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

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8 Conclusion

Even something as apparently solid as the United Nations Convention cannot but raise further issues, about how far such rights are legitimately circumscribed by adult interpretation, the availability of accessibility of social and economic resources, and the ways in which childhood is understood and socially constructed.¹

This study has attempted to identify the rights of the child in the CRC that are most relevant to the asylum context, to ascribe meaning to those rights in the asylum context and to systematically examine whether the provisions of the CEAS instruments (Phase One and Two) comply with those rights. In so doing, this study has been forced to confront the complex issues referred to above. This final chapter brings the findings of the study together and offers some reflections on meaning and compliance. Section 8.1 discusses the meaning of the rights of the child explored in this thesis. Section 8.2 provides an answer to the question of whether Phase One CEAS is compliant with the rights of the child. Section 8.3 assesses the prospects for enhanced compliance in Phase Two CEAS. Finally, section 8.4 attempts to draw from the findings of the study some conclusions on possible factors which inhibit full compliance with the rights of the child in the CEAS and on how these might be overcome.

8.1 The meaning of the rights of the child

This study identified six key rights areas, each consisting of a right or group of related rights, which are particularly relevant to the situation of asylum-seeking and refugee children in the EU. It then identified the major attributes of each right in the asylum context. What has been implicit in the findings and that is worth making explicit now is the *lex specialis* nature of the rights of the child examined. More than half of the rights that were examined are rights that are also found in general (i.e. non child-specific) human rights law: the right to seek asylum, the right to be heard, the cluster of rights relating to family unity, the socio-economic rights and the right to liberty. However, what this study has shown is that the normative content of the child-specific version of these rights is qualitatively different from that in general human

1 Carole Smith, 'Children's Rights: Judicial Ambivalence and Social Resistance', *International Journal of Law, Policy and the Family* 11 (1997): 105.

rights law. The remaining rights that were examined in this study are exclusive to children. These are: the principle of the best interests of the child, the right of the child to have his/her rights as a child recognised as refugee-relevant and the right of the child without family to special protection and assistance. All of the above rights will be briefly re-visited in order to draw out their specificity and uniqueness.

As regards the right of the child to seek asylum, the issue is not so much that children are entitled to a qualitatively different version of this right but, rather, that children are *equally* entitled to this right. The fact that Article 22 CRC establishes the right of the child to appropriate protection and humanitarian assistance in the enjoyment of applicable rights in other international human rights and humanitarian instruments challenges the legality of denying the child the possibility of making an asylum application.

As regards the child to be heard, it was found that this right was initially conceived as an alternative to the (adult) right to a fair hearing. However, as the resistance to the idea of procedural rights for children has diminished, the right of the child to be heard may be regarded as establishing an additional rather than an alternative set of guarantees for children. Thus, the child, like the adult, has a right to be heard. In facilitating the exercise by the child of this right, he/she has the right to a representative, the right to have any hearing adapted so that it is fit for purpose and the right to have his/her views given due weight in accordance with age and maturity. Each of these requirements has significant implications in the asylum context. For example, such staple features of the asylum procedure as negative credibility inferences are likely to be inconsistent with the 'due weight' requirement.

As for the right to family unity, it was observed that the source of this right in general human rights law is the right to private and family life. By contrast, there are multiple sources of the right to family unity in child-rights law, such as the right of the child not to be separated from his/her parents against their will. The near-absolute nature of some of the 'source' rights combined with their cumulative effect strengthens the imperative to keep the family together and to reunite the family that has become separated.

As regards the socio-economic rights, while everyone is entitled to such rights, the socio-economic rights of the child in the CRC are pitched at a higher level than in general human rights law owing to the special developmental needs of the child and his/her vulnerability. Thus, the right of the child to health is centred around the concept of primary health care and consequently cannot be reduced, as in the case of adults, to access to emergency or curative health care. Furthermore, the child has an associated right that finds no equivalent in general human rights law, namely, the right of the child victim of various types of ill-treatment to rehabilitation and recovery. Similarly, the right of the child to an adequate standard of living is qualitatively different from its 'adult' counterpart. Without being too reductionist, the latter is aimed at ensuring that everyone lives above the subsistence level whereas the former

aims at ensuring the child's physical, mental, spiritual, moral and social development. Admittedly, this right falls principally to the parents to fulfil (another example of the importance of family unity to the child), but the state's supporting role is still arguably greater than in the case of adults. As for the right to education, this right pertains mainly to children in general human rights law as it is largely taken up with the right to primary and second level education. In this regard, much of the normative content of the (general) right to education is child-specific.

