to health as pertaining both to physical and mental health.[9] The Committee on Economic, Social and Cultural Rights has elaborated on the normative content of the right to health in its General Comment 14.[10] It notes that the right to health is not confined to the right to *health care*, but rather embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the *underlying determinant of health*, such as food and

8 The closest equivalent in the Convention Against Torture is Article 14(1) which provides: 'Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. […]' Also of note is the obligation – often couched in 'soft' or conditional terms – in international and regional law governing anti-trafficking to facilitate the rehabilitation of victims of trafficking. See, for example, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organised Crime, 2000, Article 6.

9 See Committee RC, General Comment No. 4, 'Adolescent health and development in the context of the Convention on the Rights of the Child', U.N. Doc. CRC/GC/2003/4 (2003), para. 39(c) & (i); Committee RC, General Comment No. 6, 'Treatment of unaccompanied and separated children outside their country of origin', U.N. Doc. CRC/GC/2005/6 (2005), para. 48; Committee RC, General Comment No. 9, 'The right of children with disabilities', U.N. Doc. CRC/C/GC/9 (2007), para. 51; Committee RC, General Comment No. 13, 'Article 19: The right of the child to freedom from all forms of violence', U.N. Doc. CRC/C/GC/13 (2011), para. 52.

10 Committee on Economic, Social and Cultural Rights (Committee ESCR), General Comment 14, 'The right to the highest attainable standard of health', U.N. Doc. E/C.12/2000/4 (2000).

nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.[11] As a result of this broad understanding of the right to health, States Parties are required, not only to provide health care facilities, goods and services, but to meet other rights relevant to creating the conditions precedent to the highest attainable standard of health, such as the right to an adequate standard of living and the right to education, both of which are dealt with in subsequent sections of this chapter.

The next element relates to 'facilities for the treatment of illness'. This provision derives from Article 12(2)(d) of the ICESCR which obliges States Parties to take steps to create conditions 'which would assure to all medical service and medical attention in the event of sickness.' However, the Committee on Economic, Social and Cultural Rights does not consider such facilities to be limited to curative facilities. According to General Comment 14, the obligation 'includes the provision of equal and timely access to basic preventive, curative [and] rehabilitative health services and health education; regular screening programmes; appropriate treatment of prevalent diseases, illnesses, injuries and disabilities, preferably at community level; the provision of essential drugs; and appropriate mental health treatment and care.'[12]

The third element relates to facilities for the 'rehabilitation of health'. There is no corresponding provision of the ICESCR, although the above extract from General Comment 14 makes it clear that the Committee on Economic, Social and Cultural Rights considers rehabilitation to be an integral part of medical service/attention in the event of sickness. The fact that rehabilitation of health is expressly mentioned in Article 24 CRC can be explained by the fact that childhood ill-health can affect a child's development and consequently have long-term or permanent effects.[13] Also of relevance to the question of rehabilitation of health is Article 39 CRC, which will be analyzed below.

The second sentence of Article 24(1) obliges States Parties to strive to 'ensure that no child is deprived of his or her right of access to such health care services'. The *travaux préparatoires* of the CRC show that the purpose of this provision was to ensure that no child would be deprived of his or her right of access to health care because of a lack of ability to pay.[14] However, a broader contemporary interpretation of the right of access to health care is given by the Committee on Economic, Social and Cultural Rights. General Comment No. 14 provides that access to health care encompasses not only

11 For more on the terminology of the right to health, see Virginia Leary, 'The Right to Health in International Human Rights Law, *Health and Human Rights* 1, no. 1 (1999): 25-56.

12 *Supra* n. 10, para. 17.

13 On this point see Asbjorn Eide and Wenche Barth Eide, *A Commentary on the United Nations Convention on the Rights of the Child, Article 24 The Right to Health* (Leiden/Boston: Martinus Nijhoff Publishers, 2006), para. 31.

14 *Ibid*, para. 32.

economic accessibility but also non-discrimination, physical accessibility, and information accessibility.[15]

Article 24(2) sets out the measures a State Party must take to pursue the full implementation of the right of the child to health. Article 24(2)(b) establishes that States Parties must ensure 'the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care'. There are two aspects to this obligation: first, the provision of necessary medical assistance and health care; and second, the development of primary health care. The wording makes clear that the second is a necessary but not sufficient condition for the first. The most comprehensive definition of primary health care is provided in the Declaration of Alma Ata on Primary Health Care 1979.[16] The Declaration establishes that primary health care is 'primary' in the sense of being essential health care, the first level of contact with the national health system and the first element of a continuing health care process. It addresses the main health problems in the community, providing promotive, preventive, curative and rehabilitative services accordingly. And it includes *at least*, among other services, child health care. As to what, other than primary health care, constitutes *necessary* medical assistance and health care, this can be identified by a process of elimination. The emphasis placed on primary health care suggests that resources should not be spent on tertiary health care (i.e. high tech, high cost institutions, which are highly equipped and staffed but which benefit only a small number of people).[17] What remains is secondary health care by a hospital or physician following referral by a primary health care worker and emergency hospital treatment. Where such health care is 'necessary', it falls within the parameters of Article 24(2)(b).

Moving now to Article 39 CRC, which obliges states to promote physical and psychological recovery and reintegration of a child victim of various types of ill-treatment. Apart from the novelty of this provision in international law, Article 39 is interesting because of the way it conceives of recovery and reintegration. State Parties are obliged to 'take all appropriate measures to promote physical and psychological recovery and reintegration […] in an environment which fosters the health, self-respect and dignity of the child'. Two aspects of this are noteworthy. First, the *psychological* as well as physical recovery and reintegration of the child is required. Hence the mental health aspect of recovery and reintegration is placed on a par with the physical aspect, with obvious implications for the provision of psychological services, counselling and so forth. Second, in line with the broad understanding of the right to health discussed above, Article 39 CRC adopts a holistic, as distinct

15 Committee ESCR, General Comment 14, s*upra* n. 10, para. 12(b).

16 International Conference on Primary Health Care, Alma-Ata, USSR, 6-12 September 1978. Endorsed by UN General Assembly Resolution 34/43 of 19 November 1979.

17 On this point see Asbjorn Eide and Wenche Barth Eide, *supra* n. 13, para. 58.

from a strictly 'sickness' approach to recovery and reintegration. Thus, States Parties are required to take *all appropriate measures* – including but not confined to medical ones – to promote recovery and reintegration. Moreover, the recovery and reintegration must take place in an environment that fosters the health, self-respect and dignity of the child. This holistic approach recognizes the fact that the psycho-social well-being of the child is as important to recovery and reintegration as medical intervention. It also recognizes the linkages between recovery and the right of the child to an adequate standard of living i.e. one that promotes self-respect and dignity. In this regard, it is interesting to note that the CRC provides in Article 27(1) that the child has a right to a standard of living 'adequate for the child's physical, mental, spiritual, moral and social development.' Therefore, the right of the child to rehabilitation and recovery in Article 39 CRC is likely to be frustrated if the right to an adequate standard of living as defined in Article 27(1) CRC is not fulfilled.[18] This linkage will be taken up in the section on the right to an adequate standard of living, below.

In sum, the normative content of the right of the child to health comprises the fulfilment of the underlying determinants of health as well as a right to health care. The right to health care covers preventive, curative and rehabilitative health services, with an emphasis on primary health care. No child should be denied access to such health care services. Furthermore, the right of the child victim of various types of ill-treatment to recovery and reintegration requires states to take positive and holistic measures to facilitate that recovery and reintegration.

6.2.1.2 The 'core content' of the right

Having explored the normative content of the right of the child to health, the question arises as to whether and to what extent the right is susceptible to limitation. A number of observations should be made in this regard.

First, neither Article 24 nor Article 39 CRC contains a limitation clause such as is found in relation to the civil and political rights in the Convention.[19] Nor does the CRC contain a general (i.e. horizontal) limitation clause such as

18 The Committee RC made this link in its Concluding Observations to Lithuania in 2006, U.N. Doc. CRC/C/LTU/CO/2, when it recommended the State party at § 8 to '[t]ake urgent measures to further improve the reception conditions for families and in particular children seeking asylum in Lithuania by, *inter alia*, providing psychosocial and recovery services for traumatized children and children arriving from armed conflicts *as well as* by improving the environment of the reception facilities.' Emphasis added.

19 See, for example, Article 13(2) which imposes limitation on the right of the child to freedom of expression, Article 14(3) which imposes limitations on the right of the child to freedom of thought, conscience and religion and Article 15(2) which imposes limitations on the right of the child to freedom of association and assembly.

is found in Article 4 ICESCR.[20] However, it does not necessarily follow that the right to health provisions of the CRC are absolute. For a start, a certain elasticity of obligation is introduced by way of the phrasing of the legal obligation. Article 24 in particular contains a number of phrases designed to afford a measure of discretion to states in deciding how to give effect to the right to health, phrases such as 'strive to ensure' and 'take appropriate measures'.[21] But of greater import, being a socio-economic right, the right of the child to health is not subject to full immediate realization. Thus, as previously indicated, Article 4 CRC on the nature of the legal obligation in the Convention provides that '[w]ith regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources'. Consequently, the scope of the socio-economic rights in the CRC is determined by the amount of available resources. In this regard, resource constraints act as a kind of deferral mechanism, a functional limitation, on socio-economic rights. The question of whether middle and high income countries – such as the EU Member States which have adopted the CEAS – can reasonably argue a lack of resources is complex and beyond the scope of this work.[22] However, it is an inescapable fact that such countries have proven strongly resistant in practice to extending the full gamut of socio-economic rights to non-nationals (including children). In this context, it is necessary to identify the 'core content' of the right of the child to health, the term 'core' being understood as the essence of the right that is impervious to resource constraints and hence not susceptible of limitation on economic grounds. According to General Comment No. 3 of the Committee on Economic, Social and Cultural Rights on the nature of States Parties obligations, every socio-economic right contains two 'core' obligations: the immediate duty to 'take steps' towards the goal of full realization thereby ensuring minimum essential

20 Article 4 ICESCR provides: 'The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitation as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.'

21 For more on this question see Cynthia Price Cohen, 'Elasticity of Obligation and the Drafting of the Convention on the Rights of the Child' *Connecticut Journal of International Law* 72, no. 3 (1987-88): 71-109.

22 In this regard, it is interesting to note that the CRC contains no equivalent of Article 2(3) of the ICESCR which states that '[d]eveloping countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.' The Committee RC has interpreted the omission to mean that developing countries are not permitted to limit the Convention rights of non-nationals. The same must be true *a fortiori* of developed countries. See Committee RC, General Comment No. 6, *supra* n. 9, para. 16. On the other hand, the Committee ESCR has acknowledged 'the realities of the real world and the difficulties involved for *any* country in ensuring the full realization of economic, social and cultural rights.' Committee ESCR, General Comment 3, 'The nature of States parties obligations (Art. 2, par.1)', HRI/GEN/1/Rev.6 at 14 (1990), para. 9 (emphasis added).

levels of the right; and the undertaking to guarantee the right without discrimination.

The minimum essential obligation

In its General Comment No. 3 on the nature of States Parties obligations, the Committee on Economic, Social and Cultural Rights states that the undertaking in Article 2(1) ICESCR 'to take steps' is not qualified or limited by other considerations.[23] Thus while the full realisation of the relevant rights may be achieved progressively, steps towards that goal must be taken immediately. These steps correspond to the minimum essential obligation. Although the term 'measures' rather than steps is used in corresponding Article 4 CRC, it is submitted that there is no practical difference between the terms.[24] Both make a distinction between what are known (following the work of the International Law Commission) as obligations of conduct and obligations of result.

In terms of the right of the child to health, it is clear that Article 24(1) corresponds to the obligation of result and that Article 24(2) corresponds to the obligation of conduct. Accordingly, pursuant to Article 24(2)(b) immediate steps must be taken 'to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care'. Since the emphasis must be placed on the latter, the provision of primary health care constitutes the minimum core of the right of the child to health. This is also the position adopted by the Committee on Economic, Social and Cultural Rights in relation to the general right to health. Thus General Comment No. 3 provides that:

> […] [a] minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State Party. Thus for example, a State Party in which any significant number of individuals is deprived of essential foodstuffs, of *essential primary health care*, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant.[25]

Similarly, General Comment 14 of the Committee on Economic, Social and Cultural Rights on the right to health states that the Alma-Ata Declaration on Primary Health Care provides 'compelling guidance' on the core obligations arising from the right to health, which include at least the obligation '[t]o ensure reproductive, maternal (pre-natal as well as post-natal) and *child health care*'.[26] Consequently, it is not permissible to limit the right of the child to

23 Committee ESCR, General Comment 3, *ibid,* para. 2.

24 Indeed, in the Spanish version of the ICESCR, the obligation in Article 2(1) 'to take steps' is 'a adopter medidas' (to adopt measures).

25 *Supra* n. 22, para. 10 (emphasis added).

26 Committee ESCR, General Comment 14, s*upra* n. 10, para. 44 (emphasis added).

health below the level of primary health care in all its promotive, preventive, curative and rehabilitative dimensions.

As regards Article 39 CRC relating to the right of the child to rehabilitation and recovery, since this right is *sui generis* in international human rights law, it is inappropriate to classify it according to the civil and political/ economic, social and cultural dichotomy. Consequently, Article 4 CRC relating to the progressive realization of socio-economic rights in the Convention does not apply. Therefore, it is necessary to analyze the terms of Article 39 itself to establish whether it permits of limitation. In this regard, it is noteworthy that the language relating to the obligation ('States Parties shall take') is one of the strongest formulations used in international human rights law. These words constitute, according to Price Cohen, 'emphatic words of universal scope' and place 'the strongest possible obligation upon States Parties.'[27] Consequently, the legal obligation is one of full immediate realization, albeit that some degree of latitude is given to states in deciding on what are 'appropriate measures'. However, even this discretion is qualified by the absolute requirement that '[s]uch recovery and reintegration *shall* take place in an environment which fosters the health, self-respect and dignity of the child'. Accordingly, there is no scope for limitation of the right.

