THE CHILD IN EU ASYLUM AND IMMIGRATION LAW: A SOCIO-LEGAL ANALYSIS OF REGULATORY AND GOVERNANCE ISSUES

Thesis submitted in accordance with the requirements of the University of Liverpool for the degree of Doctor in Philosophy

by

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February 2010

ABSTRACT

This thesis uses the specific context of asylum and immigration law and policy as a lens through which to view the European Union's increasingly ambitious and explicit agenda in relation to children's rights. It sets this analysis within the wider context of the inherent characteristics of the EU as a legal order. The Treaty of Amsterdam 1997 granted the EU competence to enact legally binding measures on visas, asylum and immigration (Title IV, Part Three EC; Chapter 2, Title V, Part III TFEU, post-Lisbon). The new law-making powers triggered by Amsterdam prompted an unprecedented level of EU intervention in the lives of migrants of all ages and backgrounds – and has resulted in a set of child-focused provisions that pose genuine questions about the appropriateness of EU intercession into the children's rights arena. The thesis explores this issue from the perspective of both regulatory and governance issues: the former necessitating an analysis of the scope and content of legislative provision stemming from Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon) as it applies to young immigrants and asylum-seekers; the latter questioning the extent to which the institutional processes lying behind this law have the capacity to incorporate a children's perspective. The first part of the thesis contrasts the volume of child-focused provisions found within Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon) legislation with the somewhat disappointing children's rights model they endorse, revealing measures in relation to young people to be largely derogatory, discriminatory, discretionary and vague in nature. Whilst a slightly more sympathetic view of measures in relation to young asylum-seekers can be taken when their place at the intersection of a range of competing legal, political and social agendas is considered, it is ultimately argued that they

somewhat contradict the rhetoric currently surrounding the EU's commitment to children's rights. The second part of the thesis considers the compatibility of the EU's law-making processes - particularly its move towards strategies of 'good governance' - with a child-focused approach, the emphasis here being on the use of the familiar concepts of mainstreaming and monitoring in relation to young people. It is argued that these processes lack the rigour and robustness required to ensure that children are embedded in the governance culture of the EU. The thesis' final conclusion is that this is indicative of a wider need to rethink the philosophy of children's rights at this level, such that their analysis enters the 'mainstream' not only of EU legal process, but also of EU legal scholarship.

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ACKNOWLEDGEMENTS

The 'patchwork quilt' of financial support I have received from a number of sources has made this PhD possible: many, many thanks to the Liverpool Law School, the University of Liverpool Law Association and the Modern Law Review for their generous contributions.

Thanks are also due to a number of colleagues outside the Liverpool Law School with whom I have worked on various projects over the duration of this PhD. In particular, to those who have taken time to discuss my work, your feedback and (in many cases superior) knowledge is acknowledged and appreciated. Special thanks are due to Keleigh Coldron for her rigorous (and, towards the end, life-saving!) academic assistance and friendly reassurance.

I have been privileged to carry out my PhD studies in the Liverpool Law School where many colleagues have aided and influenced my work. Heartfelt thanks must go to both Heads of School during my PhD, Anu Arora and Fiona Beveridge, for their ongoing and generous guidance and for providing me with the support and space I needed to embark upon, and complete, this thesis. The additional friendly advice provided by my academic colleagues, Warren Barr and Louise Ackers, and the assistance of the library and IT staff, are also gratefully acknowledged. Thanks to my fellow postgraduate students, past and present, in the Law School who have fostered a research culture to be proud of. I am particularly grateful to my good friends, Sammie Currie and Bleddyn Davies, for sharing with me not only academic interests but, just as (or more?) importantly, a sense of humour!

Working with two brilliant supervisors, Helen Stalford and Michael Dougan, has enriched my PhD experience immeasurably. Michael's truly phenomenal knowledge and understanding of EU law, coupled with good advice on all aspects of academic life, have been invaluable. To Helen I owe more thanks than I can possibly state here: for her inspirational academic guidance, unwavering professionalism and good friendship, I will always be grateful. Thank you, both of you, for your constant encouragement and belief in me – your support really has made all the difference.

Thanks also to my friends outside work who have provided essential distractions and relentlessly assured me that I would, eventually, finish this! A special mention is reserved for Jen and Laura who have provided words of support, mopped up tears of frustration and cajoled when needed.

Lastly, thank you to my family for their love and support, I am certain this would not have happened without them: to my mum, Steph, for her no-nonsense thesis completion strategies(!), assiduous commitment to the English language, and abounding generosity with time and wisdom; to Pos, an absolute rock of a little sister, who always seems to believe in me (and make me laugh!).

This thesis is dedicated, with love, to the memory of my father, Steve Drywood, without whose influence I would never have embarked upon this project, and to whom I owe so much.

E.W.D., Liverpool, February 2010

PREFACE

The law is stated as it stood on 1 September 2009.

Subsequent to this date, on 1 December 2009, the Lisbon Treaty 2007 entered into force. To retain the currency of this work, the new numberings set-down by the revised Treaty on European Union and the renamed and revised Treaty on the Functioning of the European Union are, where relevant, provided.

Chapter One

INTRODUCTION

1. INTRODUCTION

The Treaty of Amsterdam 1997 granted the European Union (EU) competence to enact legally binding measures on visas, asylum and immigration.[1] A by-product of these new law-making powers is the need to address the specific situation of children within resulting legal and policy activities. This has demanded an unprecedented level of intervention in the lives of young people on the part of the EU and resulted in a set of child-focused provisions that pose genuine questions about the appropriateness of EU intercession into the children's rights arena.

Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon)[2] sets out an ambitious legislative agenda for harmonised measures addressing, *inter alia*, asylum-seekers, refugees, beneficiaries of humanitarian or temporary protection, victims of trafficking, long-term resident third-country nationals and those who migrate for family

[1] Articles 61-69, Title IV: Visas, Asylum, Immigration and Other Policies Related to the Free Movement of Persons, Part Three, Treaty Establishing the European Community: (hereafter, Title IV, Part Three EC). Following the entry into force of the Treaty of Lisbon 2007, the relevant provisions are now found in Articles 77-80, Chapter 2: Policies on Border Checks, Asylum and Immigration, Title V, Part Three, Treaty on the Functioning of the European Union (hereafter, Chapter 2, Title V, Part III TFEU). It should be noted that the UK and Ireland have reserved the right to opt-in or out of this legislation (see the Protocol on the position of the United Kingdom and Ireland attached to the Treaty of Amsterdam, OJ C 340, 10/11/97); and that Denmark has opted-out (see the Protocol on the position of Denmark attached to the Treaty of Amsterdam, OJ C 340, 10/11/97)

[2] *Ibid.*

renunciation purposes.[3] The first decade of activity has seen the completion of the initial phase of the Common European Asylum System, as well as the passing of a number of additional measures covering both legal and illegal immigration, resulting in a raft of measures that shape the rights and entitlements of the broad category of migrants. The Commission has recognised the need for the specific situation of children to be reflected in child-focused provision, the result being felt across a range of areas including education, health care, representation, accommodation and family life.

This level of engagement is in direct contrast to the EU's historic indifference to children: an approach that stems from a perception that children are of little policy and legal relevance to a Union whose roots lie in an economic single market.[4] However, significant changes have taken place over the past ten years that have pushed children to the fore of the EU agenda: this began tentatively at the turn of the millennium with the proclamation of the Charter of Fundamental Rights of the European Union 2000[5] (hereafter, the Charter) containing an article on the rights of

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[3] See, primarily, Article 63 EC

[4] Pringle, K. (1998) *Children and Social Welfare in Europe* (Open University Press), at p.134

[5] OJ C 83/389, 30.3.2010. Whilst the Treaty of Lisbon 2007 gave the Charter legally binding status (see, further: Dougan, M., 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts' (2008) 45, *Common Market Law Review*, pp.617-703), the past preceding its entry into force was characterised by uncertainty as to the position of the Charter in the Community legal order. The Charter was drafted by its Convention with a view to it becoming a legally binding instrument (see: G. de Burca, 'The Drafting of the European Union Charter of Fundamental Rights' (2001) 26 *European.Law.Review*. 126), however, at Nice, in 2000, it was simply proclaimed by the Union's three main political institutions without achieving any such binding status. In the following years, the Court restricted itself to a tentative recognition of the Charter as an instrument that inspires general principles of Community law (Case C-540/03 *Parliament v Council* [2006] E.C.R. I-5769; see, further: Drywood, E. 'Giving with One Hand, Taking with the Other: Fundamental Rights, Children and the Family Reunification Decision' (2007) 32(3) *European Law Review* pp. 396-407), before the question was finally resolved in December 2009 with the eventual entry into force of the Treaty of Lisbon 2007

the child,[6] and was spurred on by the gradual recognition of the United Nations Convention on the Rights of the Child (UNCRC) by the Court of Justice of the European Communities (ECJ), culminating in the publication of the Commission's document *Towards an EU Strategy on the Rights of the Child* in 2006.[7] The aim of the strategy was "to ensure that EU action actively promotes and safeguards children's rights" on a long-term basis. The traditional hands-off approach of the institutions in the area of children's rights has, however, led some to question its capacity to deliver on any such agenda, given its lack of experience - and, indeed, explicit legal competence - to regulate the lives of young people.[8]

The aim of this thesis, therefore, is to marry these two areas and use the specific context of asylum and immigration law and policy as a lens through which to view the EU's evolving agenda in relation to children's rights. As such, rather than being concerned with the implementation of specific EU legal provision at domestic level this thesis instead seeks to pose more fundamental questions about the ideological and constitutional foundations of EU intercession in the lives of children. The intention here is by no means to ignore, or even belittle, the importance of the national context in shaping the impact of asylum and immigration provision on young people; indeed it is acknowledged that Member States retain the

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[6] Article 24: The Rights of the Child: 1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity; 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration; 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests

[7] COM(2006) 367 Final. See also Commission staff working document accompanying the Communication from the Commission, Preliminary Inventory of EU Actions Affecting Children's Rights, Brussels, 4.7.2006, EC(2006)889

[8] Stalford, H. 'Constitutionalising Equality in the EU: A Children's Rights Perspective', (2005) 8 *International Journal of Discrimination and the Law*, pp.53-73, at p. 55

final say when it comes to the operation and administration of these systems at the national, regional and local level. Equally, it is recognised that Europe's nation states have long-established asylum and immigration regimes (ones that have been existence far longer than the EU has pursued an active agenda in the area), and extensive fundamental rights protection in place at domestic level,[9] including mechanisms that promote the rights of the child. To a certain extent, then, this poses questions as to why this analysis is situated at the EU level: after all, if the experiences of child immigrants and asylum-seekers are ultimately shaped by national implementing legislation, why is it important to critically assess EU activity? First of all, the question asked by this thesis is a legitimate one in light of the EU's increasingly explicit and ambitious children's rights agenda; one which, since 2006, has claimed to "effectively promote and safeguard the rights of the child".[10] Furthermore, as will be highlighted in this analysis, a striking number of child focused provisions appear within legislation stemming from Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon), many of which espouse key children's rights principles derived from international law. Critiquing both the regulatory content and scope of these provisions, as well as the governance strategies that lie behind them, is, therefore, an essential step in reaching broader conclusions about the appropriateness of EU intervention in the lives of children. The purpose of this thesis is not to assert that the EU should play an aggressively proactive role in the promotion of children's rights across Europe, nor is its intention to argue that responsibility for

[9] For a critique of the 'centralisation' of fundamental rights protection by the EU, in which the importance of ensuring this is carried out at the appropriate level is underlined, see: Spaventa, E., 'Federalisation versus Centralisation: Tensions in Fundamental Rights Discourses in the EU', in M. Dougan, M. and Currie, S. (Eds), *50 Years of the European Treaties: Looking Back and Thinking Forward* (Oxford: Hart, 2009)

[10] *Op. Cit.* n.7, at p. 2

upholding the rights, and meeting the needs, of child immigrants and asylum-seekers is a responsibility to be borne by the EU alone. Rather, the arguments put forward in this analysis proceed on the basis that where the EU has committed to a particular endeavour and has interceded through legislative provision, it bears some sort of responsibility to ensure that this takes place within an appropriate, and well engendered, children's rights framework. To argue otherwise would be problematic on two fronts. First, because, if there is no obligation to ensure that child-focused provision in EU law and policy has a tangible benefit for young people, their very existence is deprived of any meaningful purpose. This can surely not be regarded as good law-making. Secondly, it is not a defensible position for the EU to introduce provision within its legislative activity that has an impact upon the rights and entitlements of young people, and maintain a hands-off approach to the rights of the child on the basis of an audacious presumption that guarantees are already in place at national level. This is not to say that the Member States themselves – and, indeed international rights monitoring bodies - do not themselves have an essential role to play in upholding children's rights, it is simply to point to the need for the EU to engage meaningfully in children's rights debates.

The thesis addresses this question from the perspective of both regulatory and governance issues: the former necessitating an analysis of the scope and content of legislative provision stemming from Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon) as it applies to young immigrants and asylum-seekers; the latter questioning the extent to which the institutional processes lying behind this law have the capacity to incorporate a children's perspective. Therefore, *Part I* is primarily concerned with critiquing the approach taken to young people in these provision; an analysis which, whilst adopting a children's rights

perspective, seeks to identify not only where there is scope for improving EU provision, but also where the boundaries of EU intervention lie (and, therefore, where a particular issue may rightly be left to the expertise of the Member States). By way of transition into *Part II*, it is argued that, where deficiencies lie, they might better be addressed by questioning the governance culture that lies behind the formulation of laws and policies impacting upon child immigrants and asylum-seekers, rather than focusing upon criticising isolated provisions. Addressing the very ethos behind the elaboration of immigration and asylum provision at EU level, and questioning its capacity to incorporate a children's rights perspective allows greater scope to offer suggestions for improving the EU children's rights strategy in the longer-term.

This chapter will first explore in greater detail what is meant by "the 'child' in EU asylum and immigration law", by clarifying the scope of analysis and defining some of thesis' central terms. Second, it will provide some contextual background on child immigrants and asylum-seekers in the EU, thus outlining the social phenomenon addressed by the analysis. Third, it discusses in greater detail the theoretical perspective adopted by this thesis by both defining, and outlining the value of, socio-legal research in the current context. Fourth, it offers a brief note on the impact of the Treaty of Lisbon in the analysis within this thesis. Finally, it considers how the theoretical approach outlined in this introduction is translated into the general structure of the thesis, by exploring the specific purpose and content of the substantive and concluding chapters.

2. DEFINING THE SCOPE OF THE ANALYSIS

Whilst the fundamental questions addressed by this thesis relate to the EU's broader children's rights agenda, the specific subject matter of the

analysis is "the 'child' in EU asylum and immigration law", the content and boundaries of which merit further exploration. Essentially, the starting point for the research was the corpus of secondary legislation that emerged over the first decade of harmonised EU provision on asylum and immigration. From this, those instruments that governed the rights and entitlements of individual immigrants and asylum-seekers were identified.[11] The bulk of these are geared towards the first phase of the *Common European Asylum System*: specifically Directives in relation to the reception of asylum-seekers,[12] procedural aspects of the asylum claim,[13] qualification as a refugee[14] and a Regulation on determining the Member State responsible for examining an asylum application lodged within the EU.[15] Additionally, Directives addressing more established immigrants - namely those relating to long-term residents[16] and family reunification,[17] as well as one on the return of illegal immigrants to their

[11] This is as opposed to measures aimed at regulating 'behind the scenes' administration of immigration regimes (for example, Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders OJ L 261/28, 6.8.2004; Council Regulation (EC) No. 1683/95 of 29 May 1995 laying down a uniform format for visas OJ L 164/1, 14.7.1995)

[12] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers OJ L 31/18, 6.2.2003

[13] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status OJ L 326/13, 13.12.2005

[14] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted OJ l 304/12, 30.9.2004

[15] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national OJ L 50/1, 25.2.2003

[16] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents OJ L 16/44, 23.1.2004

[17] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification OJ L 251/12, 3.10.2003

country of origin[18] - are considered. From this, child-focused provisions were extracted and have provided the material for the analysis.

The use of a number of terms within this thesis requires clarification, particularly given the lack of consensus in migration research in relation to definitional boundaries, and the sometimes loaded use of certain terms.[19] The phrase 'EU immigration and asylum law' is used to denote the specific legal framework set down by secondary legislation under Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon). Addressees of this law are limited to 'third-country nationals', that is "any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty",[20] and, as such, this term is occasionally used interchangeably with that of 'immigrant'. Equally that of 'migrant' is understood more loosely simply to denote anyone who has engaged in the process of crossing borders and sought residence in a country of which they are not a national and, as such, corresponds to no specific legal status. The label 'asylum-seeker' or 'refugee', on the other hand, is reserved for a narrower category of persons, falling within the specific definitions outlined in the legislation and relevant provisions of international law. Unlike the term immigration - which implies a decision

[18] Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals OJ L 348/98, 24.12.2008. Additionally, the following two Directives are considered in this thesis: Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof OJ L 212/12, 7.8.2001; and Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities OJ L 261/19, 6.8.2004

[19] Geddes, A., *Immigration and European Integration: Towards Fortress Europe?* (Manchester: Manchester University Press, 2000), at pp.11-12

[20] Article 2(a) long-term residents Directive, *Op. Cit.* n.15. The provisions on citizenship of the Union found in Article 17 EC are found in Article 20 TFEU post-Lisbon

to migrate on the basis of a range of factors - these latter concepts are associated with forced migration. EU instruments on asylum define 'asylum-seeker' with reference to the asylum application:

> 'Application for asylum' shall mean the application made by a third-country national or a stateless person which can be understood as a request for international protection from a Member State, under the Geneva Convention.[21]

The 1951 Geneva Convention Relating to the Status of Refugees, to which the above definition refers, is the foremost codification of the rights of refugees at international level, and is signed by all EU Member States. Additionally, it is frequently referred to in legislative and policy documents and is, as such, firmly embedded in the EU asylum and immigration regime. Article 1A of the Convention states that:

> The term 'refugee' shall apply to any person...who owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

As such, the term 'asylum seeker' refers to someone who has entered the formal asylum determination process - and is legally resident on the EU territory by virtue of this status - but has not yet been formally notified of

[21] Article 2(b) asylum reception Directive, *Op. Cit.* n.12

the outcome of their application. A 'refugee' is someone who has received a positive decision and is, thus, granted entry and residence rights on the basis of their need for protection. A further status, that of subsidiary humanitarian protection, is found within EU asylum and immigration legislation and essentially refers to a person who does not fall within the Geneva Convention definition, but to whom the Member State authorities have nonetheless granted humanitarian protection because, if returned to their country of origin, they "would face a real risk of suffering serious harm".[22] As an example, domestic legislation in the UK recognises two statuses that come under the umbrella of 'subsidiary humanitarian protection': humanitarian protection and discretionary leave to remain.[23]

A further concept, found in asylum legislation of particular relevance to the current analysis is that of unaccompanied minor, defined in the legislation thus:

> 'Unaccompanied minors' shall mean persons below the age of eighteen who arrive in the territory of the Member States unaccompanied by an adult responsible for them whether by law or by custom, and for as long as they are not effectively taken into the care of such a person; it shall include minors who are left unaccompanied after they have entered the territory of Member States.[24]

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[22] Article 2(e) refugee qualification Directive, *Op. Cit.* n.14

[23] These replaced the previous status of exceptional leave to remain in 2003. See further: G. Clayton (2006) *Immigration and Asylum Law (2nd Edition)* (OUP), at pp.417-419

[24] Article 1(h) asylum reception Directive, *Op. Cit.* n.12. See similar definitions in Article 2(f) temporary protection Directive (*Op. Cit.* n.18), Article2(h) Dublin II Regulation (*Op. Cit.* n.15), Article 2(f) family reunification Directive (*Op. Cit.* n.17), Article 2(i) refugee qualification Directive (*Op. Cit.* n.14) and Article 2(h) asylum procedures Directive (*Op. Cit.* n.13)

In many quarters the wider term 'separated child' is preferred, as the Separated Children in Europe Programme explains:

> The Separated Children in Europe Programme uses the word 'separated' rather than 'unaccompanied' because it better defines the essential problem that such children face. Namely, that they are without the care and protection of their parents or legal guardian and as a consequence suffer socially and psychologically from this separation. While some separated children appear to be 'accompanied' when they arrive in Europe, the accompanying adults are not necessarily able or suitable to assume responsibility for their care.[25]

Therefore, this term is more appropriately used when commenting on the social phenomenon, rather than the formal legal categorisation, relative to these children. When discussing legal provision, the term unaccompanied minor is used to remain faithful to the boundaries set down in the legislation.

This leads us onto the final category of definitions to be clarified which are those denoting the status of 'child'. The UNCRC states that:

> A child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

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[25] Separated Children in Europe Programme, Statement of Good Practice: 3rd Edition (Copenhagen: Save the Children, 2004), at p.2. It should be noted that a 4th Edition of the Statement of Good Practice was published in March 2010 and is available at: <http://www.separated-children-europe-programme.org/separated_children/good_practice/index.html> (last accessed 15 June 2010)

No formalised definition of the term 'child' is found at EU level, although one might infer from that of unaccompanied minor that it is, in line with that of the UNCRC, accepted by the legislature to be someone below the age of 18. Moreover, all 27 EU Member States set the age of majority at 18 years. The terms 'young people' and 'minors' are throughout this analysis used interchangeably with that of 'children', thus indicating those under the age of 18 years.

3. UNDERSTANDING THE SOCIAL CONTEXT

Legal provisions stemming from Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon) address children from a hugely diverse range of backgrounds, representing a number of migratory phenomena. This is neatly encapsulated by the Commission in information provided on Europa, the web portal of the EU, on children in asylum and immigration law:

> Many children flee their country of origin for refugee reasons, having a 'well-founded fear of persecution', in line with the 1951 UN Refugee Convention. Others are trafficked, displaced by war, or escape from abusive environments or extreme poverty. Others still migrate with their families when family members enter EU territory to work or study.[26]

As far as quantifying this group is concerned, Eurostat, the EU statistical gathering body, provides some, albeit limited, insight. In 2006, there

[26] See: <http://ec.europa.eu/justice_home/fsj/children/asylum/fsj_children_asylum_en.htm> (last accessed 26 February 2010)

were almost 2 million non-EU immigrants into Europe.[27] Whilst a largely 'young' population, their median age being 27.7 years, the smallest category within the group as a whole was that of 'children'.[28] Eurostat's age-disaggregated data on non-EU immigrants sets the boundary of childhood at 15 years, with those under that age constituting 8% of the group as a whole, that is approximately 150,000 young people.[29] More details are available in relation to asylum with quarterly statistics produced, the latest being for the 3rd quarter of 2009 (July to September).[30] Of 62,655 asylum applications lodged in the EU-27 from July to September 2009, over a quarter - that is, around 16,000 - were under the age of 18, thus classed as minors.[31] Within this group, far more of these were aged 13 years or below (17.9%) than were in the 14-17 category (7.4%).

So, this research focuses on a significant and diverse population of young people, thus providing an interesting context for legal research. The background of a recently arrived unaccompanied asylum-seeking minor contrasts with that of the child of a long-term resident migrant family who has lived in Europe for a significant portion of their life - in terms of, for example, trauma experienced, relative wealth, level of family support and perceived vulnerability. On the one hand, this presents a significant research challenge, but on the other, it is very much a vehicle for analysis. The diverse examples upon which this research is able to draw,

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[27] Herm, A., 'Recent Migration Trends: Citizens of EU-27 Member States become Ever More Mobile, While EU Remains Attractive to Non-Citizens', (2008) 98, *Eurostat Statistics in Focus*, at p.9

[28] *Ibid.*, at p.6.

[29] *Ibid.*, at p.6

[30] Albertinelli. A. and Juchno. P., 'Asylum Applicants and First Instance Decisions on Asylum Applications', (2010) 3, *Eurostat Statistics in Focus*

[31] *Ibid.*, at p.4. Beyond their age classification, however, there is no indication of whether these children were unaccompanied or sought asylum as part of a family unit

as a consequence of the heterogeneity of this group, lifts its arguments out of the specific and allows more general conclusions to be reached on the broader emerging children's rights agenda at EU level. This research perspective requires further elaboration, which is where the discussion now turns.

4. THEORETICAL PERSPECTIVES: EXPLORING THE CONCEPT AND VALUE OF SOCIO-LEGAL RESEARCH

The analysis in this thesis adopts a socio-legal perspective, seeking to apply it to the context of research on migrant children, in a way that also accommodates the unique, multi-layered nature of the EU as a legislative organ. There is no single, agreed definition of the term 'socio-legal'. However, it essentially promotes a branch of scholarship that places value on understanding and analysing law within its social context. Cottrell argues that its appeal lies in its capacity to explore "what law as an institutionalised doctrine means in the varied local contexts of social life, where its ultimate value and significance must be judged".[32] Whist socio-legal scholarship is often associated with original empirical study and, indeed, has provided a valuable framework of principles in this regard, the pursuit of such endeavours is not a prerequisite for membership of this "broad church" of legal research.[33] Instead, the approach deployed in this thesis capitalises upon the vast array of existing literature addressing the needs, the circumstances and the challenges faced by child immigrants and asylum-seekers (both within

[32] Cottrell, R., *Law's Community: Legal Theory in Sociological Perspective,* (Oxford: Clarendon Press, 1995), at p. 296

[33] The socio-legal community was described as a "broad church" by the Chair of the Socio-Legal Studies Association in an endeavour to clarify definitional issues in the run-up to the 2001 Research Assessment Exercise

Europe and further afield)[34] and uses this as a vehicle for the critical perspective that is adopted in relation to the regulatory and governance culture surrounding children at EU level.

Furthermore, socio-legal research is generally understood by its proponents to refer to approaches that are multi or inter-disciplinary in nature:

> Our theoretical perspectives and methodologies are informed by research undertaken in many other disciplines. Traditionally socio-legal scholars have bridged the divide between law and sociology, social policy and economics.[35]

Equally, it implies that this inter-disciplinary approach is used in relation to an analysis of the factors shaping the entire law-making process, thus supporting the combination of a regulatory and governance perspective adopted in this thesis:

> Socio-legal research considers the law and the process of law (law-making, legal procedure) beyond legal texts – i.e. the socio-politico-economic considerations that surround and inform the enactment of laws, the operation of procedure, and the results of the passage and enforcement of laws.[36]

This style of analysis lends itself particularly well to research in the migration arena, one in which political, economic and cultural factors are

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[34] The scope of the literature considered in this regard is explored further in the introduction to *Chapter 3*

[35] As quoted on the Socio-Legal Studies Association website: <http://www.kent.ac.uk/slsa> (last accessed 26 February 2010)

[36] Bradshaw, A., 'Sense and Sensibility: Debates and Developments in Socio-Legal Research Methods', in Thomas, P. A., (Ed.), *Socio-Legal Studies*, (Aldershot: Dartmouth, 1997), p.68

both ubiquitous and influential. Any discussion of immigration and asylum law as it has evolved in Europe over the past decade, regardless of the context (be it at EU, or domestic level, or even the jurisprudence of the Strasbourg and Luxembourg courts), cannot but point to increasingly fraught tensions in the area.[37] The power of States to control flows of migrants across their borders - albeit one that they have largely ceded to the EU - often conflicts with the rights and entitlements of individuals, pitching principles that go right to the heart of the sovereignty of nation states against those that are expressed in liberal human rights declarations. Very often, however, the relationship between these two opposing ideals is determined as much by fluctuating economic and political climates at it is an ongoing and sustained effort to respond to the needs of the individual. Bell has highlighted that this is most often manifested in a preoccupation on the part of law and policy makers with the perceived threat of immigration to the security of the state and its welfare systems.[38] The very essence of socio-legal analysis facilitates the further exploration of these issues as factors that may hamper efforts to meaningfully engage with children's rights at EU level.

The adoption of a socio-legal perspective also allows this research to be underpinned by *the new sociology of childhood*: a movement that has driven and shaped research on children over the past thirty years. This theoretical approach arose from disquiet at the extent to which children were 'muted' in social sciences research, as described by James and Prout:

> The history of the study of childhood in the social sciences has been marked not by an absence of interest in children...but by their silence.

