



**Submission by the Office of the United Nations High Commissioner for Refugees  
in the case of  
*Defence for Children International (DCI) v. Belgium (Complaint no. 69/2011)***

*Pending before the European Committee of Social Rights*

**1. Introduction\***

1.1. By letter of 1 June 2012, the President of the European Committee of Social Rights (“the ECSR”) invited the Office of the United Nations High Commissioner for Refugees (“UNHCR”) to submit written observations in the case of *Defence for Children International (DCI) v. Belgium* (Complaint no. 69/2011) as per Rule 32A(1) of the Rules of Procedure of the ECSR. UNHCR welcomes this opportunity, as the present case raises a number of issues relating to the provision of adequate reception conditions and the social rights of children in need of international protection as refugees or otherwise.<sup>1</sup>

1.2. UNHCR, as a subsidiary organ of the United Nations, has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions to the problem of refugees.<sup>2</sup> Paragraph 8 of its Statute confers responsibility upon UNHCR to supervise the application of international conventions for the protection of refugees,<sup>3</sup> whereas Article 35(1) of the 1951 Convention relating to the Status of Refugees (“1951 Convention”)<sup>4</sup> obliges States Parties to cooperate with UNHCR in the exercise of its functions. UNHCR’s supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention. Such guidelines are included in the UNHCR *Handbook and Guidelines on Procedures and*

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\*This submission does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognized principles of international law.

<sup>1</sup> In this submission, “children in need of international protection” refers to asylum-seeking children, refugee children, child beneficiaries of subsidiary protection and children in need of international protection who have not yet applied for asylum or other forms of international protection.

<sup>2</sup> UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), available at: <http://www.unhcr.org/refworld/docid/3b00f0715c.html> (“UNHCR Statute”).

<sup>3</sup> *Ibid.*, according to Article 8(a) of the UNHCR Statute, “The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by: (a) Promoting the conclusion and ratification of international conventions for the protection of refugees, *supervising their application* and proposing amendments thereto” [emphasis added].

<sup>4</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.unhcr.org/refworld/docid/3be01b964.html>.

*Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees.*<sup>5</sup>

1.3. It is UNHCR's position that to deprive asylum-seekers of reception conditions may infringe a number of fundamental rights, as reflected in international, regional and national human rights standards, including the right of asylum-seekers to submit and to argue an asylum claim in a fair and efficient asylum procedure.<sup>6</sup> Where such deprivation results in material destitution, the ability of the asylum-seeker to pursue and to substantiate his or her claim for international protection will be significantly undermined. It is recognized that asylum-seekers are particularly vulnerable, and that children in need of international protection, in particular unaccompanied and separated children ("unaccompanied children"),<sup>7</sup> are even more vulnerable. As such, insufficient or inadequate reception conditions will have an increased negative effect on their right to seek international protection and the effective exercise of this and other rights.

1.4. UNHCR recognizes the challenges that certain European countries, including Belgium, face in view of the increased number of unaccompanied children arriving on their territory. However, UNHCR notes the following areas in need of specific attention with respect to the social rights of children in need of international protection in Belgium, and in Europe more generally: (i) the provision of appropriate reception places to all children in need of international protection, whether accompanied or not; (ii) the provision of reception conditions adapted to the specific needs of children, that enable them to access timely and appropriate social, medical and legal support and advice; (iii) the prompt provision of sufficient and appropriately trained guardians for unaccompanied children; and (iv) the assurance of access to and effective operation of child-sensitive asylum procedures, including efficient and effective procedures for determining the best interests of the child, for all children in need of international protection.<sup>8</sup>

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<sup>5</sup> UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, available at: <http://www.unhcr.org/refworld/docid/4f33c8d92.html> ("UNHCR Handbook and Guidelines"). This is a reissue of the previous *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, reprinted together with the Guidelines on International Protection. UNHCR issues Guidelines on International Protection pursuant to its mandate, as contained in the UNHCR Statute, in conjunction with Article 35 of the 1951 Convention. The Guidelines complement the UNHCR Handbook and are intended to provide guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff.

<sup>6</sup> See e.g., UNHCR, *Comments on the European Commission's proposal for a recast of the Directive laying down minimum standards for the reception of asylum-seekers*, March 2009, p. 1, at: <http://www.unhcr.org/4a0d6bf86.html> and UNHCR, *UNHCR Statement on the reception conditions of asylum-seekers under the Dublin procedure*, 1 August 2011, C-179/11, available at: <http://www.unhcr.org/refworld/docid/4e37b5902.html>.