Everyone enjoys a right to liberty but the right of the child to liberty contains additional safeguards and guarantees to protect the child from being arbitrarily detained and to protect the child while in detention. This was seen clearly in the comparative analysis of Article 37(b)-(d) CRC and the right to liberty in general human rights law. Nonetheless, it was observed that even the general right to liberty is being increasingly interpreted by treaty monitoring bodies and courts in light of the requirements of the CRC when the litigant is a child.

Moving now to the rights of the child that are wholly unique to children, it seems hardly necessary to point out the *lex specialis* nature of these rights. However, what this study has shown is that, when applied to the asylum context, these rights have potentially transformative consequences. Thus, the right of the child to have his/her rights as a child recognised as potentially refugee-relevant has transformative consequences, not only for the meaning of key eligibility concepts in refugee law but also for the number of child asylum seekers that are likely to be recognised.

Likewise, the right of the child without family to special protection and assistance has a clear application to unaccompanied and separated children who seek asylum. It has transformative consequences for the system of reception of asylum seekers and refugees: special measures must be taken to identify such children, to appoint a guardian or representative to oversee their protection and care and to provide for them a suitable care placement.

However, the right with arguably the greatest transformative potential is the principle of the best interests of the child. It was found that the principle has two dimensions: an individual dimension and a collective dimension. As regard the former, decisions taken about the individual child in the asylum context must be informed by the best interests concept. When it is considered that the principle is a short-hand way of talking about the rights of the child and that the principle carries significant weight, it follows that the principle has the potential to 'level up' actions that are governed by sub-optimal (in human rights terms) legislative standards. As regards the collective dimension of the principle, this requires the legislator to child-rights proof policy options to ensure that legislation is in the best interest of children. There is no comparable explicit duty in general human rights law.

In sum, this study has found that the differences between child-rights law and general human rights law, at least in so far as the rights in this study and

their attributes in the specific asylum context are concerned, are not small differences of nuance or gradation but rather radical differences of content, scope and import. It follows that if the CEAS is to be in compliance with the rights of the child, the way it deals with children must also be radically different from how it deals with adults.

8.2 PHASE ONE CEAS: COMPLIANCE WITH THE RIGHTS OF THE CHILD

If a simple answer is required to the question of whether the CEAS complies with the rights of the child, then the answer is 'no'. However, this study reveals some interesting findings that are lost in that bivalent answer, namely, that the CEAS reflects some rights of the child but not others and of those it reflects, the level of protection it affords is not necessarily commensurate with standard established in international child-rights law. Put differently, the EU legislator has selected among the rights of the child that are relevant to the asylum context, legislating for some but not others, and of the chosen rights, has selected among the attributes of the right, legislating for some attributes but not others.

The rights of the child that are reflected *in some way* in the relevant CEAS instruments are:

- The principle of the best interests of the child
- The right of the child to have his/her rights recognised as refugee-relevant
- The right of the child to family unity
- The right of the child without family to special protection and assistance
- The socio-economic rights of the child

The rights of the child that are not reflected in the relevant CEAS instruments are:

- The right of the child to seek international protection
- The right of the child to be heard
- The right of the child to liberty

It is hard to draw any definitive conclusions about why some rights of the child are reflected in the CEAS instruments and others are not. However, section 8.4 makes some general observations that may shed some light on the issue.

As to the level of protection afforded to the rights of the child that *are* reflected in the CEAS instruments, it can be observed that there is not a single instance of complete compliance whereby all the attributes of a given right that are relevant to the asylum context are properly reflected in the legislation. Thus, while the principle of the best interests of the child features in all the CEAS instruments, the scope of the principle is explicitly restricted to the provisions of the instruments that involve minors and the weight of the principle is implicitly restricted by the many provisions of the instruments that