[37] Geddes provides a particularly illuminating analysis on this point, *Op. Cit.* n.19

[38] Bell, M., 'Mainstreaming Equality Norms into European Union Asylum Law', (2001) 26, *European Law Review,* pp.20-59, at p.26

> What the emergent paradigm attempts is to give a voice, to children through, as Hardman suggested, regarding "children as people to be studied in their own right, and not just as receptacles of adult teaching".[39]

This is both indicative of, and a contributing factor to, the evolving status of children in formal normative rights frameworks.[40] The past thirty years have seen a move away from the 'Empire of the Father' (a system predicated upon, and sanctioning, the role of patriarchal figures as the chief decision-maker and guardian of the child's welfare, regardless of the wishes of either the child themselves or their mother)[41] towards a culture that propagates "the personhood, integrity and autonomy of children".[42] The culmination of this was the signing of the UNCRC in 1989 which, since its entry into force in September 1990, has represented the gold standard of children's rights protection across the world and enjoys a high degree of prestige as the most exhaustive and extensively ratified international human rights instrument globally.[43] These legal and

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[39] Hardman, C., 'Can there be an anthropology of children?', *Journal of the Anthropological Society of Oxford*, (1973) 4(1), pp, 85-99, at p.85. See further: James, A. and Prout, A., 'A New Paradigm for the Sociology of Childhood? Provenance, Promise and Problems' in C. Jenks (2005) *Childhood: Critical Concepts in Sociology*, Routledge, pp. 56-80, at p.57

[40] For a discussion of the relationship between the sociology of childhood and children's rights, see: Freeman, M. 'The Sociology of Childhood and Children's Rights', (1998) 6, *The International Journal of Children's Rights*, pp.433-444

[41] Bedingfield, D., *The Child in Need: Children, the State and the Law* (Bristol: Family Law, 1998), at pp.2-9

[42] Freeman, *Op. Cit.* n.40, at pp.434-435

[43] The UNCRC contains 54 articles covering a range of civil, political, economic, social and cultural rights, as well as two optional protocols (on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography). It has been ratified by all but two countries, the US and Somalia, and State parties are required to submit a report to the UN Committee on the Rights of the Child two years after ratification and thereafter every five years detailing their progress in implementing and monitoring the Convention. For further detail on the monitoring process, see: <www.huachen.org/english/bodies/crc> (last accessed 26 February 2010)

sociological developments not only support an analytical approach that is framed by the perspective of the child, but equally require that untested assumptions underpinning law and policy in relation to young people are challenged. This thesis is very much in the vein of this theoretical perspective.

Finally, it is hoped that the perspective adopted in this thesis makes a wider contribution to the evolving body of research addressing varied aspects of EU social law. Analyses of EU level law and policy have traditionally been dominated by doctrinal scholarship, a stance that has been increasingly challenged as the EU's social agenda has evolved, and the academic community has recognised the need to engage in analysis based at the level of the real-life experience of individuals. In particular, the wide range of literature drawn upon in this analysis reflects, and seeks to accommodate, the complex web of economic, political, social and cultural factors at play in relation to law and policy addressing immigrant and asylum-seeking children, and sets it in the context of the inherent characteristics of the EU as a legislative organ. At its purest, the multi-layered system of the EU implies the laying-down of supra-national provision which trickles down, first, to the national, then the regional and local level and is ultimately expressed in the practical experience of the individuals it addresses. Whilst a comprehensive assessment of the implementation of EU asylum and immigration law in relation to children is beyond the scope of this analysis, understanding the interface between domestic and EU regulation remains an important aspect of this thesis. It is through the use of literature incorporating a diversity of perspectives (regional, national and supra-national) that this multi-layered character can be accommodated. Therefore, whilst EU-level legal provision remains the sole sight of analysis, this thesis is faithful to the socio-legal ideal of grounding the discussion in the lived experiences of children.

5. A BRIEF NOTE ON THE TREATY OF LISBON

Following a lengthy negotiation and ratification process, the Treaty of Lisbon 2007 finally entered into force on 1 December 2009.[44] Its provisions revised both the Treaty on European Union and the Treaty Establishing the Economic Community, renaming the latter the Treaty on the Functioning of the European Union. For completeness, it should be noted that, alongside reproducing many of the Title IV, Part Three EC provisions, these changes establish a few new, or reinforced, competences – particularly in relation to the integration of third-country nationals.[45] In this sense, rather than offering anything especially revolutionary, these changes should be seen more as providing fresh impetus for the EU asylum and immigration agenda as it enters a new decade.[46] Furthermore, these changes do not impact significantly on the

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[44] OJ 2007, C 306. See Dougan, *Op. Cit.* n.5, for a comprehensive analysis of the Treaty's provisions

[45] Competence to enact measures to provide incentives and support for Member State action to promote the integration of third-country nationals is found in Article 79(4) TFEU. See also provisions on: a uniform status of asylum (Article 78(2)(a) TFEU); partnership and cooperation with third-countries for the purposes of managing inflows of people applying for asylum or subsidiary or temporary protection (Article 78(2)(g) TFEU); the combating of trafficking of persons, particularly women and children (Article 79(2)(d) TFEU); agreement with third-countries for readmission of illegally staying third-country nationals (Article 79(3) TFEU). Equally, in a final departure from the somewhat complex decision-making procedures outlined in Title IV, Part Three EC, all these measures are to be enacted on the basis of the ordinary legislative procedure, as outlined in Article 294 TFEU (Articles 77(2), 78(2) and 79(2) TFEU)

[46] In this regard, perhaps equally significant is the new Stockholm Programme which sets out the Council's agenda in relation to the Area of Freedom, Security and Justice during the five year period 2009-2014 (Council of the European Union, *The Stockholm Programme: An open and secure Europe serving and protecting the citizens*, 2 December 2009 (17024/9)). Although this development falls outside the time period addressed within this thesis and, as such, there is not scope to consider it in any great detail, certain aspects merit very brief comment. First, there is a reinforced commitment to fundamental rights, particularly the need to ensure legal initiatives comply with the European Convention on Human Rights 1950 and the Charter. Most significantly, this includes reference to the rights of the child and an undertaking to uphold the UNCRC and promote the 2006 Commission Strategy. Secondly, there is a clear indication that future immigration and asylum policies will focus on solidarity amongst Member States

analysis carried out in this thesis because its fundamental concern is with the direction of the emerging EU children's rights agenda (as opposed to the detail of asylum and immigration regulation). Activities stemming from Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon) in the decade following the entry into force of the Treaty of Amsterdam 1997 have, therefore, provided plentiful and illuminating material to support this analysis, the central tenet of which remains relevant even in light of minor changes to the Treaty provisions (found within Chapter 2, Title V, Part III TFEU, post-Lisbon). More significantly, the children's rights focus of this analysis means that the insertion of a reference to the promotion of the rights of the child into Article 3 of the revised TEU, amongst the objectives of the Union, is of greater significance to the discussion. Even this, however, remains relevant to this thesis only in the sense of efforts to look to the future, a point addressed within the concluding chapter. To retain currency of this work, and to facilitate its use as a resource for future reflection, the new numberings set-down by the revised Treaties are, where relevant, provided.

6. THESIS OUTLINE

The structure of this thesis is built around two parts: the first addressing regulatory issues, the second governance questions. The *Introduction to Part I* outlines the regulatory challenge posed to the EU by the need to incorporate child-focused provisions into asylum and immigration law. This is done via a discussion of the core concepts of attributed powers,

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and partnership with third-countries, as well as a reinforced commitment to the integration of migrants. Thirdly, there is explicit recognition of the need for special attention to be given to unaccompanied minors, with the Council calling upon the Commission to develop an action plan containing dedicated responses. Finally, there is a suggestion that alternative forms of governance, including some associated with 'soft law' methods, may be used to a greater extent in the future asylum and immigration (e.g. evaluation, training and engaging with civil society)

general principles of Community law and subsidiarity, in relation to the child within legislation stemming from Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon). *Chapter Two* outlines the evolution of asylum and immigration law in relation to children at EU level. This first necessitates an overview of the largely independent areas of children's rights, on the one hand, and asylum and immigration, on the other. Following this a model of children's rights within the relevant legislation is identified and critiqued. *Chapter Three* represents an extension of the arguments found in the preceding chapter: this time, however, the analysis adopts a more EU-focused stance by situating the approach to children's rights within the broader regulatory environment. Three distinct and differing case-studies on child-focused provisions are utilised here – relating to family life, education and health care. In relation to each of these a range of literature on the needs and experiences of immigrant and asylum-seeking children is used to expose the adequacy and appropriateness of legal provision in the area. Equally, the analysis incorporates a discussion of the broader legal issues related to EU intervention in each substantive area. The conclusion points to the highly complex legal and political agendas at play in relation to child-focused provisions in these areas of asylum and immigration policy. It is observed that this may hamper efforts to influence the content of provisions at a regulatory level and that energy might better be targeted at instilling a children's rights ethos in the processes that lie behind the formulation of law and policy. This argument links the discussion of regulation, with that of governance. As such, the *Introduction to Part II* outlines the link between the EU governance landscape and the evolving agenda on children's rights. It is argued that mechanisms associated with EU level governance, whilst not designed with young people in mind, must nonetheless accommodate their needs in light of the extent of EU activity in the children's rights arena. *Chapter Four* begins this analysis

with an assessment of mainstreaming in this regard. This starts by outlining the rhetoric surrounding this concept in the EU children's rights arena. The analysis then moves on to address definitional issues in relation to mainstreaming, culminating in an assessment of the adaptability of its processes to the specific context of children in asylum and immigration law. The final substantive contribution, *Chapter Five*, develops the related, and yet distinct, area of monitoring the impact of law and policy on children. This begins by outlining EU mechanisms at the *ex ante* and *ex post facto* stages of the law-making process. It then moves on to consider the particular contribution that children's rights indicators may make to the ongoing process of assessing and improving law and policy in relation to young immigrants and asylum-seekers. Finally, this chapter considers persistent factors hampering the monitoring of the impact of law and policy in relation on young people, arguments that go right to the heart of information gathering methodologies deployed by the EU institutions. The concluding contribution, *Chapter Six*, draws together the arguments in the thesis through a reflective discussion of the evolution of this research, ending with a plea for a reassessment of the current legal and academic approach to EU children's rights.

PART I

REGULATING THE CHILD IN EU ASYLUM AND IMMIGRATION LAW

Introductory remarks

Central to this thesis is the premise that EU asylum and immigration law retains its legitimacy only if it is embedded in appropriate children's rights principles. This in itself raises questions as to the extent that the EU can, and should, intervene in the regulation of children's lives particularly through legislation in an area - such as asylum and immigration - which pursues distinct and largely unrelated aims. At one end of the spectrum is a passive approach whereby the institutions go no further than to ensure that EU activity does not compel the Member States into action that explicitly violates children's rights principles. At the other extreme, one might interpret the commitment to "effectively promote and safeguard the rights of the child"[1] as implying a proactive and interventionist agenda whereby the EU acts as a trailblazing champion of children's rights. Any discussion around this point rightly takes place within the wider context of Union competences, national sovereignty and subsidiarity: principles which, together with proportionality, set the boundaries of the EU's powers to act with legal effect.[2] In the following three sections, the dual concepts of attributed powers and subsidiarity will each be explored in relation to the relatively

[1] *Communication from the Commission: Towards an EU Strategy on the Rights of the Child* COM(2006) 367 final, at p.2

[2] See Article 5 EC (replaced, in substance, by Article 5 TEU, post-Lisbon)

straightforward area of asylum and immigration, and the thornier issue of children's rights and welfare. This introduction will conclude with an overview of the regulatory challenge facing the EU as it strives to operate within the parameters of the Treaty when these two areas intersect through EU legislation on child immigrants and asylum-seekers. This final discussion will serve as a starting point for arguments that are developed in the first two substantive chapters of this thesis: these assess the content, scope and appropriateness of asylum and immigration legislation in relation to children, as against the backdrop of the EU's limited regulatory powers.

1. THE EU's REGULATORY POWERS AS PRESCRIBED BY ARTICLE 5 EC TREATY

The principles of attributed powers, subsidiarity and proportionality are, since the Maastricht Treaty 1992, laid down in Article 5 EC (Article 5 TEU, post Lisbon). Whilst the decision of the Court of Justice of the European Communities (hereafter the ECJ or the Court) in *Van Gend en Loos* established that the Community constituted a new legal order and enshrined the principles of direct effect and supremacy,[3] the limits now found in Article 5 EC ensure that national sovereignty prevails except where the Treaty provides otherwise (either through granting competence to legislate, or by providing that the principles of subsidiarity and proportionality are adhered to). The text of the provision is as follows:

> The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the

[3] Case 26/62 [1963] ECR 1, 12. See Frederico Mancini, G., 'The Making of a Constitution for Europe' (1989) 26 *CML Rev.* 595

Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

2. THE EXISTENCE AND NATURE OF COMMUNITY COMPETENCE TO LEGISLATE ON CHILD IMMIGRANTS AND ASYLUM-SEEKERS

2.1. The existence of Community competences

It is as a consequence of the first of these principles, attributed powers, found in paragraph one of Article 5 EC, that the EU is free to pursue legislative activity in the area of asylum and immigration, whilst its children's rights agenda has a far less concrete constitutional basis. In practice, the principle dictates that for any proposed Community act, authorisation under a Treaty article must be found. Whilst at first glance this appears to establish watertight compartments of competence, in reality a significant constitutional problem is presented by the existence of general legal bases which are "relatively ambiguous and open-ended in their potential scope of application".[4] If construed too broadly by over-zealous legislative institutions, they have the potential to call into question the principle of attributed powers. This has unsurprisingly resulted in judicial intervention and a largely *ad hoc* development of competences in some areas, with the ECJ's sanctioning of regulation of

[4] Arnull, A. et al. (2006) *Wyatt and Dashwood's European Union Law (5th Ed.)* Sweet and Maxwell, pp.85-86

public health through imaginative use of internal market provisions in the Tobacco Advertising case being a notable example.[5] Whilst on the one hand it is clear from this case that the Court attaches great importance to delineating the boundaries between national and Community competence, on the other, since the Treaty of Amsterdam 1997, it is increasingly the case that few policy areas fall entirely outside the remit of the Community.[6] As De Búrca noted around the time that Amsterdam entered into force:

> All that can be said is that there are some areas of policy which are more clearly and more expressly within the remit of the EC, and others which are at best only marginally or tangentially so. This can be seen in some of the inter-institutional debates over the scope of Community competence in the more recently added and so-called flanking or

[5] Case C-376/98 *Germany v Parliament and Council (Tobacco Advertising Directive)* [2000] ECR I-8419. The Tobacco Advertising Directive (Directive 98/43 [1998] OJ L213/9) was adopted under Article 95 EC (Article 114 TFEU, post-Lisbon) which grants the Community competence to adopt measures which 'have as their object the establishment and functioning of the internal market', and prohibited all forms of advertising and sponsorship of tobacco across the Union. The German government argued that, rather than promoting the operation of the internal market, the Directive was instead designed to regulate public health, an area that is excluded from harmonisation under Article 152 EC (Article 168 TFEU, post-Lisbon). The Court agreed, stating that Article 95 EC did not create a general power to regulate the internal market, and that measures adopted under this competence must make a positive contribution to its objective; the removal of genuine obstacles to free movement was permissible, but not measures in relation to purely abstract risks. Therefore, the Directive had been adopted under an incorrect legal base and must be annulled. This case illustrates the extent to which understanding the boundaries of EU competences is not simply a question of reading the Treaties: here, as in a number of other cases, the judiciary played a crucial role in defining where the EU could legitimately exercise its legislative powers. See further: Case C-210/03 *Swedish Match* [2004] ECR I-11893

[6] Davies, G., 'Subsidiarity: the wrong idea, in the wrong place, at the wrong time' (2006) 43 *Common Market Law Review*, pp. 63-84, at p.63

supplementary policies, such as those of education, culture, public health and energy.[7]

In respect of asylum and immigration, the EU derives its competence to legislate from Title IV, Part Three EC Treaty (Chapter 2, Title V, Part III TFEU, post-Lisbon), principally Articles 61-64 (Articles 77-80 TFEU, post-Lisbon). These outline a legislative agenda addressing refugees, beneficiaries of humanitarian protection, asylum-seekers, and both legal and illegal third-country national immigrants. Notably, the EC Treaty (EC) and the Treaty on European Union (TEU) contain virtually no reference to children,[8] with EU intervention in the lives of young people historically arising on a largely *ad hoc* basis as a by-product of activities in other areas.[9] In addition, as has been touched upon above, some of the welfare areas of concern to children generally, and young immigrants and asylum-seekers particularly, such as education and healthcare, have presented ongoing challenges for the European legislature in determining the boundaries of EU and national intervention. Historically, these have been regarded as remaining the preserve of domestic law-makers who have carefully guarded their right to set the legislative agenda in these areas, allowing the EU only a relatively minor role. [10]

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[7] De Búrca, G. (1999) 'Reappraising Subsidiarity's Significance after Amsterdam', Harvard Law School: Jean Monnet Working Papers, Part II, at p.9

[8] At the time of writing this thesis, the only explicit reference to children in either the EC Treaty or the TEU was found in Article 29 of the latter and related to cross-border criminal cooperation in relation to, *inter alia*, "offences against children". This, of course, changes with the insertion of a reference to the rights of the child in Article 3 revised TEU, post-Lisbon

[9] See Stalford, H. and Drywood, E., 'Coming of Age? Children's Rights in the European Union' (2009) 46 *Common Market Law Review*, pp.143-172

[10] See Articles 149 and 152 EC (Articles 165 and 168 TFEU, post-Lisbon). For further discussion of Community competence in the area of education see: Gori, G., *Towards an EU Right to Education* (The Hague: Kluwer, 2001); and on health Hervey, T. and McHale, J., *Health Law and the European Union* (Cambridge: CUP, 2004)

2.2. The nature of Community competences

This latter point raises a further issue in relation to the *nature* of the competence enjoyed by the Community. Whether the competence in any given area is exclusive, shared or complementary determines the effect of Community legislation on domestic regulatory powers and, therefore, impacts significantly upon the relationship between legal intervention at European and national level.[11] In the same way that few areas are entirely outside the area of Community competence, the same can be said for those that are wholly the purview of the European legislature, exclusive competence being limited to a handful of sectors. In respect of the vast majority of policy areas, therefore, the Community's competence can be described as shared or complementary.

Shared competence applies to a great number of policy spheres, asylum and immigration included. Both the Community and the Member States are able to regulate these sectors. However, where the Community has exercised its legislative power this takes precedence over regulation at national level. In practical terms this means that, in the event that the Community has not yet passed secondary legislation on a point of immigration and asylum law, Member States are free to adopt their own measures and are bound by the obligations imposed under primary Treaty provisions found in Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon). On the other hand, in those areas where provisions have been agreed upon at EU level, Member States, although retaining their right to legislate, must do so consistent with the relevant

[11] Given that the Treaties are currently silent on the issues of categories of competence, this analysis adopts the typology found in the Lisbon Treaty which broadly represents the consensus as it has existed among the Member States for a number of years now

Community secondary legislation. In the case of minimum harmonisation, of which most asylum and immigration instruments are an example, Community legislation establishes a regulatory 'floor of rights' above which Member States remain competent to enact higher standards of protection, but still subject to the primary Treaty provisions.

Complementary competence allows the Community to pass measures that support, coordinate and supplement regulatory activity, the latter remaining exclusively the preserve of the Member States. In practice, the Union tends to play the role of adopting broad guidelines or incentive measures or facilitating the exchange of best practice amongst the Member States. This type of competence is found in relation to, amongst other areas, education and public health,[12] two policy spheres that are closely linked to children's welfare. That said, it remains the case that there is no authority for the Community to intervene in the regulation of children's lives, except where this arises as a by-product of legislative activity in other areas. Because of this lack of explicit competence, the principle of subsidiarity takes on greater significance as a delicate balance between respecting Member States' sovereignty in sensitive areas and allowing the Community to exercise its regulatory powers is sought.

3. GENERAL PRINCIPLES OF COMMUNITY LAW AND SUBSIDIARITY IN RELATION TO ASYLUM-SEEKING AND IMMIGRANT CHILDREN

The principle of subsidiarity is, in essence, a simple and well-rehearsed concept: power should be concentrated at the most local level of

[12] *Op. Cit.* n.10

government.[13] It resonates with one of the core European ideals of a Union in which "decisions are taken...as closely as possible to the citizen". As far as the EU's legislative powers are concerned, the principle finds expression in Article 5(2) EC, from which it can be deduced that, even where there is *a priori* competence, this is only rightly exercised where national actions will not be sufficient and the stated objectives will be better achieved through Community intervention.[14] More detail on the application of the principle can be found in the Amsterdam Protocol[15] which states, firstly, that subsidiarity is a "dynamic concept" that allows community action "to be expanded where circumstances so require" and be "restricted or discontinued where it is no longer justified". Secondly, it outlines guidelines to be used in examining whether its requirements are met:

> The issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States; Actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty...or would otherwise significantly damage Member States' interests; Action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.

Of course, in relation to asylum and immigration issues the requirements of the principle can easily be met: most simply put, if internal barriers to

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[13] For the historical background, see Emiliou 'Subsidiarity: An Effective Barrier against the Enterprises of Ambition?' (1992) 17 *E.L. Rev.* 383

[14] It should be noted that the principle of subsidiarity has no application in areas where the Community has exclusive competence

[15] Protocol (No 30) on the application of the application of the principles of subsidiarity and proportionality OJ C 340/105, 10.11.1997

free movement are to be removed, migration into Europe from outside the Union's borders becomes a matter of collective concern for the Member States. In contrast, questions of subsidiarity in relation to EU intervention in the lives of children inevitably raise thorny legal and political issues. It seems fairly incontrovertible that Community intervention must, at the very least, ensure it has no negative impact on children's rights and welfare; in other words, where the EU has clear competence to legislate it must do so with a regard to the position of young people. This is the position ascribed by general principles of Community law, binding on the Community institutions whenever they act, and on the Member States when implementing Community law or when acting within the scope of Community law, and demanding a respect of fundamental rights. Article 6(2) TEU states that:

> The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

Since the proclamation of the Charter in 2000, Article 24 has demanded that this encompasses respect for the rights of the child. Furthermore, the ECJ has now twice acknowledged the value of the UN CRC as an instrument to be taken into account in applying the general principles of Community law.[16]

The principle of subsidiarity, itself a general principle of Community law, has, however, historically been associated with a hands-off approach to

[16] Case C-540/03 *Parliament v Council* [2006] E.C.R. I-5769; Case C-244/06, *Dynamic Medien Vertriebs GmbH* v. *Avides Media AG*, [2008] ECR I-505

children's rights at EU level, a position that is coming under increasing scrutiny. Whilst this thesis does not seek to argue that it would necessarily be desirable, or even beneficial, for the EU to cast-off the shackles of subsidiarity and pursue a heavily interventionist agenda in relation to children's rights, it is nonetheless important to understand the extent to which this principle does, in fact, constrain EU activity in this area. The following discussion argues that it is difficult to claim that the principle prevents EU intercession in the children's rights arena, certainly where it is required to fulfil other Treaty objectives (such as, in the current analysis, a harmonised asylum and immigration system). Equally, however, the principle does demand that the EU itself (and the academic community when criticising it) is sensitive to the appropriate boundaries between supra-national and domestic provision. Of course, there are instances in which the national legislature, or judiciary, is simply in a better position to ensure children's rights principles are upheld – sometimes they may have greater experience and knowledge in the area, other times the local context may be crucial. That said, where the EU exercises its competence in a way that impacts upon young people, it rightly becomes an issue for supra-national law-makers to ensure that children's rights are upheld. The principle of subsidiarity, it is argued, has the flexibility needed to accommodate this obligation, as well as ensuring that national sovereignty is respected.

Previously, however, it had been a long held assumption that the social, cultural and religious specificity of traditions surrounding childhood, and the associated institutions of family and school, within individual Member States had placed these policy spheres largely outside the scope of EU intervention.[17] In addition, it was felt that where common

[17] Stalford and Drywood, *Op. Cit.* n.9, at p.146

ideological ground could be found, agreed principles were adequately articulated in a range of instruments of international law, most notably the United Nations Convention on the Rights of the Child 1989 (hereafter the UNCRC).[18] In this sense, replicating these efforts at EU level was simply seen as superfluous. Writing in 2001, however, Stalford questioned the continuing validity of this approach in relation to the legal framework governing EU citizen children:

> We are witnessing the increasing erosion of the assumption that the nation state is the primary and most appropriate locus of authority for decision-making in relation to children, and particularly in relation to migrant children who are shifting between different Member States' systems of civic, social and political rights and responsibilities.[19]

Indeed, as children's rights not only intersect with an increasing number of areas of EU competence, but also begin to embed themselves within the constitutional fabric of the EU,[20] it is far harder to isolate a single level of law-making at which they should be addressed. Subsidiarity cannot, therefore, be used as an 'excuse' not to engage with children's rights in the formulation of EU law and policy. Instead, it demands a genuine consideration of whether the issue at stake is one which demands EU attention. Where, for example, the EU has itself contributed to the realisation of a potentially tricky children's rights issue, or where there would be a tangible benefit to intervention at the supra-national level, the

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[18] On this point, it should be noted that the UNCRC has been ratified by all EU Member States

[19] Stalford, H. *Children, Citizenship and Free Movement in the European Union: A Socio-Legal Analysis of the Educational Status and Experience of the Children of EU Migrant Workers*, Thesis awarded by the University of Leeds, 2001

[20] See further: Stalford, H. 'Constitutionalising Equality in the EU: A Children's Rights Perspective', (2005) 8 *International Journal of Discrimination and the Law*, pp.53-73

principle of subsidiairity dictates that (assuming competence exists) action is both appropriate and required. After all, if the application of the subsidiarity principle is about finding the best level at which to legislate, this surely implies a responsibility on the part of the legislature to take positive action where European level intervention is needed.

So, whilst no explicit Treaty base exists for legislative intervention in the lives of children, it seems that neither does any constitutional principle prohibit it. Moreover, a faithful interpretation of the principles governing the EU's regulatory powers requires that, at the very least, the rights of the child are not compromised by any legal and policy intervention. This only serves to underline that the notion of subsidiarity is sufficiently malleable so as to leave fairly open the question as to how the EU will balance the need to uphold children's rights with the exigencies of an asylum and immigration regime. Through taking a critical view of the way in which the EU has chosen to exercise these regulatory powers, the analysis in the first part of this thesis seeks not simply to dwell on instances in which the approach to children's rights found in asylum and immigration law is open to criticism, but also to highlight where a more sensitively drawn approach to the interaction between domestic and EU intervention needs to be promoted. This framework is as much about exploring where the limits of EU intervention in the lives of young people lie, as it is about identifying children's rights deficiencies in legislative provision. As such, the issue of subsidiarity is important to this thesis not only in its role providing a philosophical and legal basis for supra-national activity, but also where it acts as a brake on intervention that is neither beneficial, nor desirable.

4. THE INTERSECTION OF ASYLUM AND IMMIGRATION COMPETENCE AND CHILDREN'S RIGHTS: REGULATORY ISSUES

The issue addressed by this thesis - children in asylum and immigration law - sits at the intersection of two differing, maybe even competing, categories of competence. Here we see that any given policy issue as it exists at a societal level will not necessarily map neatly onto the legal powers that exist to address it. Furthermore, this particular issue, as it is understood in legal terms, changes depending upon the lens through which it is viewed: addressing children via asylum and immigration law may deliver a different outcome from that which would occur if young asylum-seekers and immigrants are categorised as children first and foremost. Indeed, by way of illustration of this point, it can be noted that there is divergence within national policies across Europe as to whether immigrant children who are separated from their parents or primary caregivers are dealt with through the state's immigration regime or as part of its child protection system (the latter approach, of course, advocated by those favouring a progressive and liberal approach to children's rights).