<sup>7</sup> A definition of "unaccompanied" and "separated" children is contained in UNHCR, *UNHCR Guidelines on Determining the Best Interests of the Child*, May 2008, p. 8, available at <http://www.unhcr.org/refworld/docid/48480c342.html>. According to this definition "Unaccompanied children" are children who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so. "Separated children" are those separated from both parents, or from their previous legal or customary primary care-giver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members. These two categories of children are referred to in this submission as "unaccompanied children".

<sup>8</sup> For additional information on UNHCR's position on the rights of asylum-seeking and refugee children, see also, UNHCR, *UNHCR Submissions to the Inter-American Court of Human Rights in the framework of request for an Advisory Opinion on Migrant Children presented by MERCOSUR*, 17 February 2012, available at: <http://www.unhcr.org/refworld/docid/4f4c959f2.html>.

1.5. Against this background, UNHCR elaborates below on the ways in which ensuring respect for the social rights of children in need of international protection, and more particularly, the provision of adequate reception conditions to such children, is an integral part of ensuring that these children can effectively exercise their right to asylum, as recognized in international and European refugee and human rights instruments. More particularly, Part 2 of this submission outlines UNHCR's interpretation of the relevant principles and standards of international and European refugee and human rights law concerning the reception of children in need of international protection, while Part 3 sets out UNHCR's views on the interaction between these principles and the revised European Social Charter ("revised ESC"),<sup>9</sup> and Part 4 provides UNHCR's conclusions.

## **2. Relevant principles of international human rights and refugee law regarding Child-appropriate reception standards**

### **2.1. International and European human rights law**

2.1.1. International and European human rights law acknowledges the particular vulnerability of children in need of international protection, and stipulates that they should be accorded an adequate standard of living which includes, *inter alia*, access to housing, health care and education.

2.1.2. The right to an adequate standard of living, including food, clothing and housing, is protected in the Universal Declaration of Human Rights ("UDHR")<sup>10</sup> and the International Covenant on Economic, Social and Cultural Rights ("ICESCR").<sup>11</sup> These rights apply to all persons, regardless of their immigration or other status.<sup>12</sup> Both instruments recognize that children are entitled to special care and protection due to their vulnerability.<sup>13</sup>

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<sup>9</sup> Council of Europe, *European Social Charter (Revised)*, 3 May 1996, ETS 163, available at: <http://www.unhcr.org/refworld/docid/3ae6b3678.html>.

<sup>10</sup> Article 25, UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <http://www.unhcr.org/refworld/docid/3ae6b3712c.html>.

<sup>11</sup> Article 11, UN General Assembly, *International Covenant on Economic, Social and Cultural Rights* ("ICESCR"), 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.unhcr.org/refworld/docid/3ae6b36c0.html>; see also UN Committee on Economic, Social and Cultural Rights ("CESCR"), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23, para. 10 which provides a broad definition of the minimum standard: "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," available at: <http://www.unhcr.org/refworld/docid/4538838e10.html>; see also CESCR, *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991, E/1992/23, para.13, "for a State party to satisfy its obligations under article 11 (1) of the ICESCR, it must demonstrate that it has taken whatever steps are necessary to ascertain the full extent of homelessness and inadequate housing within its jurisdiction.", available at: <http://www.unhcr.org/refworld/docid/47a7079a1.html>.

<sup>12</sup> See, Article 2 UDHR; CESCR, *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2 ICESCR)*, 2 July 2009, E/C.12/GC/20, para. 30, available at: <http://www.unhcr.org/refworld/docid/4a60961f2.html>.

<sup>13</sup> Article 25(2) UDHR; Article 10(3) ICESCR.

2.1.3. The Convention on the Rights of the Child (“CRC”)<sup>14</sup> provides a comprehensive framework setting out the responsibilities of States Parties towards all children within their jurisdiction, including asylum-seeking and refugee children. The CRC sets out a number of principles regarding the protection of children which apply throughout all stages of displacement,<sup>15</sup> including:

- The best interests of the child shall be a primary consideration in all actions affecting children, including asylum-seeking and refugee children (Article 3, in conjunction with Article 22);
- There shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinions, national, ethnic or social origin, property, disability, birth or other status, or on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians or family members (Article 2);
- Each child has a fundamental right to life, survival and development to the maximum extent possible (Article 6);
- Children should be assured the right to express their views freely and their views should be given due weight in accordance with the child’s age and level of maturity (Article 12);<sup>16</sup>
- Asylum-seeking and refugee children are entitled to receive protection and humanitarian assistance in line with the CRC and other international instruments (Article 22).<sup>17</sup>

2.1.4. In Council of Europe Member States, the human rights of children in need of international protection are also assured by the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”)<sup>18</sup> which applies to everyone within the

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<sup>14</sup> UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.unhcr.org/refworld/docid/3ae6b38f0.html>.