run contrary to the rights of the child. Of greater import, the CEAS as a whole cannot be said to be in the best interests of the child because this would mean that the instruments are broadly compliant with the rights of the child, which this study has shown not to be the case. Similarly, the right of the child to have his/her rights recognised as refugee-relevant is reflected to a limited extent in the relevant instrument. However, the underlying rationale for mandating the recognition of, for example, child-specific forms of persecution, is not carried through to its logical conclusion, which is that all eligibility concepts must be scrutinized for their sensitivity to child rights. The right of the child to family unity is mentioned in the relevant instruments, but the right is undermined by restrictive constructions of the child and the family, by weak statements of commitment to the concept of family unity which are further compromised by derogation provisions and by a failure to legislate for a right to family reunification of the child beneficiary of subsidiary protection. Likewise, the right of the child without family to special protection and assistance is established in the relevant CEAS instruments, but the key obligation to identify unaccompanied and separated children is missing, making the right devoid of application in some cases at least. Furthermore, the provisions relating to the appointment of a guardian or adviser are vague and the care placement for unaccompanied minors lacks a protective dimension. The socio-economic rights of the child – to health, standard of living and education – are reflected in the relevant CEAS instruments but the distinct normative requirements of the child version of the rights are patently missing. Therefore, in sum, where the CEAS instruments do reflect a certain degree of child-rights awareness, they nevertheless fail to establish standards that are commensurate with the requirements of child-rights law.

8.3 PHASE TWO CEAS: PROSPECTS FOR ENHANCED COMPLIANCE

The prospects for enhanced compliance with the rights of the child in Phase Two CEAS are good. Notable improvements are made to the provisions of the proposed recasts that impact, directly or indirectly, on all the rights of the child under scrutiny.

Thus, as regards the principle of the best interests of the child in the CEAS instruments, improvements are made to the stated scope of the principle in all the proposed and actual recasts and much-needed direction is provided on the factors to be taken into consideration in assessing best interests in individual cases in most recasts. Although the right of the child to seek international protection is not categorically established in the proposed recast APD, if the child does manage to make an asylum application, his/her right to have his/her rights as a child recognised as refugee-relevant is broadly, subject to a few exceptions, met in the recast QD. As regards the right of the child to be heard, some improvements are made with regard to the adaptation of the

hearing for all minors. As for the right of the child to family unity, there are some modest changes to the definition of the child and the family in recast QD and proposed recast RCD and the family unity provisions of the latter are drafted more robustly and are less susceptible to derogation than currently. Various changes are made to the provisions that relate to protection and care of unaccompanied minors. Most notably, the provisions of the instruments that relate to the role and qualities of the guardian are enhanced. As regards the socio-economic rights, the health care provisions of the proposed recast RCD can now be regarded as being in compliance with the right of the child to health, the right of the child to an adequate standard of living in that instrument is unambiguously pegged at the level in the CRC and some of the more objectionable existing provisions from the point of view of the right to education are removed. Some of the attributes of the right of the child to liberty find expression, for the first time, in Phase Two CEAS. Of particular note, mandatory detention of asylum seeking children is no longer tacitly permitted under the proposed recast RCD and the principle of last resort and of the best interests of the child are explicitly stated. In sum, if the Commission proposals are not significantly revised downwards during negotiations, then Phase Two CEAS will be a marked improvement on Phase One from the point of view of the rights of the child.

However, there is a difference between *enhanced* compliance, which is a relative question, and *full* compliance, which is an absolute question. Despite all the changes, some of which are quite far-reaching, there is still not a single right of the child that is fully and accurately reflected in every instrument in which it arises.

Thus, as regards the principle of the best interests of the child, the proposed recast APD, unlike the other proposed and actual recasts, provides no direction on the factors to be taken into consideration in assessing the best interests of the child. Furthermore, some of its provisions are still blatantly contrary to the best interests of the child, such as the provisions which retain or introduce extraordinary procedures. While unaccompanied minors are exempted from some of these procedures, they are not exempted from all of them and accompanied minors are exempted from none. As has already been pointed out above, the right of the child to seek international protection is not clearly established in the proposed recast APD. While the recast QD amends many of the provisions that were objectionable for being insensitive to the rights of the child, a small number still remain, such as the double-test for 'membership of a particular social group'. As regards the right of the child to be heard, one could quite easily read the proposed recast APD without ever realizing that the child has such a right, notwithstanding some incidental improvements to provisions of the proposed recast that impact on the right of the child to be heard. As for the right of the child to family unity, the changes to the definition of the child and the family arguably just tinker around the edges of what, from a child-rights perspective, are objectionable constructs. As