At EU level it may initially seem that the aspirations of those hoping to see an approach that adopts children's rights as its starting point may be frustrated by the parameters of the Treaties. In the strictest sense, the power to legislate in this area is derived exclusively from Treaty provisions in relation to asylum and immigration, with measures on children arising merely as a by-product. However, this presents an unnecessarily bleak view of the place for children's rights in EU asylum and immigration competence. Arguably, this approach swings too far in favour of an orthodox or technocratic reading of the Treaties, and ignores

the fact that this sort of tension is far from exclusive to this area. This is exemplified by an argument that has been made in the context of the internal market, one of the policy spheres with the longest history of legislative intervention at European level:

> ...the adoption of harmonising measures to complete the internal market will always imply that the Community must simultaneously make choices about other policy objectives...the Community must decide not only to approximate but to do so at a particular pitch and taking account of competing societal concerns (e.g.) about the protection of the environment, employees or consumers.[21]

In a sense, this perfectly encapsulates the dilemma in relation to the place of children's rights in asylum and immigration law: the former being an area of legitimate concern at EU level (the protection of which is soon to become an objective of the Union);[22] and one which, consequently, harmonisation in relation to the latter must take account of. In the internal market scenario, the solution to the limited legislative competence that exists in relation to the abovementioned 'societal concerns' has historically led to an amount of 'competence creep', something that has been accepted in an evolving and dynamic Union. This degree of flexibility is not only desirable but essential in a Union that seeks to protect and promote the rights and interests of individuals, be they its own citizens or third-country nationals, adults or children. We have already seen how the principle of subsidiarity, rather than calling into

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[21] Arnull, A., Dashwood, A., Dougan, M., Ross, M., Spaventa, E. and Wyatt, D., *Wyatt & Dashwood's European Union Law (5th Ed.)*, (London: Sweet & Maxwell, 2006), at p.86

[22] Article 3 revised TEU, post-Lisbon

question the legitimacy of a proactive legislative agenda in relation to children, can be used to support any such approach.

On this point, a further complicating factor exists because in relation to Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon), and indeed the Area of Freedom, Security and Justice more generally, there is an absence of a clear framework of values. Whilst the primary objectives have been articulated through the Tampere and Hague Programmes and, more recently, at Stockholm, priorities have flitted between those that emphasise ideas of freedom, and those that promote a securitisation agenda. Beyond the inherent tensions that exist between objectives in this area, there is no clear guidance as to how wider issues - such as children's rights - fit within the broader context of EU asylum and immigration law.[23] The risk, therefore, is that left to 'float' amongst a complex set of often competing agendas, children's rights will struggle to embed themselves such that they in any way impact the legislative programme, particularly in a legislative culture that is relatively new to the challenge of upholding children's rights.

5. CONCLUSION

The central question, therefore, for the first part of this thesis is to assess the extent to which the EU has found an appropriate balance between the objectives of an EU asylum and immigration regime and the demands of a children's rights agenda. This introduction has provided an overview of the regulatory environment in which this legal intervention has taken place and has highlighted particular issues in this regard: these include the boundary between national and EU intervention in the children's

[23] Indeed, this point is not exclusive to children, as analysts interested in gender have had mixed reactions to the place of women within Title IV, Part III EC legislation.

rights arena, the range of regulatory styles and instruments open to the EU and the uncertain place of children's rights in the wider EU agenda. Whilst *Chapter Two* kicks off the analysis with an overview of children's rights provision in EU asylum and immigration law and seeks to identify underlying themes in this regard, *Chapter Three* takes a more nuanced approach to the issue by situating it in the wider characteristics of EU regulation.

Chapter Two

THE EVOLUTION OF EU ASYLUM AND IMMIGRATION LAW IN RELATION TO CHILDREN

1. INTRODUCTION

The Treaty of Amsterdam 1997, entering into force in May 1999, was something of a watershed for the legal status of child immigrants and asylum-seekers in the EU. Not only did it see the 'communitarisation' of asylum and immigration law, such that the EU gained competence to pass legally binding measures in the area, it also represented a shift in gear of the gradually emerging EU agenda on the rights of the child. Before Amsterdam, EU activity in the areas of both children's rights and asylum and immigration had tended to be characterised by sporadic and disjointed measures that failed to endow their beneficiaries with a comprehensive set of rights and entitlements. The past decade, however, has seen both areas change radically. The role ascribed to the EU institutions by the Treaty of Amsterdam means that the scope and content of asylum and immigration regimes in the Member States is now dictated at European level, to a previously unprecedented degree, by a range of legislative measures laying down common standards and distributing the burden of receiving immigrants and asylum-seekers across Member States. At the same time, the children's rights arena has witnessed a sudden and surprising flurry of activity: sudden because EU activity was, until the turn of the millennium at least, largely confined to modest legal and judicial measures that were instrumental to the achievement of broader (primarily adult-focused) EU objectives; and surprising because of the Union's longstanding reluctance to engage directly in the

formulation of children's rights. By 2006, the legal landscape had changed markedly: not only had the EU completed the first phase of the Common European Asylum System, the Commission had also published its seminal Communication *Towards an EU Strategy on the Rights of the Child*, outlining for the first time an explicit agenda in the area.[1]

Whilst these two areas - children's rights and asylum and immigration regulation - have developed largely mutually exclusively, the body of legislation adopted on the basis of Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon), defining the rights and entitlements of third-country nationals resident in EU territory, contains extensive provisions in relation to children. Through this law, the legislative institutions have waded into the children's rights arena to a previously unprecedented degree: for almost the first time in its history, the EU has passed a sizeable set of provisions that address the child as a primary rights' bearer with a set of autonomous entitlements that can be exercised independently of his or her parents. The ground is ripe, therefore, for an analysis of the content of these provisions from a children's rights perspective.

This chapter begins by discussing the growth at EU level of the two largely discrete areas of asylum and immigration, on the one hand, and children's rights, on the other. These two domains are dealt with in separate sections in the first instance to reflect the distinct legal bases, political agendas and regulatory instruments that have informed their development. The third section then considers the interaction between children's rights and the regulation of asylum and immigration that has

[1] COM 2006(367) Final. See also Commission staff working document accompanying the Communication from the Commission, Preliminary Inventory of EU Actions Affecting Children's Rights, Brussels, 4.7.2006, EC (2006) 889

occurred in instruments arising from Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon). Here, the aim is to highlight emerging themes underpinning the approach to children across this body of law (as opposed to an instrument-by-instrument basis), in an effort to identify a normative framework in relation to young people. The final section then critiques the approach to children identified in the previous section, to reach wider conclusions about the status of children's rights within this body of law.

2. THE DEVELOPMENT OF ASYLUM AND IMMIGRATION LAW AT EU LEVEL

Although the EU has only had competence to pass binding measures on asylum and immigration since the Treaty of Amsterdam 1997, the roots of European intervention in this area can be traced back as far as the Treaty of Rome 1957. In order to fully understand the nature of the EU's law-making powers as they currently exist, this evolution will be outlined. The chapter will then move on to a discussion of the policy agenda that underpins current asylum and immigration activity, followed by a summary of the legislative provisions that have emerged in the area since Amsterdam.

2.1: The birth of an EU asylum and immigration agenda: from Rome to Amsterdam via Schengen

2.1.1: The pre-Amsterdam era

The achievement of a genuine internal market,[2] as foreseen by the Treaty of Rome 1957, gave rise to a need to abolish checks on persons at

[2] This notion began life as a European Economic Community with the signing of the Treaty of Rome in 1957 and was later replaced by the more ambitious term 'internal

Europe's internal frontiers. Although Member States were initially reluctant to cede control of their borders, there was a recognition that the "free movement of persons would not really be *free* if subject to checks at the internal borders"[3] - and, at least in this sense, there could be no distinction between third-country nationals and nationals of the Member States. The resulting Schengen *acquis*[4] ensured that, once they had entered the territory of one of the contracting parties, third-country nationals who crossed a land border, flew or took a ferry between two Schengen countries, would not be subject to checks at the border. Consequently, the conditions of entry and residence, as well as the status, rights and entitlements of third-country nationals in Europe became a matter of shared concern between the contracting parties.

The Treaty on European Union, signed at Maastricht in 1992, introduced a new Article K.1 encompassing asylum policy, immigration policy and policy regarding nationals of third-countries. As part of the intergovernmental third pillar, resulting activities were outside the control of the Community institutions. Whilst some measures were agreed upon following Maastricht, successes were few and far between with progress hampered by a lack of transparency, democratic accountability and judicial control, alongside cumbersome decision-making procedures and

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market' by the Single European Act 1986. This latter Act introduced the four fundamental freedoms upon which the Community is now built: free movement of goods, persons, services and capital (now found in Article 14 EC (Article 26 TFEU, post-Lisbon)

[3] Sidorenko, O. (2007) *The Common European Asylum System: Background, Current State of Affairs, Future Direction.* TMC Asser Press, at 12

[4] The Schengen acquis consists of the Schengen Agreement 1985 and the Schengen Implementing Convention 1990, however, in reality it did not take effect until 1995. Whilst initially an agreement between Belgium, the Netherlands, Luxembourg, France and Germany, it now binds all EU Member States with the exception of the United Kingdom and Ireland. In addition, two non-Member States, Norway and Iceland, have implemented Schengen since 2001.

low levels of implementation at Member State level.[5] In particular, because the Community institutions were largely excluded from the process, Member States failed to capitalise on the positive contribution that could have been made by both the Commission and the European Parliament, the latter being one of the chief proponents of immigrants' and asylum-seekers' rights.[6] Kostakopolou gives some indication of the low level of regard for the rights and needs of immigrants during this period:

> The intergovernmental character of this cooperation, coupled with the absence of democratic control and judicial scrutiny, ensured the continuation of the long tradition that had accustomed national elites to see cultural difference as a problem for social integration.[7]

2.1.2: The new Title IV, Part Three EC inserted by Amsterdam

Despite the deficiencies of the pre-Amsterdam period, these activities did succeed in laying the groundwork for what, upon the signing of the Treaty of Amsterdam, became a fully-fledged area of Community competence. Boccardi comments on the significance of this:

> The progress in the asylum cooperation field achieved at Amsterdam was by any standards exceptional. The transfer of the asylum competence to the Community Pillar was an event of historic

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[5] See Chapter 4 in Boccardi, I. *Europe and Refugees: Towards an EU Asylum Policy* (Kluwer, 2002), for an assessment of asylum and immigration measures during this period

[6] *Ibid.*, at. p.118

[7] Kostakopoulou, T. (2002) '"Integrating" Non-EU Migrants in the European Union: Ambivalent Legacies and Mutating Paradigms' *Columbia Journal of European Law*, Spring 2002: 181-201, at 188

proportions, which a mere five years earlier would have been unthinkable.[8]

Part Three of the Treaty introduced a new Title IV on 'Visas, asylum, immigration and other policies related to free movement of persons', spanning Articles 61-69 of the Treaty (Articles 77-80, Chapter 2, Part V, Title III, post-Lisbon). Article 61 EC sets the agenda for the progressive establishment of what is termed an 'area of freedom, security and justice', which encompasses, amongst others, measures on asylum, immigration and safeguarding the rights of third-country nationals.[9]

In relation to asylum and immigration, more detail on the content of this policy is provided by Article 63 EC[10] which is divided into four subparagraphs: each of these itemises the areas in which provisions are to be enacted. First, measures on asylum are to address criteria for determining which Member State is responsible for considering an application for asylum in one of the Member States;[11] and minimum standards are to be established on the reception of asylum seekers,[12] the qualification of third-country nationals as refugees,[13] and Member States'

[8] Boccardi, *Op. Cit.* n.5, at p.152

[9] Article 61(b) EC. The area of freedom, security and justice is also to contain provisions on cross-border cooperation of the judiciary in civil matters (Articles 61(c) and 65 EC); competent authorities in administrative matters (Article 61(d) and Article 66 EC); and the police and judiciary in police and criminal matters (Article 61(e) and Article 31(e) TEU). These provisions are now found in Title V, Part Three TFEU, post-Lisbon

[10] The provisions of Article 63 EC are now found in Articles 78 and 79 TFEU, post-Lisbon

[11] Article 63(1)(a) EC. Article 61(a) gave the EU a five year period in which to adopt measures on this particular point

[12] Article 63(1)(b) EC

[13] Article 63(1)(c) EC

procedures for granting or withdrawing refugee status.[14] Secondly, on refugee policy, the EU is to adopt minimum standards for giving temporary protection to displaced persons from third-countries who cannot return to their country of origin and for persons who otherwise need international protection.[15] In addition, burden sharing measures should be passed in order to promote a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons.[16] Thirdly, measures on immigration are to address conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, this is also to include provisions on family reunion.[17] Further, measures on illegal immigration and illegal residence must also cover the repatriation of illegal residents.[18] Finally, the EU must define the rights and conditions under which legally resident nationals of third-countries who are resident in a Member State may reside in other Member States.[19]

Of further relevance to the EU's law-making powers in relation to asylum and immigration are provisions on the decision-making procedure to be applied and the role of the Court of Justice of the European Communities (ECJ). In respect of the former, Article 67(1) EC states that the Council shall act unanimously on a proposal from the Commission, or on the initiative of a Member State, and, after consulting the Parliament. This

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[14] Article 61(1)(d) EC

[15] Article 63(2)(a) EC. Article 61(a) EC gave the EU a five year period in which to adopt measures on this particular point

[16] Article 63(2)(b) EC

[17] Article 63(3)(a) EC

[18] Article 63(3)(b) EC

[19] Article 63(4) EC

applies for a period of five years following the entry into force of the Treaty of Amsterdam (1999-2004). This provision allowed the Member States to flex their muscles through the power to veto. Following 2004, it was decided that the co-decision procedure - outlined in Article 251 EC - was to be used in relation to illegal immigration and measures promoting burden-sharing between the Member States when bearing the consequences of refugees.[20] All other areas had either been acted upon by this date, or retained the original procedure laid out in Article 67(1) EC. In respect of the ECJ, under Article 68(1) EC, references are only permitted from courts or tribunals 'against whose decisions there is no judicial remedy', therefore significantly restricting the role of the Court. A final unusual feature of Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon) is the position of the UK, Ireland and Denmark who have negotiated special protocols on their participation in Title IV. According to their protocol, the UK and Ireland will not in principle take part in any measures adopted under this part of the Treaty, unless they communicate their intention to do so;[21] whereas Denmark has negotiated a complete opt-out.[22]

[20] Article 1(2) Council Decision of 22 December 2004 providing for certain areas covered by Title IV of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty, states that the co-decision procedure will apply from 1st January 2005 to measures adopted pursuant to Articles 63(2)(b) and (3)(b) EC, OJ L 396/45, 31.12.04

[21] Protocol (No 4) on the position of the United Kingdom and Ireland, annexed to the Treaty of Amsterdam 1997

[22] Protocol (No 5) on the position of Denmark, annexed to the Treaty of Amsterdam 1997

2.2: The law and policy of the first decade of the EU asylum and immigration agenda

2.2.1: A shifting policy agenda at EU level

Just a few months after the entry into force of the Treaty of Amsterdam, EU ministers came together at Tampere to discuss the future of the EU area of freedom, security and justice, with asylum and immigration high on the agenda. At this meeting Member States declared that the freedom to move freely throughout the Union 'should not be regarded as the exclusive preserve of the Union's own citizens'.[23] This aspiration was underlined by a collective commitment to incorporate human rights instruments, particularly the Geneva Convention Relating to the Status of Refugees 1951, into asylum legislation;[24] and to accord migrants from outside the EU 'rights and obligations comparable to those of EU citizens'.[25] As the EU was entering a new era, the rhetoric of Tampere led commentators to observe a shift in values surrounding its asylum and immigration agenda:

> The transition from mere 'flanking measures' for the realisation of the Internal Market towards an independent objective rooted in the new Human Rights dimension of the Union was finally complete.[26]

Although the need to manage migration flows and to combat illegal immigration remained in evidence, there was a degree of hope that

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[23] Paragraph 3, Presidency Conclusions of the Tampere European Council, 15 and 16 October 1999

[24] *Ibid.*, Paragraphs 4 and 13

[25] *Ibid.*, Paragraphs 18 and 21

[26] Boccardi, *Op. Cit.* n.5, at p.174

through an agenda set by the Community's institutions, and a move away from the dominance of national polities, third-country national migrants would in the future benefit from legal provisions dictated to a greater extent by European values of fairness, democracy and respect for cultural diversity.[27]

This initial optimism was tempered by the impact of world events just two years later. The terrorist attacks on the United States of America on 11 September 2001 transformed the politics of asylum and immigration across the western world. In the immediate aftermath of the atrocities, Member State governments lost no time in declaring their commitment to the fight against terrorism.[28] This led not only to a plethora of anti-terrorism measures at EU level,[29] but also to a fundamental shift in the priorities of the EU asylum and immigration agenda. Brouwer assesses the impact on asylum and immigration in the EU as threefold: first, a shift away from the priority of giving long-term resident third-country nationals an equal, or at least comparable, legal status as EU nationals; second, attempts to exclude alleged terrorists from the protection of refugee status; and, third, a focus of attention on managing migration through improved databases of information on individual migrants.[30] By the following summer, as Guild notes, the Tampere commitment to ensuring that nobody was sent back to persecution[31] had been replaced by

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[27] Kostakopoulou, *Op. Cit.* n.7, at p.188

[28] See UN Security Council Resolution 1373 of 28 September 2001 (SC/7158)

[29] For a summary see Brouwer, E. (2003) 'Immigration, Asylum and Terrorism: A Changing Dynamic: Legal and Practical Developments in the EU in Response to the Terrorist Attacks of 11.09' *European Journal of Migration and Law* 4: 399-424, at 402-403

[30] *Ibid.*, at p.423

[31] The idea that no one can be sent back to persecution is known as the principle of non-refoulement in international law

the priority of "making arrangements to prevent abuse of the system and ensuring that those whose asylum applications have been rejected are returned to their countries of origin more quickly".[32]

It is, therefore, not surprising that in 2004, when the Council set the Hague Programme[33] - its second five year agenda in the area of freedom, security and justice - priorities had shifted once again towards a greater emphasis on the threat of terrorism and the desire of Member States to carefully monitor movement across borders:

> Substantial sections of the programme emphasise provisions relating to 'strengthening security'...By contrast, protection of fundamental rights, fair treatment of third-country nationals, the role and powers of the newly proposed Fundamental Rights Agency and the role of the European Court of Justice are dealt with very briefly.[34]

The Hague Programme reoriented efforts towards the collection of data and information on migrants, reiterated the need for common procedures on the return of illegally staying immigrants and set out the priorities for the second phase of the Common European Asylum System.[35]

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[32] Paragraph 29, Presidency Conclusions of the Seville European Council, 21 and 22 June 2002

[33] The Hague Programme, approved by the European Council at its meeting in Brussels, 4 November 2004: available at < http://ec.europa.eu/justice_home/doc_centre/doc/hague_programme_en.pdf> (last accessed 20 January 2010)

[34] Balzacq, T. and Carrera, S. 'The Hague Programme: The Long Walk to Freedom, Security and Justice' in Balzacq, T. And Carrera, S. (2006) *Security versus Freedom? A Challenge for Europe's Future*, Ashgate, at pp.5-6

[35] Following the entry into force of the Lisbon Treaty 2007, on 1st December 2009, the Hague Programme will be largely enshrined in a Chapter 2, Title V, Part III TFEU: 'Border Checks, Asylum and Immigration'. See, in particular, Article 78(2)(a) and (b) TFEU on a uniform status for those granted asylum or subsidiary protection; Article 78(2)(g) TFEU on cooperation with third countries on managing migration flows; Article 79(3) TFEU on agreements with third-countries on the readmission of third-

2.2.2: Overview of legislative progress

As far as legislative activity since Amsterdam is concerned, much of the EU's attention has been concentrated on the Common European Asylum System, completed, a year behind schedule, in December 2005. Directives in this area, as foreseen by the Treaty, have addressed minimum standards on the reception of asylum-seekers,[36] asylum determination procedures[37] and the rights and status of refugees and other beneficiaries of humanitarian protection.[38] The Directive laying down minimum standards for the reception of asylum-seekers (hereinafter 'the asylum reception Directive') ensures that Member States make provision for material reception conditions 'to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence'.[39] More specific obligations are outlined in areas such as housing, health care, employment and vocational training, but these generally contain only a very low-level of entitlement: housing may be in detention centres;[40] determining employment conditions is largely deferred to

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country nationals; and Article 79(4) TFEU on measures to support Member State action on integration of third-country nationals.

[36] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers OJ L 31/18, 6.2.2003

[37] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status OJ L 326/13, 13.12.2005

[38] Council Directive 2004/83/EC of 29th April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted OJ l 304/12, 30.9.2004

[39] Article 13(2) asylum reception Directive, *Op. Cit.* n.36

[40] Article 14(1)(b) asylum reception Directive, *Ibid.*

Member States;[41] and health care may be limited to 'emergency care' and essential treatment'.[42]

The Directive on minimum standards for granting and withdrawing refugee status (hereinafter 'the asylum procedures Directive') requires that Member States grant asylum applicants a personal interview,[43] provide them with interpretation services,[44] allow them access to the United Nations High Commissioner for Refugees,[45] and give them the opportunity to take legal advice.[46] An 'individual, objective and impartial' examination must be made and a reasoned written decision communicated to the applicant.[47] This legislation also outlines the controversial 'safe third country concept' whereby a country of origin is deemed to have sufficient legal and humanitarian safeguards in place, such that an applicant from that country cannot be considered to have a valid asylum claim unless they present 'serious counter-indications'.[48]

In addition, a pre-Amsterdam instrument - the Dublin Convention 1990 - which laid down rules for determining the Member State that would be responsible for examining an asylum application lodged within the EU,

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[41] Article 11 asylum reception Directive, *Ibid.*

[42] Article 15(1), asylum procedures Directive, *Ibid.*

[43] Articles 12, 13 and 14, asylum procedures Directive, *Op. Cit.* n.37

[44] Articles 10(1)(a), (b), (e) and 13(2)(b), asylum procedures Directive, *Ibid.*

[45] Article 10(1)(c) asylum procedures Directive, *Ibid.*

[46] Article 15 asylum procedures Directive, *Ibid.*

[47] Articles 8(2)(a), 9(1) and (2) asylum procedures Directive, *Ibid.*

[48] Recital 17 to the preamble and Article 27 asylum procedures Directive, *Ibid.* Article 29 of the same provisions outlines a procedure for the European Council to adopt a common list of third countries to be regarded as safe by the Member States

was enshrined in a legally binding instrument, the Dublin II Regulation.[49] This outlines a hierarchy of criteria to be applied in this regard – the default position being that an application is heard by the state in which it was first lodged.[50] A further Regulation establishes a system for the comparison of fingerprints to facilitate the application of the Dublin Convention (hereinafter 'the Eurodac Regulation').[51]

Qualification as, and entitlements associated with, refugee and humanitarian protection are outlined in the final Directive on the Common European Asylum System (hereinafter 'the refugee qualification Directive').[52] This is essentially concerned with the definitional issues touched upon in the introduction to this thesis, and outlines a number of substantive and material benefits to be accessed by those who are granted refugee (or subsidiary humanitarian) status.

Other forms of migration that, whilst associated with the Common European Asylum System, do not strictly concern asylum and refugee law, have also been addressed. For example, the procedure outlined in the temporary protection Directive in relation to a mass-influx of displaced

[49] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national OJ L 50/1, 25.2.2003

[50] Article 13 Dublin II Regulation, *Ibid.*

[51] Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention OJ L 316/1, 15.12.2000

[52] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted OJ l 304/12, 30.9.2004

persons (hereinafter 'the temporary protection Directive').[53] This was a priority in the immediate wake of the entry into force of the Treaty of Amsterdam 1997 in light of the refugee crisis prompted by the events in Kosovo in the 1990s. This Directive seeks to share the burden of providing temporary protection following such an event amongst the Member States. Beneficiaries of the legislation are to be granted a renewable residence permit valid for an initial period of one year,[54] and are allowed access to the asylum application process.[55]

Whilst much time and energy has been devoted to the issue of 'illegal' immigration, this has focused on operational initiatives to facilitate return (for example, enforcing expulsions, and cooperation on the removal of illegal immigrants by air),[56] rather than granting rights and entitlements for third-country nationals whilst they remain in the EU. Measures do, however, cover victims of trafficking: a Directive was passed in 2004 outlining the scope of a residence permit to be granted to victims of trafficking who cooperate with Member State authorities (hereinafter 'the trafficking Directive).[57] In spite of offering valuable entitlements to

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[53] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof OJ L 212/12, 7.8.2001

[54] Articles 4(1) and 8(1) temporary protection Directive, *Ibid.*

[55] Articles 17-19 temporary protection Directive, *Ibid.*

[56] See, generally, 2002 Return Action Programme, Council document 14673/02; and, specifically, Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals OJ L 149/34, 2.6.2001; and Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air OJ L 321/26, 6.12.2003; and Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders OJ L 261/28, 6.8.2004

[57] Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been

victims of trafficking, the content of this legislation is dictated as much by the need to combat criminal activity, as by the desire to support and empower individuals.[58] The Directive provides for a residence permit for victims, but this is conditional upon them demonstrating a clear intention to cooperate with the authorities in the host Member State to secure the criminal conviction of traffickers.[59] Children are not *prima facie* included within the scope of the provision,[60] although Member States can choose to derogate from this exclusion and are then compelled to meet certain welfare needs.[61]

A particularly controversial Directive on common standards and procedures in the Member States for returning illegally staying third-country nationals, spent over three years in the negotiation process attracting much (largely negative) comment, with Baldaccini and Toner declaring it to be a "sour chapter" in the EU's attempts at implementing an action plan in this area.[62] It was finally passed in December 2008 (hereinafter 'the returns Directive'),[63] and comprises three stages to the return of an illegally staying third-country national: the decision itself, to

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the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities OJ L 261/19, 6.8.2004

[58] Paragraph 23, Presidency Conclusions to the Tampere European Council of 15 and 16 October 1999

[59] Article 8 trafficking Directive, *Op. Cit.* n.57

[60] Article 3(3) trafficking Directive, *Ibid.*

[61] Article 10 trafficking Directive, *Ibid.*

[62] Baldaccini, A., Guild, E., and Toner, H. (Eds.) *Whose Freedom, Security and Justice? EU Immigration and Asylum Law since 1999,* (Portland, USA: Hart, 2007), at p. 13

[63] Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals OJ L 348/98, 24.12.2008

be taken by Member State authorities,[64] a period of voluntary departure initially between seven and 30 days,[65] and, if necessary, the removal of an individual.[66] The Directive outlines certain procedural safeguards, most notably in relation to the use of detention centres in the period leading up to removal.[67]

In a similar vein, progress on 'legal' immigration - that is, addressing the status of third-country national migrants within the EU - has also been limited. Nonetheless, in this case, two significant pieces of legislation have emerged from this period. The first of these is a Directive on the status of long-term resident third-country nationals (hereinafter 'the long-term residents Directive'),[68] which essentially grants a right to equal treatment for beneficiaries and family members in relation to a number of areas such as *inter alia* employment, education, social security, welfare benefits.[69] This is to be offered in respect of third-country nationals who have been legally resident for a continuous period of five years.[70] Finally, a Directive on the right to family reunification[71] addresses the right of third-county national migrants, who are legally resident on the Union territory, to be united with certain family members in the host

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[64] Article 6 returns Directive, *Ibid.*

[65] Article 7 returns Directive, *Ibid.*

[66] Article 8 returns Directive, *Ibid.*

[67] Articles 16 and 17 returns Directive, *Ibid.*

[68] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents OJ L 16/44, 23.1.2004

[69] Article 11 long-term residents Directive, *Ibid.*

[70] Article 4 long-term residents Directive, *Ibid.*

[71] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification OJ L 251/12, 3.10.2003

Member State; as well as according a number of benefits to those family members.[72] This is subject to the third-country national migrant demonstrating that they have suitable accommodation, sickness insurance and regular and stable resources sufficient to support their family.[73]

Negotiations for measures on economic migration appear to have struck too close to the heart of Member State interests with tentative proposals for agreements withdrawn, in favour of less ambitious policy plans that are yet to yield any concrete legislative action. The notable exception in this regard is the very recent 'Blue Card' Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment. [74] Whilst this Directive contains little of specific relevance to young people, similarly to the long-term residents Directive it allows family members equal access to nationals of the host Member State in relation to a number of welfare related areas.[75]

[72] Articles 7(1) and 14(1) family reunification Directive, *Ibid.* Article 4 provides a definition of family members.