The prohibition of discrimination

Any limitation on the right of the child to health, in addition to respecting the minimum essential obligation, must not be discriminatory. A prohibition of discrimination is part of the normative content of the right of the child to health. This is evident from two clauses of Article 24 CRC. Article 24(1) second sentence provides 'States Parties shall strive to ensure that *no child is deprived of his or her right of access* to such health care services', while Article 24(2)(b) requires States Parties to 'ensure the provision of necessary medical assistance and health care to *all children*'. Furthermore, Article 2 CRC establishes a prohibition of discrimination as a cross-cutting general principle of the Convention, providing:

> 1. States Parties shall respect and ensure the rights set forth in the present Covenant to each child within their jurisdiction without distinction of any kind, irrespective of the child's or his or her parent's or legal guardian's race colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
> 2. States Parties shall take all appropriate measure to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians or family members.

27 Cynthia Price Cohen, *supra* n. 21, p. 76.

The first paragraph of Article 2 CRC is a standard 'auxiliary' non-discrimination provision, prohibiting discrimination in relation to other rights in the Convention, like the right to health. Like other such provisions in international human rights law, it prohibits discrimination on a number of grounds, including 'other status'. Following the initiative of other treaty monitoring bodies[28] and indeed the ECtHR in relation to Article 14 ECHR,[29] 'other status' has been interpreted by the Committee RC as extending to nationality and even protection status. Thus the Committee has stated that '[t]he principle of non-discrimination […] prohibits any discrimination on the basis of the status of a child as being unaccompanied or separated, or being a refugee, asylum seeker or migrant'.[30] Interestingly, Article 2(2) CRC is an 'autonomous' non-discrimination provision, prohibiting discrimination or punishment in any matter (including but not limited to the enjoyment of Convention rights) on the basis not only of the status but also, *inter alia*, of the *activities* of the child's parents, legal guardians or family members.[31]

Hence, discrimination against or between children seeking or enjoying international protection is clearly prohibited. However, this does not mean that every difference in health treatment between, for example, children seeking and children enjoying international protection, or either of those groups and national children offends against the prohibition of discrimination. There is a well-established international legal 'formula' for assessing claims of discrimination, which contains a number of hurdles that have to be overcome before a distinction will be classified as discrimination. This formula starts from the premise that not every difference in treatment amounts to discrimination because, in the words of ECtHR, 'the competent national authorities are frequently confronted with situations and problems which, on account of difference inherent therein, call for different legal solutions; moreover, certain legal inequalities tend only to correct factual inequalities.[32] Consequently, the alleged victim of discrimination must show that he/she is less favourably

28 Committee ESCR, General Comment 20, 'Non-discrimination in economic, social and cultural rights (art. 2, para. 2 of the International Convenant on Economic, Social and Cultural Rights)', U.N. Doc E/C.12/GC/20 (2009), para. 30; Committee on the Elimination of Racial Discrimination, General Recommendation 30, 'Discrimination against Non-citizens', U.N. Doc CERD/C/64/Misc 11/rev. 3 (2004), particularly paras. 29 and 36 which relate to discrimination in relation to the right to health; Human Rights Committee, General Comment 15, 'The position of aliens under the Covenant', U.N. Doc. HRI/Gen/Rev.1 at 18 (1994), para. 2.

29 ECtHR, *Gaygusuz v Austria*, Appl. No. 17371/90, Judgment of 16 September 1996; (1997) 23 EHRR 90.

30 Committee RC, General Comment No. 6, *supra* n. 9, para. 18.

31 For analysis of this innovative provision in international law see Samantha Besson 'The Principle of Non-Discrimination in the Convention on the Rights of the Child', *International Journal of Children's Rights* 13, no. 4 (2005): 433-461.

32 ECtHR, *Belgian Linguistics* case, Appl. Nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, Judgment of 23 July 1968, para. 9.

treated as compared with similarly-situated persons. If this hurdle is overcome and a *prima facie* case of discrimination is made out, the burden of proof shifts to the state to show that the differential treatment is justified. The Committee on Economic, Social and Cultural Rights has stated in General Comment 20 on Non-discrimination in economic, social and cultural rights:

> Differential treatment on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures of omissions and their effects.[33]

In sum, the question of whether the child seeking or benefiting from international protection is discriminated against in the enjoyment of his/her right to health turns on a comparator test and thereafter, on whether the difference in treatment is justifiable. This cannot be determined in the abstract but requires a contextual assessment which will be undertaken below.

6.2.2 Phase One CEAS: compliance with the right of the child to health

Having set out the normative and core content of the right of the child to health, this sub-section explores whether the relevant CEAS instruments are consistent with both or at least the minimum standard. The relevant CEAS instruments are the RCD and the QD. Given the complexity of the provisions on health care in each directive, it is convenient to devote a subsection to each directive.

6.2.2.1 The Reception Conditions Directive

Article 15 of the RCD relating to health care provides as follows:

> (1) Member States shall ensure that applicants receive the necessary health care which shall include, at least, emergency care and essential treatment of illness.
> (2) Member States shall provide necessary medical or other assistance to applicants who have special needs.

Hence, a general standard of health care is established in paragraph 1, while a specific standard is established in paragraph 2 regarding persons with special

33 Committee ESCR, General Comment 20, *supra* n. 28, para. 13.

needs. Taking the general standard first, it can be observed that paragraph 1 actually sets two different standards: a higher standard i.e. *necessary* health care, which implies access to the full range of primary health care services as well as access to secondary health care services where they are needed, and a lower standard i.e. *emergency* care and *essential* treatment of illness, which suggests emergency hospital and curative care. It can be observed that while the higher standard conforms to both the normative and the core content of the right of the child to health, the lower standard conforms to neither.

The effect of paragraph 2 is to insulate applicants who have special needs from the lower standard established in paragraph 1, since such applicants must be provided with *necessary* medical or other assistance. But there is confusion about the scope of paragraph 2 *ratione personae*. Who are persons who have special needs? Some light is shed on this question in Chapter IV on Provisions for Persons with Special Needs. This chapter includes an article on minors (Article 18), unaccompanied minors (Article 19) and victims of torture and violence (Article 20). It establishes a 'general principle' in Article 17 for dealing with 'vulnerable persons' according to which Member States are required to take their specific situation into account in the national legislation implementing the provisions relating to material reception conditions and health care. An illustrative list of such persons is provided and includes minors and unaccompanied minors alongside other groups such as persons who have subjected to torture, rape or other serious forms of psychological, physical or sexual violence. But the general principle only applies if such persons are 'found to have special needs after an individual evaluation of their situation.' It is unclear whether this provision mandates an individual screening process to identify persons with special needs, or whether the absence of such screening at the national level could vitiate the obligation. Related to this, it is unclear whether being a minor or unaccompanied minor *per se* is enough to qualify a child as being a person with special needs or whether some further vulnerability must be demonstrated. The Commission evaluation of the RCD reflects these ambiguities.[34]

Chapter III RCD is also relevant to the question of the level of health care provision. It allows for the reduction, withdrawal and even outright refusal of reception conditions in certain situations in an effort to counteract abuse of the reception system. Article 16(1) provides that where the asylum seeker

34 Thus, according to the evaluation, '[a]lthough the majority of Member States recognize [persons with special needs] by listing all the groups mentioned in the Directive or by using an open clause, some do not cover the full list in Article 17 or do not address persons with special needs at all (SK, FR, HU, LT, MT, PL, LV, EE and some regions of AT). Furthermore, in some Member States (UK, DE, BE, LU, EL, IT, SK, SI) no identification procedure is in place.' 'Report from the Commission to the Council and to the European Parliament on the Application of Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers', COM (2007) 745 final, §. 3.5.1, p.9. Hereinafter, 'Commission evaluation of the RCD'.

abandons the place of residence, fails to comply with reporting duties or requests for information, fails to appear for personal interview, has already lodged a previous application or has concealed financial resources, the Member State may reduce or withdraw reception conditions. Pursuant to Article 16(2), Member States may refuse (outright) reception conditions 'where an asylum seeker has failed to demonstrate that the asylum claim was made as soon as reasonably practicable after arrival in that Member State.' However, Article 16(4) establishes that 'Member States shall under all circumstances ensure access to emergency health care'. Consequently, it is not possible to refuse the right to health care outright, or reduce or withdraw it beyond this minimum level. Nevertheless, the level is considerably below the 'core content' of the right of the child to health, namely, access to the full range of primary health care services.

Article 16(4) further provides that '[d]ecisions shall be based on the particular situation of the person concerned, especially with regard to persons covered by Article 17 [i.e. the general principle on persons with special needs], taking into account the principle of proportionality.' This provision establishes that minors and unaccompanied minors are not exempted from having their health care under the directive reduced or withdrawn, although their special needs must be taken into account in assessing proportionality. This raises the question of whether such treatment could ever be proportionate when the object of the treatment is a child. The normative content of the right of the child to health draws attention to the vulnerability of the child to ill-health and its attendant consequences for development.[35] Children seeking international protection are widely regarded as being more vulnerable than children in the host population.[36] This vulnerability means that the impact of reduced health care on the child is likely to be more profound than in respect of someone who does not have special needs. In the context, it is submitted that Article 16(4) of the directive is unworkable and bound to be defeated by its own requirement of proportionality.

Furthermore, where, as in the case of derived rights, the child's access to health care is reduced, withdrawn or refused because of the parents' 'abuse' of the reception system, this falls foul of the prohibition of discrimination in Article 2(2) CRC which forbids 'all forms of discrimination *or punishment* on

35 In this regard, the Committee RC notes in General Comment No. 13 that '[a]t a universal level all children aged 0-18 years are considered vulnerable until the completion of their neural, psychological, social and physical growth and development.' *Supra* n. 9, para. 72(f), p. 27.

36 The Committee RC has identified refugee and asylum seeking young children (of pre-school age) and adolescents experiencing all types of migration as vulnerable groups. See respectively, Committee RC, General Comment No. 7, 'Implementing child rights in early childhood', U.N. Doc. CRC/C/GC/7/Rev.1 (2006), para. 24 and Committee RC, General Comment No. 4, *supra* n. 9, para. 38.

the basis of the status, *activities*, expressed opinions, or beliefs of the child's parents, legal guardians or family members.'[37]

To sum up, the main provision on health care in the RCD, namely Article 15(1), contains two possible standards of health care, the lower of which conforms to neither the normative or core content of the right of the child to health. This is mitigated somewhat by the reference to necessary medical assistance for persons with special needs, but it is unclear whether minors or unaccompanied minors fall within the personal scope of this provision. Furthermore, Chapter III RCD allows for the reduction and withdrawal of health care, subject to the floor of emergency health care. This minimum level offends against the core content of the right of the child to health.

Turning now to the right of the child victim of ill-treatment to recovery and reintegration under Article 39 CRC, two articles of the RCD are of note. Article 20 on the victims of torture and violence provides that 'Member States shall ensure that, if necessary, persons who have been subjected to torture, rape and other serious acts of violence receive the necessary treatment of damages caused by the aforementioned acts.' The rather redundant use of the words 'if necessary' aside, it should be noted that this provision also applies to minor victims of torture and sexual and other violence.

But of even greater significance, Article 18 RCD relating to minors provides:

> Member States shall ensure access to rehabilitation services for minors who have been victims of any form of abuse, neglect, exploitation, torture or cruel, inhuman and degrading treatment, or who have suffered from armed conflicts, and ensure that appropriate mental health care is developed and qualified counselling is provided when needed.

The RCD is the only CEAS instrument to contain a provision specifically directed to 'incorporating' Article 39 CRC. The inclusion of this provision in the directive, with its specific reference to appropriate mental health care and qualified counselling, is praiseworthy. However, it does not accurately reflect the terms of Article 39 CRC. Notably the references to 'all appropriate measures' and to 'an environment which fosters the health, self-respect and dignity of the child' are omitted. This is not a question of squabbling over wording; these omissions are significant. The holistic approach advanced in Article 39 CRC is essential in the context of traumatized child asylum seekers where it is well established that the medical or 'sickness' model of rehabilitation is a limited one.[38] First, the medical model pathologises responses to trauma rather than

37 Emphasis added.

38 See for example, M.E. Kalverboer, A.E. Zijlstra and E.J. Knorth, 'The Developmental Consequences for Asylum- seeking Children Living With the Prospect for Five Years or More of Enforced Return to Their Home Country', *European Journal of Migration and Law* 11 (2009): 41-67 and Margaret McCallin, 'The Convention on the Rights of the Child as

understanding such responses as normal reactions to situations of extreme stress. Second, it flounders on the almost inevitable under-funding of mental health care and consequent shortage of mental health professionals and qualified counselling. In this regard, it is unsurprising that the Commission evaluation of the RCD found that 'adequate access to health care has its limitations, e.g. no effective access to medical care, lack of specific care (in particular for victims of torture and violence) and insufficient cost cover.'[39] And third, it fails to recognize that a contributory factor to a child's trauma is his/her current living conditions.