<sup>15</sup> UN Committee on the Rights of the Child, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, paras. 12-30, available at: <http://www.unhcr.org/refworld/docid/42dd174b4.html>.

<sup>16</sup> UNHCR, *Best Interests Determination Children - Protection and Care Information Sheet*, June 2007, p. 2, available at: <http://www.unhcr.org/refworld/docid/46a076922.html>; UNHCR, *UNHCR Guidelines on Determining the Best Interests of the Child*, May 2008, para. 20, available at: <http://www.unhcr.org/refworld/docid/48480c342.html>; UNHCR, *Field Handbook for the Implementation of UNHCR BID Guidelines*, November 2011, available at: <http://www.unhcr.org/refworld/docid/4e4a57d02.html>; UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, paras. 5, 22 December 2009, HCR/GIP/09/08, available at: <http://www.unhcr.org/refworld/docid/4b2f4f6d2.html>.

<sup>17</sup> CRC, *supra* note 14, Article 22 provides: “1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties. 2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.”

<sup>18</sup> Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocols No. 11 and 14)*, 4 November 1950, ETS 5, available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>.

jurisdiction of a Contracting State. Reception conditions must therefore be consistent, *inter alia*, with provisions relating to the prohibition of inhuman or degrading treatment (Article 3), the right to respect for private and family life (Article 8), the right to an effective remedy (Article 13) and the prohibition of discrimination (Article 14).<sup>19</sup>

2.1.5. In the case of *M.S.S. v. Belgium and Greece*, the Grand Chamber of the European Court of Human Rights (“ECtHR”) recognized the particular vulnerability of asylum-seekers because of the traumatic experiences many had endured previously.<sup>20</sup> The ECtHR emphasized that asylum-seekers belong to “a particularly underprivileged and vulnerable population group in need of special protection” and noted “the existence of a broad consensus at the international and European level concerning this need for special protection [...]”.<sup>21</sup> The ECtHR further held that the situation of material destitution and the prolonged uncertainty resulting from the State’s failure to provide the concerned asylum-seekers with living conditions respectful of their human dignity constituted a violation of Article 3 ECHR.<sup>22</sup>

2.1.6. The ECtHR has also acknowledged that the procedural conditions under which an applicant prepares his or her asylum claim affects, at least partially, the quality of the examination of that claim.<sup>23</sup> In the same way as insufficient linguistic and legal aid undermined the rigorous scrutiny of the claim in the case of *I.M. v. France*,<sup>24</sup> UNHCR notes that inappropriate material reception conditions also impact on the quality of the examination of the asylum claim.

2.1.7. Children, whether they are accompanied<sup>25</sup> or unaccompanied,<sup>26</sup> have been found by the ECtHR to be in a situation of extreme vulnerability. In the jurisprudence of the ECtHR, and in line with international human rights law, a child’s situation of extreme vulnerability

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<sup>19</sup> The *Charter of Fundamental Rights of the European Union*, 7 December 2000, Official Journal of the European Communities, 18 December 2000 (2000/C 364/01), available at: <http://www.unhcr.org/refworld/docid/3ae6b3b70.html>, contains similar provisions, see e.g., Articles 1 (human dignity), 4 (prohibition of inhuman or degrading treatment or punishment), 7 (family and private life), 21 (non-discrimination), 24 (rights of the child). Article 24 specifically provides that in all actions relating to children, whether taken by public authorities or private institutions, the best interests of the child must be a primary consideration. The Charter of Fundamental Rights of the EU is applicable in European Member States, such as Belgium, when they apply EU law, including when they implement the Reception Conditions Directive. (Regarding the latter, see below note 52.)

<sup>20</sup> ECtHR, *M.S.S. v. Belgium and Greece* (Application no. 30696/09), Grand Chamber judgment of 21 January 2011, para. 232, available at: <http://www.unhcr.org/refworld/docid/4d39bc7f2.html>.

<sup>21</sup> *Ibid.*, paras. 232 and 251.

<sup>22</sup> *Ibid.*, paras. 220, 232, 233 and 263; see also UNHCR, *UNHCR Statement on the reception conditions of asylum-seekers under the Dublin procedure*, 1 August 2011, C-179/11, para. 4.1.6, available at: <http://www.unhcr.org/refworld/docid/4e37b5902.html>.

<sup>23</sup> ECtHR, *I.M. v. France* (Application no. 9152/09), judgment of 02 February 2012, para. 155, available at: <http://www.unhcr.org/refworld/docid/4f2932442.html>.

<sup>24</sup> *Ibid.*, paras. 140-141 and 143-146.