[73] Article 7 family reunification Directive, *Ibid.*

[74] Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155/17, 18.06.2009

[75] See, primarily, Articles 14 and 15 Blue Card Directive, *Ibid.* The Directive also defers to the family reunification Directive (*Op. Cit.* n.71) in relation to the benefits to be enjoyed by family members

3. THE GRADUAL EMERGENCE OF AN EU CHILDREN'S RIGHTS AGENDA[76]

3.1: The hands-off approach of the pre-Amsterdam era

Historically, EU intercession in the children's rights arena was virtually non-existent. This was partly a further expression of a tendency to marginalise children in law and policy through much of the last century, at least in the period before the signing of the United Nations Convention on the Rights of the Child in 1989 (hereafter, the UNCRC). Further - and of more significance at EU level - children tend not to be perceived as economic actors: it is, therefore, assumed that they are of no concern to a Community based on economic unity.[77] Before Amsterdam, the Treaties provided no real basis for a children's rights policy at EC (and, later, EU) level, such that Community law only really impacted upon children 'accidently'. From time to time, provision was made for children where internal market measures impacted upon them as eventual consumers, in areas such as television advertising and toy safety, for example.[78] More prominent were measures benefiting children as family members found in the free movement of persons' provisions. Under secondary legislation aimed at facilitating the internal free movement of Member State

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[76] Parts of this section have been published in Stalford, H. and Drywood, E. (2009) 'Coming of Age? Children's Rights in the European Union' 46 *CML Rev*, 143-172, which provides a more detailed discussion of the history - and the current status of - children's rights in the EU

[77] Pringle, K. (1998), *Children and Social Welfare in Europe'*, OUP, at p.134

[78] Council Directive 88/378/EEC of 3 May 1988 on the approximation of the laws of the Member States concerning the safety of toys, OJ *L 187/1 , 16.07.1988;* Council Directive 89/552/EEC on the coordination of on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities OJ *L 298/23, 17.10.1989* (now amended by Directive 2007/65 of the European Parliament and of the Council of 11 December 2007 OJ L332/27, 18.12.2007)

nationals for the purposes of work, the children of EU migrant workers were able to access social rights on an equal basis to nationals of the host Member State.[79] In a series of judgments, these rights were widely interpreted by the ECJ to grant the children of EU migrant workers extensive educational rights, in particular.[80] This, however, was hardly indicative of any proclivity on the part of the EU institutions to endow children with an independent set of rights. As Stalford argued, there was little to alleviate the parasitic nature of these entitlements:

> Children's substantive rights under EU law continue to be subjugated to the economic activities of their parents and their parents' propensity to migrate, consequently ignoring the needs of the wider non-migrant population of children.[81]

Although there were a number of soft-law initiatives during this period that addressed children because of social (rather than economic) imperatives,[82] this was not sufficient to convince observers of the EU's commitment to a genuine children's rights endeavour.

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[79] The principal piece of legislation in this area was Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ L 257/2, 19.10.1968. Article 12 grants the children of EU migrant workers access to the education system of the host state under the same conditions as nationals, and Article 7(2) which entitles the migrant worker to 'the same social and tax advantages' as nationals of the host Member State has been construed by the ECJ to include family members (see e.g. Case 32/75 *Anita Cristini v. Société nationale des chemins de fer francais* ECR 1085)

[80] For a summary of the educational entitlements of the children of EU migrant workers, see: Ackers, L. and Stalford, H (2004) *A Community for Children? Children, Citizenship and Internal Migration in the EU.* Ashgate, particularly Chapter 8

[81] Stalford, H. (2000) 'The Developing European Agenda on Children's Rights' *Journal of Social Welfare and Family Law*, 22(2): 229-236, at p.232

[82] Stalford, *Ibid.*, at p. 233

There was still a sense that the EU was failing to see children as autonomous rights holders, acknowledging their place in EU law only where necessary to facilitate broader economic objectives. It is not surprising, therefore, that it is around this time that voices from non-governmental organisations (NGOs) and the academic sector, calling for a more coherent and rights based children's agenda, began to gather volume. Euronet, a prominent coalition of children's rights networks and organisations that (until its recent disbanding) lobbied the EU to ensure children are taken into account in all legislation, policies and programmes, was launched in 1995; three years previously Save the Children opened an office in Brussels with the specific remit of monitoring EU activities. In addition, the presence of groups such as ChildONEurope and Eurochild have contributed to what is now a prominent children's rights lobbying voice in Brussels. Equally, a literature critiquing the EU's *ad hoc* approach to children's rights began to emerge in the late 1990s,[83] such that the indifference shown to children in EU law and policy was becoming increasingly indefensible.

3.2: Reinforced recognition of children's rights in recent years

Since Amsterdam, the volume of child-focused activity at EU level has increased significantly. There are a number of explanations for this. First, a new reference to children was inserted into Article 29 TEU (replaced by Article 67 TFEU, post-Lisbon) on the prevention and combating of crimes, including offences against children, through cross-border police

[83] For example, Ruxton, S. (1997) *Children in Europe*, NCH Action for Children. In addition, Ackers and Stalford's book (*Op. Cit.* n.80) on children and EU citizenship arose from research carried out in the late 1990s and funded by the European Commission and the Nuffield Foundation, demonstrating that even at this fairly early stage, the EU institutions were beginning to show a willingness to engage with research on the impact of their laws and policies on children specifically

and judicial cooperation.[84] Second was the prohibition on age-based discrimination found in Article 13 EC (Article 19 TFEU, post-Lisbon).[85] Whilst in its conception most likely aimed at older people, and lacking an explicit reference to children, this latter provision represents a more generic, and potentially far-reaching, acknowledgement of the impact of EU law and policy on young people. Finally, at Nice, came an even more significant development in the children's rights arena, with the proclamation of the Charter of Fundamental Rights at the turn of the millennium. Alongside a number of general provisions of significance to children,[86] Article 24 of the Charter contains an article dedicated to the rights of the child:

> The rights of the child:
>
> 1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely.

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[84] Article 29 TEU (amended by the Treaty of Nice 2000). Now found in Article 67 TFEU, post-Lisbon, although without the specific reference to children

[85] Article 13(1) EC Treaty states: 'Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. The non-discrimination provision is now found in Article 19 TFEU, post-Lisbon

[86] For example: the right to receive free compulsory education (Article 14(2)); the prohibition of discrimination on grounds of *inter alia* age (Article 21); the prohibition of exploitative child labour (Article 32); provisions targeting the family unit are also of relevance to children such as the right to respect for private and family life, home and communications (Article 7), and the family's right to enjoy legal, economic and social protection, expressed in Article 33. For further analysis of the significance of these measures see McGlynn, *Families and the European Union: Law, Politics and Pluralism,* (Cambridge University Press, 2006) p.21; Stalford, "Constitutionalising Equality in the EU: A Children's Rights Perspective", (2005) 8 *International Journal of Discrimination and the Law,* pp.53-73; Cullen, "Children's Rights", in Peers and Ward (eds.), *The European Charter of Fundamental Rights,* (Hart, 2004); and McGlynn, "Rights for Children?: the potential impact of the European Union Charter of Fundamental Rights", 8 (2002) *European Public Law,* pp. 387-400

Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

This provision is heavily inspired by the UNCRC: in particular, the first paragraph of Article 24 broadly corresponds to Convention provisions on the right of a child to participate in decisions affecting them (Article 12); the second paragraph largely replicates the best interests principle (Article 3(1) UNCRC); and the final paragraph corresponds to Article 9 UNCRC on rights to parental relationships.

Whilst significant in setting the tone for a gradual change in the cultural approach of the institutions, none of these developments created a general competence for the EU to enact measures in the area of children's rights. Article 29 TEU (replaced by Article 67 TFEU, post-Lisbon) has a very specific remit, pulling children into the EU agenda only in respect of cross-border crime. The non-discrimination provisions are of a vague and general nature and, as such, are not directly effective and, moreover, require unanimity to yield any legislative action. Finally, the Charter lacked (until the entry into force of the Lisbon Treaty, at least) legally binding status. What they did do, however, was bring children's rights closer to the fore of the EU political agenda at the exact time the Common European Asylum and Immigration System was beginning to take shape, meaning the ground was ripe for a more active engagement with the needs of young people. Equally, the Court has made its own

contribution by acknowledging the value of the UNCRC as an instrument to be taken into account in applying the general principles of Community law in its decision in *Parliament v Council*,[87] later reinforced in the rather surprising context of free movement of goods in *Dynamic Medien*.[88]

3.3: 'Towards an EU Strategy on the Rights of the Child'?

The first explicit acknowledgement of the EU's commitment to the rights of the child came with the Commission's seminal 2006 Communication Towards an EU Strategy on the Rights of the Child, which for the first time identified this area as 'a priority for the EU'.[89] This DG Justice Freedom and Security document sets out an ambitious and far-reaching plan of action for the protection and promotion of children's rights spanning an array of internal and external policy areas. It points to the need to create 'children friendly societies within the EU' in order to 'further deepen and consolidate European integration'.[90] The UNCRC is repeatedly referred to, with the document stating that it 'must be taken fully into account'.[91] To fulfil this ambition, the document identifies a number of long-term strategies, each encompassing activities on specific points. The first cluster of points relate to the substance of EU activities on children's rights. First, the Commission commits itself to capitalising

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[87] Case C-540/03 *Parliament v Council* [2006] E.C.R. I-5769

[88] Case C-244/06, *Dynamic Medien Vertriebs GmbH* v. *Avides Media AG*, [2008] ECR I-505

[89] *Op, Cit.* n.1. See also Commission staff working document accompanying the Communication from the Commission, Preliminary Inventory of EU Actions Affecting Children's Rights, Brussels, 4.7.2006, EC (2006) 889

[90] *Ibid.*, at p.3

[91] *Ibid.*

on existing activities whilst addressing newly identified urgent needs.[92] Second, the Commission is to assess the successes of its current action in ensuring the full enjoyment of children's rights and set priorities for the future.[93] Third, there is a renewed promise that the European Union will continue and further enhance its active role in promoting the rights of the child in international forums and third-country relations.[94] The second set of strategies focuses on the process of ensuring a commitment to children's rights and capacity building in the area. First, to ensure that all EU activities incorporate the needs and interests of all young people, there is a commitment to mainstreaming children's rights in all legislative proposals.[95] Second is the promise to develop efficient coordination and consultation mechanisms - beginning with the establishment of the European Forum on the Rights of the Child - that brings together relevant stakeholders.[96] Third, there is a commitment to training for all those involved in implementing children's rights at EU level.[97] Finally, a new strategy for communicating children's rights, in a manner friendly to young people, is to be developed.[98]

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[92] *Ibid.*, at p.7. These 'urgent' needs focus on provisions to assist children 'in crisis'. For example, the establishment of universal telephone numbers for child helplines and to report missing or exploited children; and measures to combat the use of credit cards to purchase sexual images of children

[93] *Ibid.*, at p.8

[94] *Ibid.*, at p.10

[95] *Ibid.*, at p.8. This mainstreaming commitment is the subject of *Chapter Four* of this thesis

[96] *Ibid.*, at pp.8-9

[97] *Ibid.*, at p.9

[98] *Ibid.*, at pp.9-10

4: IDENTIFYING A NORMATIVE FRAMEWORK IN RELATION TO CHILDREN IN EU ASYLUM AND IMMIGRATION LAW

From the early days of EU legislative activity in the area, the Commission has declared its commitment to incorporating the particular needs of children into asylum and immigration law, with the Commissioner for Justice and Home Affairs making the following statement in 2001:

> To take into consideration the specific situation of groups with special needs, and in particular children, must be a key concern for the development of immigration and asylum policies that are both fair and efficient.[99]

Since then this commitment to 'mainstream' children's rights has been reiterated on a number of occasions, most emphatically in the Commission's 2006 Communication on the rights of the child.[100] Specifically in relation to asylum, the need to address a number of areas has been identified as essential if the Common European System is to provide an 'appropriate response to situations of vulnerability': for example, adequate medical and psychological assistance and counselling for traumatised persons, victims of torture and trafficking; proper identification and response to the needs of minors; development of appropriate interview techniques for categories of vulnerable persons based *inter alia* on cultural age and gender awareness and the use of

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[99] António Vitorino, Commissioner for Justice and Home Affairs, speech at seminar on 'Children affected by armed conflict and forced displacement', Norrköping, 2 March 2001 as cited in Ruxton, S. (2003) *Separated Children in EU Asylum and Immigration Policy* Save the Children, at p.18.

[100] *Op. Cit* n.1, at pp. 7-8

specialised interviewers and interpreters; and rules regarding the assessment of claims based on gender and child-specific persecution.[101] Whilst children have been less prominent in the immigration agenda, the 'specific needs' of children were highlighted in relation to, for example, the Commission's strategy on the integration of migrants,[102] underlining that young people remain a concern in the formulation of law and policy across the EU agenda in relation to third-country nationals.

The most striking feature of child-focused provisions in the legislation arising from Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon) is that they are surprisingly voluminous given the EU's reluctance in other areas of competence to endow children with autonomous rights and entitlements. Albeit to varying degrees, children are explicitly addressed in every major piece of legislation passed in the first decade of the Common European Asylum and Immigration System. The aim of this section is to go further than simply highlighting where these provisions exist in relation to each instrument: rather, it takes a holistic view of the corpus of EU asylum and immigration law and seeks to identify common themes in the approach to children found within it. For ease of reference a summary table of the child-focused provisions stemming from Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon) is found in *Appendix A*. For the purposes of this discussion, however, the normative framework in relation to children is best understood by clustering child-focused provisions around four

[101] Most recently articulated in the Green Paper on the future Common European Asylum System COM(2007) 301 final, at 7; a similar list was previously found on the Freedom, Security and Justice pages of Europa (www.europa.eu.int) on pages entitled 'Paying Special Attention to the Situation of Unaccompanied Minors'

[102] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Third Annual Report on Migration and Integration COM(2007) 512 final, at 7

categories: (1) those that focus upon the child's best interests; (2) those that are geared towards legal representation and children's participative rights; (3) those that recognise the specific welfare needs of children; and (4) those that seek to respond to the specific vulnerabilities of unaccompanied asylum-seeking minors.

4.1: The use of the best interests principle

The best interests principle is a central tenet of contemporary approaches to child law. Its most famous expression is found in Article 3(1) UNCRC:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

As well as constituting one of the umbrella principles of the document as a whole, its importance in relation to activities in a number of areas, such as the child's separation from the family, juvenile justice and depravation of liberty, is reiterated in later articles.[103] Indeed, on a global scale, the influence of the best interests principle is felt in national legal systems at every point where children's rights interact with the law: in relation to divorce, custody and access disputes; adoption proceedings; young people in the criminal justice system; in healthcare and education decisions; and in relation to childcare. As it has gathered universal acceptance over the past twenty years, the principle has been described as enjoying "astonishingly solid consensus", as "occupy[ing] hallowed

[103] Articles 9, 40 and 37 respectively. Also found in relation to parental responsibility (Article 18), foster placement (Article 20) and adoption (Article 21)

ground" and as "the cornerstone of the current law".[104] When used appropriately, it should ensure that actions in relation to children are informed by a concern to ensure their welfare. Further, its flexible formulation allows it to be applied in a multitude of contexts, and allows it to incorporate a wide range of values and interests. That said, the best interests principle has proven to be far from beyond reproach. Indeed, it is its very flexibility that has been criticised for rendering the concept vague and indeterminate: with little guidance on how it is to be applied, there are those that have argued it has "yet to acquire much specific content".[105] It has also been said that it elicits highly subjective judgements that inevitably reflect the values of the individual making the decision: as such, its application in different cultural, social and political contexts can vary considerably.[106] Furthermore, it requires a balancing exercise in relation to the various options and is, thus, based on little more than speculation as to future outcomes.[107] In short, whilst without doubt an essential guiding light in the elaboration of child-focused law and policy, the best interests principle must be treated with caution, requiring thought and guidance on its precise meaning and implementation.

How, then, has this principle been deployed in EU asylum and immigration law? Information provided by the Commission on Europa in relation to minors seeking asylum in the European Union states that "the

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[104] See Reece, H. (1996) 'The Paramountcy Principle: Consensus or Construct?' 49(2) *Current Legal Problems* pp.267-304, at pp.268-269

[105] Alston, P. (1994) 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' 8 *International Journal of Law and the Family* pp.1-25, at p.4

[106] Alston, *Ibid.*, at p.5

[107] Parker makes this point in relation to custody decisions: Parker, S. (1994) 'The Best Interests of the Child: Principles and Problems' 8 *International Journal of Law and the Family* pp.26-41

European Commission takes the best interests of the child as a guiding principle when drawing up legislative proposals to establish the common European asylum system".[108] This is reflected in frequent references to the principle in the legislative texts themselves. In five of the Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon) instruments (asylum reception, asylum procedures, refugee qualification, returns and trafficking Directives), the best interests of the child is to be a primary consideration for Member States when implementing the Directive.[109] In addition, the concept makes sporadic appearances as a guiding principle in relation to actions in a number of specific areas: housing asylum-seeking or refugee siblings together ("as far as possible siblings should be kept together, taking into account the best interests of the minor concerned");[110] safeguards when tracing members of an unaccompanied minor's family;[111] when examining applications for family reunification ("Member States shall have due regard to the best interests of minor children");[112] in relation to the role of a representative appointed to act on behalf of an unaccompanied minor in the asylum determination process (who "must ensure his/her best interests");[113] and

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[108] See: <http://europa.eu.int/comm/justice_home/fsj/asylum/childr.../fsj_asylum_children_en.ht> (no longer available). A more recent expression is found in 2962nd Council Meeting of Justice and Home Affairs, Brussels, 21 September 2009: Press Release (13497/09 (Presse 271)), at p.8: best interests are described as the EU's 'guiding principle' in relation to unaccompanied minors

[109] Article 18(1) asylum reception Directive, *Op. Cit.* n.36; Article 17(6) asylum procedures Directive, *Op. Cit.* n.37; Article 20 (5) and recital 12 of the preamble to the refugee qualification Directive, *Op. Cit.* n.38; Article 5(a) and recital 22 of the preamble to the returns Directive, *Op. Cit.* n.63; Article 10(a) trafficking Directive, *Op. Cit.* n.57

[110] Article 19(2) asylum reception Directive, *Ibid.;* and Article 30(4) refugee qualification Directive, *Ibid.*

[111] Article 19(3) asylum reception Directive, *Ibid.;* and Article 30(5) refugee qualification Directive, *Ibid.*

[112] Article 5(5) family reunification Directive, *Op. Cit.* n.71

[113] Article 2(1)(a) asylum procedures Directive, *Op. Cit.* n.37

when deciding on a return or detention decision in respect of an illegally staying unaccompanied minor.[114] In addition, under the Dublin II system, Member States should only unite an unaccompanied minor with family members or relatives in another Member State to have their asylum application heard where it is in the young person's best interests.[115]

This liberal scattering of the best interests principle across this legislation has seen it emerge as somewhat of a *leitmotif* for children in EU asylum and immigration law. Reading across the instruments, one is left with the feeling that wherever a provision geared towards children appears, a reference to best interests is sure to follow close behind. At first sight, this would seem to be indicative of steps toward a child-focused approach to this legislation, and one to be welcomed for its endorsement of a principle widely accepted as a touchstone of children's rights provision. However, this has proceeded on the untested assumption that the best interests principle is appropriate for shaping law and policy in relation to asylum-seeking and immigrant children – a point that, at the very least, requires further exploration.

To begin, it should be acknowledged that the best interests principle is a dynamic and intentionally vague concept so that it can be adapted to the many, diverse contexts in which children are situated. So, in theory, at

[114] Articles 10(1) and 17(5) returns Directive, *Op. Cit.* n.63. There is further use of the best interests principle in relation to the family reunification provisions found in the temporary protection Directive (see Article 15(4), *Op. Cit.* n.53)

[115] Articles 6 and 15(3) Dublin II Regulation, *Op. Cit.* n.49. The use of the principle in the Dublin II system is further reinforced by a Regulation laying down rules for its application which states that Member State authorities must cooperate on ensuring that best interests are upheld where an adult other than the mother, father or legal guardian of an unaccompanied minor is entrusted with the child's care (Article 12(1) Commission Regulation (EC) No 407/2002 of 28 February 2003 laying down certain rules for the application of Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention OJ L 62/1, 5.3.2002)

least, it allows decision makers to accommodate the vastly different needs of the broad range of migrants addressed by this legislation. Here, it should be noted that the welfare needs of third-country national children who are resident in Europe as part of a wider family of economic migrants are likely to differ enormously from those of an unaccompanied asylum-seeking minor who had fled likely persecution in their country of origin. By way of further illustration, the best interests principle is cited, *inter alia*, in relation to decisions on family reunification that takes place in the host Member State,[116] as well as in relation to decisions to return an illegally staying third-country national minor to their country of origin.[117] Weighing up the factors that will need to be considered in deciding whether something is in the best interests of the children involved in these two scenarios can demand vastly different tasks: the former necessitating a judgement to be made on circumstances within a European Member State; the latter requiring some assessment of the mechanisms in place in the child's country of origin. The very flexibility of the concept, therefore, is one of its great strengths, as it allows decision-makers to consider a wide-range of factors. In this sense, it is both understandable and entirely appropriate that is has been used frequently in EU asylum and immigration legislation. However, the legislature's reliance upon it as a principle that can accommodate the welfare needs of a range of immigrant and asylum-seeking children proceeds on two fundamental presumptions, both of which can be challenged: the first is that the best interests principle is uncontested in the asylum and immigration arena; the second is that adequate structures are in place at national level to assist decision-makers in applying it sensitively and effectively. Each of these will be considered in turn.

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[116] Article 5(5) family reunification Directive, *Op. Cit.* n.71

[117] Article 10(1) and 17(5) returns Directive, *Op. Cit.* n.63

One of the principal criticisms levied at the best interests principal is its 'indeterminacy'. In other words, it has been argued that the values employed to give it content and meaning can be inappropriate.[118] As Leech has noted:

> The phrase "in the best interests of the child" can, and often does, reflect a (more or less) benevolent authoritarianism. Outside personal relationships with family, teachers or grown-up friends, the best most children can expect of most adults is patronage.[119]

Eekelaar elaborates by pointing to the potential for the best interests principle to act as a smokescreen for decisions that are influenced by factors unrelated to the child's welfare:

> It might fail to provide sufficient protection to children's interests because its use conceals the fact that the interests of others, or, perhaps, untested assumptions about what is good for children, actually drive the decision.[120]

This lack of transparency and unpredictability make the principle vulnerable to being undermined or manipulated by other agendas. This is a particular threat in the context of asylum and immigration, an inherently agenda-laden area in which the rights of the individuals involved

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[118] Alston, P. and Gilmour-Walsh, B., *The Best Interests of the Child: Towards a Synthesis of Children's Rights and Cultural Values*, (UNICEF, 1996), at p.6

[119] Leach, P., *Children First: What Our Society Must Do – and Is Not Doing – for Our Children Today*, (Michael Joseph: London, 1994), at p.208

[120] Eekelaar, J. (2002) 'Beyond the Welfare Principle' 14(3) *Child and Family Law Quarterly* pp.237-250, at p.238

frequently clash with the exigencies of a regulatory system. For example, where an illegally staying child is returned to their country of origin it is hard to imagine that these decisions will routinely be taken on the basis of a genuine enquiry into the child's circumstances both in the host state and the country of origin; and much easier to believe that factors such as the need to reduce numbers of illegal immigrants, fears of burdens on welfare systems and over-stretched immigration officials, may also play a crucial role. The reliance on a principle that appears to allow so much scope for decisions to be taken in any number of interests, that may not necessarily correspond to those of the child, means that the best interests principle must be treated with caution in this particular area.

A further criticism is that it has frequently been noted that the best interests principle is embedded in Eurocentric, or Westernised, understandings of the role of children in society.[121] Indeed, a debate on cultural relativism has raged since the signing of the UNCRC, with commentators questioning the extent to which it represents a genuine international consensus as to the position of children, and their rights, within a global society.[122] That said, across Europe, agreement has been reached that the best interests principle is an entirely appropriate and, when used correctly, very positive guiding principle for the treatment of young immigrants and asylum-seekers.[123] At the very least, however, some acknowledgement must be made that the cultural understandings of the interactions between the child, the family and administrative authority

[121] See further Alston, *Op. Cit.* n.105

[122] See, generally, Alston and Gilmour-Walsh, *Op. Cit.* n.118

[123] See, for example: Enenajor, A. (2008) 'Rethinking Vulnerability: European Asylum Policy Harmonization and Unaccompanied Asylum Seeking Minors' 2(2) *Childhood's Today (Online)*, available at http://www.childhoodstoday.org/download.php?id=17 (last accessed 16 June 2010); and Separated Children in Europe Programme, *Statement of Good Practice: 3rd Edition* (Copenhagen: Save the Children, 2004)

of young people from a diversity of backgrounds may offer an entirely different framework of reference from that of European children. It is perhaps not surprising, then, that research with immigrants and asylum-seekers in Europe has pointed to the lack of familiarity young people have with children's rights concepts such as the best interests principle.[124]

The arguments outlined here are not intended to cast doubt upon the importance, and relevance, of the best interests principle in ensuring that children's rights are upheld in EU asylum and immigration law. Rather they seek to underline the need for a careful and considered application of the principle. This, in turn, leads us onto the second reason that the EU must be cautious in its reliance upon the notion of best interests in its asylum and immigration provision. Many of the instances in which the principle appears proceed on the assumption that sufficient mechanisms and guidance are in place at the national level to enable the investigative, judicial and welfare authorities to attach due weight to the child's best interests and honour its application in relation to each individual. In practice, the operation of the principle at the national level can be very unpredictable and does not always deliver positive outcomes for the children involved.[125] Initial assessments of the operation of the Dublin II system, for example, highlighted examples where decisions to send children to another EU Member State to have their asylum claim heard overlooked the need to fully consider their best interests.[126] Equally,

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[124] Smith, T., *Separated Children in Europe: Policies and Practices in European Union Member States: A Comparative Analysis* (London: Save the Children, 2003), at p.7

[125] See, for example, the criticism levied by Ruxton at a number of Member States, particularly in relation to decisions on family reunification, returns to country of origin and participation in the asylum determination process: Ruxton, S., *Separated Children Seeking Asylum in Europe: A Programme for Action* (London: Save the Children and UNHCR, 2000), pp.6-7

[126] See the Separated Children in Europe Programme's submission to the Commission on the implementation of the Dublin II system: available at < http://www.separated-

some children who were given inadequate explanations as to why decisions to transfer them had been taken, even where this was done on the basis of their best interests, were left bewildered by a system that operates on a basis they simply did not understand. The result was that some of these children simply fled and 'disappeared' from the immigration system, thus following a course of action that raises clear welfare issues. It is not surprising, therefore, that the Separated Children in Europe Programme highlights that the operation of the best interests principle in this particular context is simply not meeting the welfare needs of many children addressed by EU asylum legislation.[127] Whilst this is just one example of where the mechanisms in place at Member State level to ensure that the best interests of the child are upheld can be open to criticism, there is ample evidence that the standards applied to these sorts of assessments vary enormously between states, and that they are not always particularly effective in safeguarding children's welfare.[128] It may seem that the Member States are better placed to apply the best interests principle: application at the domestic level brings with it the advantage of concrete, rather than abstract, context (that is to say, decisions can be taken in full knowledge of the child's specific circumstances, as well as the specifics of relevant national and local immigration regulation); equally, states have a longer and more developed history of deploying children's rights principles, something to which the EU is relatively new. However, as has been seen, a rigorous and diligent application of the best interests principle to young

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children-europe-programme.org/separated_children/publications/reports/index.html#comparative_analysis> (last accessed 16 June 2010)

[127] *Ibid.*

[128] *UNHCR Guidelines on Formal Determination of the Best Interests of the Child* (UNHCR, 2006), available at < http://www.unicef.org/violencestudy/pdf/BID%20Guidelines%20-%20provisional%20realease%20May%2006.pdf> (last accessed 16 June 2010)

immigrants and asylum-seekers by domestic authorities is very often not realised. Is it, therefore, acceptable for the EU to both endorse and reinforce an approach that is so obviously less than perfect? In other words, when it espouses so freely the best interests principle in its legislative texts, the EU bears some responsibility for realising its practical application. This clearly, therefore, demands some consideration of what role the EU should play in ensuring the effective application of the best interests principle in asylum and immigration provision, a point to which the discussion now turns.