regards the right of the child without family to protection and care, the various positive changes that are made are undermined by the continued failure to establish a mechanism for the identification of the unaccompanied or separated child. As for the socio-economic rights of the child, the right of the child to health is still unmet in the recast QD because that directive lacks any provision on the right of the child victims of various forms of ill-treatment to recovery and reintegration. The right of the child to an adequate standard of living seems at first to be met in both relevant recasts, but on closer scrutiny, an adequate standard of living for asylum seekers on financial allowances is not secured in the proposed recast RCD and the recast QD permits Member States to limit the social welfare entitlements of beneficiaries of subsidiary protection to a level arguably incompatible with the right of the child to an adequate standard of living. The educational entitlements in the recast QD are more or less consistent with the right of the child to education but those in the proposed recast RCD are still arguably discriminatory. Although the new provisions of the proposed recast RCD on liberty are a vast improvement on the impoverished provisions of the existing directive, some attributes of the right of the child to liberty, namely, those relating to conditions of detention and specific procedural guarantees are not completely reflected in the proposed recast. In sum, therefore, while proposed Phase Two CEAS better complies with the rights of the child than Phase One, there is still little evidence of any attempt to systematically and thoroughly integrate the rights of the child into relevant provisions of the instruments. Consequently, it cannot be said that the proposed and actual recasts are in the best interests of children.

8.4 FACTORS INHIBITING COMPLIANCE

This section attempts to draw from the findings of the study some conclusions on possible factors which inhibit full compliance with the rights of the child. Three possible causes are addressed: the fact that the child-rights agenda is overwhelmed by the larger migration-control agenda which drives the CEAS; the fact that the EU legislator may lack the child-rights capacity necessary to effectively integrate a child-rights perspective into the CEAS; and the possibility that the failure of the CEAS to fully comply with the rights of the child is symptomatic of a larger unresolved question, namely, the precise relationship between EU law and fundamental rights. These possible causes are also avenues for future research.

The policy decision by the EU legislator to integrate the rights of the child into the CEAS has not occurred in a vacuum. Rather, it is a sub-policy within the broader policy agenda that has driven the creation and development of the CEAS. That broader policy agenda is complex and justice cannot be done here to its many facets. But it is well established that the broader policy agenda has a significant deterrent component, whereby the aim is to harmonise policy

to a standard that is just high enough to comply with the requirements of general human rights law but still low enough to make the asylum process unpleasant and unfruitful, to encourage asylum seekers to seek protection in the region of origin, to discourage secondary movements of refugees from those regions and to detect and punish 'abuse' of the asylum system.² When the child-rights policy agenda is situated in this broader policy context, it is easy to see how the former becomes compromised. In this study, the compromise is seen in two key ways.

First, it is seen in the act of giving to the child asylum seeker/refugee with one hand and taking from asylum seekers/refugees generally with the other, such that the latter action cancels out the former. The proposed recast APD is probably the starkest illustration of this. On the one hand, the proposed recast reiterates the guarantee that the personal interview of the unaccompanied minor (where there is one) must be conducted by a person with the necessary knowledge of the special needs of minors and that the decision by the determining authority must be prepared by a similarly knowledgeable official and adds to these guarantees by establishing higher and in some cases child-specific standards in relation to staff competence and training, the examination of the applications and the personal interview. On the other hand, the proposed recast retains or introduces possibilities to derogate, directly or indirectly, from these standards in a host of circumstances. The derogations are sweeping – not directed at minors *per se*, but taking in minors nonetheless. The net result is that there is no necessary improvement to the situation of minors.

Second, the compromise is seen in an ambivalent attitude towards the child, whereby the legislation variously constructs an image of the child as needy and vulnerable and prioritises the child's status as a child over and above his/her migration status and an image of the child as being just an adult in miniature, possibly even an adult in fact and prioritizing the child's migration status over and above his/her status as a child. The first image is apparent in the many additional guarantees in the CEAS relating to the care of unaccompanied minors and the increasing tendency to designate minors as 'persons with special needs' alongside persons with a disability and persons who have been subjected to psychological, physical or sexual violence. It is apparent in the references to the 'special needs' of unaccompanied minors and in the

2 For a cross section of the considerable scholarly literature on this subject, see: Cathryn Costello, 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?', *European Journal of Migration and Law* 7 (2005): 35-69; Catherine Teitgen-Colly, 'The European Union and Asylum: An Illusion of Protection' *Common Market Law Review* 34 (2006): 1303-1566; Helene Lambert, 'The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom and International Law', *International and Comparative Law Quarterly* 55 (2006): 161-192; and Jari Pirjola, 'European Asylum Policy – Inclusions and Exclusions Under the Surface of Universal Human Rights Language', *European Journal of Migration and Law* 11 (2009): 347-366.

assumption that accompanied minors lack the capacity to make an asylum application in their own right and that it is therefore justified to subsume their claims to protection into those of their parents.