<sup>25</sup> ECtHR, *Muskhadzhiyeva and Others v. Belgium* (Application no. 41442/07), judgment of 19 January 2010, para. 75, available at: <http://www.unhcr.org/refworld/docid/4bd55f202.html> and ECtHR, *Kanagaratnam and Others v. Belgium* (Application no. 15297/09), judgment of 13 December 2011, para. 87 available at: <http://www.unhcr.org/refworld/docid/4ef0a7902.html>.

<sup>26</sup> ECtHR, *Rahimi v. Greece* (Application no. 8687/08), judgment of 5 April 2011, para. 86, available at: <http://www.unhcr.org/refworld/docid/4d9c3e482.html>; ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (Application no. 13178/03), judgment of 12 October 2006, paras. 55 and 103, available at: <http://www.unhcr.org/refworld/docid/4533718d4.html>.



takes precedence over considerations relating to a child's status as an irregular immigrant.<sup>27</sup> In the case of *Rahimi v. Greece*, the ECtHR took into account, as a determining factor, the unaccompanied situation of the applicant, who was a child at the time, to conclude that he undoubtedly belonged to "the category of the most vulnerable persons of society".<sup>28</sup> Furthermore, on several occasions, the ECtHR has observed that children have specific needs and that the CRC obliges States to implement appropriate measures to ensure that asylum-seeking children receive protection and humanitarian assistance.<sup>29</sup> Furthermore, the ECtHR has stressed that in all decisions concerning children, the best interests of the child must be a primary consideration in conformity with the CRC.<sup>30</sup>

2.1.8. Within the Council of Europe, a number of Parliamentary Assembly resolutions and recommendations also take account of the vulnerability of unaccompanied children, irrespective of their migration status, and explicitly call upon Member States to ensure that access to adequate accommodation, education and health care is guaranteed.<sup>31</sup> Similarly, the Committee of Ministers' Recommendation on life projects for unaccompanied minors and the Council of Europe Strategy for the Rights of the Child (2012-2015) also affirm the particular vulnerability of unaccompanied children seeking asylum, and provide that States must devote special attention to their needs.<sup>32</sup> Many of these Council of Europe standards emphasize that the best interests of the child must be a primary consideration in all actions regarding the child, regardless of the child's migration or residence status.<sup>33</sup>

## 2.2. International refugee law and European Union (EU) asylum Law

2.2.1. International refugee law and EU asylum law builds upon the general human rights law principles summarized above, including that they be applied in a child-appropriate manner.<sup>34</sup> It recognizes that (i) the particular vulnerability of children in need of international

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<sup>27</sup> ECtHR, *Popov v. France* (Application nos. 39472/07 and 39474/07), judgment of 19 January 2012, para. 91, available at: <http://www.unhcr.org/refworld/docid/4f1990b22.html>; ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, *supra* note 26, para. 55.

<sup>28</sup> ECtHR, *Rahimi v. Greece*, *supra* note 26, para. 87.

<sup>29</sup> ECtHR, *Popov v. France*, *supra* note 27, para. 91; *Muskhadzhiyeva and others v. Belgium*, *supra* note 25, para. 62.

<sup>30</sup> ECtHR, *Popov v. France*, *supra* note 27, para. 140; ECtHR, *Rahimi v. Greece*, *supra* note 26, para. 108.

<sup>31</sup> Council of Europe; Parliamentary Assembly, *Resolution 1810 (2011) Unaccompanied children in Europe: issues of arrival, stay and return*, 15 April 2011, para. 5.13, available at: <http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=17991&Language=EN>; Parliamentary Assembly, *Recommendation 1985 (2011) Undocumented migrant children in an irregular situation: a real cause for concern*, 7 October 2011, available at: <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=18041&Language=EN>; Parliamentary Assembly, *Recommendation 1703 (2005) Protection and assistance for separated children seeking asylum*, 28 April 2005, Rec 1703 (2005), available at: <http://www.unhcr.org/refworld/docid/47fdfb1bd.html>.

<sup>32</sup> See Council of Europe, Committee of Ministers, *Recommendation CM/Rec(2007)9 of the Committee of Ministers to member states on life projects for unaccompanied migrant minors*, 12 July 2007, para 17 available at: <https://wcd.coe.int/ViewDoc.jsp?id=1164769>; Committee of Ministers, *Council of Europe Strategy for the Rights of the Child (2012-2015)*, 15 February 2012, available at: [http://www.coe.int/t/dg3/children/MonacoStrategy\\_en.pdf](http://www.coe.int/t/dg3/children/MonacoStrategy_en.pdf).

<sup>33</sup> Parliamentary Assembly, *Recommendation 1985 (2011) Undocumented migrant children in an irregular situation: a real cause for concern*, 7 October 2011, available at: <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=18041&Language=EN>; Parliamentary Assembly, *Recommendation 1703 (2005) Protection and assistance for separated children seeking asylum*, 28 April 2005, Rec 1703 (2005), available at: <http://www.unhcr.org/refworld/docid/47fdfb1bd.html>.