A further problem with Article 18 RCD is that it fails to provide a mechanism for identifying minors who have been victims of the listed ill-treatment, an obligation arguably implicit in Article 39 CRC. Thus, the Committee RC has referred to the duty to identify such children in its General Comment No. 6[40] and in a number of concluding observations made to States Parties in relation to asylum seeking children.[41] The lack of a mechanism for identifying persons with special needs in general has already been commented on.

In sum, the right of the child victim of various types of ill-treatment to recovery and reintegration is reflected in the RCD, albeit imperfectly.

6.2.2.2 The Qualification Directive

The QD establishes five distinct 'streams' of access to healthcare.

First, Article 29(1) provides that beneficiaries of international protection have access to health care under the same eligibility conditions as nationals. Thus equal access to the full range of health care services available to nationals is implied.

Second, however, an exception is crafted in Article 29(2) in respect of beneficiaries of subsidiary protection, whose right to health care may be limited to 'core benefits', which must nevertheless be provided 'at the same levels and under the same eligibility conditions as nationals'.

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an Instrument to Address the Psychosocial Needs of Refugee Children' *International Journal of Refugee Law* 3, no. 1 (1991): 82-99.

39 § 3.5.2, p. 9.

40 Paragraph 47 provides that in ensuring the access of separated and unaccompanied children to facilities for the treatment of illness and rehabilitation of health, 'States must *assess* and address the particular plight and vulnerabilities of such children' (emphasis added). Committee RC, General Comment No. 6, *supra* n. 9

41 For example, in its concluding observations to Norway in 2010, the Committee expressed its concern 'at the cursory identification of children affected by armed conflict'. U.N. Doc. CRC/C/NOR/CO/4. Similarly in its concluding observations to Finland in 2000, the Committee recommended 'that the State party ensure that every effort is made to identify [asylum seeking and refugee] children who require special support upon their arrival in the State party, as well as consider providing adequate psychological assistance to them and their parents.' U.N. Doc. CRC/C/15/Add.132.

Third, Article 29(3) provides that 'adequate health care' under the same eligibility conditions as nationals must be provided to beneficiaries of international protection who have special needs. It provides an illustrative list of persons with special needs which includes 'minors who have been victims of any form of abuse', although not minors or unaccompanied minors *per se*. By contrast, Article 20 which establishes general rules relating the rights of refugees and beneficiaries of subsidiary protection provides in paragraph 3 that Member States shall 'take into account' the specific situation of vulnerable persons such as minors and unaccompanied minors when implementing such rights. However, paragraph 4 clarifies that this applies 'only to persons found to have special needs after an individual evaluation of their situation.' This formulation raises the same confusion as discussed above in relation to Article 17 of the RCD. The relationship between Article 29(3) and Article 20 QD is unclear.

Fourth, as regards family members of beneficiaries of international protection, the general rule established under the principle of family unity in Article 23 is that family members 'are entitled to claim the benefits referred to in Articles 24-34' which includes the right to health care in Article 29. However, again, an exception is crafted regarding family members of beneficiaries of subsidiary protection status: per Article 23(2), 'Member States may define the conditions applicable to such benefits [as health care]'.

Finally, Article 20 which establishes the general rules regarding the rights of refugees and beneficiaries of subsidiary protection provides in paragraphs 6 and 7 that where a refugee or beneficiary of subsidiary protection obtained that status 'on the basis of activities engaged in for the sole or main purpose of creating the necessary conditions for being recognized', Member States may reduce such rights, albeit within the limits set out by the Geneva Convention and international obligations of Member States, respectively. In respect of the Geneva Convention, it should be noted that no provision of that Convention relates to health care. However, in respect of the international obligations of Member States, this clearly includes obligations under the right to health articles of the CRC. Consequently, Article 20 is not as restrictive as it first appears.

In sum, under the QD, refugees and their family members are entitled to the *full range of public health care services* available to nationals; beneficiaries of SP are entitled, at a minimum, to *core benefits* while *conditions* may be imposed on their family members' access to health care; persons with special needs, which may or may not include minors and unaccompanied minors, are entitled to *adequate health care*; and persons who gained recognition in bad faith may have their right to health care *reduced* but within the limits set by international refugee and human rights law.

There are two major problems with these streams of access to healthcare from the point of view of the right of the child to health. First, the terminology (e.g. 'core benefits', 'conditions', 'adequate', 'reduced') does not map easily

onto the terminology used in Article 24 CRC, making it difficult to assess whether the various streams conform to either the normative or core content of the right of the child to health. Second, the permitted differential treatment of different groups raises the question of discrimination and consequently of whether there is a violation of the core content of the right of the child to health. Of particular concern is the differential treatment of refugees as compared with beneficiaries of subsidiary protection and of family members of refugees as compared with family members of beneficiaries of subsidiary protection. The extent to which Member States do actually differentiate between these groups is hard to ascertain from the Commission evaluation of the QD, which provides somewhat inconsistently:

> Only LT and MT appear to apply the possibility provided by Article 29(2) to reduce the access of beneficiaries of subsidiary protection to healthcare to core benefits. In AT, due to the federal system, the level of benefits granted to beneficiaries of subsidiary protection depends on the region they are hosted by. In DE, in cases of subsidiary protection, there is no access to some specific benefits concerning medical treatment.[42]

On principle, it is worth exploring whether this treatment constitutes discrimination. The reasoning pursued here follows the international legal 'formula' for assessing claims of discrimination.

First, on the issue of comparability, it is hard to sustain the charge that children from different protected groups are incomparable to one another. Of course, as Westen observes, the determination of whether two people are alike for purposes of the equality principle flounders on the truism that no two people are alike in every respect and all people are alike in some respect.[43] To have meaning, the comparator principle must refer to people who are alike in respect of a right requiring certain treatment. Therefore, the purpose of comparison is to establish whether there is a *relevant* difference between, for example, a child beneficiary of subsidiary protection and a child refugee viz. à viz. the right to health. Since all children are vulnerable to ill-health and its attendant consequences for their development, is submitted that there is no relevant difference between the groups.

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42 'Report from the Commission to the European Parliament and the Council on the Application of Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons a Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection', COM (2010) 314 final, § 5.5.1.2, p. 14. Hereinafter, 'Commission evaluation of the QD'.

43 Peter Westen 'The Empty Idea of Equality', *Harvard Law Review* 95, no. 3 (1982): 544. For a succinct analysis of the difficulties in using comparability to assess claims of discrimination, see Anne Baysfsky, 'The Principle of Equality or Non-Discrimination in International Law', *Human Rights Law Journal* 11, nos. 1-2 (1990): 1-34.

Second, on the issue of the legitimate aim, economic justifications or justifications relating to protection status are arguably harder to make out when the child is the subject of equality. As for economic justifications, the Committee on Economic, Social and Cultural rights has underlined the fact that 'even in times of severe resources constraints whether caused by a process of adjustment, or economic recession, or by other factors the vulnerable members of society can and indeed must be protected […]'.[44] Similarly, the Committee RC has stated that (even scarce) economic resources must be mobilized to meet the rights of particularly vulnerable children, such as separated and unaccompanied children.[45] Equally, children enjoying international protection (whether accompanied or unaccompanied) can be regarded as a vulnerable group, as has already been argued.

As for justifications relating to protection status, one can anticipate, for example, an argument that child beneficiaries of subsidiary protection have an inherently temporary status and consequently it is justified to limit their health care accordingly. A number of counter-arguments can be made. First, there is no correlation between temporariness as it corresponds to stability of status and temporariness in the temporal sense. Indeed, it is well known that beneficiaries of subsidiary protection may require indefinite protection, depending on the situation in the country of origin.[46] Indeed, all or a large part of a childhood can be spent under a supposedly temporary status. Second, given that children are in the critical process of developing, even a temporary diminution in health care can be critical.

This segues with the third part of the international legal 'formula' for assessing discrimination – the question of proportionality. The reader is referred back to the discussion on proportionality in the analysis of the RCD. Accordingly, it is submitted that the 'streams' of entitlement to health care in the QD constitute discrimination and thus are contrary to the core content of the right of the child to health.

As regards the right of the child victim of ill-treatment to recovery and reintegration, the QD refers, in Article 29(3) on health care, to 'minors who have been victims of any form of abuse, neglect, exploitation, torture, cruel, inhuman and degrading treatment or who have suffered from armed conflict' – a list that is clearly derived from Article 39 CRC. However, rather than

44 Committee ESCR, General Comment 3, *supra* n. 22 at para.12.

45 Committee RC, General Comment No. 6, *supra* n. 9 at para. 16.

46 Indeed the Commission has noted in this regard: 'When subsidiary protection was introduced, it was assumed that this status was of a temporary nature. As a result, the Directive allows Member States the discretion to grant them a lower level of rights in certain respects. However, practical experience acquired so far has shown that this initial assumption was not accurate.' Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted, COM (2009) 551, p.8.

establishing a right to recovery and reintegration of children in such situations, Article 29(3) requires Member States to provide such children (along with other beneficiaries of international protection with special needs), with more generic assistance, namely 'adequate health care'. Furthermore, unlike the RCD, the QD does not contain any general provision on victims of torture or violence. Both omissions are regrettable.

To conclude, some, at least, of the different streams of access to healthcare provided for in the QD offend against the minimum essential obligation inherent in the right of the child to health and against the prohibition of discrimination. Therefore, the core content of the right of the child to health is not consistently met in the QD. The directive also fails to secure the right of the child victim of various forms of ill-treatment to recovery and re-integration, *pace* Article 39 CRC.

6.2.3 Phase Two CEAS: prospects for enhanced compliance

6.2.3.1 The proposed recast Reception Conditions Directive

Article 19 of the proposed recast RCD on health care provides:

> 1. Member States shall ensure that applicants receive the necessary health care which shall include at least emergency care and essential treatment of illness or post traumatic disorders.
> 2. Member States shall provide necessary medical or other assistance to applicants who have special reception needs, including appropriate mental health care where needed.

Compared to Article 15 of the existing directive, the reference in paragraph one to post-traumatic disorders and in paragraph two to appropriate mental health care for applicants with special reception needs should be noted. The proposed recast RCD also clarifies the vexed issue about the identity and identification of persons with special needs. Chapter IV, now re-titled 'Provisions for vulnerable persons', reiterates in Article 21 the general principle that Member States must take into account the specific situation of vulnerable persons such as minors and unaccompanied minors in the national implementing legislation. However, the scope of the principle is no longer restricted to persons found to have special needs after an individual evaluation of their situation. It follows that minors and unaccompanied minors can be automatically considered to be vulnerable. Even if they are not, new Article 22(1) on the identification of the special reception needs of vulnerable persons is relevant, providing:

> Member States shall establish mechanisms with a view to identifying whether the applicant is a vulnerable person and, if so, has special reception needs, also indi-

> cating the nature of such needs. Those mechanisms shall be initiated within a reasonable time after an application for international protection is made. Member States shall ensure that these special reception needs are also addressed, in accordance with the provisions of this Directive, if they become apparent at a later stage in the asylum procedure.

Article 22(1) also obliges Member States to ensure 'adequate support for persons with special reception needs throughout the duration of the asylum procedure and [to] provide for appropriate monitoring of their situation.' If minors and unaccompanied minors are not automatically considered to be vulnerable, then the identification mechanism should pick this up. This means that children are not susceptible to the problematic lower standard of health care in Article 19(1) but are brought squarely within the scope of the higher standard of health care in Article 19(2), which, in turn, conforms to the normative content of the right of the child to health.

Chapter III relating to reduction or withdrawal of reception conditions subsists in the proposed recast, but with two important amendments. First, whereas the existing directive provides that emergency health care must be provided even in cases of reduction, withdrawal or refusal of reception conditions, the proposed recast effectively insulates the right to health care from the scope of application of Chapter III. Thus, new Article 20(3) provides that 'Member States shall under all circumstances ensure access to health care *in accordance with Article 19* [emphasis added].' Second, and this is something of a moot point in the light of the foregoing, the possibility of refusing outright reception conditions where the applicant did not make the application as soon as reasonably practicable after arrival is deleted.

Finally, whereas the existing RCD makes no reference to the right to health care of applicants in detention, new Article 11 of the proposed recast relating to the detention of vulnerable persons and persons with special needs, provides in paragraph 1:

> In all cases, vulnerable persons shall not be detained unless it is established that their health, including their mental health, and well-being, will not significantly deteriorate as a result of the detention.
> Where vulnerable persons are detained, Member States shall ensure regular monitoring and adequate support taking into account their particular situation including their health.

Further provisions which relate to the detention of minors and unaccompanied minors will be critiqued in Chapter 7. However, Article 11(1) is interesting in the context of the right to health, since it predicates the detention of vulnerable persons (a category which, according to Article 21, includes/may include minors and unaccompanied minors) on their state of health and implicitly provides for their release in the event of a significant deterioration of their health.

The provision of the proposed recast RCD on victims of torture and violence (Article 25 which corresponds to Article 20 of the present directive) contains two innovations. In addition to the 'necessary treatment of damages', paragraph 1 adds that victims of torture and violence are entitled to receive 'in particular access to rehabilitation services that should allow for obtaining medical and psychological treatment.' A new second paragraph establishes a training and confidentiality requirement for those working with victims of torture, rape or other serious acts of violence. Regrettably, the proposed recast makes no attempt to better align the provision on the right of the child victim of various forms of ill-treatment to recovery and reintegration with the wording of Article 39 CRC.[47]

Notwithstanding the last point, the proposed recast RCD, as it relates to minors and unaccompanied minors, can now be considered to conform broadly to both the core and the normative content of the right of the child to health.

6.2.3.2 The recast Qualification Directive

As regards the recast QD, the major question is whether it removes the confusing plethora of streams of entitlement to healthcare that currently exist. Some important improvements should be noted in this regard.