The second image is apparent in the equivocation about the dividing line between childhood and adulthood. Thus, in the case of the accompanied child, the proposed recast RCD and the recast QD still impose various restrictions on the married child, the sub-text being that marriage makes a child an adult. In the case of the unaccompanied child, the lack of any mechanism in the directives for identifying such children reveals an assumption that such children will self-present, just like adults do. Moreover, the provisions in the proposed recast APD on age assessment, although an improvement on the current provisions, signal that there are real doubts about whether unaccompanied minors are actually minors at all. Even when age is not in dispute, certain provisions of the directives betray an assumption that older unaccompanied minors can legitimately be treated like adults. Thus the proposed recast APD retains the derogation from the obligation to appoint a representative where the unaccompanied minor is likely to 'age out' and the proposed recast RCD retains the derogation from the obligation to provide a special placement where the unaccompanied minor is over the age of 16, albeit subject to the best interests of the child. This tendency to blur the line between minority and adulthood has been noted in the literature as creating situations 'when a child is not a child'.³

This contradictory image of the child (needy and vulnerable versus able and knowing) may also reflect a less than full understanding of the tensions within child rights law. The CRC attempts to maintain a delicate balance between acknowledging and providing for the special developmental and protection needs of the child, on the one hand, and the fact that the child is a rights-bearer, a decision-maker, an agent, on the other. This so-called welfare-agency dichotomy is part and parcel of child-rights law and, moreover, is not simply a question of balancing competing rights, but also of balancing the dichotomy within rights, as the discussion on the best interests principle made clear. The challenge for any legislator is to maintain this balance, accommodating the child's agency *and* providing for the child's protection, without the child's agency being used as an excuse for diminished protection. As Bhabha vividly puts it, 'there is an acute tension between the infantilisation of autonomous youth making decisions in suboptimal situations and the dereliction of duty towards exceedingly vulnerable child populations liable to severe abuse'.⁴ It is evident from this study that the EU legislator has struggled with this challenge, oscillating between paternalism and skepticism. This raises the

3 Heaven Crawley *When is a Child Not a Child? Asylum, Age Disputes and the Process of Age Assessment* (ILPA Research Report, 2007).

4 Jaqueline Bhabha, 'Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights?', *Human Rights Quarterly* 31 (2009): 439.

question of the capacity of the EU legislator in the complex area of child-rights law.

The previous section ended by noting that there is little evidence of any attempt to systematically and thoroughly integrate the rights of the child into relevant provisions of the CEAS instruments. Most provisions are of the instruments 'age-neutral', but only in the sense that they do not mention age. Many of them have a disproportionate negative impact on children precisely because they do not mention age, the provisions of the proposed recast RCD on conditions of detention being a case in point. Some provisions of the instruments are 'age-specific', being geared explicitly to children. But often they are geared, not to all children, but only to a particular sub-set of children, namely, unaccompanied minors. Of course, the situation of unaccompanied minors is particularly perilous and demands special safeguards and guarantees. But the distinct impression created in both Phase One and proposed Phase Two CEAS is that the EU legislator has fastened onto the theme of unaccompanied minors to the detriment of accompanied minors. Thus, accompanied minors do not always fall within the personal scope of the best interests principle, are not necessarily entitled to lodge an asylum application on their own behalf, are not entitled to a representative, are more susceptible to detention, are more likely to be detained under conditions contrary to the needs/rights of a child and are not exempt from any of the extraordinary asylum procedures or the concepts that restrict inclusion.

Furthermore, the age-specific provisions of the directive are not necessarily guided by rights-based considerations. For example, the proposed recast APD exempts unaccompanied minors from the accelerated/manifestly unfounded procedure, from a finding of inadmissibility on the grounds of coming from a safe third country, from the application of the safe third country concept itself and from border procedures. No child-rights advocate would quibble with these exceptions *per se*. But what is the underlying principle? It cannot be the principle that exceptional procedures are not suitable for unaccompanied minors, since unaccompanied minors remain fully susceptible to the admissibility procedure on grounds other than safe third country, the procedure for subsequent applications and the re-introduced European safe third country procedure. Focusing just on the exemption from the safe third country concept, this cannot be based on a principled objection to applying safe-country concepts to unaccompanied minors, since they are still susceptible to the first country of asylum concept, the European safe third country concept and, indeed, the DR. Finally, the exemptions cannot be based on the principle that such procedures are in some way contrary to the rights of the child (which various chapters of this thesis have shown them to be) since only unaccompanied minors are exempted. One is forced to conclude that the exemptions are *ad hoc*, random, lacking in transcendent principle.