First, it should be noted that it is not the function of the EU to ensure compliance with the best interests principle in domestic law and policy. This is a role already carried out by the United Nations Committee on the Rights of the Child, a body that has far greater expertise and experience, deployed through well-established mechanisms. A more appropriate part to be played by the EU is in providing greater clarity and more explicit guidance as to the function of the best interests principle within its wider legislative provision on asylum and immigration. There is broad consensus within the children's rights arena that agreeing on appropriate guidelines for the application of the best interests principle that are grounded in the specific context is essential if it is to successfully safeguard children's welfare.[129] At the moment, with few exceptions, the legislature's willingness to cite the principle across a number of provisions, stands in direct contrast to its readiness to elaborate upon its requirements within the Common European Asylum and Immigration System.

[129] Alston and Gilmour-Walsh, *Op. Cit.* n.118, at p.6

Whilst there has been no formalised approach to provide guidance on the application of the best interests principle at EU level, a recent legislative proposal suggests the tide may be turning. Alongside the criticisms outlined above, divergent application of the best interests principle between Member States was identified as a weakness in the functioning of the provisions of the Dublin II Regulation on unaccompanied minors. It was, therefore, argued that if Dublin II was to operate as a truly harmonised system, more guidance was needed at the European level as to the factors to be taken into account in determining if it was in the child's best interests to have their asylum claim heard in the same country as a member of their family. As a result, the proposal for a recast Dublin II Regulation suggests that the following factors are relevant in this regard:[130]

- family reunification possibilities;
- the minor's well-being and social development, taking into particular consideration the minor's ethnic, religious, cultural and linguistic background;
- safety and security considerations, in particular where there is a risk of the child being a victim of trafficking;
- the views of the minor, in accordance with his/her age and maturity.

The provision of something approaching practical guidance on the application of the best interests principle, albeit in a highly specific context, is some evidence of an attempt to reach a more meaningful understanding of its use in EU law.

[130] These factors are contained in a recast Article 6 (Guarantees for Unaccompanied Minors), Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member states by a third-country national or a stateless person (Recast), COM(2008) 820 final

As a final point, there is one, somewhat curious, application of the best interests principle within the legislation that demands further clarification: that is, its use in relation to the transposition of legislative instruments. The traditional role of the best interests principle is in informing decisions in relation to individual children, whereas in the specific context of EU asylum and immigration legislation it is most prominently used as a principle to guide the transposition of supra-national measures into domestic law. The very basis of the principle is that the best interests of the *child* must prevail, and this has led commentators to cast doubt upon its capacity to manage the competing interests of a number of *children.*[131] It seems, then, legitimate to question the status of the principle as a requirement in the transposition of legislation that addresses a group of, as yet, unknown young people, each of whose best interests are somehow to be assessed, incorporated into and upheld by generic child-focused provisions. This seems indicative of an approach in which very little clarity exists as to how the principle operates in the specific context of a multi-layered system of governance such as the EU. There is a sense that this could become an exercise in passing the baton of responsibility from the EU - who would like to be seen to be championing the rights of the child - to the Member States, whose burden it then becomes to express meaningfully in national legislation.

The endorsement of a central children's rights principle, such as that of best interests, within this legislation, is, of course, a positive step, given it represents a widely-accepted framework for ensuring the welfare of children. That said, its use within Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon) somewhat glosses over the more

[131] Parker, *Op. Cit.* n.107

complex aspects of its often tricky, and sometimes contested, application. It is recognised that in both practical and ideological terms Member States are best positioned to accommodate and respond to these challenges and, as such, these arguments perhaps raise subsidiarity issues. However, ultimately, it is concluded that the EU should at least exercise a little critical caution rather than blindly subscribing to such principles on the presumption that they will automatically underpin national implementation and practice. This demands, at the very least, some meaningful articulation of how the EU envisages the Member States will fulfil their obligations to uphold the best interests principle as members of a harmonised immigration and asylum system that ensures respect for the rights of the child.

4.2: Representation and children's participative rights

The right of the child to have their voice heard is seen as the corollary to best interests, a principle aimed at empowering young people by focusing on their participative capacities. The agency principle is derived from the UNCRC: Article 12 requires that a child capable of forming his or her own views shall have the right to express those views freely in all matters that affect him or her, and that his or her views shall be given due weight in accordance with his or her age and maturity. Like the best interests principle, it is an axis of the Convention, underpinning the entire ethos of the document. As such, the principle has been applied in a multitude of contexts - from legal proceedings in family courts to child protection hearings[132] - and its fundamental importance in the lives of child asylum-seekers, in particular, is apparent. It is probably in relation to decisions affecting the child's right to reside in the host country that that the idea of

[132] James, A. (2008) 'Children, the UNCRC, and Family Law in England and Wales' 46(1) *Family Court Review* pp.53-64

their right to participate becomes most meaningful for young immigrants. Provisions clustered around the notion of participation are therefore primarily found in the context of the asylum claim. As ideas about the capacity of children to participate in legal proceedings affecting them have evolved, the importance attached to ensuring a 'space' exists for this to happen has also grown, as Griffiths has argued:

> [B]uilding sensible law and policy in that space requires empirical knowledge of what children do and do not say, and how children are understood or misunderstood in different types of settings.[133]

In respect of child asylum-seekers, for example, this raises important capacity issues: whilst it is all very well setting down a right to access justice at EU level, this itself assumes the necessary expertise, knowledge and resources are available locally to make good on this commitment. This is an especially thorny area in relation to a population who are, by their very nature, often reluctant to discuss their experiences which - in the case of asylum - constitute the very foundation of their claim to be granted residence.

Throughout provisions in relation to asylum and temporary protection, an obligation exists to ensure that unaccompanied minors are provided with someone who can act as a representative on their behalf. The following provision is found in the asylum procedures, asylum reception, refugee qualification and temporary protection Directives:

> The Member States shall as soon as possible take measures to ensure the necessary representation of unaccompanied minors...by legal

[133] Griffiths, A. 'Hearing Children In Children's Hearings' [2000] Issue 3 (September) *CFLQ* 283, at p.283

guardianship, or, where necessary, representation by an organisation which is responsible for the care and well-being of minors, or by any other appropriate representation.[134]

There is some elaboration as to the tasks to be carried out by this person: the asylum procedures Directive stating that it is to "ensure the child's best interests",[135] whilst according to the refugee qualification Directive it is "to ensure the minor's needs are duly met" and there is an obligation to make regular assessments.[136] Certainly, the lack of cultural and linguistic familiarity with the environment in which the child finds themselves necessitates someone who can assist them in accessing not only immigration procedures but also welfare provisions such as school and medical care. Without such representation, there are surely doubts as to the extent to which a young asylum-seeker could meaningfully engage with the host society (yet perhaps this role is more about safeguarding the child's welfare than it is about upholding any sort of participative right). Indeed, it seems the expectation is that this person would go beyond that of a 'champion' acting on behalf of the child, and fulfil more of an *in loco parentis* role taking responsibility for the overall well-being of the young person: certainly the reference to a legal guardian would suggest this. It is no wonder, then, that this provision has been criticised for its failure to lay down the essential qualifications of the guardian/representative and the absence of a clear specification of their role. Whilst, ultimately, it would be for the Member States to identify the

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[134] Article 16(1) temporary protection Directive, *Op. Cit.* n.53; Article 19(1) asylum reception Directive, *Op. Cit.* n.36; Article 30 refugee Directive, *Op. Cit.* n.38; Article 17(1)(a) asylum procedures Directive (which defers to the provision in the asylum reception Directive), *Op. Cit.* n.37

[135] Article 2(i) asylum procedures Directive, *Ibid.*

[136] Article 30(2) refugee qualification Directive, *Op. Cit.* n.38

appropriate person and determine their function to fit with their own child welfare systems, as well as the specifics of their immigration regulation, the vagueness of the provision as it stands provides very little clarity. The concern put-forward here is that this lack of certainty as to scope of the obligation may result in Member States simply result in Member States opting for weaker, rather than stronger, standards in relation to appointing a representative. This is point is supported by the Separated Children in Europe Programme which identifies many instances of poor practice in this relation to guardians and representation, such that doubts are raised as to the extent that children's welfare is safeguarded in some Member States.[137] Further, doubts have been cast as to the appropriateness of allowing a legal guardian to be substituted for the far weaker standards of representation by "an organisation which is responsible for the care and well-being of minors" or "other appropriate representation".[138]

The asylum procedures Directive governs the entitlements of children relating to the determination of their claim. This instrument makes an inauspicious start to honouring the child's right to participate in legal proceedings affecting him/her as, whilst it ensures that each adult having legal capacity has the right to make an application for asylum on his/her own behalf, it allows Member States discretion as to whether to extend the same right to children.[139] Essentially, this means that young people who apply for asylum along with their parents will have their claim heard as part of a family unit. This approach assumes, first, that parents are aware of their child's experiences of persecution and, secondly, that they

[137] Smith, *Op. Cit.* n.124, at pp.15-17

[138] Save the Children (2007) *Submission from Save the Children Group on the Commission Green Paper on the Future of the Common European Asylum System*, at p.18, available at < http://www.savethechildren.net/alliance/europegroup/europegrp_pubs.html> (last accessed 6 February 2010), at p.18

[139] Articles 6(2) and 6(4)(a) asylum procedures Directive, *Op. Cit.* n.37

will adequately represent them. In addition, the possibility that children will have been subjected to treatment that gives them a valid claim for asylum in their own right is ignored.[140] Furthermore, before a decision on the applicant's case can be reached, adult asylum-seekers have the right to a personal interview. No such entitlement is extended to minors, however, with Member States retaining the right to determine the cases in which this will be offered.[141] It is difficult to see how this upholds the second paragraph of Article 12 UNCRC which states that "the child shall...be provided the opportunity to be heard in any judicial and administrative proceedings affecting [him/her]".[142] As far as legal representation is concerned, whilst there is a right to insist upon this, Member States are not obliged to provide it free of charge.[143] There is, however, the possibility to derogate from this in respect of *inter alia* those who lack sufficient resources.[144] Realistically few, if any, child asylum-seekers, particularly unaccompanied minors, will have the means

[140] It is, of course, acknowledged that, in the majority of cases, it would not be desirable for a child to pursue an asylum claim independently from their parents and, as such, most often it is entirely appropriate for parents to represent their children. It is, nonetheless, argued that it runs contrary to the principle of *non-refoulement* (*Op. Cit.* n.31), found in the 1951 Geneva Convention Relating to the Status of Refugees, as well as the participatory principle found in Article 12 UNCRC, to fail to guarantee all children access to an autonomous asylum claim. The instances in which a child would pursue a claim independent of their parents would, most likely, be few and far between. However, where, pertinent welfare issues suggest this would be the best option for the child, it is an essential entitlement. This may be the case where, for example, a child is put under pressure to unequivocally support their parents' claim (Nilsson, E. (2005) 'A Child Perspective in the Swedish Asylum Process: Rhetoric and Practice', in Andersson, H. et al. (eds.) *The Asylum Seeking Child in Europe*. CERGU, pp.73-87, at p.77)

[141] Article 12(1) asylum procedures Directive, *Ibid.*

[142] The full text of the paragraph reads: 'For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law' (Article 12(2) UNCRC)

[143] Article 15(1) asylum procedures Directive

[144] Article 15(3)(b)

to afford their own legal fees. Whilst the majority of Member States will have assistance schemes in place, it is disappointing that this requirement is not set down at EU level.[145] Of course, the obligation to provide unaccompanied minors with the representative discussed above - which is reiterated in the asylum procedures Directive - allows some form of adult representation in this process, albeit not necessarily of a legal nature.[146] Unfortunately, however, a raft of derogations are permissible in respect of the appointment of this person to assist the child during the asylum determination process: Member States may refrain from this obligation where the unaccompanied minor is likely to reach the age of majority before a decision on the asylum claim is taken, where he/she is married, or where he/she is aged 16 years or over.[147] Where an unaccompanied

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[145] The impact of the global recession on the provision of legal aid to the most vulnerable is already being felt with The Guardian newspaper reporting that in the UK organisations that currently provide this service are having to close their doors to child asylum-seekers because of cuts to funding: Robins, J. 'Denying Child Asylum Seekers a Legal Lifeline' *The Guardian* ,10 June 2010

[146] Conversely, Article 17(2)(b) allows Member States to refrain from appointing this representative where free legal advice is provided. The exact definition of a guardian differs between jurisdictions, as does the role of any such person relative to the child's legal representative (where such a person exists): as an example, in the UK, a system of 'dual representation' exists where the Children Act 1989 ensures a child in public law proceedings is offered assistance from a guardian appointed by the Children and Family Courts Advisory and Support Service (CAFCASS) alongside legal representation by a solicitor (for more analysis of different jurisdictional models of representing children in court proceedings see Bilson, A. and White, S. (2005) 'Representing Children's Views and Best Interests in Court: An International Comparison' 14 *Child Abuse Review* pp.220-239). A further associated problem in relying upon the child's guardian for legal representation has been identified by *Terre des Hommes* (Terre des Hommes (2009) *Disappearing, Departing, Running Away, A Surfeit of Children in Europe?:* Study carried out in Belgium, France, Spain and Switzerland on the disappearances of unaccompanied foreign minors placed in institutions, available at < http://www.crin.org/docs/Disappearing_children.pdf>, (last accessed 16 June 2010)). On the basis of research carried out in Belgium, France, Spain and Switzerland it was pointed out that where the guardian is appointed by the state (which is often the case), there exists a conflict of interests in challenging aspects of the asylum determination process (itself administered by the state) (at p.74). This underlines the need to keep the two roles of guardian and legal representative separate and to ensure that they are clearly defined

[147] Article 17(2) asylum procedures Directive. In respect of the last of these derogations, national legislation to this effect must have been in place by 1 December 2005

minor is granted an interview, and a representative is in place, this person must be given the opportunity to inform the young person about the meaning and possible consequences of the process and, where appropriate, give guidance on how to prepare for it. Furthermore, Member States shall allow the representative to be present at that interview and to ask questions or make comments.[148] There is an obligation to ensure that any person conducting the personal interview, as well as those making a decision on an asylum application, have the necessary experience and expertise in relation to the special needs of young people.[149] The Directive allows the use of medical examination to verify the age of unaccompanied minors, but places an obligation on Member States to ensure informed consent from the child before any such procedure takes place.[150] Overall, this Directive places very few concrete obligations on the Member States to ensure that child asylum-seekers are given both the opportunity to participate in the determination of their asylum claim and the support which would empower them to do so. Although Article 17 of the Directive is devoted to 'guarantees for unaccompanied minors', and provisions are couched in participation-friendly terms, this means little when the conditional language of the measures mean that there are many circumstances in which Member States can compromise on the degree to which they will incorporate the views of the child into the asylum determination process.

Participatory provisions so far have focused on legal proceedings and the child's right to representation. The only other area in which any allusion to the rights found within Article 12 UNCRC is found is in relation to

[148] Article 17(1)(b) asylum procedures Directive

[149] Article 17(4) asylum procedures Directive

[150] Article 17(5) asylum procedures Directive, *Op. Cit.* n.37

housing provision for unaccompanied minors. Both the refugee qualification and temporary protection Directives state that when competent authorities weigh-up the various options in relation to accommodation (be it with relatives, a foster family, an accommodation centre, or alternative provision), the views of the child should be taken into account in accordance with his or her age and degree of maturity.[151] Given the status of participation as an umbrella principle within universally accepted children's rights standards, it is curious that, in relation to child immigrants and asylum-seekers, housing is the only welfare domain in which the EU legislature has opted to make reference to it. Certainly, the idea that a child's views and wishes should be taken into account in decisions affecting them is no stranger to the areas of healthcare and education at a domestic level. One would be reluctant to conclude that the implicit inclusion of a duty to hear the views of the child in relation to some areas, implies an intention to ensure its exclusion in relation to others. Even less explicable is the duty found in relation to accommodation in the reception Directive. Here it is stated that:

> [A]s far as possible, siblings shall be kept together, taking into account the best interests of the minor concerned and, in particular, his or her age and degree of maturity".[152]

This is nothing short of a clumsy amalgamation of the child's right to be heard in accordance with his or her age and degree of maturity and the best interests principle. A brief glance at the preparatory documents to this legislation suggests that the somewhat haphazard use of the

[151] Article 16(2) temporary protection Directive, *Op. Cit.* n.53; Article 30(3) refugee qualification Directive, *Op. Cit.* n.38

[152] Article 19(2) reception Directive, *Op. Cit.* n.36

participatory principle is more a consequence of accident than design, arising from a tokenistic allegiance to children's rights principles.

4.3: The welfare needs of child immigrants and asylum-seekers

Interestingly, one of the most striking features of these provisions is the repeated use of standard provisions, most notably in the areas of representation (as outlined above), education, accommodation, health and family tracing. The overall sense is of a package of welfare entitlements geared towards children - with a basic formula in relation to each - cropping up in instruments that regulate different forms of migration and different stages of the migration process. The content of each key provision, along with the pieces of legislation in which it is found, is outlined below.[153]

Education:

"Member States shall ensure that minors have access to the educational system under the same conditions as nationals" (Article 14(1) temporary protection Directive; Article 10 asylum reception Directive; Recital 14 of the preamble to the long-term residents Directive; Article 10(b) trafficking Directive; Article 27(1) refugee Directive).[154]

Accommodation:

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[153] For ease of reference, where there would seem to be no significant legal impact, slight differences in the wording of these provisions have been glossed over. The exact wording of each can be seen in *Appendix 1*

[154] The word 'same' is replaced by 'similar' in both the asylum reception and long-term residents Directives. It is thought that there is little significance to this, particularly as Article 11(1)(b) long-term residents Directive states that: "Long-term residents shall enjoy equal treatment with nationals as regards education and vocational training, including study grants in accordance with national law.".

"Member States shall ensure that unaccompanied minors are placed either: (a) with adult relatives; or (b) with a foster family; or (c) in centres specialised in accommodation for minors; or (d) in other accommodation suitable for minors" (Article 16(2) temporary protection Directive; Article 19(2) reception Directive; Article 30(3) refugee Directive).[155]

Health:

"Member States shall provide, under the same eligibility conditions as nationals of the Member State...adequate 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" (Article 29(3) refugee Directive; Article 18(2) reception Directive).[156]

Family tracing:

"Member States, protecting the unaccompanied minor's best interests, shall endeavour to trace the members of his or her family as soon as possible. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis, so as to avoid jeopardising their safety" (Article 19(3) reception Directive; Article 30(5) refugee Directive).[157]

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[155] Each of these provisions goes on to give further guidance on the children's rights principles to be applied when making decisions about accommodation. This differs between instruments, as can be seen in *Appendix 1*

[156] The wording here is taken from the refugee Directive which differs in parts from the provision found in the reception Directive which makes specific reference to 'rehabilitation services', 'appropriate mental health care' and 'qualified counselling'

[157] Parts of this provision are also replicated in Article 10(c) trafficking Directive

Chapter 3 provides a more detailed analysis of provisions in the area of family life, education and healthcare relative to children so there is little need to say much more at this stage. One point, however, does merit further exploration: that is the origin of, or inspiration behind, these provisions. In 1997, before the Treaty of Amsterdam, the Council passed a non-binding Resolution on unaccompanied minors.[158] Many of the provisions outlined above are found in this document[159] which, interestingly, was somewhat maligned by commentators at the time for the low-level of children's rights protection it endorsed.[160] It is also significant to note that this Resolution is the product of the intergovernmental era, a period in which law-making was not subject to the controls of the central pillar which asylum and immigration became a part of following Amsterdam. To base the welfare entitlements of children so wholly upon an instrument that was subject to far less scrutiny than subsequent provisions (that of the European Parliament, for example) says little for the rights-based approach of these provisions.

4.4: Provision recognising the vulnerability of unaccompanied minors

[158] Council Resolution of 26 June 1997 on unaccompanied minors who are nationals of third countries OJ C 221/23, 19.7.1997

[159] See Article 3(3) on family tracing; Article 3(4) on legal representation; Article 3(6) on education; Article 3(7) on health; Article 4(4) on accommodation. In addition, aspects of Article 5(5) on the asylum interview are found in Article 17 asylum procedures Directive.

[160] Hunter, A. (2001) 'Between the Domestic and the International: The Role of the European Union in Providing Protection for Unaccompanied Refugee Children in the United Kingdom' *European Journal of Migration and the Law*, 3: 383-410, at 400-401; Ruxton 2003, *Op. Cit.* n.99, at p.23

A final point to make on the normative framework in relation to children in this legislation is to highlight the emphasis upon measures that recognise, and seek to respond to, the vulnerabilities of unaccompanied minors. In its policy documents, the Commission has repeatedly emphasised that provisions targeting this group are an essential part of a harmonised asylum system. Indeed, unaccompanied minors have received significantly more political and legislative attention than any other group of young people addressed by Title IV (Chapter 2, Title V, Part III TFEU, post-Lisbon), Part Three EC. As has been outlined above, there are measures making specific provision for young people in relation to material benefits (healthcare, education, and accommodation), family rights and procedural aspects of the asylum determination process. Overall, provisions in relation to unaccompanied minors are, understandably, largely framed in terms of the child's vulnerabilities as a lone migrant. It is quite revealing that, if we take the reception Directive as an example, the articles on young people are found within 'Chapter IV: Provisions for Persons with Special Needs', which begins with the general principle that:

> "Member States shall 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 healthcare".

There are examples of provisions on unaccompanied minors that set a high standard as far as recognising the specificity of children's experiences surrounding asylum is concerned. For example, the refugee qualification Directive largely defers to the principal instrument of international law in the area - the Geneva Convention - in defining a refugee as someone who is fleeing persecution in their country of origin.

However, whilst the Convention has been criticised for its bias towards adult male refugees (reflecting the post-World War II climate in which it was written),[161] the Directive makes some attempt to bring the definition more closely in line with the reality of 21st century persecution. In particular, it explicitly states that "[a]cts of persecution [within the meaning of Article 1A of the Geneva Convention can, *inter alia*, take the form of acts of a gender-specific or *child-specific* nature".[162] Bhabha - who has written extensively on the issue of children and asylum - highlights the growing numbers of boys who have undergone forced recruitment as child soldiers and girls who have suffered female genital mutilation as realities that do not fit within a refugee qualification system built around assumptions that credible asylum-seekers are politically active adult males.[163] Indeed, Ruxton has noted the difficulties faced by children across Europe in seeking to persuade Member State authorities that they are genuine victims of persecution. Although criticised for its failure to provide any definition of child-specific persecution, thus leaving the provision open to diverse interpretation in national legislation,[164] there is no doubting that this aspect of the refugee qualification Directive could, subject to sensitive and committed implementation by Member States, prove to be a significant driver in a more child-focused asylum system across Europe. On the other hand, there is a sense that overall a fairly low-level of children's rights provision is endorsed in respect of unaccompanied minors, with a number

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[161] Bhabha, J. (2004) 'Demography and Rights: Women, Children and Access to Asylum' *International Journal of Refugee Law*, 16(2): 227-243

[162] Article 9(2)(f) refugee qualification Directive, *Op. Cit.* n.38

[163] Bhabha, J. (2008) 'Seeking Asylum Alone: Treatment of Separated and Trafficked Children in Need of Refugee Protection' *International Migration*, 42(1), pp.141-147.

[164] Ruxton, S. (2005) *What About Us? Children's Rights in the European Union: Next Steps*, Euronet, at p.73

of immigration regulation practices - such as the use of detention centres and medical testing in age assessment procedures - having their legal and ethical validity questioned by children's rights campaigners.

Furthermore, the volume of child-sensitive provision for unaccompanied minors is in no sense borne out in relation to other groups of children: that is, those who have migrated within a family unit. This seems to be reflective of a wider tendency that the volume of legal provisions aimed specifically at children is reduced as their immigration status (or, more often, that of their parents) is perceived as being more secure. So, child-sensitive provisions are extensive in instruments that address more precarious types of migration - such as asylum and trafficking - but much less common in long-term and economic migration where children are assumed to have migrated within a family unit. For example, whilst the Directive addressing the status of long-term resident third-country nationals makes just a cursory reference to the right to access education of the children of long-term resident adults,[165] no less than four articles in the Directive that sets minimum standards for the reception of asylum seekers contain clauses geared towards the needs of children.[166] Whilst the extent (albeit not necessarily the quality) of these provisions is welcomed, they risk masking the inadequacy of the law in relation to children moving within families.

An illuminating example of this is the obligation, discussed in detail above, placed upon Member States to appoint a representative in respect

[165] Long-term residents Directive, *Op. Cit.* n.68

[166] Asylum reception Directive, *Op. Cit.* n.36

of unaccompanied minors.[167] This entitlement, however, only applies to lone children and does not extend to those in families.[168] Whilst, on the one hand, this is an understandable consequence of the EU's desire to respect the boundaries of family life, on the other, it fails to recognise the importance of children in their family's migratory experience. The reality for many adults in a culturally and socially unfamiliar setting and facing language barriers is that navigating the state welfare, education, health care and legal systems of unfamiliar European countries can present many difficulties. To do this on behalf of their children, especially when attitudes to childhood and formal schooling in their country of origin may be very different, throws up yet further challenges. Indeed, research has shown that it is often the children of migrant families that become the chief advocates and drivers of integration for the rest of the family.[169] Far from undermining the role of the family, or stifling children's autonomy, appropriate representation and guardianship can be empowering in the sense that it paves the way for migrant children to engage more fully in their environment.[170]

5: CRITIQUING THE APPROACH TO CHILDREN'S RIGHTS IN EU ASYLUM AND IMMIGRATION LEGISLATION

The previous section has identified a normative framework in relation to children in EU asylum and immigration law. Whilst the volume of

[167] Article 30(1) refugee qualification Directive, *Op. Cit.* n.38; Article 19(1) asylum reception Directive, *Op. Cit.* n.36; Article 17(1) asylum procedures Directive, *Op. Cit.* n.37

[168] Provisions on legal representation in the asylum reception, asylum procedures and refugee Directives are found in sections aimed exclusively at *unaccompanied* minors

[169] See Spicer, N. (2008) 'Places of Exclusion and Inclusion: Asylum-Seeker and Refugee Experiences of Neighbourhoods in the UK' *Journal of Ethnic and Migration Studies*, 34(3): 491-510

[170] *Ibid.*

provisions tailored towards young people is extensive, the discussion so far has illustrated that this does not necessarily translate into a well-engendered, rights-based policy in relation to children. Following on from the discussion above, attention is now turned to identifying a number of underlying problems in relation to the approach to children found in EU asylum and immigration legislation. Specifically, it is argued that although child-focused provisions exist, their potential for positive impact is somewhat diluted by four underlying weaknesses.