First, Article 30(1) reiterates that beneficiaries of international protection have access to health care under the same eligibility conditions as nationals.

Second, the exception in the existing directive providing that the health care entitlements of beneficiaries of subsidiary protection may be limited to core benefits is deleted. Thus, there is no distinction in the level of health care afforded to refugees and beneficiaries of subsidiary protection.

Third, Article 30(2) reiterates the obligation to provide 'adequate health care' to beneficiaries of international protection who have special needs, but adds a stipulation that this includes the 'treatment of mental disorders when needed'. The reference to mental disorders, with its suggestion of psychiatric illness, contrasts negatively with the reference to mental health care in the proposed recast RCD.[48] Moreover, no new mechanism is introduced to identify persons with special needs. And the general rules on the content of international protection in Article 20(3) which obliges Member States to 'take into account' the situation of vulnerable persons such as minors and unaccompanied minors in the national implementing legislation is still subject to the

47 Article 18(2) of the current directive is reproduced without amendment in Article 23(4) of the proposed recast.

48 In the Commission proposal for a recast QD, the reference was to mental health care. This was replaced by the phrase 'treatment of mental disorders' during negotiations. See Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted, COM (2009) 551, Article 30(2).

limitation, now in Article 20(4), that this only applies to 'persons found to have special needs after an individual evaluation of their situation.' It can be observed that the recast QD is out of kilter with the improvements made in this regard in the proposed recast RCD, raising concerns about whether the higher standards in the RCD will survive the legislative process.

Fourth, as regards family members of beneficiaries of subsidiary protection, it is no longer open to Member States to define the conditions applicable to their derived rights. Consequently, they are entitled to health care under the same eligibility conditions as nationals.

Finally, the provisions of the existing directive authorising Member States to reduce the rights of refugees and beneficiaries of subsidiary protection who obtained their status in bad faith is deleted.

In sum, the various streams of access to healthcare are removed in the recast QD, bringing the healthcare provisions broadly into line with the normative content of the right of the child to health. However, it is still unclear whether minors or unaccompanied minors are persons with special needs and thereby entitled to 'the treatment of mental disorders'. This could be significant if such treatment is not generally provided to nationals. Moreover, the recast QD fails to add a provision corresponding to Article 39 CRC or any specific provision on victims of torture or violence.

6.3 STANDARD OF LIVING

6.3.1 The right of the child to an adequate standard of living

Article 27 CRC provides, *inter alia*:

> 1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
> 2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
> 3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

Article 27 CRC is based on, but goes significantly beyond a comparable provision in Article 11 ICESCR.[49] A number of regional human rights instruments also address the right to an adequate standard of living.[50]

6.3.1.1 The normative content of the right

Article 27(1) sets out an obligation of result: the right of the child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. In order to understand the meaning of this provision, it is useful to first examine the 'template' right to an adequate standard of living set out in the ICESCR. Article 11(1) of the Covenant provides, *inter alia*, '[t]he States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.' The reference to adequate food, clothing and housing establishes that the right to an adequate standard of living is aimed at fulfilling the most basic human needs. However, the Committee ESCR has stressed that this does not mean that the normative content of the right is a minimal one. Thus, in its General Comment 4 on The Right to Adequate Housing, the Committee states that 'the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity.'[51] Similarly, in its General Comment 12 on the Right to Adequate Food, the Committee notes that:

> The right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement. The right to adequate food shall

49 Article 11(1) ICESCR provides, *inter alia*: 'The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right […].' Furthermore, Article 10(1) of the Covenant is also of relevance: 'The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children […].'

50 Article 17 of the Revised European Social Charter and Article 34 of the Charter of Fundamental Rights of the EU. Issues relating to the right to an adequate standard of living may also arise under various articles of the ECHR, notably Articles 6, 8 and P1-1 in conjunction with Article 14. In extreme cases Article 3 ECHR may be of relevance. See ECtHR, *MSS v Belgium and Greece*, Appl. No. 30696/09, Judgment (GC) of 21 January 2011 and ECtHR, *Rahimi v Greece*, Appl. No. 8687/08, Judgment of 5 April 2011.

51 Committee ESCR, General Comment 4, 'The right to adequate housing', U.N. Doc E/1992/23 (1991), annex III at 114, para. 7.

> therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients.[52]

Nevertheless, the definition of the right to an adequate standard of living in terms of such basic commodities as food, clothing and housing does indicate that the right is rather narrow in scope. By contrast, Article 27 CRC does not limit the right to physical determinants of well-being, but rather refers to a standard of living adequate for the 'child's physical, mental spiritual, moral and social development'. Thus Asbjorn Eide observes that '[t]he right of the child to an adequate standard of living goes beyond the purely material aspects of living such as food and housing. […] It goes beyond the right of the child to survive by having the basic needs safeguarded. This child is entitled to enjoy conditions which facilitate its development into a fully capable and well functioning adult person.'[53] Hence, economic adequacy – in the sense of having enough (income) to secure material well being – is a necessary but not sufficient condition for the attainment of the right of the child to an adequate standard of living. What the further conditions are is not clear from the text of Article 27 itself and, in attempting to attribute meaning to the right, commentators have attempted to link Article 27 to anti-poverty concepts from the social sciences, such as the concept of social exclusion, which understands poverty as a relative, as opposed to an absolute phenomenon.[54] This appears also to be the position of the Committee RC which notes in General Comment No. 7 that '[g]rowing up in relative poverty undermines children's well-being, social inclusion and self-esteem and reduces opportunities for learning and development.'[55]

Furthermore, the Committee RC links the right to an adequate standard of living with a host of other rights in the Convention such as the right of the child to social security (Article 26), the right of the child to such care and protection as are necessary for well-being (Article 3(2)), the right of the child to development (Article 6(2)), the right of the child to health (Article 24), the right of the child to education (Article 28) and the right of the child to 'rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts' (Article 31).[56] In this regard it may be observed that the rights in the CRC are truly

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52 Committee ESCR, General Comment 12, 'The right to adequate food', U.N. Doc E/C.12/1999/5 (1999), para. 6.

53 Asbjorn Eide, *Article 27, The Right to an Adequate Standard of Living, A Commentary on the United Nations Convention on the Rights of the Child* (Leiden/Boston:Martinus Nijhoff Publishers, 2006), 17.

54 See, for example, Gerry Redmond, 'Child Poverty and Child Rights: Edging Towards a Definition', *Journal of Children and Poverty* 14, no. 1 (2008): 63-82.

55 Committee RC, General Comment No. 7, 'Implementing child rights in early childhood', U.N. Doc. CRC/C/GC/7/Rev.1 (2006) at para. 26.

56 *Ibid*, para. 10.

(as opposed to rhetorically) indivisible and interdependent and consequently it is not possible to address the child's right to an adequate standard of living in isolation of these other rights.

In sum, therefore, the right of the *child* to an adequate standard of living is broader and more comprehensive than the right to an adequate standard of living in general human rights law.

However, a distinction must be made between the state's obligation and the parents' obligation regarding the right of the child to an adequate standard of living. It is clear from paragraphs 2 and 3 of Article 27 that the primary responsibility to secure for the child an adequate standard of living falls to the child's parents, with the state assuming a secondary responsibility. This delineation of responsibility provides further insight into the normative content of the right. Commenting on Article 18 of the CRC, which also deals with the respective responsibilities of parents and the state, Sharon Detrick observes that the term 'primary responsibility' was intended to achieve two aims:

> On the one hand, it was meant to protect parents, or, as the case may be, other persons responsible for the child against excessive state intervention. On the other hand, it was meant to indicate that parents […] could not expect the state always to intervene, because the provision of the conditions of living necessary for the child's development is primarily their responsibility. That being said, the use of the term 'primary responsibility' […] implies that a secondary responsibility to secure the conditions of living necessary for a child's development lies with the state.[57]

It is worth pointing out that the division of responsibility between the parents and the state is redundant in the context of unaccompanied minors, where there are no parents. In such situations, the primary responsibility to secure the child's right to an adequate standard of living falls entirely to the state. Thus, the Committee RC notes that '*States* should ensure that separated and unaccompanied children have a standard of living adequate for their physical, mental, spiritual and moral development.'[58]

As for the secondary responsibility of the state, the precise contours of this responsibility are set out in Article 27(3) according to which the state has a positive obligation to firstly, take appropriate measures to assist parents in discharging their duty and secondly, 'in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.' As regards the duty to assist parents in discharging their duty, the Committee RC recommends indirect interventions such as taxation and benefits, adequate housing and health services as well as more direct inter-

57 Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (The Hague/Boston/London: Martinus Nijhoff Publishers, 1999), 459.

58 Committee RC, General Comment No. 6, *supra* n. 9, para. 44 (emphasis added).

ventions such as parenting education, parent counselling and other parent and family supports.[59] The Committee also observes that:

> Situations which are most likely to impact negatively on young children include […] parenting under acute material or psychological stress or impaired mental health; […] The Committee urges States Parties to take all necessary steps to ensure that parents are able to take primary responsibility for their children; to support parents in fulfilling their responsibilities, including by reducing harmful deprivations, disruptions and distortions in children's care.[60]

This observation is of particular resonance in the asylum context as a growing body of research shows that asylum-seeking families tend to be more dysfunctional and the parents at greater risk of suffering from mental-health problems than families even in deprived sections of the host population.[61] This is considered to be due to past trauma coupled with current living conditions and uncertainty about status. Consequently, the duty to assist parents has important ramifications for the *parents'* right to an adequate standard of living and associated rights. Thus, the Committee observes that 'realising children's rights is in large measure dependent on the well-being and resources available to those with responsibility for their care. Recognising these interdependencies is a sound starting point for planning assistance and services to parents, legal guardians and other caregivers.'[62]

As regards material assistance and support in case of need, whether a family seeking or enjoying international protection is needy in this sense will depend on whether the adults are able to work (i.e. eligible to work, capable of working and successful in finding work) and receive adequate remuneration. Where they are not, the state must provide the material aspects of living. Furthermore, in such situations, arguably the delineation of responsibility between the parents' and the state shifts, with the state becoming primarily responsible for securing the child's standard of living. Thus, the Committee ESCR underlines that 'States Parties are obliged to fulfil (provide) a specific right contained in the Covenant when individuals or groups are unable for reasons beyond their control to realise the right themselves by the means at their disposal.'[63]

In sum, the right of the child to an adequate standard of living is pitched higher than the corresponding right in general human rights law. However, the right is to be primarily met by the child's parents, with the state exercising a secondary responsibility. The state's responsibility involves supporting

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59 Committee RC, General Comment No. 7, *supra* n. 55, para. 20.
60 *Ibid* at para. 18.
61 See, for example, Kalverboer, Zijlstra and Knorth, *supra* n. 38.
62 Committee RC, General Comment No. 7, *supra* n. 55, para. 20.
63 Committee ESCR, General Comment 13, 'The right to education', U.N. Doc. E/C.12/1999/10 (1999), para. 47.

parents in discharging their responsibility (which raises the issue of the parents' right to an adequate standard of living) and providing material assistance and support in cases of need.

6.3.1.2 The 'core content' of the right

The minimum essential obligation

Being a socio-economic right, the right of the child to an adequate standard of living is subject to resource constraints per Article 4 CRC. Indeed, the issue of resource constraints is expressly factored into the obligation of conduct in Article 27(3) which obliges states to act 'in accordance with national conditions and within their means'. As such, resource constraints operate as a functional limitation on the right of the child to an adequate standard of living. In this context, the question arises as to the permissible limits of the limitation, or, in other words, the minimum absolute obligation.

Recalling that the minimum obligation corresponds with the duty to take steps towards the full realisation of the right, it can be observed that Article 27(3) envisages two steps: 1) to take appropriate measures to assist parents to implement the right; and 2) to provide in case of need material assistance and support programmes, particularly with regard to nutrition, clothing and housing. As regards the first, the term 'appropriate' leaves a large measure of discretion to States Parties about which measures they take to assist parents. Nevertheless, demonstrable measures must be taken. As regards the second, there is no leeway (c.f. 'shall in case of need provide'). Consequently States Parties are under an obligation to provide for basic human needs. Any erosion of the right beyond this level would be incompatible with human dignity. This is consistent with the approach of the Committee on Economic, Social and Cultural Rights which states in General Comment No. 3:

> […] [a] minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State Party. Thus for example, a State Party in which any significant number of individuals is deprived of *essential foodstuffs*, of essential primary health care, *of basic shelter and housing*, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant [emphasis added].[64]

This is also consistent with the approach of the ECtHR in two recent cases in which the Court found a violation of Article 3 ECHR because the respondent state failed to ensure the most basic standard of living for the applicant asylum seekers with the result that there were homeless and destitute. In *M.S.S. v Belgium and Greece*, the Court revised its earlier case-law that Article 3 ECHR does not entail any general obligation to give refugees financial assistance to

64 *Ibid* at para. 10

enable them to maintain a certain standard of living.[65] The Court seemed to consider that because Greece is bound by the minimum standards of the RCD, this brought the issue of a minimum standard of living within the material scope of Article 3 ECHR.[66] It follows that the minimum standard of living in the RCD must itself be compatible with Article 3 ECHR. In *Rahimi v Greece*, the Court found that the abandonment by the state of a 15 year old unaccompanied minor until he happened to be taken care of by a local NGO constituted a violation of Article 3 ECHR.[67] In both cases the Court noted the extreme vulnerability of the applicants as members of an 'underprivileged and vulnerable population', an observation that applied *a fortiori* to the unaccompanied minor.[68]

In conclusion, the minimum essential obligation inherent in the right of the child to an adequate standard of living is the duty to assist parents in their fulfilment of the obligation and, in cases of need, to provide for basic levels of nutrition, clothing and housing. Anything less than this is likely to constitute inhuman and degrading treatment.