<sup>34</sup> UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08, available at: <http://www.unhcr.org/refworld/docid/4b2f4f6d2.html>.

protection and (ii) the provision of adequate and appropriate reception conditions, including those adapted to the specific needs of children in need of international protection, are essential in ensuring that children can effectively exercise their right to asylum. International refugee law and EU asylum law also recognize the need to put in place appropriate and child-sensitive asylum procedures, including the timely appointment of appropriately qualified and trained legal guardians.

2.2.2. The 1951 Convention, as complemented by the 1967 Protocol,<sup>35</sup> is an important point of departure for considering reception conditions for asylum-seekers.<sup>36</sup> At a minimum, those provisions not connected to lawful stay or residence, apply to asylum-seekers.<sup>37</sup> Together with the Conclusions of UNHCR's Executive Committee (ExCom),<sup>38</sup> the membership of which includes 32 Council of Europe Member States, including Belgium, and UNHCR's Handbook and Guidelines, there is now a body of agreed standards of treatment for the reception of asylum-seekers, including children.

2.2.3. In this regard, ExCom Conclusion No. 93 (LIII) underlines that the implementation of reception arrangements should be guided by the following general considerations,<sup>39</sup> as well as the particular circumstances of the child (see also ExCom Conclusion No. 107 (LVIII) referred to in paragraph 2.2.5 below):

- While there is scope for flexibility in the choice of reception arrangements, it is important that the various reception measures respect human dignity and applicable international human rights law and standards;
- Asylum-seekers should have access to the appropriate governmental and non-governmental entities when they require assistance so that their basic support needs, including food, clothing, accommodation, and medical care, as well as respect for their privacy, are met;
- Gender- and age-sensitivity should be reflected in reception arrangements. These should address in particular the educational, psychological, recreational and other

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<sup>35</sup> UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: <http://www.unhcr.org/refworld/docid/3ae6b3ae4.html>.

<sup>36</sup> UNHCR, *Reception of Asylum-Seekers, including Standards of Treatment, in the Context of Individual Asylum Systems*, EC/GC/01/17, 4 September 2001, para. 3, <http://www.unhcr.org/3b95d6244.html>.

<sup>37</sup> See, Articles 3 (non-discrimination), 4 (freedom of religion), 5 (rights granted apart from the Convention), 7 (exemption from reciprocity), 8 (exemption from exceptional measures), 12 (personal status), 16 (access to courts), 20 (rationing), 22 (public education), 31 (non-penalization for illegal entry or stay), and 33 (*non-refoulement*).

<sup>38</sup> The Executive Committee of the High Commissioner's Programme (ExCom) was established in 1958 and functions as a subsidiary organ of the United Nations General Assembly. It has both executive and advisory functions. Its terms of reference are found in United Nations General Assembly Resolution 1166(XII) which states *inter alia* that it is "to advise the High Commissioner, at his request, in the exercise of his functions under the Statute of his Office." This includes issuing Conclusions on International Protection (often referred to as "ExCom Conclusions"), which address issues in the field of refugee protection and serve as "international guidelines to be drawn upon by States, UNHCR and others when developing or orienting their policies on refugee issues". See UNHCR, *General Conclusion on International Protection*, 13 October 1989, No. 55 (XL) - 1989, para. (p), at: <http://www.unhcr.org/excom/EXCOM/3ae68c43c.html>. ExCom Conclusions are adopted by consensus by the States which are Members of the Executive Committee and can therefore be considered as reflecting their understanding of legal standards regarding the protection of refugees. As of 11 July 2012, 87 States are Members of the Executive Committee including Belgium, see <http://www.unhcr.org/pages/49c3646c89.html>.

<sup>39</sup> UNHCR Executive Committee, *Conclusion on reception of asylum-seekers in the context of individual asylum systems*, 8 October 2002, No. 93 (LIII) - 2002, paras. b) (i) and (ii) available at: <http://www.unhcr.org/refworld/docid/3dafdd344.html>.

special needs of children, especially unaccompanied and separated children. Reception arrangements should also take into account the specific needs of victims of sexual abuse and exploitation, of trauma and torture, as well as of other vulnerable groups;

- The range and scope of relevant social and economic benefits may vary, depending on the nature of the asylum procedure, and the type of reception arrangements in place; and
- Reception arrangements can be mutually beneficial where they are premised on the understanding that many asylum-seekers can attain a certain degree of self-reliance, if provided with the requisite opportunities.