First, they are derogatory in the sense that they too often deviate from accepted standards of international law in relation to young immigrants and asylum-seekers. This is the case in relation to, for example, provisions endorsing the use of medical screening in age-determination cases and the possibility of accommodating children in accommodation centres. Equally, the lack of obligation to ensure that children can lodge an autonomous asylum-claim could even be argued to run counter to the very essence of the principle on *non-refoulement*[171] in the 1951 Geneva Convention, to say nothing for the participatory principles of the UNCRC

Secondly, they are selective in that often where provisions for the benefit of young people are found, they apply only to younger children. In fact, it is only children aged below 13 years that can be sure of accessing the entire gamut of child-focused provisions in this legislation. Age-based thresholds are found at both 12 and 15 years in the family reunification Directive; at 14 years in relation to fingerprinting to facilitate the functioning of the Dublin II system;[172] and at 16 years in relation to the appointment of a representative in the asylum determination process.

[171] *Op. Cit.* n.31

[172] Article 4(1) Eurodac Regulation, *Op. Cit.* n.52, permits fingerprinting only in relation to asylum applicants of at least 14 years of age

Equally selective (and somewhat perplexing) is the distinction drawn between married and unmarried minors in relation to this latter provision.

Thirdly, they are discretionary, as their implementation into national law is frequently optional. As will be outlined in the following chapter, the family reunification Directive proceeds on the basis of a narrowly drawn concept of the 'nuclear' family, whilst allowing Member States to extend the definition to other family members only where they *choose* to do so.[173] Given fears at European level in relation to 'asylum shopping' for the Member State with the most generous provisions, one questions the likelihood of national legislatures to adopt provisions that are ostensibly more appealing than those of their neighbours? Equally, Member States must actively choose to extend the provisions of the trafficking Directive, granting a residence permit to those victims that cooperate with the authorities in the fight against trafficking, to children. This potentially deprives children of a right to entry and residence in the Member State to which they are trafficked.

Finally, many provisions are vacuous leaving Member States to 'add teeth' to vague and indeterminate provisions. This was seen most vividly in relation to the legislature's reluctance to engage in elaborating upon the definition, and use, of the best interests principle in relation to its many and varied applications within this legislation, and equally, to the lack of clarity in relation to the role of the representative or guardian envisaged by this legislation.

[173] See recital 10 of the preamble to the family reunification Directive as an example of this (*Op. Cit.* n.71); see further the 'humanitarian clause' in Article 15 Dublin II Regulation (*Op. Cit.* n.49)

6. CONCLUSION

This chapter essentially opens the door to the rest of the thesis by providing an initial insight into the position of the child in EU asylum and immigration law. Whilst primarily providing an overview of relevant child-focused measures it has, more fundamentally, identified within them a normative framework that serves as a vehicle for subsequent conclusions in relation to the developing EU children's rights agenda. The chapter considered the two areas of asylum and immigration law and children's rights – and outlined their simultaneous, but essentially independent, evolution at EU level. Certain underlying trends were identified in relation to the way each of these areas has developed. When considering asylum and immigration, it pointed to the presence of a number of key instruments that now shape the rights and entitlements of asylum-seekers and immigrants of all ages across Europe. Equally, the discussion noted the impact of wider economic and political factors which have increasingly come into play as this body of law has sprung up over the past decade. In relation to the position of children, it was observed that an initial reluctance to recognise the status of young people as autonomous rights bearers has been increasingly challenged at EU level, culminating in the publication of the Commission's seminal Communication *Towards an EU Strategy on the Rights of the Child* in 2006. Crucially, in addition to identifying a future programme of action on children's rights in a number of areas of EU law and policy, it also pointed to the need to engage in wider, process-related measures to facilitate this emerging strategy. Thus, the birth of an ambitious children's rights agenda was noted, setting the scene for the subsequent analysis of child-focused provisions in asylum and immigration law. The ensuing discussion grouped these provisions into four essential categories: provisions that promote the best interests of the child; those

that promote the child's right to participation and representation; those that are focused on the provision of a number of welfare benefits; and, finally, those that reflect the vulnerabilities of unaccompanied minors. This analysis allowed the volume of child-focused provisions found within Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon) legislation to be contrasted with the somewhat disappointing children's rights model they endorse. Thus, the final section posited that these measures are largely derogatory, selective, discretionary and vacuous in nature. So, one reaches the end of this first substantive chapter with a rather bleak view of the position of the child in EU asylum and immigration law. Perhaps, though, the children's rights perspective adopted in this analysis asks too much of the EU and fails to respond to some of the more nuanced, competence related challenges outlined in the introduction to the first part of this thesis. In light of this, the next chapter develops some of the criticisms identified here, and uses the substantive areas of family life, education and health care to set these arguments within the context of the inherent characteristics of the EU as a legal order.

Chapter Three

THE WELFARE TRINITY: EU PROVISION IN RELATION TO THE FAMILY LIFE, EDUCATIONAL AND HEALTH CARE NEEDS OF ASYLUM-SEEKING AND IMMIGRANT CHILDREN

1. INTRODUCTION

This chapter seeks to build upon some of the points raised in *Chapter Two* in relation to the position of children's rights in EU asylum and immigration law by developing them in the specific context of family life, education and health care. The question considered in this analysis is whether the content of legislation constitutes an appropriate response to the rights and needs of children, in light of the very particular characteristics of the EU as a legal order. Put differently, has the EU deployed the legislative and policy tools at its disposal in a way that fits the social problem with which it is faced? In this way, the chapter will develop the more general criticisms of the position of children's rights in EU asylum and immigration outlined in the previous chapter, by setting them within the EU's broader regulatory framework. Therefore, rather than seeking to expose specific rights' violations, the analysis presented here adopts a critical perspective on both when, and how, the EU has chosen to exercise its powers.

The three substantive areas addressed by this chapter - family life, education and health - provide insightful case-studies on the EU's exercise of its regulatory powers in relation to child immigrants and

asylum-seekers for a number of reasons. First, they are probably the three welfare areas most immediately associated with the well-being of young people, particularly those who have experienced migration. Secondly, they have each given rise to an extensive set of provisions relating specifically to children within EU asylum and immigration legislation. Finally, the EU has a history of activity in relation to the three areas of family life (specifically that of EU national migrants), education and health care, each stemming from differing types of legal competence and pursuing distinct aims and objectives. As such, they give rise to a number of examples of successes and failures of EU intervention that can be used to assess the appropriateness of the strategies pursued in relation to child immigrants and asylum-seekers under Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon).

Most interestingly, however, they represent three different models of EU intervention in the lives of child migrants. To begin, provisions in relation to family will be shown to be largely discriminative and restrictive. Secondly, measures on education endorse notions of formal equality and are, thus, assimilative in nature. Finally, whilst largely dominated by a restrictive approach to immigration regulation, provisions on health care nonetheless acknowledge the specific needs of refugee and asylum-seeking children. This spectrum of approaches exposes the essentially complex, and often contradictory, interaction between the range of policy competences at play and the ways in which regulation can be deployed in pursuit of political and legal aims.

This analysis treats each area – family, education and health – in turn. Context in relation to each is provided through a brief literature review of available research on young immigrants and asylum-seekers in relation to each area. The range of sources drawn upon here has necessarily been

fairly wide and in no sense restricted to research relating specifically to those children who fall within the legal category addressed by this thesis (that, is third-country national children resident on the EU territory). In particular, work that has addressed EU citizen children, as well as that relating to young migrants resident in other developed countries (particularly the US), has been drawn upon. Clearly, whilst subtle differences exist between the experiences of different legal categories of child migrant they also have much in common, something acknowledged by the Commission in relation to their consultation on the educational experiences of third-country national and citizen migrant children.[1] The legal provisions outlined in each section are restricted to those that have arisen from the Community's competence in the area of visas, asylum and immigration (Articles 63 and 64 EC (Articles 78 and 79 TFEU, post-Lisbon)). Whilst brief acknowledgement is given to measures from outside this area where appropriate, the aim of this chapter is to critique the approach arising specifically from this area of competence.

2. A CRITIQUE OF CHILDREN'S FAMILY LIFE RIGHTS UNDER TITLE IV, PART THREE EC

The first welfare area relating to asylum-seeking and immigrant children considered in this chapter is their enjoyment of family life, recognised as one of the most essential features of young people's lives, with the institutions of family and childhood inextricably linked. Societies are founded upon the assumption that the most appropriate environment for children to grow up within is the family unit,[2] and the need to protect,

[1] Commission Green Paper – Migration and Mobility: Challenges and Opportunities for EU Education Systems, COM(2008) 423 final, at p.2

[2] This comment is made in full recognition of the ever-evolving nature of family constitutions and their accompanying 'advantages and disadvantages' and 'winners and

facilitate and promote kinship ties is deeply rooted in history, culture and religion. Rice summarises the role of the family, both for individuals (adults and children alike) and the wider community:

> Families are the lifeblood of our communities – the place where dreams are born, children are nurtured, adults find purpose, and life challenges are weathered.[3]

Legally, recognition of the essential role of the family is found at international level, Article 16(3) Universal Declaration of Human Rights stating that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State". This is further articulated in relation to children by the United Nations Convention on the Right of the Child 1989, which focuses upon a child's right to maintain contact with both parents[4] and, of most relevance to migrant children, to have claims for family reunification dealt with in a "humane, positive and expeditious manner".[5] Whilst the Charter does not explicitly recognise a right to family reunification, it does replicate Article 8(1) European Convention on Human Rights 1950 in recognising a right to a private and family life.[6] This is supplemented by an

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losers' (see Jensen, A-M. and McKee, L. (2004) *Children and the Changing Family: Between Transformation and Negotiation*, Routledge: Farmer)

[3] Rice, N. (1994), 'Local Initiatives in Support of Families' in Kagan, S. and Weissman, B. (1994), *Putting Families First* (San Francisco: Jossey-Bass Publishing), at p.321

[4] Article 9 UNCRC: this provision is subject to an exception where judicial authorities determine that contact with both parents is not within the child's best interests

[5] Article 10(1) UNCRC

[6] Article 7 Charter replicates the first paragraph of Article 8 ECHR, the text of which reads as follows: 1. Everyone has the right to respect for his private and family life, his home and his correspondence.; 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or

acknowledgement of the right of children to maintain contact with both their parents, unless it is contrary to his/her interests.[7] This section begins with a discussion of the tensions that often arise between maintaining family life and the migration process, and considers the EU's history of intervention in this area, in order to provide some background for a subsequent analysis of provisions on family life and children arising from Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon).

2.1: The EU and the interaction between family life and migration

The very process of travelling to, and settling in, another country can threaten kinship ties. Writing in the 1990s, Batistella pointed to the tension between maintaining family life and migration across borders:

> As it has developed in this century, migration implies separation from the family. Long gone are the images of entire families disembarking from steamboats onto Ellis Island or reaching the shores of South America.[8]

Whilst the law attaches importance to protecting the family unit, State powers have traditionally been reluctant to interfere in the private sphere of the household.[9] In a migration context, however, the state's regulation

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the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others

[7] Article 24(3). Further protection is given to the family unit in Article 33, which states that the family shall enjoy legal, economic and social protection in the context of professional life; and Article 9 which recognises the right to marry and found a family.

[8] Batistella, G. (1995) 'Family Reunification: Policies and Issues', 4 (2/3) *Asian Pacific Migration Journal*, pp.233-52, at p.244.

[9] Indeed, Fortin devotes a section of *Children's Rights and the Developing Law* (2009 (3rd Ed.), OUP, Part Three) to discussing the interaction between children's rights and parental powers, and comments that "social policy, strongly influenced by common

of an individual's right to entry and residence can raise conflicts with their enjoyment of family life. Indeed, the European Court of Human Rights has developed an extensive jurisprudence on the balancing exercise required when weighing up the rights of the individual to enjoy a family life, and the interest of States in maintaining their borders.[10] Commentators have noted the difficulty that many immigrant and asylum-seekers, children included, can face when seeking to maintain kinship ties in the face of illiberal immigration regulations.[11]

The EU has a strong history of intervention in the area of migrants' family life: a history that was primarily based on facilitating free movement, rather than endowing individuals with rights-based entitlement. This was particularly the case with children, who were never really characterised as anything other than 'dependents' for the purposes of family rights in the free movement provisions. However, this has arguably been somewhat redressed by some highly purposive ECJ judgments, which revealed themselves to be more responsive, or sensitive, to individual rights.[12] As far as the position of children is

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assumptions about family privacy and parental autonomy, reflects a distinct lack of sympathy for the view that the law should attempt to interfere with family life" (at p.322)

[10] See, most notably: judgment of 21 December 2001, No 31465/96, *Sen v the Netherlands*. See, further: judgment of 21 June 1988, No 10730/84, *Berrehab v The Netherlands*; judgment of 18 February 1991, No 12313/ 86, *Moustaquim v Belgium*; judgment of 24 April 1996, No 22070/93, *Boughanemi v France*; judgement of 3 July 2001, No 47390/99, *Javeed v the Netherlands*. For a recent discussion of this case-law, see: Stevens, D., 'Asylum-Seeking Families in Current Legal Discourse: A UK Perspective', (2010) 32(1) *Journal of Social Welfare and Family Law*, pp.5-22

[11] For a summary of contemporary issues surrounding family migration see: Batistella (1995), above note; and Lahav, G. (1997) 'International Versus National Constraints in Family-Reunification Migration Policy', 3 *Global Governance*, pp. 349-72.

[12] Spaventa, E., 'From *Gebhard* to *Carpenter*: Towards a (non-)Economic European Constitution' (2004) 41 CMLRev, p.743; Spaventa, E. (2007) *Free Movement of Persons in the European Union: Barriers to Movement in their Constitutional Context*, Kluwer, especially Chapters 6 and 7. Most recently, on the willingness of the ECJ to

concerned, the most relevant cases here are *Baumbast*[13] and, later, *Chen.*[14] Indeed, these judgments are fairly groundbreaking as they allowed adults to derive a status as the family members of children. Yet, importantly, an entirely different legal framework with different teleological factors - more clearly articulated than those in relation to third-country nationals – shapes decision in relation to the rights of family members of citizens. Therefore, whilst they provide interesting background, they ultimate reveal little about how family rights will be regulated under Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon). What it does do, however, is tell us that the challenge of balancing individual rights to family life with immigration regulation is hardly new to the EU.

In the case of third-country nationals,[15] Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon) grants the Community clear competence to enact measures on family reunification. Article 63(a) EC (Article 79(2)(a) TFEU, post-Lisbon) states that measures on immigration policy may be enacted in relation to:

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grant rights to family members see *Metock v Minister for Justice, Equality and Law Reform* (C-127/08) [2008] IEHC 77; [2008] 3 C.M.L.R. 39, and associated analyses (Currie, S. 'Accelerated Justice or a Step Too Far? Residence Rights of Non-EU Family Members and the Court's Ruling in Metock' (2009) 34(2) *European Law Review*, pp. 310-326; Costello, C. 'Metock: Free Movement and "Normal Family Life" in the Union ' (2009) *Common Market Law Review* pp. 587-622)

[13] Case C-413/99, *Baumbast and R* , [2002] ECR I-7091

[14] Case C-200/02, *Zhu and Chen*, [2004] ECR I-9925

[15] That is, 'wholly' third-country national situations where no party is a Member State national, thus deriving their rights from Title IV, Part Three EC (Chapter 2, Title V, Part III EC, post-Lisbon) provisions. This is as opposed to situations involving third-country national family members of EU citizens whose rights to entry and residence are governed by the citizenship Directive: Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158/77, 30.4.04

"...conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion".

Furthermore, family rights are clearly an important aspect of wider policies in relation to the Common European Asylum System, particularly where the reception of asylum seekers and the rights and entitlements of refugees and beneficiaries of humanitarian protection are concerned. The following three sections consider children's family life rights under Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon). This analysis is three-fold: (1) an exploration of provisions addressing family reunification; (2) a discussion of measures to facilitate the unity of family groups who are resident on the EU territory; and (3), a critique of the definition of family found in this legislation. This analysis seeks to provide a clearer insight into what shapes the scope and content of provisions on the family life of young immigrants and asylum-seekers in EU law. Given the relatively valueless nature of the EU's competence in relation to visas, asylum and immigration - and the broader area of Freedom, Security and Justice - this is a particularly useful site for analysis of the position of children's rights in this legal framework, as family-related law and policy can hardly be impervious to the rights of the child. Furthermore, such a clear competence exists in relation to a number of family-related areas that an analysis of provisions in this area demonstrates particularly clearly the approach to the regulation of young people's rights under this legislation.

2.2: Children and family reunification provisions under Title IV, Part Three EC

The discussion begins by outlining provisions on family reunification (or reunion),[16] defined by the Office of the High Commissioner for Human Rights thus:

> Family reunification refers to the situation where family members join another member of the family who is already living and working in another country in a regular situation.[17]

The EU itself has recognised the benefit to immigrants generally, as well as society as a whole, of provisions that facilitate family life, stating that:

> "Family reunification is a necessary way of making family life possible. It helps to create socio-cultural stability facilitating the integration of third-country nationals in the Member State, which also serves to promote economic and social cohesion".[18]

Of course, the family reunification Directive is the primary piece of legislation in the area. If appropriate conditions are met, the provisions authorise the entry and residence of certain family members of legally resident third-country nationals and open up, albeit in a limited manner,

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[16] No distinction is drawn between the terms reunion and reunification for the purposes of this analysis

[17] Office of the High Commissioner for Refugees, *OHCHR Migration Papers: Family Reunification*, November 2005, available at <http://www2.ohchr.org/english/issues/migration/taskforce/docs/familyreunification.pdf> (last accessed 17 January 2010)

[18] Recital 4 of the preamble to Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification OJ L 251/12, 3.10.2003

access to education and employment.[19] This Directive is primarily aimed at those third-country nationals who enjoy a degree of permanency of residence in the host state: indeed, as far as provisions on family life are concerned, the long-term residents Directive largely defers to the family reunification Directive.[20] The scope of the Directive extends to those with recognised refugee status[21] (however asylum-seekers are excluded).[22] Ostensibly, the Directive makes heavy weather of its rights-based approach to family reunification: aside from the inclusion of the phrase "*right* to family reunification" in its title,[23] repeated reference is made to the Directive's compliance with fundamental rights, with Article 8 ECHR and the Charter mentioned in particular,[24] alongside a more general statement of respect for the rights of women and children.[25] McGlynn, however, describes this commitment as "alarming" in light of the nature of the Directive's provisions which, she argues, endorse a fairly low level of entitlement.[26] This criticism is borne out by examining the Directive's

[19] See Article 14 family reunification Directive, *Ibid.*, for the education and employment entitlements of family members

[20] See, for example, Article 16 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents OJ L 16/44, 23.1.2004

[21] See Chapter V (Articles 9 to 12) family reunification Directive, *Op. Cit.* n.18

[22] Article 3(2)(a) family reunification Directive, *Ibid.*

[23] This is a significant factor given that, in principle, no explicit right to family reunification is enshrined in international law (see ILO, *International Labour Conference, 87th Session, Migrant Workers, Report III (1B)* (Geneva, June 1999) at para.473). Perruchoud, however, argues that a *right* to family reunification is implicit where the law recognises the two rights of free movement and enjoyment of family life (see R. Perruchoud (1989) Family Reunification, *International Migration*, XXVII (4), p.509)

[24] Recital 2 of the preamble to the family reunification Directive, *Op. Cit.* n.18

[25] Recital 11 of the preamble to the family reunification Directive, *Op. Cit.* n.18

child-focused provisions, as well as their subsequent interpretation by the Court, in more detail.

To understand the legal framework laid down in this Directive, it helps to distinguish between cases that involve children as 'joiners' and those in which they are the 'joined'. Where a child has remained in their country of origin (or another third-county), whilst one or both of their parents is resident in, for example, an EU Member State, with no plans to return, they can join their parents if the host state's rules in relation to admission of family members allows it. In other words, the child's enjoyment of family life is entirely dependent upon a sympathetic immigration regime, with their rights as a 'joiner' determined by the laws applicable to the Member State in which a parent resides. Because of this, rights to family life that, at first instance, may seem to be for the benefit of adult family members, impact greatly upon children. Under the Directive, for an adult parent to be eligible, this person, known as the 'sponsor', must have been granted a residence permit valid for at least one year[27] and be able to demonstrate that he/she has suitable accommodation, comprehensive sickness insurance and stable and regular resources.[28] If this is met, the sponsor can be joined in the host country by, amongst other family members, their or their spouse's unmarried minor children.[29] However, Article 4 of the Directive contains two controversial derogations that allow Member States to introduce legislation restricting those children

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[26] McGlynn, C., 'Family Reunion and the Free Movement of Persons in European Union Law' (2005) 7(3) *International Law FORUM de droit international* pp.159-166, at p.165

[27] Article 3(1) family reunification Directive, *Op. Cit.* n.18

[28] Article 7(1) family reunification Directive, *Ibid.*

[29] Article 4(1) family reunification Directive, *Ibid.*, states that minor children are understood to be under the age of majority set by the law of the Member State

who are eligible on the basis of their age when the application for reunification is submitted. The first of these is that children over the age of twelve years may be subject to a "criteria for integration" before allowing reunification.[30] Somewhat unhelpfully, "criteria for integration" is not defined at any point in the Directive. The second permissible derogation allows Member States to require that any application for family reunification is submitted before a child reaches the age of fifteen.[31] Those children who are allowed to join their parents in the host Member State on the basis of the Directive will be granted a residence permit of at least one year's duration,[32] subject to their parents continuing legal residence. They will also be able to access education and, where applicable, employment.[33] Ultimately, when the child reaches adulthood they may be entitled to an autonomous residence permit.[34] In spite of this positive entitlement, it seems that the provisions in this Directive are very much geared towards minimising the likelihood of a child gaining permanent residence, thus lending weight to the argument that the instrument is more about immigration control than it is the rights of the individual.

The provisions in Article 4 of the family reunification Directive that restrict the circumstances in which older children can benefit from family reunification with their parents in the EU, were the subject of an action

[30] Final subparagraph of Article 4(1), family reunification Directive, *Ibid.*

[31] Article 4(6) family reunification Directive, *Ibid.*

[32] Article 13(2) family reunification Directive, *Ibid.*

[33] Article 14 family reunification Directive, *Ibid.*

[34] This is to be granted to those who have reached the age of majority, but must be within five years of residences (Article 15(1) family reunification Directive, *Ibid.*)

for before the ECJ.[35] The European Parliament sought annulment of the relevant provisions on the basis that they breached the right to respect for family life, and non-discrimination in respect of this right, as well as failing to have regard to the best interests of children. These arguments were rejected by the Court who attached great importance to the margin of appreciation accorded to states under international law in assessing applications for family reunification. From a children's rights perspective, the decision was disappointing. Most obviously this is because the provisions of the Directive that restrict a child's right to family reunification were upheld. In practical terms, however, it seems that this had little effect on individuals applying for family reunification following the ruling: to implement these derogations relevant national legislation had to have been enacted before the Directive's deadline for transposition and, in the event, no Member State opted to do take advantage of this.[36] However, it is the symbolic impact of this judgment, particularly the precedent it sets for future ECJ cases involving child immigrants and asylum-seekers, that is most disappointing. Writing shortly before the judgement, McGlynn commented that:

> All the rhetoric of the Charter and numerous policy documents will mean little if, when faced with a direct challenge to children's rights,

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[35] Case C-540/03, *Parliament v Council* [2006] E.C.R. I-5769; [2006] 3 C.M.L.R. 28. This judgement is the subject of an analysis by the author of this thesis in the *European Law Review*: Drywood, E. 'Giving with One Hand, Taking with the Other: Fundamental Rights, Children and the Family Reunification Decision' (2007) 32(3) *European Law Review* pp. 396-407. Therefore, aspects of this discussion have previously been published elsewhere

[36] This requirement is found in Final subparagraph of Article 4(1), family reunification Directive, *Op. Cit.* n.18. According to Article 20 of this provision, the deadline for transposition was 5 October 2005. The author believes, anecdotally, that this provision was inserted at the insistence of the Austrian government who, at the time of the Directive's formulation, had plans for legislation that would introduce exactly these restrictions. The author can find no evidence that the legislation was ever enacted and, once again anecdotally, has been told that they never came to fruition

the Court backs down and panders to the securitisation and anti-immigration agenda of the Member State governments.[37]

The Court's reasoning, in particular its deployment of children's rights principles, seems to confirm McGlynn's fears. Although recognising the significance of the UNCRC in relation to general principles of Community law, the Court largely skirted over children's rights principles. Only fleeting consideration was given to Article 10(1) UNCRC, in spite of the obligation found within it to deal with a child's application for family reunification in a "humane, positive and expeditious manner". Equally, the Court, whilst acknowledging the presence of the best interests principle in Article 24(2) of the Charter, never engaged in any assessment of whether it is upheld by the disputed provisions. Instead, the decision is based almost entirely on an assessment of the boundaries of the margin of appreciation accorded to States in weighing up their obligation to respect family life with their focus on controlling the entry of non-nationals into their territory, found in the Strasbourg court's judgments in relation to Article 8 ECHR.[38] Furthermore, the decision is largely constructed around untested assumptions about migrant children and family life that do little to reassure the reader of the capacity of the Court to deliver reasoned and convincing judgements in relation to young people. For example, the Court supports the Council's justification for using the age of twelve as a threshold for accessing family reunification provisions by arguing that it is an age at which children have reached a crucial stage in their development, and that integration into another environment would pose

[37] C. McGlynn *Families and the European Union: Law, Politics and Pluralism*, Cambridge University Press, 2006, at p.77

[38] For example, *Sen v Netherlands*, *OP. Cit.* n. 10 (Paragraph 36 *Parliament v Council*, *Op. Cit.* n.36)

difficulties.[39] Whilst the view that children reach a crucial point in their development around the age of twelve is widely supported, equally important is that it is not until a much later age that children have fully developed personalities and cognitive abilities.[40] Crucially, it is believed that these developments are nurtured within the support and love of a family. Secondly, and more worryingly, is the following statement by the Court:

> ...the fact that a spouse and child over 12 years of age are not treated in the same way cannot be regarded as unjustified discrimination against the minor child. The very objective of marriage is a long-lasting married life together, whereas children over 12 years of age will not necessarily remain for a long time with their parents.[41]

It would appear that the Court is concerned here with minimising the effect of migration on the population of the host-state, somewhat of an emerging theme in this assessment of the family reunification Directive. Reading between the lines, the Court seems to be of the view that married couples will stay together as a single unit, whilst the older children of migrants may marry and, it seems their fear is, that they themselves will have children, thus affecting the population as a whole. However, the Court's idea that married couples have a long-term future, while the parent-child relationship is short-term, has little basis in reality.[42] It runs

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[39] Paragraph 48 *Parliament v Council, Ibid.*

[40] For a summary of research evidence on child and adolescent developmental capacity for decision-making see Fortin, *Op. Cit.* n.9, at pp.72–74

[41] Paragraph 75 *Parliament v Council, Op. Cit.* n.35

[42] On the UK, for example, see Office National Statistics *Social Trends No 36* (2006) available at: <www.statistics.gov.uk>). Indeed, if divorce statistics across Europe are also considered (Statistics published by Eurostat in May 2006 suggest that nearly 1 in 2 marriages in Europe end in divorce: Eurostat *The Family in the EU 25 Seen Through*

counter to many people's views of family to conclude that parents of thirteen year olds, or the children themselves, see their family set-up as temporary. Further, this sort of conceptualisation fails to respond to a changing demographic across Europe in which it has been shown that children are living with their parents for longer. To summarise, then, an assessment of family reunification provisions aimed at allowing children to join their parents in an EU Member State, and their interpretation by the ECJ, leaves little doubt that where Member State interests in a well-functioning immigration regime come into conflict with the rights of the child to enjoy family life, the former will prevail.

The second set of provisions in the family reunification Directive relate to children as the 'joined': these are aimed at young people who have arrived in the host state alone and remain separated from their parents or other close family members, known in the legislation as unaccompanied minors. The scenarios which may lead to family separation for children, immediately before or during migration, are too numerous and complex to discuss in any detail here. The UNHCR gives some indication, however, as to how this might occur when it points to "the chaos of conflict, flight and displacement".[43] Whilst it is difficult to find recent accurate statistics on unaccompanied asylum-seeking minors currently in the EU Member States, estimates from 2000, the beginning of the first phase of the common European asylum system, put the figure at around

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Figures, 9th May 2006, available at <http://epp.eurostat.ec.europa.eu>) there is a certain irony to the Court of Justice's view of 'family'.