The prohibition of discrimination

Unlike the right to health, the right to an adequate standard of living does not contain an express prohibition of discrimination. However, the two concepts are intimately connected. The prohibition of discrimination is designed to tackle relative as opposed to absolute deprivation as is clear from the first part of the 'formula' for assessing discrimination, namely, the question of whether the alleged victim is less favourably treated as compared with similarly situated persons. Similarly, the right to an adequate standard of living is interpreted as countering social exclusion, which focuses on relative as well as absolute poverty. In any event, a prohibition of discrimination is part of the 'core content' of each and every right in the CRC as a result of the general principle of non-discrimination in Article 2.

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65 ECtHR, *M.S.S. v Belgium and Greece*, Appl. No. 30696/09, Judgment of 21 January 2011.

66 *Ibid*, see in particular para. 250 of the judgment.

67 ECtHR, *Rahimi v Greece* Appl. No. 8687/08, Judgment of 5 April 2011.

68 One should also mention the decision of the European Committee of Social Rights in the case of *Defence for Children International v the Netherlands*. The Committee found that children unlawfully present in the Netherlands a) came within the personal scope of Article 31(2) of the Revised ESC relating to the right to shelter despite the express wording of the Charter limiting its scope to lawful residents; and b) had been denied their right to shelter. What is interesting about this case from our perspective is not the jurisdictional issue (the rights in the CRC applying, per Article 2, to every child within the jurisdiction of a State Party), but to the role of human dignity (and vulnerability to violations of human dignity) in ring-fencing a core content of rights that can neither be excluded *ratione personae* nor – it follows logically – limited. European Committee of Social Rights, Complaint No. 47/2008, Decision on the merits, 29 October 2009.

6.3.2 Phase One CEAS: compliance with the right of the child to an adequate standard of living

6.3.2.1 The Reception Conditions Directive

Article 13 RCD establishes general rules on material reception conditions and health care. Material reception conditions are defined as including 'housing, food and clothing, provided in kind, or as financial allowances or in vouchers, and a daily expenses allowance'.[69] Article 13(2) provides that:

> Member States shall make provisions on material reception conditions to ensure a standard of living *adequate for the health of applicants and capable of ensuring their subsistence*. Member States shall ensure that *that* standard of living is met in the specific situation of persons who have special needs, in accordance with Article 17.[70]

Article 17, in turn, obliges Member States to 'take into account the specific situation of vulnerable persons such as minors [and] unaccompanied minors [...] in the national legislation implementing the provisions [...] relating to material reception conditions and health care.' However, according to the second paragraph of Article 17, this 'shall apply only to persons found to have special needs after an individual evaluation of their situation.' The obliqueness of this caveat has previously been discussed. Hence, there is an awareness that concepts such as health and subsistence have a subjective, variable dimension and that in order to meet the minimum standard of living, more may need to be done for minors and unaccompanied minors. But the objective standard established in the directive is the same for everyone. Thus, once a minor can subsist and his/her health is adequate, the standard is reached. While the standard may conform to the right to an adequate standard of living in general human rights law, it does not properly reflect the more robust right of the child to an adequate standard of living in the CRC, namely, one adequate for the child's physical, mental, spiritual, moral and social development.

Article 14 RCD elaborates on the standard of living established in the directive. It relates to 'modalities for material reception conditions' – standards that must be met when housing is provided in kind (i.e. direct provision). It sets out the possible types of housing and the rights applicants have in such housing, which include protection of their family life and family unity of minor children with their parents. However, it contains a derogation provision in paragraph 8, according to which Member States are permitted to 'exceptionally set modalities for material reception conditions different from those provided in this Article, for a reasonable period, which shall be as short as possible'

69 Article 2(j).
70 Emphasis added.

in four situations, including when the asylum seeker is in detention or confined to border posts.[71] In such cases, the different conditions 'shall cover in any case basic needs.' Of course, Article 14 is still subject to the general rule in Article 13 requiring Member States to ensure a standard of living 'adequate for the health of applicants and capable of ensuring their subsistence.' Hence, basic needs are regarded as being not incompatible with an adequate standard of living – an interesting insight into the meaning of the latter term. It seems clear that 'basic needs' correspond to the core but not the normative content of the right of the child to an adequate standard of living.

There is no corollary to Article 14 on how material reception conditions are to be met in situations other than direct provision. Article 13(5) does stipulate that '[w]here Member States provide material reception conditions in the form of financial allowances or vouchers, the amount thereof shall be determined in accordance with the principles set out in this Article.' In other words, the minimum standard of living established in the directive applies. However, no benchmarks are established regarding the amount of financial allowances or vouchers. Nor is any reference made to a right to social security. In light of the fact that under Article 11 of the directive Member States can (and according to the Commission evaluation, do) prohibit access to the labour market for a period of at least one year and thereafter can impose conditions on asylum seekers' access to the labour market, this is a significant omission. Unsurprisingly, the Commission found in its evaluation of the RCD that:

> The main problems concerning application of the Directive were discovered in Member States where asylum seekers are given financial allowances. These allowances are very often too low to cover subsistence (CY, FR, EE, AT, PT, SI). The amounts are only rarely commensurate with the minimum social support granted to nationals, and even when they are, they might still not be sufficient, as asylum seekers lack family and/or other informal kinds of support.[72]

The standard of living that results from Article 13(5) suggests that neither component of the core content of the right of the child to an adequate standard of living is met when asylum seekers are given financial allowances. Thus, it seems that the minimum essential obligation is not adequately met (i.e. material assistance in case of need and support to parents) *and* asylum seeking children are discriminated against as compared with similarly situated national children (i.e. national children dependent on state assistance).

Chapter III of the RCD relating to the reduction or withdrawal (and refusal) of reception conditions is also relevant to the question of the right to an

71 The other three situations are: 1) when an initial assessment of the specific needs of the applicant is required; 2) when the types of accommodation outlined in the article are not available in a certain geographical area; 3) when housing capacities normally available are temporarily exhausted.

72 Commission evaluation of the RCD, *supra* n. 34 at p. 6

adequate standard of living. As previously outlined, Article 16 allows for the reduction, withdrawal and even outright refusal of reception conditions in certain situations in an effort to counteract abuse of the reception system. Thus, where the asylum seeker abandons the place of residence, fails to comply with reporting duties or requests for information, fails to appear for personal interview, has already lodged a previous application or has concealed financial resources, the Member State may reduce or withdraw reception conditions. Moreover, Member States may refuse (outright) reception conditions 'where an asylum seeker has failed to demonstrate that the asylum claim was made as soon as reasonably practicable after arrival in that Member State.' Persons with special needs, such as minors and unaccompanied minors, are fully susceptible to the operation of Article 16, although their particular situation must be taken into account in assessing the proportionality of the measure. The only 'floor' established in reducing, withdrawing or refusing reception conditions relates to access to emergency health care.

Two objections to this chapter of the RCD were made in the section on the right of the child to health, namely, that the proportionality requirement is bound to be defeated in the case of children and that to reduce, withdraw or refuse reception conditions to a child on the basis of the parents' behaviour offends against Article 2(2) CRC which forbids 'all forms of discrimination or *punishment* on the basis of the status, *activities*, expressed opinions, or beliefs of the child's parents, legal guardians or family members'.[73] These arguments apply equally here and a further one can be added. Since the only floor relates to health care, this means that all other reception conditions can conceivably be reduced to a level well below not only the normative content of the right of the child to an adequate standard of living but also the core content of the right, and indeed, be withdrawn or refused altogether, resulting in an outright violation of the right and in treatment that is inhuman or degrading.

Overall, it cannot be said that the right of the child to an adequate standard of living is met in the RCD. The general standard of living in the directive is pitched at the standard in general, but not child-specific, human rights law. Moreover, while the core of the child right seems to be met when asylum seekers are in direct provision, it is unmet when asylum seekers are given financial allowances. The option to reduce, withdraw or refuse reception conditions without limitation in certain cases could constitute an outright violation of the right of the child to an adequate standard of living and possibly to a violation of Article 3 ECHR.

73 Emphasis added.

6.3.2.2 The Qualification Directive

The QD does not establish a general minimum standard of living, the inference being that the rights afforded to beneficiaries of international protection (e.g. access to employment, education, social assistance, health care, accommodation and integration facilities) imply a reasonable standard of living. However, given the restrictions on many of the rights of beneficiaries of subsidiary protection, this cannot be taken for granted. Thus, Member States are permitted to impose restrictions on access to employment, social assistance, health care and integration facilities when it comes to beneficiaries of subsidiary protection. For example, while refugees are entitled to necessary social assistance on the same basis as nationals, Member States may limit the social assistance granted to beneficiaries of subsidiary protection to 'core benefits', which must then be provided at the same levels and under the same eligibility conditions as nationals.[74] However, some insight into the question of the minimum standard of living for beneficiaries of subsidiary protection can be gleaned from the entitlements of their family members. Article 23 provides for the concept of derived rights for family members of beneficiaries of international protection, subject to the exception that, in respect of family members of beneficiaries of subsidiary protection, Member States 'may define the conditions applicable to such benefits'. However, '[i]n these cases, Member States shall ensure that any benefits provided guarantee an adequate standard of living'. *A fortiori*, this standard must be met in respect of beneficiaries of subsidiary protection themselves. To the extent that this standard is less than the standard of living afforded to refugees, it can be regarded as discriminatory according to the same logic used to analyze the compliance of the QD with the right to health in § 6.2.2.2 above. As such, it is contrary to the core content of the right of the child to an adequate standard of living.

6.3.3 Phase Two CEAS: prospects for enhanced compliance

6.3.3.1 The proposed recast Reception Conditions Directive

The proposed recast RCD contains a number of important amendments of relevance to the right of the child to an adequate standard of living. The general standard of living, now set out in Article 17, is still established as one adequate for health and subsistence, but health is said to encompass physical *and* mental health. Again, that standard must be met in the specific situation of vulnerable persons but the procedures for identifying such persons are greatly improved, as previously discussed.

74 Article 28(2).

Moreover, a number of important new provisions are added to the article on minors (now Article 23). Firstly and of greatest importance, paragraph one, in addition to specifying the best interests obligation, provides that 'Member States shall ensure a standard of living adequate for the minor's physical, mental, spiritual, moral and social development.' This brings the RCD into line with the CRC as regards the right of the child to an adequate standard of living. Interestingly, if this provision is interpreted, as it should be, in the light of Article 27 CRC, this is likely to have a knock-on effect on the standard of living of the parents of accompanied children, given the intimate connection between the child's and the parents' standard of living.

Secondly, paragraph three obliges Member States to 'ensure that minors have access to leisure-activities, including play and recreational activities appropriate to their age within [direct provision] premises and accommodation centres'. This provision, which reflects the terms of Article 31 CRC, is a welcome addition. Unfortunately, it does not extend to children in 'private houses, flats, hotels or other premises adapted for housing applicants'. While it is accepted that the state could not guarantee such a right in privately-sourced accommodation, this argument does not apply when such accommodation is provided by the state. Therefore, if a distinction is to be introduced, it should be between state-sourced and privately-sourced accommodation, not between *types* of accommodation.

Thirdly, the right of minors to family unity with their parents or adult responsible for them is moved from the article on modalities for material reception conditions (i.e. the direct provision article) to Article 23 on minors. The consequence of this move is that it is no longer subject to the derogation provision in the former article. Furthermore, the right is made subject to a best interests assessment.

As regards the article on modalities for material reception conditions (now Article 18), a new paragraph provides that 'Member States shall take into consideration gender and age-specific concerns and the situation of vulnerable persons in relation to applicants within the premises and accommodation centres' but again, with the regrettable exception of 'private houses, flats, hotels or other premises adapted for housing applicants'. Article 18 still establishes a derogation clause, but it can only be deployed in 'duly justified cases' and the list of circumstances in which the derogation can be applied are reduced from four to two, namely, when an initial assessment of the specific needs of the applicant is required and when housing capacities normally available are temporarily exhausted. The requirement that in such situation, the reception conditions 'shall in any event cover basic needs' subsists.

As regards reception conditions in situations other than direct provision, a new provision (Article 17(5)) provides:

> Where Member States provide material reception conditions in the form of financial allowances and vouchers, the amount thereof shall be determined on the basis of

> the point(s) of reference established by the Member State concerned either by law or practice to ensure adequate standards of living for nationals, such as the minimum level of social welfare assistance. Member States may grant less favourable treatment to asylum applicants compared to nationals in this respect, where it is duly justified.

This provision of the 2011 proposed recast RCD differs markedly from the equivalent provision in the 2008 version, which proved to be too radical for Member States. That version pegged the value of material reception conditions to the amount of social assistance granted to nationals and specified that 'any differences in this respect shall be duly justified.'[75] The sub-national standard of material reception conditions means that the problem of discrimination subsists. However, the problem is mitigated somewhat by new rules regarding access to the labour market. New Article 15 obliges Member States to grant access to the labour market no later than 6 months after lodging an application, a period than can be extended to a year in cases where the first instance procedure is delayed either because of the large number of applicants at a given time or due to obstruction on the part of the applicant. Member States may still impose conditions on access to the labour market according to their national law but these conditions cannot impede effective access to the labour market.

Finally, the provisions of Chapter III relating to the reduction or withdrawal of reception conditions remain largely intact. No exemption for minors or unaccompanied minors is introduced. However, the provision relating to the outright refusal of reception conditions where an asylum seeker fails to make a claim as soon as reasonably practicable after arrival is deleted.