2.2.4. In order to improve and enhance the protection and care of refugee children, UNHCR has adopted a Policy on Refugee Children, endorsed by the UNHCR Executive Committee in October 1993.<sup>40</sup> In light of this policy and international human rights and refugee law standards, UNHCR issued updated Guidelines on Protection and Care for Refugee Children<sup>41</sup> in 1994, which provides that the reception of children should be well-planned, positive and humane to meet the needs of each child, and in particular that:

- Unaccompanied children should be provided with all the social services and legal protections available to children in the host country who are not in the care of their parents (Article 22(2) CRC).
- The care and placement of unaccompanied children should be supervised by national or local child welfare services to ensure that they receive care that meets at least the minimum standards provided for national children.
- Siblings must be kept together.
- Children who have developed close ties should also be kept together. The most appropriate form of placement must be determined for each unaccompanied child. The age, personality, needs and preference of the child must be considered. For some children, family care will be most desirable. For other children, group care may be more appropriate. The most important criterion is that children are provided care that is age-appropriate, loving and nurturing, by continuous care-givers.
- Every effort must be made to place children in foster families or groups of similar ethnic, cultural, linguistic, and religious background (Article 20 (3) CRC).<sup>42</sup>

2.2.5. In addition to ensuring that children in need of international protection are provided with appropriate reception conditions to meet the needs of each child, in its Conclusion No. 107 (LVIII), UNHCR's Executive Committee has called upon States to implement appropriate and child-sensitive asylum procedures, and more particularly to:

“utilize, within the framework of the respective child protection systems, appropriate procedures for the determination of the child's best interests, which facilitate adequate child participation without discrimination, where the views of the child are given due weight in accordance with age and maturity, where decision makers with relevant areas of expertise are involved, and

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<sup>40</sup> UNHCR, *UNHCR Policy on Refugee Children*, 6 August 1993, EC/SCP/82, available at: <http://www.unhcr.org/refworld/docid/3f9e6a534.html>.

<sup>41</sup> UNHCR, *Refugee Children: Guidelines on Protection and Care*, 1994, p. 42, available at: <http://www.unhcr.org/refworld/docid/3ae6b3470.html>.

<sup>42</sup> See also, UNHCR, *UNHCR Submissions to the Inter-American Court of Human Rights in the framework of request for an Advisory Opinion on Migrant Children presented by MERCOSUR*, *supra* note 8.



where there is a balancing of all relevant factors in order to assess the best option.”<sup>43</sup>

2.2.6. In 2009, UNHCR issued Guidelines on Child Asylum Claims offering substantive and procedural guidance on carrying out refugee status determination in a child-sensitive manner.<sup>44</sup> The following procedural and evidentiary issues are relevant in establishing appropriate and child-sensitive asylum procedures:

- Due to their young age, dependency and relative immaturity, children should enjoy specific procedural and evidentiary safeguards to ensure that fair refugee status determination decisions are reached with respect to their claims.<sup>45</sup>
- Claims made by child applicants, whether they are accompanied or not, should normally be processed on a priority basis, as they often will have special protection and assistance needs. Priority processing means reduced waiting periods at each stage of the asylum procedure, including as regards the issuance of a decision on the claim. However, before the start of the procedure, children require sufficient time in which to prepare for and reflect on rendering the account of their experiences. They will need time to build trusting relationships with their guardian and other professional staff and to feel safe and secure.
- For unaccompanied and separated child applicants, efforts need to be made as soon as possible to initiate tracing and family reunification with parents or other family members.
- An independent, qualified guardian needs to be appointed immediately, free of charge in the case of unaccompanied or separated children. Children who are the principal applicants in an asylum procedure are also entitled to a legal representative.<sup>46</sup> Such representatives should be properly trained and should support the child throughout the procedure.
- The right of children to express their views and to participate in a meaningful way is also important in the context of asylum procedures.<sup>47</sup> A child’s own account of his/her experience is often essential for the identification of his/her individual protection requirements and, in many cases, the child will be the only source of this information. Ensuring that the child has the opportunity to express these views and needs requires

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<sup>43</sup> UNHCR, *Conclusion on Children at Risk*, 5 October 2007, No. 107(LVIII) – 2007, para. (e), available at: <http://www.unhcr.org/refworld/docid/471897232.html>.

<sup>44</sup> UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, *supra* note 16.

<sup>45</sup> The relevant applicable age for children to benefit from the additional procedural safeguards elaborated in this section is the date the child seeks asylum and not the date a decision is reached. This is to be distinguished from the substantive assessment of their refugee claims in which the prospective nature of the inquiry requires that their age at the time of the decision may also be relevant.