[43] United Nations High Commissioner for Refugees, *Summary Note: UNHCR's Strategy and Activities concerning Refugee Children* (Geneva, 2005), available at: http://www.unhcr.org/refworld/pdfid/439841784.pdf (last accessed 26 February 2010), at p.3

16,000 applications across Europe.[44] The importance of laws and policies that are sympathetic to the need to be reunited with relatives if (and as soon as) possible is clear given the difficulties of life without a family for young people. Thornblad has commented that for refugee children "the separation from the parents is in the majority of cases the greatest trauma".[45] These are sentiments echoed by the UNHCR:

> Given the fundamental role played by the family in the protection, physical care and emotional well-being of its members, separation from families is particularly devastating for refugee children.[46]

Under the family reunification Directive, all refugees - adults and children - are exempt from provisions that require the sponsor to be financially self-sufficient, in light of the hardship they are likely to have suffered when fleeing their country of origin.[47] In respect of unaccompanied minors who have been granted refugee status, the definition of family members who are eligible for reunification with the child in the host state is extended to include "first-degree relatives in the

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[44] Divergences in definitions and collection of statistics differ across the Member States making it very hard to find an accurate figure. However, these estimates were made by the UNHCR in 2001 on the basis of information available. 16, 100 applications were made by unaccompanied minors in 26 European countries: this covered the current EU-27, with the exception of Cyprus, Greece, Latvia and Malta; but also included statistics from Croatia, Norway and Switzerland. UNHCR *Trends in Unaccompanied and Asylum-Seeking Children in Europe, 2000*, November 2001

[45] Thornblad, H. (2001) *Providing a choice for separated refugee children – A report on the value of renewing home country links*, Save the Children, p.10

[46] Cited in Bhabha, J. and Schmidt, S. (2006) '*Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the US*', Harvard College, at p.8 (original citation not available)

[47] Article 12(1) and Recital (8) of the Preamble to the family reunification Directive, *Op. Cit.* n.18. According to Article 12(1) Member States may choose not to apply this exception where family reunification is possible in another country with which the sponsor has links, or the refugee fails to apply for family reunification within three months of the granting of their status

ascending line".[48] Where no such relative exists, there is a possibility for Member States to choose - although there is no obligation - to offer reunification to the child's "legal guardian or any other member of the family".[49] In one sense, these provisions are a rare but welcome example of EU legislation recognising children as autonomous rights holders, allowing parents to derive associated benefits from their status. Historically, it is children's rights that have frequently been categorised as 'parasitic' on the immigration status of their parent(s).[50] Recognition of the unique position of young unaccompanied refugees, as migrants who, although minors, are resident in Europe independent of their parents, has bucked this trend and provided a tangible right that makes a shared life for the families of these children a real possibility. Furthermore, this is a refreshing change from the tone of the provisions discussed above relating to children as the 'joiners' which appear to conceptualise young migrants as potentially undesirable burdens on the host state. Unfortunately, however, this initial enthusiasm is quickly tempered when the extent of the entitlements of family members who are granted residence on the basis of family reunification are considered. Although under the Directive family members are, in principle, entitled to access employment (including self-employed activity) and vocational guidance/training,[51] this may be restricted in relation to relatives in the ascending line, thus significantly limiting the opportunities offered to the

[48] Article 10(3)(a) family reunification Directive, *Ibid.*

[49] Article 10(3)(b) family reunification Directive, *Ibid.*

[50] McGlynn, C., *Families and the European Union: Law, Politics and Pluralism,* (New York: Cambridge University Press, 2006). See the ECJ's judgment in *Baumbast, Op. Cit.* n.13, as an example of this. This case can be contrasted with that of *Chen, Op. Cit.* n.14, in which the third-country national mother of a Union citizen was able to derive her right to entry and residence in the UK from her infant daughter

[51] Article 14(1) family reunification Directive, *Op. Cit.* n.18

parents of a child refugee.[52] This leads one to question the efficacy of family reunification provisions in relation to children if, at face value, they do not guarantee their parents access to paid employment. The very idea underpinning the Directive - that of facilitating integration through allowing migrants to enjoy family life - is somewhat undermined where Member States are effectively permitted to exclude beneficiaries from becoming full and productive members of the host society. This discussion now turns to those provisions aimed at ensuring family members who have migrated together can remain as a unit in the host state.

2.3: Children and measures to facilitate family unity under Title IV, Part Three EC

From the moment of arrival in the host state, the rights, entitlements and freedoms of migrant families are determined by the immigration regulations in force in that country. Therefore, the possibility of a family remaining as a unit can be largely dictated by policies in relation to where they live. This is particularly so in the case of most asylum-seeking families who are unable to afford housing and are at the mercy of local authorities to find them somewhere to reside as a unit. [53] Wherever possible, of course, this means keeping children with their parents. In relation to separated children, however, the need to house siblings together, where appropriate, has been identified as essential not just for the benefit of the young people themselves, but also in terms of their

[52] Article 14(3) family reunification Directive, *Ibid.*: "Member States may restrict access to employment or self-employed activity by first-degree relatives in the direct ascending line..."

[53] In the UK, for example, see: Perry, J. (2005) *Housing and Support Services for Asylum-Seekers and Refugees: A Good Practice Guide*, Chartered Instituted of Housing (Joseph Rowntree Foundation)

wider integration into host society.[54] Ensuring families are provided with accommodation as a unit can be problematic given that in many Member States there is a dearth of housing suitable for larger groups.[55] Furthermore, the dispersal policies adopted in some European countries in recent years - whereby migrants are compulsorily distributed across the host state territory to remove the burden upon major asylum-receiving cities[56] - can pose a significant challenge to individuals' capacity to maintain kinship ties, particularly with extended family members.[57]

In making provision specifically for unaccompanied minors, the refugee qualification Directive contains provisions that seek to ensure existing family units are maintained in the host state. Member States are encouraged (albeit not obliged) to provide accommodation for children with adult relatives[58] and to "as far as possible" keep siblings together.[59] In respect of asylum-seekers, the same measures exist in the reception Directive and are underpinned by a general obligation to, wherever

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[54] Ruxton, S. (2000) *Separated Children Seeking Asylum in Europe: A Programme for Action* Save the Children and UNHCR, at p.88.

[55] Perry *Op. Cit.* n.53, at pp.30-31

[56] This was the case in the UK with London, for example: Bloch, A. (2000) 'A New Era or More of the Same?' 12(1) *Journal of Refugee Studies*, pp.29-42, at p.40

[57] For a comparative review of dispersal policies in three EU Member States (UK, Sweden and The Netherlands) see: Robinson, V. *et al* (2003) *Spreading the Burden? A Review of Policies to Disperse Asylum-Seekers and Refugees*, Policy Press

[58] Article 30(3)(a) Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ 1304/12, 30.9.2004

[59] Article 30(4) refugee qualification Directive, *Ibid.*

possible, maintain family unity through the provision of housing.[60] The commitment to facilitate family life through housing is somewhat weakened by a number of alternative accommodation options in relation to separated young people.[61] Moreover, the highly conditional nature of provisions relating to housing children as family units surely opens the door to a raft of justifications as to why this is not possible on the part of Member States.

2.4: The concept of 'family' in EU asylum and immigration law

The EU's conceptualisation of family in internal free movement provisions has long been questioned because of, amongst other reasons, the privileged status it accords to heterosexual marriage and the biological parent-child relationship.[62] Critics have tirelessly waged war on what many view as a distinctly unenlightened notion of family and fought to ensure that these provisions better reflect the reality of contemporary family life and migration (and have been, to a certain extent aided by the ECJ in this endeavour), some of these criticisms have been addressed by the citizenship Directive. It seems, however, that as far as defining the category of persons that are able to benefit from family-

[60] Articles 8, Article 14 (2)(a) and 19(2) Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L 31/18, 6.2.2003

[61] Specifically: foster family, centres specialised in accommodation for minors or other accommodation suitable for minors (Article 30(2) refugee qualification Directive, *Op. Cit.* n.58 and Article 19(2) reception Directive, *Ibid.*)

[62]See Stalford, H., 'Concepts of Family Under EU Law: Lessons from the ECHR', (2002) 16 *International Journal of Law, Policy and the Family*, 410; Stalford, H., 'The Citizenship Status of Children in the European Union', (2000) 8 *International Journal of Children's Rights*, 101; Ackers, L. and Stalford, H., *A Community for Children? Children, Citizenship and Internal Migration in the EU*, (Aldershot: Ashgate, 2004), 69-75; Woods, L., 'Family Rights in the EU – Disadvantaging the Disadvantaged', (1999) 11(1) *Child and Family Law Quarterly*, 17; McGlynn, C., 'The Europeanisation of Family Law', (2001) 35(1) *Child and Family Law Quarterly*, 35.

related provisions under Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon) legislation there is little evidence that any lessons have been learnt. For example, a reluctance to extend the possibility of family reunification to any relative other than the parents of immigrant and asylum-seeking children (be they refugees, asylum-seekers, beneficiaries of temporary protection or any other young migrant) pervades this legislation. Indeed, the text of the family reunification Directive confirms that the legislature is wedded to the notion of the 'nuclear' family, with confirmation found in the preamble that "family reunification should apply in any case to members of the nuclear family, that is to say the spouse and the minor children".[63] Across this legislation, whilst some provisions suggest that Member States may *choose* to offer family reunification to "other close relatives" or "family members",[64] an *obligation* is in place only in relation to parents. Clearly, Member States are keen to maintain their borders and not to extend residence permits on the basis of family reunification to what may be perceived as an unmanageably wide category of relatives. However, restricting family reunification to the parent-child relationship can be problematic on a number of fronts. First, where the child is the sponsor in an application for family reunification - that is, they seek to be joined by their parents in an EU Member State - the exclusion of the child's siblings from the definition of eligible relatives can pose a threat to family unity. Where a child's eligible parents have other children who have remained in the

[63] Recital 4 of the preamble to the family reunification Directive, *Op. Cit.* n. 18

[64] For example: Articles 15(1)(b), 15(2) and 15(3) Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof OJ L 212/12, 7.8.2001; Articles 15(1) and (3) Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national OJ L 50/1, 25.2.2003

country of origin (or other third-country), they may be faced with a 'Sophie's choice' dilemma in which they must choose with which of their children they will reside and enjoy family life.

Third-country national children come from a range of cultures, within many of which the role of the extended family takes on far more significance than in the West. The following comment has been made in relation to separated Caribbean families, and is echoed elsewhere:

> In Caribbean family networks all social and economic rights and obligations are not concentrated in smaller autonomous nuclear family units, but are rather placed in wider webs of relations where relatives outside the immediate family may play a prominent part.[65]

Furthermore, the very nature of forced migration means that children fleeing to Europe are likely to have come from areas that are beset by war, famine, poverty and illness.[66] The high levels of mortality arising from these events can lead to family structures that are far removed from the traditional European nuclear family. As an example, it is estimated that 12 million children in sub-Saharan Africa have been orphaned by the AIDS epidemic on the continent, with around a fifth of under 18s in countries such as Botswana, Zambia and Zimbabwe having lost one or both parents to the disease.[67] Research has shown that, following these events, it is often grandmothers and female siblings that assume the

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[65] K. Fog Olwig "Narratives of the Children Left Behind: Home and Identity in Globalised Caribbean Families" (1999) 25(2) *Journal of Ethnic and Migration Studies* 267-284, at p.268

[66] On this point, see: Ayotte, W., *Separated Children Coming to Western Europe: Why They Travel and How They Arrive* (London: Save the Children, 2000)

[67] *Report on the Global Aids Epidemic*, UNAIDS, 2008, at p.163

primary role within the household and, therefore, many parenting duties.[68] Those children that flee this sort of background may leave behind relatives to whom they have extremely close bonds, but who do not fit the traditional category of immediate family members as understood in the Western world.[69] Finally, to deprive children of the social and cultural familiarity offered by contact with a sustained relationship with family members may lead to wider social problems. As Ayotte explains, this sort of interaction can assist children's integration into the host society:

> Taking a holistic community-based approach can reduce some of the tensions inherent in the meetings of culture. For example, any problematic symptoms or behaviours that children exhibit could be cross checked with members of that child's community so that their meaning can be verified. What is normal in one culture can be seen as unacceptable, even deviant, in another.[70]

2.5: Balancing children's right to a family life with immigration control

When criticising the EU for the relatively marginal role children's rights have played in determining the scope of measures on the family life of immigrants and asylum-seekers, the nature of its competence to legislate

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[68] *Ibid.*, at p.164

[69] This argument is lent further weight by the obligation to ensure alternative care for children deprived of their family environment that is found in Article 20 UNCRC. In particular, paragraph 3 of this provision states that 'due regard should be paid to desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background', supporting the argument that, where possible, this role should be carried out by a family member

[70] Ayotte, W. (2002) *Separated Children, Exile and Home Country Links*, Save the Children: Denmark

in the area should be borne in mind. Whilst these provisions regulate the lives of children, they arise from the EU's law-making powers under Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon) and not a general competence in the area of children's rights. Is it, therefore, surprising that they seem to be more about ensuring the Member States are able to control the flow of immigrants into their territories, than endowing children with a comprehensive set of family life rights? There is a palpable sense, both in the content of this asylum and immigration legislation, and the Court's judgment in *Parliament v Council*,[71] that the EU does not want to impose on the Member States rules that may be seen to open the floodgates to a large number of third-country national migrants, something that may be explained on a number of counts.[72] First, generous rules granting family members residence rights seem to prompt fears on the part of authorities as to the burden that will be placed on national welfare provisions.[73] Secondly, it is a reflection of how poorly any level of investment in the needs of immigrants and asylum-seekers plays at a political level, something of which national politicians will be acutely aware. Finally, it should not be forgotten that these largely domestic concerns still come into play, so long as Member States retain the right to veto proposals in the area of

[71] *Op. Cit.* n.35

[72] It is, of course, acknowledged that the Member States must adopt laws and policies on family reunification consistent with their own fundamental rights obligations under international law. See, further: Cholewinski, R., 'Family Reunification and Conditions Placed on Family Members: Dismantling a Fundamental Human Right', (2002) 4 *European Journal of Migration and the Law*, at pp.271-290

[73] The 'burden' of family members of recently arrived EU migrants has become somewhat of a preoccupation of the right-wing media in the UK, for example: see M. Hickley *Polish Migrants Living in Britain Claiming £21 Million in Child Benefits for Children Left Behind*, Daily Mail, 29th January 2008.

asylum and immigration.[74] It seems, therefore, that to a certain extent the EU is happier to leave the slightly thorny issue of the rights of children to access family life through asylum and immigration provisions to the Member States. The comments of the ECJ in *Parliament v Council* encapsulate this position:

> In the final analysis, while the Directive leaves the Member States a margin of appreciation, it is sufficiently wide to enable them to apply the Directive's rules in a manner consistent with the requirements flowing from the protection of fundamental rights.[75]

In other words, the legislation in question will set a minimum level that barely upholds children's rights principles, and leave the option to engage more meaningfully with the needs of young people to the Member States. In this sense, therefore, the EU has 'checked out' of its commitment to the rights of children in the family life arena, preferring to support the Member States in their endeavour to retain a tight control over their borders.

This position, however, does not stand up to scrutiny if the EU's self-ordained aims in relation to children's rights, fundamental freedoms and the rights and entitlements of legally resident third-country nationals are considered. It is hardly consistent with the rhetoric found in the Commission's document on the Children's Rights Strategy which commits "to a comprehensive strategy to ensure that the European Union contributes to promoting and safeguarding children's rights in all its

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[74] Article 67 EC. It should be recalled that following the entry into force of the Treaty of Lisbon 2007, proposals on asylum and immigration will be subject to the as outlined in Article 294 TFEU (Articles 77(2), 78(2) and 79(2) TFEU)

[75] Paragraph 104*Parliament v Council, Op. Cit.* n.35

internal and external actions". Neither does it uphold the Tampere commitment to fair treatment of third-country nationals which endorses a "more vigorous integration policy...aim[ed] at granting them rights and obligations comparable to those of EU citizens".[76] Indeed, this analysis has shown that, at points, the regulation of child immigrants and asylum-seekers is exercised in a way that simply does not reflect their family make-up and is this deprived of any real utility.

It is interesting to note that in an area, such as family life rights, where a very clear competence to legislate exists – and, indeed, one in which the position of young people can hardly be overlooked – the extent to which the EU is willing to promote a children's rights agenda has been shown to be limited. There are few explanations for the largely hands-off role the EU has taken in the area, aside, of course, from an underlying desire to respect the political sensitivities of immigration regulation and, in particular, avoid being seen to promote a system that it overly generous to the rights of individual migrants. A largely cynical view, maybe, but hardly unjustified in the face of the repeated derogations, conditions and restrictions placed on the child's right to enjoy family life under this legislation.

3. A CRITIQUE OF CHILDREN'S RIGHT TO EDUCATION UNDER TITLE IV, PART THREE EC

Educational entitlements of immigrant and asylum-seeking children under EU law are very much predicated on the basis of equality of access with Member State nationals. This section begins by outlining the educational needs of young migrants which, if they are to be met, would

[76] Paragraph 18, Presidency Conclusions: Tampere European Council, 15th-16th October 1999

seem to require far more extensive policy intervention than that which the EU legislature has endorsed under Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon). Following a summary of these legal provisions, the scope of the right under EU law to access education on the basis of equality with the host population is considered in light of a significant body of case-law from the ECJ addressing Union citizen migrants (or, previously, the children of workers). Finally, this section considers where the boundaries of EU intervention in the educational experience of child immigrants and asylum-seekers lie. In particular, it is questioned whether the nature of competences in relation to this particular substantive area make it possible, or even desirable, for a more proactive educational agenda to be pursued at EU level in relation to the immigrant population.

3.1: The educational needs of immigrant and asylum-seeking children

The aim of this part of the discussion is to understand what constitutes good education policy in relation to asylum-seeking and immigrant children. The analysis begins by outlining the role of education in the lives of such children. Following on from this, a range of research from the UK, European states and other developed countries that look at the experiences of migrant children in host country schools is considered.[77] As such, a number of keys areas in which there is scope for policy intervention to improve the educational experiences of this group will be outlined.

[77] It should be noted that this analysis does not dwell too greatly on the distinct educational experiences of legal categories of migrants, because so many of the issues are cross-cutting. That said, where specific issues arise in relation to, for example, separated children, or those detained in accommodation centres, these are highlighted

3.1.1: The importance of education for asylum-seeking and immigrant children

It seems appropriate to begin this analysis by acknowledging that education is universally accepted as playing a fundamental role in the lives of *all* children. To describe schools in terms of their traditional function as sites of learning and intellectual development does not do justice to the contribution the educational environment can make to a child's personal, social and cultural growth.[78] A positive school community is essential for nurturing young personalities, providing a forum for socialisation amongst peers and laying the groundwork for future opportunities as young people move into adulthood. It is hardly surprising, then, that a range of international instruments enshrine education as a fundamental right to be enjoyed by all children, most notably Article 28 UNCRC.[79]

In spite of an initial reticence to intervene in the education sphere, at EU level we now find acknowledgement of the importance of education: as a fundamental right in Article 14 Charter of Fundamental Rights[80] and as an area for development and cooperation by the Community in Article 149 EC (Article 165 TFEU, post-Lisbon). Furthermore, the institutions

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[78] See further Committee on the Rights of the Child, *General Comment No.1: The Aims of Education*, 17th April 2001, United Nations, Geneva

[79] A right to education is also found in Article 26 Universal Declaration of Human Rights and in Article 2, Protocol 1 of the European Convention on Human Rights 1950. See: Fortin, *Op. Cit.* n.9, Chapter 6 for further discussion of the right to education, and Chapter 11 for the educational rights of minority children

[80] Article 14 Charter: 1. Everyone has the right to education and to have access to vocational and continuing training.; 2. This right includes the possibility to receive free compulsory education.; 3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

have recognised the contribution that a well-engendered education policy can make both at the level of the individual and the wider community, with the Commission writing that:

> The European Council has repeatedly stressed the key role of education and training for the future growth, long-term competitiveness and social cohesion of the Union. To achieve this it is crucial fully to develop the potential for innovation and creativity of European citizens.[81]

The above discussion goes some way to highlighting the essential place of education in the lives of migrant children, as many of the functions schools perform have particular resonance for non-native populations. Amongst other factors, the educational environment serves as the primary site of integration for immigrant children (and, frequently, the wider family), gives them a stake in the community, provides them with an opportunity for academic achievement and can lead to qualifications and experiences with currency in the host state. Research has consistently identified a migrant child's experience in the education system as a significant factor in determining their overall quality of life in the host state.[82] As Phillimore notes in relation to young asylum-seekers:

> Clearly education and training that allows [*asylum-seekers and refugees*] to look forward, rather than back, and become fully

[81] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Improving competences for the 21st Century: An Agenda for European Cooperation on Schools, COM(2008) 425 final, at 3

[82] This has been shown in relation to different legal categories of migrant: on asylum-seekers see Hannan, L., *A Gap in their Hearts: the experience of separated Somali children*, (UN Office for the Coordination of Humanitarian Affairs, 2003); on the children of EU citizens, see Ackers and Stalford, *Op. Cit.* n.62

integrated into society is a *need* for [*asylum-seekers and refugees*] as well as, in many cases, their *right*....[83]

It is easily understood, therefore, why asylum-seeking and immigrant children have frequently shown themselves to be some of the most motivated and engaged learners amongst their peers.[84] It seems almost paradoxical, however, that underachievement is rife within the non-native school community, a conclusion that has repeatedly been reached.[85] In considering research on the children of immigrants, Crul argues that this low-level of performance is evident "in all school success indicators: they drop out at higher rates, repeat grades more frequently, and are concentrated in the least challenging educational tracks".[86] This mismatch between the level of engagement of immigrant pupils and their educational attainment certainly suggests that there is much scope to improve educational provision for immigrant children. This brings us onto the next part of the discussion which considers where problems lie and how policy-led efforts can be targeted at improving this situation.

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[83] J. Phillimore *et al.* (2006) Asylum seekers and refugees: education, training, employment, skills and services in Coventry and Warwickshire, Learning and Skills Council, available online at http://readingroom.lsc.gov.uk/pre2005/research/commissioned/asylum-seekers-and-refugees-%20education-and-training-services.pdf, at p.13

[84] Stanat, P. and Christensen, G., (2006) *Where immigrant students succeed: A comparative review of performance and engagement in PISA 2003*, OECD

[85] See, amongst others: Stanat and Christensen, *Ibid.*

[86] Crul, M. (2007) 'Pathways to Success for the Second Generation in Europe', *Online article,* available at <http://www.migrationinformation.org/Feature/display.cfm?ID=592> (last accessed 26 February 2010)

3.1.2: Towards an improved model of education for immigrant and asylum-seeking children

Perhaps not surprisingly, the need for national education systems to adapt to an increasingly diverse population has received growing political interest at EU level over the past few years. Following the publication of a Commission Green Paper on the educational challenges and opportunities presented by migration,[87] a Europe-wide consultation was launched. This consultation makes use of, and seeks to build upon, a wealth of literature that considers how schools can meet the needs of immigrant children in a way that also benefits the school community as a whole.[88] An analysis of relevant research reveals that suggestions in this area are clustered around four themes: (1) access to education must be universal, immediate and meaningful; (2) appropriate linguistic support must be made available to those children who are not native speakers; (3) schools must engage with wider-support networks to facilitate the learning of immigrant children; and (4), both the curriculum and school environment can be enriched by cultural diversity and sensitivity. Each of these points will be expanded upon in turn.

Access to the education system - universal, immediate and meaningful:

Whilst some European countries effectively deny access to irregular migrants by requiring proof of legal residence before children are admitted to the school system, most countries extend a right to access education to all children of compulsory school age. [89] Rights, however, are undermined where individuals experience unreasonable delays in

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[87] *Op. Cit.* n.1

[88] Commission Staff Working Document: Results of the consultation on the education of children from a migrant background SEC(2009) 1115 final

[89] Eurydice (2004) *Integrating Immigrant Children into Schools in Europe* DG Education and Culture, European Commission, at p.34.

exercising them, a challenge that young migrants often encounter. The arrival of child asylum-seekers, for example, in the host country rarely coincides with the start of the educational year: Appa points to a number of instances in the UK in which this has led to delays in finding a school place.[90] Commencing lessons can be delayed further while schools ascertain the child's background and assess their educational level, often requiring translation services to be put in place. Ofsted acknowledge that this process can be slow, with schools reporting that "it was not always possible to align the arrival, admission and assessment".[91]

Equally damaging are the instances in which there are no measures to support the immigrant child's adjustment to an unfamiliar school environment. In addition to the linguistic problems encountered by non-native children (discussed further below), it must be borne in mind that cultural approaches to schooling differ significantly between global regions. Perhaps the best documented example is the educational background of asylum-seeking Somali children:[92] many have no previous experience of formal schooling,[93] live in families with high levels of adult illiteracy and are unfamiliar with group and collaborative learning strategies.[94] In such cases, strategies to assist these young people to

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[90] Appa, V., *A study on how asylum seekers and refugees access education in four local authorities in England* (NCB, 2008), at p.29

[91] Ofsted, *The Education of Asykum-Seeking Pupils* (The Crown, 2003), at p.16

[92] This is an EU-wide problem: categorised by country of origin, Somali asylum-seekers constitute one of the ten largest groups in the EU (Eurostat, *Statistics in Focus (Population and Social Conditions): Asylum Applications in the European Union*, 110/2007)

[93] In 2005, it was reported that only 11% of primary aged school children in Somalia have access to primary education: See information on Somali children in school provided by UNICEF, available at <http://www.unicef.org/somalia/education_2432.html> (last accessed 26 February 2010)

[94] See Rutter, J. (2004) *Refugee Communities in the UK: Somali Children's Educational Progress and Life Experiences*, a resource on multiverse.co.uk, a website for teaching

engage with the educational environment are essential, or their right to access schooling may be rendered meaningless. Ofsted summarises the kind of support that has been shown to facilitate the access and admission of asylum-seekers to schools in the UK in the following way:

> ...effective guidance included information about education entitlements of asylum-seekers, [*financial*] support available, background information on difficulties facing asylum-seekers, key elements in the admission and induction process and strategies for support in the classroom.[95]

This requires extensive engagement, at a local level, with the particular needs of individual children that is sensitive to their educational background.

Linguistic support for non-native speakers: A lack of proficiency in the language of the host state has consistently been shown to hamper immigrant children's educational performance, as well as impacting negatively on their level of integration and enjoyment within the school environment.[96] It has been observed that the discrepancy between native and immigrant children is particularly pronounced in subjects such as reading and science that require language skills, as opposed to non-text based subjects like mathematics.[97] This underlines the importance of

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professionals addressing the educational achievement of pupils from diverse backgrounds, available at <http://www.multiverse.ac.uk/attachments/359b73d7-13c5-4809-8717-6bb2d74adec2.doc.>.

[95] Ofsted, *Op. Cit.* n.91, at p.6

[96] Stanat and Christensen, *Op. Cit.* n.84, at pp.29-56 and 155; Eurydice, *Op. Cit.* n.89, at p. 68

[97] Stanat and Christensen, *Ibid.*, at pp.22-56.

"efficient, systematic and effective models of language support".[98] Indeed, research has shown that those countries with the most pronounced gap between immigrant and native student attainment were those with the least systematic language support.[99] In 2007, a pan-European, trans-Atlantic taskforce looked into school language policies and practices in fourteen immigrant-receiving countries, concluding with a number of key policy recommendations, these included: enhanced teacher training; the use of frameworks and explicit standards; and the linking of language training to the wider curriculum.[100] There is, therefore, clearly great scope for reducing the gap in attainment between immigrant and native students through improved language training, a process that can be facilitated by identifying and sharing existing good practice.