In sum, the revised article on minors establishes a standard of living for children that is consistent with – indeed, based on – Article 27 CRC. The article relating to accommodation in kind is also improved from a child-rights perspective. However, the article on reception conditions in situations other than direct provision is still arguably discriminatory when compared with the situation of similarly-situated national children and it remains possible under Chapter III to reduce or withdraw reception conditions of minors below the minimum essential obligation inherent in the right of the child to an adequate standard of living. It is unclear how these provisions interact with the broad statement of principle in the revised article on minors. Therefore, the standard of living for most, but not all, asylum seeking children is improved under the proposed recast.

75 COM (2008) 815 final, Article 17(5).

6.3.3.2 *The recast Qualification Directive*

The recast QD also contains a number of amendments that impact on the implicit standard of living established in the directive. These amendments are geared towards a greater equalization of treatment of refugees and beneficiaries of subsidiary protection. Thus, beneficiaries of subsidiary protection are to be granted access to employment, health care and integration facilities on the same basis as refugees. Moreover, the provision on access to employment-related education is enhanced and a new article (28) is devoted to access to procedures for recognition of qualifications – the lack of which hitherto constituted a significant practical barrier to access to employment. However, the distinction between refugees and beneficiaries of subsidiary protection is retained in terms of the right to social welfare: the social welfare entitlements of beneficiaries of subsidiary protection may still be limited to 'core benefits' under Article 29.[76] Hence the recast QD constitutes a modified improvement on the QD in terms of the right of the child to an adequate standard of living.

6.4 EDUCATION

6.4.1 The right of the child to education

Article 28(1) of the CRC provides:

> States Parties recognize the right of the child to education and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
> (a) Make primary education compulsory and available free to all;
> (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
> (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
> (d) Make educational and vocational guidance available and accessible to all children;
> (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.[77]

76 This provision was deleted in the Commission proposal but the European Parliament reinstated the limitation during negotiations with the result that it reappears in the recast QD.

77 Article 28 also contains a second paragraph which relates to school discipline and a third paragraph which relates to international cooperation in education. These are not relevant to the present inquiry.

Furthermore, Article 29 CRC relates to the aims of education. Paragraph 1 provides that the education of the child is to be directed to the development of the child's abilities to their fullest potential; to respect for human rights; to respect for the child's family, cultural identity, language and values, for the national values of the country in which he/she is living, for the country from which he or she may originate, and for different civilizations; to the preparation of the child for responsible life in a free society; and to respect for the natural environment. Paragraph 2 provides:

> No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of the present article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the state.

The right 'of everyone' to education is also established in Article 13 of the ICESCR, which is very similar in content to Article 28 and 29 CRC.[78] The right to education is further protected under a number of European regional instruments.[79]

6.4.1.1 The normative content of the right

It is proposed to analyze the right of the child to education according to a conceptual framework first developed by the Special Rapporteur on Education and then taken up by the Committee ESCR in relation to the right to education in the ICESCR.[80] Accordingly, in its General Comment 13 on the right to education, the Committee ESCR defines the scope and attributes of the right to

78 Article 13(2) ICESCR which corresponds to Article 28(1) CRC provides: 'The States Parties to the present Covenant recognized that, with a view to achieving the full realization of this right: (a) primary education shall be compulsory and available free to all; (b) secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible by evey appropriate means, and in particular by the progressive introduction of free education; (c) higher education shall be made equally accessible to all, on the basis of capacity by every appropriate means, and in particular by the progressive introduction of free education; (d) fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education; (e) the development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.' Furthermore, Article 13(1) relates to the aims of education, Article 13(3) to the liberty of parents in their choice of education for their children and Article 13(4) to freedom of educational establishment.

79 Article 17(1) of the Revised European Social Charter, Article 14 of the EU Charter of Fundamental Rights and Protocol 1 Article 2 ECHR.

80 Preliminary Report of the Special Rappoteur on the Right to Education, Ms. Kararina Tomasevski, U.N. ESCOR, Commission on Human Rights., 55th sess., ¶ ¶ 50-74, U.N. Doc. E/CN.4/1999/49 (1999).

education under the rubric of the 4 'A's' – availability, accessibility, acceptability and adaptability.[81] This applies to education in all its forms and at all levels. While the Committee RC has not yet explicitly endorsed this framework, the analysis below directly links each of the concepts to the language of the CRC in order to demonstrate the applicability of the framework to the right of the child to education in the CRC.[82]

'Availability' requires that functioning educational institutions and programmes – in other words, an education infrastructure – be available in sufficient quantity within a state to cope with the needs of the population. What they require to function depends on, among other factors, the developmental context of the particular state. There are, however, minimum facilities which are required in all countries such as school buildings, sanitation facilities for both sexes, trained teachers and so forth. In terms of the CRC, the availability requirement is explicitly mentioned in the sub-paragraphs of Article 28(1) relating to primary and secondary education and educational and vocational guidance. Although the sub-paragraph relating to higher education refers only to accessibility, according to Verhyde, the availability requirement is implicit since both concepts are interlinked.[83]

'Accessibility' relates to the requirement of equal access to education. According to the Committee ESCR, the notion has three overlapping dimensions: 1) education has to be accessible to all, especially the most vulnerable groups, in law and in fact, without discrimination on any of the internationally prohibited grounds; 2) education has to be physically accessible to all, even those in remote locations; and 3) education has to be economically accessible to all, in the sense of being affordable, though not necessarily free. In terms of the CRC, the accessibility requirement is mentioned in the sub-paragraphs of Article 28(1) relating to second and higher level education and vocational education and guidance. Although the sub-paragraph on primary education is silent on the issue of accessibility, it is implicit in the idea of *free compulsory* primary education.

Quite apart from the textual references to accessibility, the concept of equality in education pervades both Article 28(1) and 29 CRC. Thus, the chapeau of Article 28(1) establishes that the right of the child to education is subject to progressive realization but subjects that caveat to the requirement of equal opportunity. Hence, the idea of equality is built into the normative

81 Committee on Economic, Social and Cultural Rights, General Comment 13, *supra* n. 63, para. 6.

82 This is done in response to scholarly criticism of attempts to conceptualise the right to education without tying the concepts to relevant treaty provisions. See Sital Kalantry, Jocelyn Getgen and Steven Arrigg Koh, 'Enhancing Enforcement of Economic, Social and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR', *Human Rights Quarterly* 32 no. 2 (2010): 253-310.

83 Mieke Verheyde, *A Commentary on the United Nations Convention on the Rights of the Child, Article 28, The Right to Education* (Leiden: Martinus Nijhoff Publishers, 2006), para. 11.

content of the right to education. This is in view of the possible subversion of education as a tool of discrimination and also the potential of education to counteract discrimination. Thus Verheyde comments:

> Because education can serve these two mutually contradictory purposes, the drafters of the CRC decided to put a strong emphasis on equality in education by reconfirming the general non-discrimination principle of Article 2(1) of the CRC in the chapeau of Article 28(1) and hence making all other aspects of the right to education dependent upon it.[84]

Subsequent sub-paragraphs outlining the right to education at the various levels reinforce this obligation, referring to education for 'all', 'every child' or 'all children'. The reference in the chapeau to 'equal opportunity', a term synonymous with positive measures (or 'positive discrimination'/ 'affirmative action', depending on the parlance), is significant and will be elaborated on below in the section on non discrimination. Sub-paragraph (e) relating to measures to encourage school attendance and the reduction of drop-out rates also relates to the question of equality, since children at most risk of dropping out tend to come from the groups generally discriminated against in society. This provision is an implicit positive action provision since it obliges states to actively address the root causes of poor school attendance and early school drop-out rates.

As for Article 29, guidance on its link with equality can be gleaned from the Committee RC's General Comment No. 1 on the Aims of Education.[85] The Committee notes that the requirement in Article 29(1) that education be directed to the development of the child's fullest potential is an implicit prohibition of discrimination in education, whether it be in the curriculum, in pedagogical methods or the learning environment. Moreover, on a larger scale, the Committee highlights:

> [T]he links between article 29(1) and the struggle against racism, racial discrimination, xenophobia and related intolerance. Racism and related phenomena thrive where there is ignorance, unfounded fears of racial, ethnic, religious, cultural and linguistic or other forms of difference, the exploitation of prejudices, or the teaching or dissemination of distorted values. A reliable and enduring antidote to all of these failings is the provision of education which promotes an understanding and appreciation of the values reflected in article 29(1), including respect for differences, and challenges all aspects of discrimination and prejudice.[86]

84 *Ibid*, para. 28.
85 Committee RC, General Comment No. 1, 'The Aims of Education', U.N. Doc. CRC/GC/2001/1 (2001).
86 *Ibid*, para. 11.

'Acceptability' means that the form and substance of education have to be relevant, culturally appropriate and of good quality. In terms of the CRC, this requirement derives from Article 29(1) relating to child-centred education to the development of respect for the child's own cultural identity, language and values, for the national values of the country in which the child is living and the country from which he or she may originate. Thus, the Committee RC observes that 'the curriculum must be of direct relevance to the child's social, cultural, environmental and economic context and to his or her present and future needs'.[87] The 'acceptability' requirement can also be linked to the freedom of educational establishment in Article 29(2). This freedom is also provided for in Article 13(4) ICESCR and the Committee ESCR has noted that '[u]nder article 13(4), everyone, *including non-nationals*, has the liberty to establish and direct educational institutions [emphasis added]'.[88] The freedom of educational establishment in the CRC encompasses an implicit obligation to respect the liberty of parents to choose to send their children to schools other than public schools – an obligation that is explicitly established in Article 13(3) ICESCR[89] and also implicit in the requirement in Protocol 1 Article 2 ECHR of respect for the right of parents to ensure that their children are taught in conformity with their own religious and philosophical convictions.[90]

Finally, 'adaptability' means that education has to be flexible so that it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings. In the context of the CRC, this requirement derives from both Article 28(1) and 29. Thus, Article 28(1)(b) obliges States Parties to develop different forms of secondary education, sub-paragraph (d) establishes an obligation to provide educational and vocational guidance and sub-paragraph (e) requires States Parties to take measures to encourage regular attendance at school and reduce drop-out rates. The absence of any of these measures would likely signal an inflexible education system. In terms of Article 29, the adaptability requirement can be linked to the aims of education set out in the first paragraph in general and in particular to the references to cultural identity, the national values of

87 *Ibid*, para 9.

88 Committee ESCR, General Comment 13, *supra* n. 63, para. 13. Article 13(4) ICESCR provides: 'No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.'

89 Article 13(3) ICESCR provides: 'The States Parties to the present Covenant undertake to have respect for the liberty of parents and, where applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.'

90 See ECtHR, *Family H. v United Kingdom*, App. No. 10233/83, Decision of 6 March 1984 (1984) 37 DR 105.

the country in which the child is living and the country from he or she may originate.

To conclude, the normative content of the right of the child to education can be divided into four inter-related attributes: availability, accessibility, acceptability and adaptability. An education system meeting all four attributes corresponds with the right of the child to education.

6.4.1.2 The 'core content' of the right: the prohibition of discrimination

It is proposed to focus here on the prohibition of discrimination, rather than also addressing the minimum essential obligation as was done in the previous sections. This is because the minimum essential obligation relates mainly to the question of free education at the different levels, a debate that is not especially relevant to the asylum context.[91]

It has already been established that the concept of equality/non-discrimination is built into the normative content of the right of the child to education. However, in order to get a sense of what discrimination in education *means*, it is useful to have recourse to the definition of discrimination in the UNESCO Convention against Discrimination in Education (1960).[92] The various elements of the definition will be explored through the lens of a recent trilogy of cases to come before the ECtHR on Article 14 in conjunction with Protocol 1 Article 2 (P1-2) which provides, *inter alia*, that '[n]o person shall be denied the right to education'.

Article 1 of the UNESCO Convention against Discrimination in Education provides:

> For the purposes of this Convention, the term 'discrimination' includes any distinction,
> exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular:
> (a) Of depriving any person or group of persons of access to education of any type or at any level;
> (b) Of limiting any person or group of persons to education of an inferior standard;
> (c) Subject to the provisions of Article 2 of this Convention, of establishing or maintaining separate educational systems or institutions for persons or groups of persons; or

91 For pioneering, although by now somewhat outdated attempts to identify the core of the right to education, see Fons Coomans, 'Clarifying the Core Elements of the Right to Education', *SIM Special* 18, and by the same author (1997) 'Identifying Violations of the Right to Education', *SIM Special* 20 (1995).

92 Adopted by the General Conference at its eleventh session, Paris, 14 December 1960.

(d) Of inflicting on any person or group of persons conditions which are incompatible with the dignity of man.

The UNESCO definition, while somewhat out-dated on the grounds of discrimination is of enduring relevance in a number of respects.

The first relevant aspect of the UNESCO definition is the reference in the chapeau to 'purpose or effect'. This indicates that both direct discrimination (i.e. distinctions that are overtly made in the basis of a suspect ground) and indirect discrimination (i.e. facially neutral distinctions, perhaps without any discriminatory intent, that have a differential impact) are contemplated in the definition of discrimination. International human rights law has long accepted that the prohibition of discrimination encompasses the concept of indirect discrimination,[93] and EU law has also been pioneering in the field of indirect discrimination.[94] Interestingly, the ECtHR, which had been somewhat out of kilter with the international consensus on indirect discrimination, recently acknowledged that indirect discrimination against Roma children in education falls under the rubric of Article 14 ECHR in conjunction with P1-2. In *D.H. and Others v the Czech Republic*[95] and *Oršuš and Others v Croatia*,[96] the Court held that where statistics or other means of proof indicate a *prima facie* case of indirect discrimination, the burden of proof shifts to the state to justify the differential treatment.