<sup>46</sup> “Guardian” here refers to an independent person with specialized skills who looks after the child’s best interests and general well-being. Procedures for the appointment of a guardian must not be less favourable than the existing national administrative or judicial procedures used for appointing guardians for children who are nationals in the country. “Legal representative” refers to a lawyer or other person qualified to provide legal assistance to, and inform, the child in the asylum proceedings and in relation to contacts with the authorities on legal matters. See UNHCR, *Conclusion on Children at Risk*, *supra* note 43, para. (g)(viii). For further details, see UN Committee on the Rights of the Child, *General Comment No. 6*, *supra* note 15, paras. 33–38, 69. See also UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, February 1997, p. 2 and paras. 4.2, 5.7, 8.3 and 8.5, available at: <http://www.unhcr.org/refworld/docid/3ae6b3360.html>.

<sup>47</sup> Article 12 CRC. The CRC does not set any lower age limit on children’s right to express their views freely as it is clear that children can and do form views from a very early age.

the development and integration of safe and child-appropriate procedures and environments that generate trust at all stages of the asylum process. It is important that children be provided with all necessary information in a language and manner they understand about the possible existing options and the consequences arising from them.<sup>48</sup> This includes information about their right to privacy and confidentiality enabling them to express their views without coercion, constraint or fear of retribution.<sup>49</sup>

- Age assessments are conducted in cases when a child's age is in doubt and need to be part of a comprehensive assessment that takes into account both the physical appearance and the psychological maturity of the individual.<sup>50</sup> It is important that such assessments are conducted in a safe, child- and gender-sensitive manner with due respect for human dignity. The margin of appreciation inherent to all age-assessment methods needs to be applied in such a manner that, in case of uncertainty, the individual will be considered a child.<sup>51</sup>
- Decisions need to be communicated to children in a language and in a manner they understand. Children need to be informed of the decision in person, in the presence of their guardian, legal representative, and/or other support person, in a supportive and non-threatening environment.

2.2.7. EU law also clearly recognizes that adequate reception conditions are a prerequisite to ensure the exercise of the right to asylum. This is affirmed by European Union Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers ("Reception Conditions Directive"),<sup>52</sup> which, as clearly stated in its Recital 5, aims to ensure full respect for human dignity and to promote the application of Articles 1 (the right to human dignity) and 18 (the right to asylum).<sup>53</sup>

2.2.8. The Reception Conditions Directive establishes important standards for EU Member States concerning reception conditions for child asylum-seekers, whether unaccompanied or accompanied. The following provisions are particularly relevant in the present case:

- Article 17 recognizes the particular vulnerability of asylum-seeking children, and stipulates that when implementing the provisions of the Reception Conditions Directive relating to material reception conditions and healthcare, Member States shall take into account the needs of vulnerable persons, such as minors and unaccompanied minors.
- Article 18 states that the best interests of the child shall be a primary consideration for Member States when implementing the provisions of the Reception Conditions Directive with respect to minors.
- Article 19(1) provides that Member States should take measures as soon as possible to provide for the representation of unaccompanied minors.

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<sup>48</sup> UN Committee on the Rights of the Child, *General Comment No. 6*, *supra* note 15, para. 25; UN Committee on the Rights of the Child, *General Comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, paras. 123–124, available at: <http://www.unhcr.org/refworld/docid/4ae562c52.html>.

<sup>49</sup> Articles 13 and 17 CRC.

<sup>50</sup> UNHCR, *Conclusion on Children at Risk*, *supra* note 43, para. (g)(ix).

<sup>51</sup> *Ibid.*, para. (g)(ix); UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, *supra* note 46, paras. 5.11, 6.

<sup>52</sup> Council of the European Union, *Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in Member States*, ("Reception Conditions Directive"), 6 February 2003, 2001/0091 (CNS), Recital 5, available at: <http://www.unhcr.org/refworld/docid/3ddcfda14.html>.

<sup>53</sup> *Ibid.*

- Article 19(2) provides that unaccompanied minors who make an application for asylum must be provided suitable accommodation for the entire period of their stay.

2.2.9. Other EU asylum instruments, such as (i) Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (“Asylum Procedures Directive”)<sup>54</sup> and (ii) Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (“Qualification Directive”),<sup>55</sup> provide specific guarantees, including the establishment of appropriate and child-sensitive asylum procedures, for unaccompanied minors on account of their vulnerability and stipulate that the best interests of the child should be a primary consideration of Member States.<sup>56</sup>

### **3. The interaction between the relevant international and European refugee and human rights law standards and the revised European Social Charter**

#### **3.1. Personal Scope of the revised European Social Charter**

3.1.1. According to paragraph 1 of the Appendix<sup>57</sup> to the revised ESC “[...] the persons covered by Articles 1 to 17 and 20 to 31 include foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned [...]”. The Appendix further provides however that “refugees and stateless persons lawfully staying in the territory are to receive treatment as favourable as possible, and in any case not less favourable than under the obligations accepted by the Party under the said Convention and under any other existing international instruments applicable to those refugees”.