Two deductions can be made. The first is that the EU is not effectively 'mainstreaming' the rights of the child into relevant legislation, contrary to

stated policy.⁵ It has not been the work of this study to probe the mechanisms by which the EU legislator attempts to integrate the rights of the child into EU legislation generally or the CEAS in particular. However, other commentators have pointed to the poverty of its mechanisms, noting that while the EU institutions regularly state their commitment to mainstreaming child rights, they have produced very little by way of a methodology for so doing.⁶ Further research is needed into the issue of child-rights mainstreaming in the EU and the CEAS could be an interesting study in this regard. The second, more radical, deduction is that the problem lies with mainstreaming itself. Section 8.1 on the meaning of the rights of the child concluded that the rights of the child examined in this study are radically different from the rights in general (i.e. adult) human rights law and consequently that the way that the CEAS deals with children must be radically different from the way that it deals with adults. Mainstreaming is based on the premise that integration, as opposed to segregation, is the best way to ensure compliance with the target rights. However, it cannot be ruled out that a better way to ensure compliance with the rights of the child in the CEAS is to establish a parallel but separate regime for children, possibly in the form of a discrete directive. This idea, which is only beginning to be considered in the literature, may well be politically unfeasible but it is nonetheless worthy of further research in the context of the CEAS.⁷

The final question to be addressed is the possibility that the failure of the CEAS to fully comply with the rights of the child is symptomatic of a larger unresolved question, namely, the precise relationship between EU law and fundamental rights. The drafting and entry into force of the Charter of Fundamental Rights of the EU and the plans for accession by the EU to the ECHR have kept alive this debate. Without wishing at this stage to enter into the merits of the debate, it can be noted that a key unresolved question is whether, when the EU legislator exercises a Treaty competence, it is under an obligation to respect (i.e. not violate) fundamental rights or to actively promote (i.e. fulfil) fundamental rights. Traditionally the EU has adopted a negative, violations approach to the protection of fundamental rights, untroubled by the debate in international human rights law in the 1980s about the duty to respect,

5 The seminal Commission Communication, 'Towards an EU Strategy on the Rights of the Child', identifies a key objective as 'mainstreaming children's rights in EU actions'. COM (2006) 367 final. As follow-up to this outline strategy, the Commission published in early 2011 'An EU Agenda for the Rights of the Child', the purpose of which was 'to reaffirm the strong commitment of all EU institutions and of all Member States to promoting, protecting and fulfilling the rights of the child in all relevant EU policies and to turn it into concrete results.' COM (2011) 60 final, p.3.

6 Eleanor Drywood, "'Child-Proofing" EU Law and Policy: Interrogating the Law-Making Processes Behind European Asylum and Immigration Provision', *International Journal of Children's Rights* 19, (2011): 405-428.

7 *Ibid.*

protect and fulfil.⁸ However, the Charter refers not only to a duty to respect rights but also to the duty to ‘promote the application thereof’, which suggests a more positive obligation.⁹ Indeed some provisions of the Charter, not least Article 24 relating to the principle of the best interests of the child, appear to require positive action. Whether the Charter will serve as a line in the sand, marking the distinction between the traditional negative approach and a new positive approach to fundamental rights in EU law remains to be seen. However, recalling the typology of the rights of the child advanced in Chapter 3 (see Annex), it can be appreciated that only one third, roughly, of the rights of the child in the CRC correspond to civil and political rights – rights which are best protected by a negative approach. The other two-thirds of the rights in the CRC correspond to socio-economic rights and child-specific protection rights, both of which require active measures of promotion. Until the EU is fully committed to promoting as well as respecting fundamental rights, then regardless of policy commitments to the rights of the child or a professed allegiance to the best interests of the child, most of the rights of the child will be beyond the reach of the legislator.

8 The classification of the human rights legal obligation into duties to respect, protect and fulfill was first articulated by Asbjorn Eide, the UN Commission on Human Rights Special Rapporteur on Food in the 1980s. See ‘Asbjorn Report on the Right to Adequate Food as a Human Right’, UN Doc. E/CN.4/Sub.2/1987/23. This classification was taken up by the Committee on Economic, Social and Cultural Rights in several of its General Comments on specific ICESCR rights and later by the UN Committee on the Elimination of Discrimination against Women. For a contemporary discussion of the shift from a ‘violations’ approach to human rights to a more positive approach see Eva Brems, ‘Human Rights: Minimum and Maximum Perspectives’, *Human Rights Law Quarterly* 9, no. 3 (2009): 349-372.

9 Article 51 of the Charter of Fundamental Rights of the EU.