93 The 'purpose or effect' formula is used in Article 1(1) of the Convention on the Elimination of Racial Discrimination, Article 1 of the Convention on the Elimination of Discrimination Against Women and Article 2 of the Convention on the Rights of Persons with Disabilities. Although it is omitted from the definition of discrimination in the ICESCR, the ICCPR and the CRC, the general comments of the treaty monitoring bodies indicate that the concept of indirect discrimination is read into the definition of discrimination. See, respectively, Committee ESCR, General Comment 20, 'Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the ICESCR)', U.N. Doc. E/C.12/GC/20 (2009), at para. 10; Human Rights Committee, General Comment 18, 'Non-discrimination', U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994) at para. 7; Committee RC, General Comment No. 1, 'The aims of education', U.N. Doc. CRC/CGC/2001/1 (2001) at para. 10.

94 For an early case on indirect discrimination see *O'Flynn v Adjudication Officer*, Case C-237/94, Judgment of 23 May 1996 and for early legislation on indirect discrimination see Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex. Indirect discrimination is currently defined in EU anti-discrimination legislation as occurring 'where an apparently neutral provision, criterion or practice would put persons [characterised by an impugned ground] … at a particular disadvantage compared with [other persons], unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving the aim are appropriate and necessary.' See, for example, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal treatment of men and women in matters of employment and occupation (recast), Article 2(b).

95 ECtHR, *D.H. and Others v the Czech Republic*, Appl. No. 57325/00, Judgment of 13 November 2007.

96 ECtHR, *Oršuš and Others v Croatia,* Appl. No. 15766/03, Judgment (GC) of 16 March 2010.

The second relevant aspect of the UNESCO definition is that Article 1(c) in conjunction with Article 2, to which it is subject, constitutes an early recognition of the need to take positive action to counteract discrimination.[97] Article 2 establishes the general permissibility of single sex education or separate educational systems for religious or linguistic reasons if the different systems offer equivalent access to and quality of education. This is because separate systems may be needed to ensure equality in education. Positive discrimination is based on the Aristotlean concept of equality as treating equals equally.[98] If people are not in an equal situation to begin with, then treating people equally (i.e. formal or *de jure* equality) is unlikely to lead to equality of outcome (i.e. substantive or *de facto* equality). Consequently, where a marginalized group of people is at issue, substantive equality may require a period of differential treatment. While this offends against the prohibition of discrimination (i.e. treating people strictly the same), it may be regarded as an exception to the rule. Thus, in its General Comment 13 on the right to education, the Committee ESCR states:

> The adoption of temporary special measures intended to bring about *de facto* equality for men and women and for disadvantaged groups is not a violation of the right to non-discrimination with regard to education, *so long as such measures do not lead to the maintenance of unequal or separate standards for different groups and provided they are not continued after the objectives for which they were taken have been achieved*.[99]

It should be noted that some forms of positive action in some contexts are so narrowly construed as to provide little apparent added-value. For example, in the EU anti-discrimination law context the Court has adopted a very cautious approach to the interpretation of legislation authorizing positive discrimination

97 The 1966 Convention on the Elimination of Racial Discrimination (CERD) is generally regarded as the source, at the international level, of the concept of positive discrimination. Article 1.4 CERD provides: 'Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.'

98 Aristotle said: 'Equality in morals means this: things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unalikeness.' *Ethica Nicomachea*, Volume 3, 1131a-1131b (W. Ross translation 1925); *Metaphysica*, I.5.1056b (W. Ross translation, 2nd ed. 1928).

99 Para. 32 (emphasis added).

on grounds of sex.[100] However, positive discrimination – prioritizing a member of a disadvantaged group over a member of a non-disadvantaged group in the allocation of a resource for which they are competing – is a particularly controversial form of positive action. Other forms of positive action are less so, provided they are closely linked to the realization of the aim of substantive equality.

The issue of the proper delineation between positive and negative discrimination was explored by the ECtHR in *Orsus.* Here, the applicants alleged that their placement in segregated classes for Roma children for some or all of their primary school education, which covered a reduced curriculum, constituted indirect discrimination. The government argued that any difference in treatment was justified because the purpose of the segregated classes was to enable the Roma children to gain a sufficient command of the Croatian language to be able to participate in mainstream education. The Court accepted this argument *in principle*, holding:

> The Court considers that temporary placement of children in a separate class on the grounds that they lack an adequate command of the language is not, as such, automatically contrary to Article 14 of the Convention. It might be said that in certain circumstances such placement would pursue the legitimate aim of adapting the education system to the specific needs of the children. However, when such a measure disproportionately or even, as in the present case, exclusively affects members of a specific ethnic group, then appropriate safeguards have to be put in place.[101]

As to what the appropriate safeguards are, the Court examined four core issues. Firstly, whether the initial placement of the applicants in separate classes was based on a clear and specific legal basis and a specifically designed method of language-testing. Secondly, whether the adapted curriculum was designed to improve language proficiency as opposed to simply omitting aspects of the regular curriculum. In this regard, the Court held:

> Since, as indicated by the Government, teaching in the schools in question was in Croatian only, the state in addition had the obligation to take appropriate positive measures to assist the applicants in acquiring the necessary language skills in the

100 For example, see *Kalanke v Hansestadt Bremen*, Case C-450/93, Judgment of 17 October 1995 and *Badeck*, Case C-158/97, Judgment of 28 March 2000 in which the Court gave a narrow interpretation of Article 2(4), the positive discrimination provision, of Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. For commentary see Daniela Caruso, 'Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives', *Harvard International Law Journal* 44, no. 2 (2003): 331-386.

101 ECtHR, *Oršuš and Others v Croatia,* Appl. No. 15766/03, Judgment (GC) of 16 March 2010, para. 157.

> shortest time possible, notably by means of special language lessons, so that they could be quickly integrated into mixed classes.[102]

Thirdly, whether there was a monitoring and transfer procedure which would ensure the immediate transfer to a mixed class of children whose Croatian reached an adequate level. Fourthly, whether, in view of the poor attendance and high drop-out rate among Roma children, positive measures were adopted, for example, to raise awareness of the importance of education among the Roma population and to assist the applicants with any difficulties they encountered in following the school curriculum. On the facts, the Court found all four of these safeguards to be missing in the instant case.

Another contentious issue relating to positive discrimination is whether it is permitted or obliged by the equality principle. The reference in Article 28(1) CRC to equality of opportunity – a term synonymous with substantive equality – indicates a positive obligation. This is consistent with the positive nature of some of the safeguards listed by the ECtHR in the *Orsus* case. Indeed *Orsus* followed an earlier ECtHR judgment in the case of *Sampanis v Greece*, in which the obligation to take positive measures to facilitate the education of vulnerable groups such as Roma children was forcefully articulated by the Court:

> Il ressort enfin de la jurisprudence de la Cour que la vulnérabilité des Rom/Tsiganes implique la nécessité d'accorder une attention spécial à leurs besoins et à leur mode de vie propre, tant dans le cadre réglementaire considéré que lors de la prise de décision dans des cas particulièrs […] Ils ont dès lors besoin d'une protection spéciale. […] La présente affaire mérite donc une attention particulière, d'autant qu'au moment de la saisine de la Cour les personnes concernées étaient des enfants mineurs pour qui le droit à l'instruction revêtait un intérêt primordial.[103]

The third relevant aspect of the UNESCO definition is that it establishes that discrimination in education is not limited to an outright denial of access to education (although this is provided for in the concept of exclusion in the chapeau and in the reference to deprivation of access in 1(a)) but extends to limiting educational opportunities, for example by confining someone to education of an inferior standard, or providing segregated education or education that is inimical to dignity. The recent trilogy of ECHR cases illustrates these various modes of discrimination.

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102 *Ibid*, para 165. This finding constitutes a development of ECHR case-law as the Court's previous line was simply that there is no obligation to provide instruction in languages other than the official languages of the State. See ECtHR, *Belgian Linguistic* case, Appl Nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, Judgment of 23 July 1968.

103 ECtHR, *Sampanis v Greece* Appl. No. 32526/05, Judgment of 5 June 2008, para. 72.

DH v the Czech Republic concerned the practice of placing Roma children, following psychological testing, in 'special' schools for children with intellectual difficulties.[104] The special schools followed a simplified curriculum and effectively led to long-term disadvantage. Statistical evidence showed that Roma children in a particular school district were 27 times more likely to be placed in such schools than non-Roma children. The Court held that the statistics created a rebuttable presumption of discrimination that the state had to justify. The Court rejected the contention that the psychological tests constituted objective and reasonable justification for the difference in treatment as the tests themselves were designed for the majority population and were not adapted to take Roma characteristics into account. *Sampanis v Greece* concerned the segregation of Roma children into special preparatory classes in a separate building annexed to the school.[105] Although the government argued that this was done to help the children attain the right level so that they could transfer into mainstream classes, this argument was rejected on the grounds that the segregation was not based on any suitable tests or criteria and no children were ever transferred to mainstream classes. Furthermore, there was evidence that, in segregating the Roma children, the school authorities were responding to pressure from non-Roma parents. Finally, *Orsus v Croatia* concerned the practice of placing Roma children in Roma-only classes because they lacked sufficient command of the Croatian language to participate in mainstream classes.[106] The special classes followed a reduced curriculum, possibly by up to 30%, pursued no particular Croatian language programme and failed to lead to a transfer into mixed classes as soon as the students met the language proficiency requirement. These cases reveal how insidious discrimination can be in practice.

To summarize, the prohibition of discrimination in education encompasses both direct and indirect discrimination. It has a positive as well as a negative dimension, in the sense that equality in education requires that temporary special measures may need to be adopted in favour of a disadvantaged group in order to achieve substantive equality. As this conflicts with the cardinal rule of formal equality, namely, treating all persons the same, care must be taken to ensure that supposed positive discrimination is not a guise for discrimination. Finally, discrimination in education is not limited to an outright denial of access to education but encompasses other acts that limit educational opportunities.

104 ECtHR, *DH v the Czech Republic,* Appl. No. 57325/00, Judgment of 13 November 2007.
105 ECtHR, *Sampanis v Greece* Appl. No. 32526/05, Judgment of 5 June 2008.
106 ECtHR, *Orsus v Croatia,* Appl. No. 15766/03, Judgment (GC) of 16 March 2010.

6.4.2 Phase One CEAS: compliance with the right of the child to education

6.4.2.1 The Reception Conditions Directive

Of the relevant CEAS instruments, the RCD contains the most elaborate, but arguably also the most restrictive, provisions relating to the right to education. Article 10 titled 'Schooling and education of minors' provides:

> 1. Member States shall grant to minor children of asylum seekers and to asylum seekers who are minors access to the education system under similar conditions as nationals of the host Member State for so long as an expulsion measure against them or their parents is not actually enforced. Such education may be provided in accommodation centres. The Member State concerned may stipulate that such access must be confined to the state education system. Minors shall be younger than the age of legal majority in the Member State in which the application for asylum was lodged or is being examined. Member States shall not withdraw secondary education for the sole reason that the minor has reached the age of majority.
> 2. Access to the education system shall not be postponed for more than three months from the date the application of asylum was lodged by the minor or the minor's parents. This period may be extended to one year where specific education is provided in order to facilitate access to the education system.
> 3. Where access to the education system as set out in paragraph 1 is not possible due to the specific situation of the minor, the Member State may offer other education arrangements.

There are five problematic aspects of Article 10 RCD when considered in the light of the right of the child to education.

First, certain children may be denied access to education outright. Article 10(3) establishes that where access to the education system is not possible due to the specific situation of the minor, the Member State is permitted, but not compelled (c.f. 'may') to offer other education arrangements. The option not to offer other education arrangements constitutes a violation of the right of the child to education (specifically, the availability and accessibility requirements) and may also, depending on the profile of the children affected, constitute indirect discrimination. Moreover, the Commission's evaluation of the RCD indicates that detained minors in a significant number of member States are denied access to education.[107] Although the Commission considers this to be a violation of the directive, arguably the failure to allow detained children to access the education system falls under the rubric of Article 10(3) (i.e. where

107 Thus, the Commission notes that '[c]ontrary to the provisions of the Directive, many Member States deny detained minors access to education or make it impossible or very limited in practice (AT, BE, FI, FR, HU, IT, PL,SK, SI, UK, NL). Only in a few Member States is this right recognized or special classes organized in detention centers (LV, CZ, LT, SE).' Commission evaluation of the RCD, § 3.4.4, p. 8, *supra* n. 34.

access is not possible due to the specific situation of the minor) and accordingly can be construed as being *permitted* by the directive. Such an interpretation is bolstered by the dearth of provisions in the directive relating to detention in general and the conditions of detention of minors in particular – an issue that will be taken up in Chapter 7.