3.1.2. In previous decisions, this Committee has extended the personal scope of the revised ESC. In *Defence for Children International (DCI) v. The Netherlands* (Complaint no. 47/2008), a case regarding the right to shelter of foreign unaccompanied migrant children unlawfully present in the Netherlands, this Committee observed that the Charter must be interpreted so as to give life and meaning to fundamental social rights. The decision states that the restrictions in paragraph 1 of the Appendix to the revised ESC should not lead to unreasonably detrimental effects where the protection of vulnerable groups of persons is at stake.<sup>58</sup> Furthermore, it concluded that provisions of the revised ESC, including the right to

<sup>54</sup> Council of the European Union, *Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, (“Asylum Procedures Directive”), 2 January 2006, 2005/85/EC, available at: <http://www.unhcr.org/refworld/docid/4394203c4.html>.

<sup>55</sup> European Parliament and Council of the European Union, *Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, L337/9, available at: <http://www.unhcr.org/refworld/docid/4f197df02.html>.

<sup>56</sup> See e.g., Recital 14 of the Asylum Procedures Directive, *supra* note 53; Recital 18 of the Qualification Directive, *supra* note 55.

<sup>57</sup> Council of Europe, *European Social Charter (Revised)*, 3 May 1996, ETS 163, available at: <http://www.unhcr.org/refworld/docid/3ae6b3678.html>.

<sup>58</sup> European Committee of Social Rights (ECSR), *Defence for Children International (DCI) v. the Netherlands* (Complaint No. 47/2008), Decision on the merits of 20 October 2009, paras. 34, 36 & 37, available at: <http://www.unhcr.org/refworld/docid/4b9e37ea2.html>; see also ECSR, *International Federation of Human*

shelter in Article 31, were applicable to children unlawfully present in their territory for as long as they were in the jurisdiction of the relevant State Party. In doing so, this Committee noted that it was necessary to seek an interpretation of the revised ESC that was the most appropriate in order to realize the aim and achieve the object of the revised ESC, namely to facilitate social and economic progress and to maintain and further realize human rights and fundamental rights,<sup>59</sup> rather than one which would restrict to the greatest possible degree the obligations undertaken by the Parties.

3.1.3. UNHCR notes that children in need of international protection are particularly vulnerable and submits that such vulnerability should be taken into account to assess the seriousness of the detrimental effects on them of the non-applicability of the revised ESC.

## **3.2. The social rights in the revised ESC in light of the relevant international and European human rights and refugee law standards**

3.2.1. States' compliance with their international obligations should form an integral part of their compliance with their obligations under the revised ESC. This Committee has already taken into consideration a State's international obligations when assessing its compliance with the revised ESC. In *Defence for Children International (DCI) v. The Netherlands*, this Committee held that "the revised ESC should be interpreted in harmony with other rules of international law of which it forms part, [such as the CRC], and those relating to the provision of adequate shelter to any person in need, regardless whether s/he is on the State's territory legally or not."<sup>60</sup>

3.2.2. UNHCR notes that international, Council of Europe and EU human rights and refugee law standards, as well as the relevant jurisprudence of the ECtHR, as outlined in Part 2 above, demonstrate a broad consensus concerning the vulnerability of children in need of international protection, and unaccompanied children in particular, and the importance of sufficient and child appropriate reception conditions in order to enable such children to effectively exercise their right to asylum.

3.2.3. In keeping with this Committee's jurisprudence cited above, the compliance of Belgium's reception policies and practices with its obligations under international and European human rights and refugee law should form an integral part of any assessment of its compliance with the revised ESC.

## **4. Conclusion**

4.1 International and European human rights and refugee law standards recognize that (i) children in need of international protection, and unaccompanied children in particular, are particularly vulnerable, and that legislative provisions should be interpreted and implemented in a manner that has the best interests of the child as a primary consideration, and (ii) that access to child appropriate reception conditions is achieved. Providing child appropriate reception conditions is an essential component in ensuring that asylum-seekers, including children in need of international protection, can effectively access asylum procedures in order to exercise their right to asylum. Child appropriate reception conditions would include, *inter*

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*Rights Leagues (FIDH) v. France* (Complaint No. 14/2003), Decision on the merits of 8 September 2004, paras. 30-32, available at: <http://www.unhcr.org/refworld/docid/4fe9d0352.html>.

<sup>59</sup> Preamble para. 1, European Social Charter (*Revised*), *supra* note 57.

<sup>60</sup> ECSR, *Defence for Children International (DCI) v. the Netherlands*, *supra* note 58, paras. 34, 36 and 37.

*alia*, access to safe and suitable accommodation, adapted social welfare support, health care, education, legal advice and guardianship arrangements.

**UNHCR**  
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