Second, access by the asylum-seeking child to the education system may be unduly delayed at the beginning of the process and terminated prematurely at the end, also offending against the accessibility requirement. Thus, Article 10(2) RCD provides that access to the education system can be postponed for 3 months which runs from the date on which the application for asylum was lodged. This may be problematic in the context of unaccompanied minors because, under the APD, an unaccompanied minor may not be authorized to lodge an asylum application him/herself but may be required to have one lodged on his/her behalf by a representative.[108] In turn, the decision about whether or not to lodge an application on behalf of an unaccompanied minor is a complex one, requiring a period of information gathering and assessment. Furthermore, as outlined in Chapter 5, there are few mechanisms for identifying unaccompanied minors as such with the result that there may be a significant delay before it becomes apparent (if it does at all) that the individual is an unaccompanied minor. In the meantime, the clock has not been started for the purposes of the 3 month time-limit.[109]

At the other end, Article 10(1) RCD first sentence requires Member States to grant asylum seeking children access to the education system 'for so long as an expulsion measure against them or their parents is not actually enforced'. The terminology here is somewhat unclear. If the wording of this provision is read in the light of the Returns Directive, then an 'expulsion measure' is equivalent to a 'return decision' and the term 'enforced' is equivalent to removal (and not to the issuance of a return decision).[110] This much is unproblematic. However, the Returns Directive envisages that removal may be postponed in a number of circumstances.[111] It is important that in such

108 Article 6(4)(a) and (b) APD.

109 According to the Commission evaluation of the RCD, delays in access to education regularly occur. Thus the Commission reports that '[w]hile access to primary schools is not a problem, secondary education is often dependent on places available or decisions of local authorities (AT, SI, FI, HU). In a few Member States, minors might be granted access to schooling only at particular times in the school year, which might in practice cause delays (PL, FR).' *Supra* n. 34, § 3.4.4, p. 8,

110 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals. See in particular Articles 3, 8 and 9.

111 Article 9 (Postponement of removal) provides that removal *shall* be postponed if it would violate the principle of *non-refoulement* or for as long as a suspensory effect is granted pending a review of the return decision. It further provides that Member States *may* postpone removal owing to the specific circumstances of the individual case such as the

circumstances, the expulsion measure is not regarded as being enforced, otherwise the child subject to the measure could be denied access to education for the period of the postponement.

Third, a number of provisions of Article 10 RCD, on an ordinary reading of their terms, appear to permit the establishment of segregated education for asylum seeking children. Thus, paragraph one first sentence refers to access to the education system under 'similar' conditions as nationals while the second sentence provides that '[s]uch education may be provided in accommodation centres'. Paragraph two authorizes the postponement of access to the education system for a period of one year 'in order to facilitate access to the education system'. And paragraph three permits Member States to offer 'other education arrangements' apparently indefinitely where access to the education system is 'not possible due to the specific situation of the minor'. It will be recalled that segregated education constitutes a form of discrimination in education (per the UNESCO definition) unless the segregation is itself a temporary special measure in order to achieve substantive equality.

It may be observed that where Member States educate asylum seeking children in accommodation centres – as a great many do – the reason is not generally linked to the attainment of substantive equality, but rather to administrative convenience and an unspoken policy of discouraging integration of asylum seekers, the majority of whom will not be recognized as refugees. Moreover, the Committee RC has criticized States Parties on several occasions for providing sub-standard education in accommodation centres.[112]

As for the year-long postponement of access to the education system 'in order to facilitate access to the education system', it is accepted that this could be construed as a temporary special measure in order to achieve substantive equality. However, following *Orsus and Others v Croatia*, where the temporary segregation of children affects a particular ethnic group (or, it follows from the internationally prohibited grounds of discrimination, a group identified by a particular status, such as asylum seekers), then appropriate safeguards have to be put in place. These safeguards include: a) a clear, reliable and individualized method of testing of the need for separate education; b) a curriculum that pursues the aim of eventual integration into mainstream

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third country national's physical state or mental capacity or technical reasons, such as lack of transport capacity or failure to remove due to lack of identification.

112 For example, in its Concluding Observations to Denmark in 2011, the Committee noted that 'the majority of asylum-seeking child of school-going age receive education in separate schools where the quality of the education is significantly lower than that of mainstream Danish schools, and […] these schools do not grant academic credits which qualify the children for further education.' U.N. Doc. CRC/C/DNK/CO/4, para. 57(d). Similar concerns have been expressed by the Committee in its Concluding Observations to the Netherlands in 2004 (U.N. Doc. CRC/C/15/Add.227, para. 53), to Greece in 2002 (U.N. Doc CRC/C/15/Add. 170, para. 68(g)), to Spain in 2002 (U.N. Doc. CRC/C/15/Add. 185, para 44(d)), to the United Kingdom in 2002 (U.N. Doc. CRC/C/15/Add.188, para. 49) and to Norway in 2000 (U.N. Doc. CRC/C/15/Add. 126, para.50).

education; c) a monitoring and transfer procedure that would ensure the immediate transfer into mainstream education of children who attain the requisite level. Consequently, an interpretation of Article 10(2) that would permit the blanket channelling of asylum-seeking children into a separate system for the duration of a year would constitute discrimination.

As regards the provision authorizing Member States to offer 'other education arrangements' where access to the education system is 'not possible due to the specific situation of the minor', it would be difficult to construe this as a temporary special measure. For a start, the indefinite nature of the provision is incompatible with the requirement of temporariness integral to the concept of positive discrimination. Moreover, if a child was unable to transfer to mainstream education after a year of special education, this would be a serious indictment of the system of special education and a signal that the safeguards established in *Orsus* were not being followed.

Fourth, Article 10 arguably fails to establish the positive obligation of states to take special measures to enable the vulnerable group that is asylum-seeking children to enjoy their right to education. The fact that Member States are permitted to exclude an asylum seeking child from mainstream education because access is 'not possible' due to the specific situation of the child, but are not required to provide alternative education for the child speaks forcefully to this point. Similarly, the possibility of postponing access to mainstream education for up to one year in order to facilitate access to the education system falls short of imposing a positive *obligation* on Member States to assist asylum seeking children in gaining access to the education system. Article 10(1) fourth sentence is also relevant in this regard. It provides that '[m]inors shall be younger than the age of legal majority in the Member State in which the application for asylum was lodged or is being examined'. The disjunctive nature of this formulation (c.f. 'or') means that, where the applicant has been transferred under the DR, the responsible Member State has potentially two ages of legal majority to choose from in order to exclude the individual from education. On the one hand, it is difficult to argue that this provision is discriminatory since national children are unlikely to enter the education system at this late stage, and hence are arguably not in a comparable position. On the other hand, it is precisely because the education of asylum seeking children is likely to have been disrupted that they may need to continue in education beyond the usual school-leaving age. In this regard, that provision of Article 10 RCD offends against the positive obligation inherent in the prohibition of discrimination as well as the requirement deriving from the normative content of the right to education that education be adaptable.

Fifth, the permissive provision in Article 10(1) which allows Member States to 'stipulate that such access [to the education system] must be confined to the state education system' conflicts with the requirement of accessibility and, more particularly, freedom of educational establishment with its implicit requirement to respect the liberty of parents to choose to send their children

to schools other than public schools. If an asylum seeking child meets the entrance requirements for such a school, including the ability to pay a fee if there is one, then it is hard to justify a denial of access on the grounds that he/she is an asylum seeker.

In sum, the education provision of the RCD is highly problematic from the point of view of the right of the child to education. It falls foul of aspects of the normative content of the right to education and appears to sanction discriminatory practices.

6.4.2.2 The Qualification Directive

The QD provides in Article 27(1) that 'Member States shall grant full access to the education system to all minors granted refugee or subsidiary protection status, under the same conditions as nationals.' This conforms to the prohibition of discrimination in education.

However, the QD contains no recognition that owing to their particular vulnerability, child beneficiaries of international protection may require positive measures in order to benefit from substantive equality in education. Whether there is a deficiency in this regard cannot be gleaned from the Commission's evaluation of the directive because it fails to evaluate Article 27(1). The only provision of the directive that touches on the question of positive measures is Article 33 on access to integration facilities. It provides:

> 1. In order to facilitate the integration of refugees into society, Member States shall make provisions for integration programmes which they consider to be appropriate or create pre-conditions which guarantee access to such programmes.
> 2. Where it is considered appropriate by Member States, beneficiaries of subsidiary protection status shall be granted access to integration programmes.

The term 'appropriate' in both paragraphs signals a level of deference to Member States that is arguably incompatible with the positive obligation to secure substantive equality. Furthermore, the distinction between refugees and beneficiaries of subsidiary protection is itself discriminatory, as has been argued in previous sections.[113]

113 Unsurprisingly, the Commission evaluation of the QD is rather vague on Article 33, providing that '[a]t least 16 Member States do not differentiate between refugees and beneficiaries of subsidiary protection with respect to access to integration facilities. However, the integration programmes provided for are sometimes very limited and may cover only language training or financial loans. In HU, access of beneficiaries of international protection to integration programmes is reported to be granted on a discretionary basis and to be ineffective due to the absence of implementation measures. Legal provisions in BG are vague and do not guarantee sustainability of the programmes. Several Member States (e.g. EE, IE, LV) do not formally provide for integration programmes for beneficiaries of international protection. However, both protection groups are reported to have access to integration facilities in some of them (e.g. IE).' *Supra* n. 42, § 5.5.1.4, p. 15.

In *toto*, the QD conforms to the negative prohibition of discrimination in education and hence is strong on the formal aspect of equality but contains little by way of positive measures to facilitate the education of child beneficiaries of international protection and hence is weak from the perspective of substantive equality.

6.4.3 Phase Two CEAS: prospects for enhanced compliance

6.4.3.1 The proposed recast Reception Conditions Directive

The proposed recast of the RCD contains a number of important amendments to the education provision. Two provisions are deleted: the provision requiring minors to be younger than the age of legal majority in the Member State in which the application for asylum was lodged or is being examined and the provision extending postponement of access to the education system for up to a year where specific education is provided in order to facilitate access. This latter provision is replaced by a new requirement that '[p]reparatory classes including language classes shall be provided to minors where it is necessary to facilitate their access and integration into the national education system.' Finally, the discretionary provision whereby Member States *may* offer alternative educational arrangements where access to the education system is not possible due to the specific situation of the minor, is amended. Now the obligation is mandatory: in such circumstances 'Member States shall offer other educational arrangements in accordance with national law and practices.' These are significant improvements, although it must be noted that minors are still not granted access to the education system on the same basis as nationals and segregated education is still permissible. Therefore, the education provision of the proposed recast RCD is still amenable to being applied in a discriminatory manner.

6.4.3.2 The recast Qualification Directive

As regards the recast QD, no changes are made to the education provision. However, the integration provision (now Article 34) is amended. The differential treatment of refugees and beneficiaries of subsidiary protection is removed. Now all beneficiaries of international protection must be 'ensured access' to such integration programmes as Member States 'consider to be appropriate so as to take into account the specific needs of beneficiaries of international protection'. A new paragraph is added, stipulating that 'those integration programmes could include introduction programmes and language training tailored as far as possible to the needs of beneficiaries of international protection.' Hence beneficiaries of subsidiary protection are no longer discriminated against in their access to whatever integration programmes are in

existence, but there is still no mandatory direction to Member States on the content of such programmes.

6.5 SYNTHESIS OF FINDINGS

This chapter explored the extent to which the CEAS in both phases complies with three key socio-economic rights of the child: the right to health, to an adequate standard of living and to education. It was posited that the CEAS instruments should generally conform to the normative content of these rights, but where the instruments allow for Member States flexibility in the form of discretionary and derogation provisions, they should conform at least to the core content of the rights.

As regards the right to health, neither the RCD nor the QD was found to conform clearly to either the normative or the core content of the right. The essential problem in the RCD is that although the general standard of health it establishes must be levelled up in the case of persons with special needs, it is uncertain whether minors and unaccompanied minors fall into this category. Furthermore, the directive allows for the reduction and withdrawal of health care to a minimum level that is less than the core content of the right of the child to health. However, the RCD does provide for rehabilitation and recovery for child victims of various types of ill-treatment, although identification of such children remains a problem and the relevant provision is not an accurate reflection of the relevant right in the CRC. In the proposed recast, most of these various problems are addressed, such that it can be considered to conform broadly with both the core and the normative content of the right of the child to health. As regards the QD, the essential problem is that it fails to establish one basic standard of health care for everyone but rather creates different streams of entitlement. This offends against the prohibition of discrimination and therefore violates the core content of the right of the child to health. Furthermore, the directive fails to establish a right of the child victim of various forms of ill-treatment to recovery and reintegration. The first but not the second problem is addressed in the recast QD, with the result that it cannot be stated that the recast fully conforms to the right of the child to health.

As regard the right of the child to an adequate standard of living, the normative content of the right is not met in the RCD because the general standard of living in the directive is pitched at the standard in general, not child-specific, human rights law. As regards the 'core content' of the right, this is unmet when asylum seekers are given financial allowances and where Member States avail of the option to reduce, withdraw or refuse reception conditions. As for the proposed recast, a new provision establishes a separate, and child-rights compliant, standard of living for minors but the other problems persist and it is unclear, in the mix, whether the right of all children to

an adequate standard of living will be met. As regards the QD, while the right of the child refugee to an adequate standard of living appears to be secured, the right of the child beneficiary of subsidiary protection may be limited. As this differentiation appears to offend against the prohibition of discrimination, it follows that the core content of the right is unmet. In the recast QD, some rights relating to the standard of living of beneficiaries of subsidiary protection are levelled up, but there is still a differentiation in the matter of social welfare. Consequently, the recast QD does not fully comply with the core content of the right of the child to an adequate standard of living.

Finally, the RCD does not meet either the normative or core content of the right of the child to education, mainly because it sanctions various discriminatory practices such as segregated education. Some but not all of these practices are eliminated in the proposed recast, with the result that there is still a problem of compliance. The QD, on the other hand, does comply with the right of the child to education, although it can be criticized from a substantive equality perspective. Some modest improvements are made in the recast regarding access to integration programmes but considerable discretion is still left to Member States regarding the content and scope of such programmes. Nevertheless, the core of the right of the child to education is certainly met in both the current and recast QD.