Engagement with wider support measures: Research on the educational experiences of immigrants and asylum-seekers has also underlined that schools do not exist in a vacuum, and that a positive school experience requires programmes that more broadly engage with the child's life in the host country. For separated children, who may be cared for by local or national authorities, this requires what has been termed a 'multi-agency approach' drawing those responsible for the child's welfare, health and immigration status together - along with voluntary agencies who offer support to young migrants - in an effort to support schooling.[101] Equally, where the child lives within a family unit,

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[98] As recommended by: Christensen, G. and Stanat, P., *Language Policies and Pracitces for Helping Immigrants and Second-Generation Immigrants Succeed* (Migration Policy Institute, 2007), at p.10

[99] Stanat and Christensen, *Op. Cit.* n.84, at p.155.

[100] Christensen and Stanat, *Op. Cit.* n.98

[101] Ofsted, *Op. Cit.* n.91, at p.16

engaging parents in the wider school community has proven to be a valuable educational tool for both the children and adults involved:

> Family literacy programs and other parental involvement components can help immigrant parents learn English in order to gain employment skills and actively participate in their children's formal education from the beginning.[102]

Cultural enrichment and sensitivity in the curriculum and school environment: Finally, it is argued that intercultural education, and the promotion of diversity through schools, can greatly enhance the educational experience of young migrants. Eurydice defines intercultural education thus:

> ...an approach to teaching that is conducive to interactions between cultures whose origins differ widely. It is intended for the benefit of all pupils and points up [*sic*] the role of schools in developing values of respect and tolerance vis-à-vis cultural diversity.[103]

Adopting this approach in the classroom can foster a sense of positive identity in immigrant children, at the same time as promoting values of tolerance and understanding. Greater cultural sensitivity can go some way to minimising the discord between the home and school environment often experienced by immigrant children. This is particularly important in relation to children from cultural backgrounds in which the roles of boys

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[102] Matthews, H. and Ewen, D., *Reaching All Children? Understanding Early Care and Education Participation Among Immigrant Families* (Center for Law and Social Policy: Washington DC, 2006), at p.1

[103] Eurydice, *Op. Cit.* n.89, at p.70.

and girls can differ greatly from those found in most European counties. Sarroub gives the following example:

> School life for the Yemeni girls involved crossing and re-crossing various religious, cultural, and gender boundaries. Certain classes, such as gym, caused anxiety and frustration among the Yemeni girls, an anxiety mirrored by their parents.[104]

Using schools to promote cultural understanding impacts also on teachers and native peers, and can smooth the process of 'acclimatisation' to the new school environment for immigrant children. Intercultural education therefore holds appeal not just for the contribution it can make to the school experience of immigrant children specifically, but also for the enrichment it offers to the education of the native population. Experiences in multi-cultural schools in the UK have led to the following observation:

> Diversity and difference is genuinely seen as enhancing possibilities for learning and enriching the classroom rather than principally being a problem.[105]

Clearly, then, providing an educational experience appropriate to the needs of asylum-seeking and immigrant children is a complex legal and policy challenge. This is not least because, whilst the needs of the individual children involved can be both considerable and varied, any policy in the sphere of education - even when aimed at a discrete group of

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[104] L. Sarroub (2001) 'The Sojourner Experiences of Yemeni American High School Students: An Ethnographic Portrait' 71(3) *Harvard Educational Review* at p.403

[105] A. Akbar *Immigrant Children Make Learning a Richer Experience for All, Study Shows* The Independent, 26th June 2004.

young people - has a far wider impact on the host society. Thorny questions are raised in relation to EU intervention in the arena of education which, were it to go too far, would be both legally challengeable and politically unpalatable. Article 149 EC (Article 165 TFEU, post-Lisbon) states that:

> ...[t]he Community shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, *while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.*[106]

Against this backdrop, the legislature is bound to feel constrained when formulating provisions in relation to asylum-seeking and immigrant children. Increasingly multicultural education systems are, as the discussion above has shown, a somewhat inevitable consequence of engaging migrant children in the school community. Any sort of EU agenda which pushes Member States in this direction will certainly be perceived by some as striking a little too close to the heart of national sovereignty and potentially posing a threat to linguistic and cultural identities, two areas specifically mentioned in Article 149 EC (Article 165 TFEU, psot-Lisbon). In light of these sensitivities, the discussion now moves on to outline how far the EU legislature has gone in setting down the educational entitlements of young immigrants and asylum-seekers.

[106] Emphasis added

3.2: Children's rights to education under Title IV, Part Three EC

Access to schooling perhaps springs to mind most immediately if one speculates on the legal entitlements that ought to be available to migrant children in the host country. It is, therefore, not surprising that education is one of the more prominent welfare benefits accorded to children under EU asylum and immigration legislation. Clearly, the Commission attaches a degree of importance to education provisions, citing them as wider evidence of an underlying child-focused approach to legislation in this area, here in respect of the asylum reception Directive:

> This provision *[on access to education]* lays down one of the rules that illustrate the special attention to minors that characterises the proposal as a whole.[107]

The approach to educational entitlement in this legislation is overwhelmingly one of equal access for migrants by reference to nationals of the host Member State. Whilst this formulation finds its roots in the pre-Amsterdam Resolution on unaccompanied minors,[108] the education provision in this instrument represented a fairly inauspicious start to EU intervention in the education of third-country national children. Rather than encouraging Member States to grant unaccompanied minors an unconditional right to education, the Resolution makes the equal access it grants contingent upon a degree of permanency of residence.[109] For those children whose continued presence

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[107] Proposal for a Council Directive laying down minimum standards for the reception of applicants for asylum in Member States COM(2001) 181 Final, at p.13

[108] Article 3(7) Council Resolution of 26 June 1997 on unaccompanied minors who are nationals of third countries OJ C 221/23, 19.7.1997

[109] Article 3(7) Resolution on unaccompanied minors, *Ibid.*, applies to "unaccompanied minors of school age" who "will be staying in a Member State for a prolonged period"

in the EU is less certain,[110] all that the Resolution requires is that they "receive all necessary material support and care to satisfy their basic needs", which it seems does not include access to education.[111] What is particularly problematic about this provision is that it forces education providers to pre-judge the outcome of any immigration decision in respect of the child to determine whether they would be entitled to access schooling. Since Amsterdam, the era of Community competence in the area of asylum and immigration has brought with it a renewed commitment to ensuring access to education for third-country nationals regardless of their immigration status. This section will outline in detail the scope and content of these measures.

3.2.1: Educational entitlement of refugees and beneficiaries of humanitarian protection

Third-country national children who have recognised refugee status, or benefit from a subsidiary form of humanitarian protection,[112] have a right to "full access to the education system...under the same conditions as

[110] More specifically, those who are held at the border "until a decision has been taken on their admission to the territory" (Article 2(3) Resolution on unaccompanied minors, *Ibid.*)

[111] Article 2(3) Resolution on unaccompanied minors, *Ibid.* states that this covers "food, accommodation suitable for their age, sanitary facilities and medical care"

[112] Defined in Article 2(e) refugee qualification Directive, *Op. Cit.* n.58, as "a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin...would face a real risk of suffering serious harm...and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country". Most unaccompanied children in the UK are granted either humanitarian protection or discretionary leave to remain until they are 18 and not full refugee status. Humanitarian protection certainly falls within the definition of subsidiary protection, however discretionary leave to remain relates only to inadequate reception conditions upon return to the country of origin so may not. As a consequence many children accorded protection in the UK may fall outside the provisions of this Directive

nationals".[113] A child who has not themselves been granted any form of protection, but who derives their right of residence from a family member (who has been granted refugee or subsidiary humanitarian protection), can also access this entitlement.[114] This would usually be in the case of the children of recognised refugees or beneficiaries of humanitarian protection.

According to the Commission proposal for this Directive, there was no attempt to limit access to education to those of "school age", instead granting it to all "minors".[115] This was, first, because there is no universal definition of "school age" across Europe and, second, it is argued it would be contrary to UNCRC principles to make children's schooling conditional upon their age.[116] It is evident from the proposal that the Commission chose to grant access to education on the *same* conditions as Member State nationals, for the very reason that it would trigger the equal treatment principle.[117] Finally, it is made clear that the application of this principle means that children are to be granted "free access to the public education system",[118] although unlike other legislative instruments in the area this is not articulated in the final legislative text.

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[113] Article 27(1) refugee qualification Directive, *Ibid.* This is complemented by an equivalent right for adults to access the 'general education system, further training or retraining' and a right to 'equal treatment' (as compared to nationals) in the recognition of diplomas, certificates and formal qualifications': Articles 27(2) and (3) of the same provision respectively

[114] Article 23(2) Directive refugee qualification Directive, *Ibid.*

[115] Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection COM(2001) 510 final, 31

[116] *Ibid.*, at p.31

[117] *Ibid.*

[118] *Ibid.*

The refugee qualification Directive was, on the whole, well received during the consultation process. However, in respect of educational entitlement, the Committee on Women's Rights and Equal Opportunities, having acknowledged the right to education found in the Charter, argued that children needed to be provided with "education and/or training appropriate to their needs and standards".[119] This appears to have been motivated by a concern that many children have their basic right to schooling neglected and a particular worry that the level of education provided for children varied with their status and place of accommodation.[120] This point is not reflected in the final legislative text.

3.2.2: Educational entitlement of asylum-seeking children

An entitlement to education is granted both to child asylum-seekers, and the children of asylum-seekers, in the reception Directive. In a departure from the phrasing deployed in other pieces of legislation, access is to be under "*similar* conditions as nationals of the host Member State".[121] Given that the original proposal talked of access on the *same* basis,[122] this is clearly a deliberate choice which seems to have occurred in the Council. The most straightforward explanation would seem to be that - unlike in the case of refugees - a political desire existed to prevent asylum-seekers from triggering the equal treatment principle in respect of

[119] European Parliament Report on the proposal for a Council directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, A5-0333/2002 final, pp. 56-74, at p.57

[120] Whilst the Committee does not elaborate on this point, there is particular concern about access to schooling for children who are in accommodation centres, *Ibid.*

[121] Emphasis added. Article 10(1) asylum reception Directive, *Op. Cit.* n.60

[122] Proposal for a Council Directive laying down minimum standards for the reception of applicants for asylum in Member States COM(2001) 181 final, p.34

educational entitlement. The ECJ has adopted a generous interpretation of the scope of equal treatment in respect of education concerning Union citizens and their family members.[123] It is possible that, fearful of a similar outcome if these provisions were to be considered by the Court, the legislature opted to side-step this particular line of case-law: by eschewing the phrase 'same basis as nationals of the host Member State' the possibility of arguing by analogy that a similarly generous interpretation be applied is minimised. It is, thus, that the choice of phrasing in this provision has potentially significant consequences.

Beyond the basic entitlement to access, Article 10 of the asylum reception Directive in fact contains the most detailed provision on education adopted under Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon). First, it allows Member States to opt to provide education in accommodation centres.[124] Second, that access may be limited to the state education system[125] (however, the proposal for a recast reception Directive suggests removing this provision[126]). Third, the Directive provides that "access to the education system shall not be postponed for more than three months from the date the application was lodged".[127] In addition, the Directive addresses the age boundaries for

[123] Chapter 4, Ackers and Stalford, *Op. Cit.* n.62

[124] Article 10 (1) asylum reception Directive, *Op. Cit.* n.60

[125] Article 10(1) asylum reception Directive, *Ibid.* It is not clear what is the significance of limiting access to the state education system. However, given that host state national children do not have an automatic right of access to private education establishments, the EU legislature is unlikely to have been comfortable with legislation that might suggest this was a possibility for third-country nationals

[126] Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum-seekers (recast) COM(2008) 815 final, at p.23

[127] Article 10(2) asylum reception Directive, *Op. Cit.* n.60. This provision takes account of the dispersal policy (applied in some Member States) whereby asylum-seekers and their families may be relocated to a different area of a Member State from that in which

educational entitlement as an asylum-seeker. An upper age limit is set, with the Article stating that "minors shall be younger than the legal age of majority" in the relevant Member State.[128] This is somewhat offset by a provision that ensures Member States cannot withdraw someone's right to education simply because they have reached the age of majority.[129] The Commission proposal reveals that this measure aims to further ally the situation of asylum-seeking children with that of nationals of the host Member State by ensuring that an asylum-seeking child may continue their education beyond the age of eighteen where this is normal practice in the host Member State.[130] Finally, the Article provides that if education under "similar conditions as nationals of the host Member State" is not possible because of the "specific situation of the child" the Member State may offer "other education arrangements".[131] The original Commission proposal suggests that the scenario envisaged here was one in which the child needed language tuition in advance of entering mainstream schooling.[132] During negotiations, the European Parliament argued for a specific reference to linguistic-support courses,[133] rather than the current distinctly vague entitlement. This is another point addressed by the

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they made their application. Given that relocation may take some time, the legislation allows for a delay in children accessing education provisions. It is worth noting that the original proposal recommended a shorter period of time in which access to education can be delayed (65 days as opposed to three months) (*Op. Cit.* n.122) and that the European Parliament argued for it to be further reduced to 21 days (OJ C 131 E/119, 5.6.2003)

[128] Article 10(1) asylum reception Directive, *Ibid.* However, the recast Directive proposes removing this provision (*Op. Cit.* n.126, at p.23)

[129] Article 10(1) asylum reception Directive, *Op. Cit.* n.60

[130] Proposal for reception Directive, *Op. Cit.* n. 122, at p.13

[131] Article 10(3) asylum reception Directive, *Op. Cit.* n.60

[132] Proposal for reception Directive, *Op. Cit.* n. 122, at pp.13 and 34

[133] Proposal for a recast reception Directive, *Op. Cit.* n. 126

proposal for a recast asylum reception Directive which suggests inserting a provision obliging Member States to provide where necessary "preparatory classes, including language classes, aimed at facilitating the access of minors to the national education system, and/or specific education designed to assist their integration into that system".[134] During the negotiations for this Directive, a further interesting proposal from the Parliament suggested extending the entitlement to education found in Article 10 to childcare and pre-school facilities.[135] This was rejected in the final document.

3.2.3: Educational entitlements of illegally staying immigrant children

Where the return of an illegally staying third-country national child is pending, they will be "guaranteed access to the basic education system, subject to the length of their stay".[136] Similarly, where a child is detained in preparation for their return, Article 17(3) provides that "minors...shall have, depending on the length of their stay, access to education". These measures would, in all likelihood, result in distinctly limited educational entitlement for the children they address. Although it is entirely possible that the "length of stay" of a child in these circumstances would be sufficient so as to merit access to schooling, it would surely be rare circumstances in which this was decided from the outset such that appropriate arrangements could be put in place.

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[134] *Ibid.*, at p.23

[135] OJ C 131 E/119, 5.6.2003

[136] Article 14(1)(c) Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals OJ L 348/98, 24.12.2008

3.2.4: Educational entitlements of long term resident immigrant children

The 14th recital to the preamble to the long-term residents Directive states that:

> Member States should remain subject to the obligation to afford access for minors to the educational system under conditions similar to those laid down for their nationals.

The main legislative text includes a provision by which beneficiaries are to enjoy "equal treatment with nationals" in a number of areas, education included.[137] However, as has previously been noted, children are likely to access entitlements under this provision as family members and not as beneficiaries in their own right. Therefore, to honour the commitment in the preamble, children who are family members of long-term resident third-country nationals would have to argue that their parents' right to equal treatment in respect of education extends to an entitlement for their benefit also. This approach is largely confirmed by the family reunification Directive which states that family members are entitled to the same access to education as the primary migrant from whom they derive their right to residence.[138]

3.2.5: Other education provisions under Title IV, Part Three EC

An entitlement to education is also found in both the temporary protection and trafficking Directives. It will be recalled that the scope of the trafficking Directive only includes children if Member States elect to apply a derogation to that effect.[139] In this case, access to education is, as

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[137] Article 11(1)(b) long-term residents Directive, *Op. Cit.* n.20

[138] Article 14(1)(a) family reunification Directive, *Op. Cit.* n.18

[139] Article 3(3) Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who

with the refugee Directive, granted under the "same conditions as nationals".[140] Once again, Member States may choose to limit this access to the public education system, a provision to which the Economic and Social Committee unsuccessfully objected during negotiations.[141] The temporary protection Directive, contains very similar provisions: granting access to education "under the same conditions as nationals of the host Member State" and, again, allowing this entitlement to be limited to the state education system.[142]

In the interests of completeness, it is interesting to note that Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon) has provided the legal base for a Directive on the admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service. Whilst this provision has not been considered elsewhere in this thesis, as it addresses short-term stays in the EU to pursue a specific activity, it is undeniably of relevance when seeking to understand the EU's approach to educational entitlement of third-country national children. The rationale behind this Directive is to facilitate temporary migration with the aim of mutual cultural enrichment between Union - and third - countries. In relation to children, the Directive allows for access to, and residence in, an EU Member State for between three

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have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities OJ L 261/19, 6.8.2004

[140] Article 10(b) trafficking Directive, *Ibid.*

[141] Opinion of the Economic and Social Committee on the 'Proposal for a Council Directive on the short-term residence permit to be issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities' OJ C 221/80, 17.9.2002

[142] Article 14(1) temporary protection Directive, *Op. Cit.* n.64. See n.126 on limiting this entitlement to the state education system

months[143] and one year[144] for school pupils from outside the Union as part of a recognised exchange scheme.[145] There are a number of conditions to access these provisions, the most significant being that the pupil exchange organisation must be responsible for subsistence, study, health care and return travel costs,[146] and that these provisions may be restricted to countries that offer a reciprocal exchange scheme.[147] Furthermore, it must be noted that this Directive does not offer any chance of enhancing the educational opportunities of third-country nationals whose residence is derived from other provisions;[148] it simply offers a discrete right of admission and (temporary residence) within clearly defined circumstances.

Finally, reference must be made to Directive 77/486 on the education of the children of migrant workers which, whilst not a Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon) instrument, appears to contain extensive provision in relation to the children relevant to this analysis, albeit only those whose parents are migrant workers.[149] Article 2 states that children must be offered free supplementary tuition to assist them with learning the language of the host state; and Article 3 requires

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[143] Article 1(a) Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service OJ L 375/12, 23.12.2004

[144] Article 13 study exchange Directive, *Ibid.*

[145] See the definition of 'school pupil' in Article 2(c) and the specific conditions outlined in Article 9 study exchange Directive, *Ibid.*

[146] Article 9(1)(d) study exchange Directive, *Ibid.*

[147] Article 9(2) study exchange Directive, *Ibid.*

[148] See the restrictions in Article 3(2) study exchange Directive, *Ibid.*

[149] Council Directive 77/486/EEC of 25 July 1977 on the education of the children of migrant workers, OJ L 199/32, 6.8.1977

take all appropriate measures to promote and preserve the culture and native language of the child's country of origin. The rationale underpinning this Directive is determined by migratory trends in Europe during the 1970s, which were dominated by periods of stay in the host state of not more than a few years for work purposes. A desire to ensure that children 'slot in' to the education system of the host state (hence the language tuition), combined with measures that allow young people to retain their linguistic and cultural background, so as to facilitate return migration are, thus, prominent. However, this provision has been notoriously badly implemented at Member State level, leading to more recent calls to 'revive' its provisions in line with current EU law and policy.[150]

3.3: Expounding the notion of equal access to education for asylum-seeking and immigrant children

When the standard education formulation in EU asylum and immigration legislation - that of access on the same basis of nationals of the host Member State - is held up against the model of good practice for the education of immigrants and asylum-seekers (as outlined earlier in this chapter), it would appear to respond only in a limited way to the educational needs of young immigrants and asylum-seekers. However, the argument now turns to explore this notion of equal access to education in greater detail and consider whether it may go further in meeting the educational needs of children than is first apparent.

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[150] Stalford, H. (2000) 'Transferability of formal qualifications in the EU: The Case of EU Migrant Children' in Shaw, J. (ed) Social Law and Policy in an Evolving European Union (London: Hart Publishing) pp.243-258; and Chapters 4 and 5, Ackers and Stalford, *Op. Cit.* n.62

If an entitlement to access education on the same basis as nationals of the host Member State is interpreted literally, it would seem to imply little more than a right to a school place for third-country national children, albeit unhampered by conditions that are not applied to native young people. At first sight, there appears to be no recognition in this formulation that immigrant and asylum-seeking children have *different* educational needs from their peers, instead there is an assumption that they can simply be assimilated into the host state education system. However, the EU has long recognised that the principle of equal treatment includes not just an obligation to ensure that comparable situations are not treated differently, but also that different situations must not be treated in the same way.[151] Therefore, in implementing EU provisions on education, national legislation must recognise that the right of certain third-country national children to equal treatment with their native peers implies an acknowledgement of the *differing* needs of these children. Furthermore, an extensive line of case-law stemming from the 1970s on the educational rights of the children of Community worker (or, more latterly, Union citizen) parents, suggests that what at first glance seems to be a basic entitlement can give rise to a range of associated benefits.[152] This line of cases adopts a highly purposive approach to the notion of equal access to education providing extensive interpretation of the scope of such provisions, thereby serving as a significant vehicle for the development of children's rights under EU law.[153] In spite of the

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[151] See: Paragraph 31 Case C-148/02 *Garcia Avello* [2003] ECR I-11613

[152] See, Cases: 76/72 *Michel S v Fonds national de reclassement social des handicappés*, [1973] ECR 437; 9/74 *Casagrande v Landahauptstadt München* [1974] ECR 3205, 197/86 *Steven Malcolm Brown v The Secretary of State for Scotland* [1988] E.C.R. 3205; 389 and 390/87 *Echternach and Moritz v Minister van Onderwijs en Wetenschappen* [1989] E.C.R. 723; and *Baumbast, Op. Cit.* n.13

[153] For analyses of these cases see M. Gould 'Children's Education and the European Court of Justice' in D. Freestone (ed.) *Children and the Law*, Hull University Press, 1990, pp.172-200; Shaw, J. (1998) 'The nature and extent of 'educational rights under

persuasive value of these decisions, it must be noted that they addressed intra-Community migration involving nationals of Member States and, therefore, were reached in the context of a vastly different regulatory environment from the one in question here. In light of this, the chapter now moves to consider these cases and their applicability to provisions relating, instead, to third-country national children.

Regulation 1612/68 which, before the adoption of the citizenship Directive in 2004,[154] was the principal legislative instrument outlining the rights of Community national workers and their families who migrated within the European territory, grants children a right to be "admitted to that [host] state's general educational, apprenticeship and vocational training courses *under the same conditions* as the nationals of that state".[155] Crucially, the provision goes on to state that efforts should be made to ensure that children "attend these courses under the best possible conditions". The ECJ has consistently interpreted this measure widely in terms of both the scope of educational opportunities it covers and the range of associated benefits to which children will be entitled.[156] For example, in respect of the former, a disability benefit was held to constitute an educational opportunity to which the son of an Italian national residing in Belgium was entitled on an equal basis as Italian

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EC law: a review' *Journal of Social Welfare and Family Law*, 20(2) pp.203-210; M. Dougan (2005) 'Fees, Grants, Loans and Dole Cheques: Who Covers the Costs of Migrant Education within the EU?' *Common Market Law* Review, 42 pp. 943-986; and Chapter 8, Ackers and Stalford, *Op. Cit.* n.62

[154] Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ L 257/2, 19.10.1968. This right is subject to certain residence requirements on the part of both the parent and the child

[155] Article 12, *Ibid.*

[156] Shaw, J., 'The Nature and Extent of Educational Rights under EC Law: A Review', (1998), *Journal of Social Welfare and Family Law*, 20(2) pp.203-210, at p.205.

nationals.[157] Equally, in *Casagrande*, the Court stated that, although the provision refers only to 'admission', this encompasses, in appropriate circumstances, grants to disabled children to attend secondary school in Germany available to German nationals.[158] In both these cases, the Court attached a degree of importance to the need to interpret provisions on children's educational rights in light of the spirit of the Regulation which included the need to facilitate the integration of migrants and their families,[159] as well as the obligation found in the relevant provision to ensure access to education "under the best possible conditions". Finally, and more recently, in *Baumbast and R* the Court held that the (third-country national) children of an EU migrant worker retain an autonomous right to reside in the host Member State for the purposes of continuing their education, independent of their parents' immigration status.[160]

The question, then, is whether the Court would be as keen to apply a similarly wide interpretation to the concept of equal access to education found in asylum and immigration legislation, such that wider support measures that facilitate the educational experience of children could be interpreted as falling within its scope. The extensive understanding of 'admission' found in *Casagrande*,[161] in particular, provides some precedent on this point, whilst the autonomy of the right found in the *Baumbast and R* judgment highlights the value the Court attaches to education for migrant children. However, the presence in this case-law of a number of factors that are simply absent from the regulatory framework

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[157] *Michel S, Op. Cit.* n.152

[158] *Op. Cit.* n.152

[159] Recitals 6 and 7 of the preamble to Regulation 1612/68, *Op. Cit.* n.155

[160] *Op. Cit.* n.152

[161] *Ibid.*

laid down by Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon) cannot be ignored. First of all, ECJ judgments have supported the removal of barriers to the achievement of the internal market with almost relentless enthusiasm; and, in recent years, this same proclivity has been found in the prophetic status accorded to Union citizenship which, the Court has stated, is destined to be the fundamental status of all Member State nationals.[162] This can be contrasted with the notoriously illiberal nature of asylum and immigration law era where, more crucially, there is no equivalent underlying aim articulated in the Treaty which would provide a normative framework on which the Court could base its judgments.

Secondly, in an area such as education, which is often perceived as weighing so heavily on the public purse,[163] a restrictive approach to immigration regulation is only likely to be magnified. In particular, an interpretation of education provisions for third-country nationals that required Member States to embark upon such costly endeavours as providing language support and training in cultural awareness for the benefit of immigrants and asylum-seekers may be a step too far given the current preoccupation across Europe with the impact of the collapse of the global economy on public spending. Indeed, Currie has recently speculated upon the possibility of the ECJ retreating somewhat from its previously liberal approach to cases involving the education of migrant children:

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[162] Paragraph 31 Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] E.C.R. I-6193. The statement is now found in the 3rd recital of the preamble to citizenship Directive, *Op. Cit.* n.15

[163] Stalford comments that "children are an expensive venture as far as the welfare state is concerned, particularly in view of the abundant initiatives (in the UK, at least) aimed at tackling childhood poverty, early years health and education" (Stalford, H. (2008) 'The Relevance of EU Citizenship to Children' in: Invernizzi, A. and Williams, J. ed(s). *Children and Citizenship*. Sage, pp.159-170, at p.167)

> [T]here is potential for an apparently 'generous' judgment from the ECJ...to contribute to national unrest, in particular when concerns about "foreign welfare claimants" are conflated with statements pertaining to the European Union's supposed role in undermining Member States' ability to control their own borders.[164]

In spite of these reservations, there would still be no immediately apparent compelling reason for the Court to disregard an entire body of case law when assessing the scope of asylum and immigration provisions on education. Evidently, the Commission intended for the equal treatment principle to apply: it was crystal clear about this in the proposal for the refugee qualification Directive. In its choice of wording, it cannot have been impervious to the potential implications of this when applied to the education of migrant children. Furthermore, the obligation to take the best interests of the child into account when implementing provisions of the refugee qualification, asylum reception, trafficking, and returns Directives would surely indicate that Member States ought to adopt measures that ensure immigrant and asylum-seeking children are provided with educational support beyond a basic right to access schooling. There is a line of argument that without this interpretation the entire provision would be rendered useless. In the absence of extensive support measures that ensure a child can engage with the learning environment, their right to access education becomes meaningless. Put simply, what is the value of physical presence in the classroom if a child is linguistically and culturally unable to benefit from it?

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[164] Currie, S., (2009) 'EU Migrant Children, their Primary Carers and the European Court of Justice: Access to Education as a Precursor to Residence under Community Law', *Journal of Social Security Law* 16(2), pp.76-105, at p.87

Additionally, it should be noted that, although there is no explicit competence at EU level to enact extensive measures on education law and policy,[165] a commitment to improving the educational experience of immigrant and asylum-seeking children chimes with wider Union aims in the areas of non-discrimination,[166] fundamental rights,[167] integration and cultural diversity,[168] social inclusion[169] and the Lisbon agenda.[170] A raft of Recommendations, Decisions, pacts and conclusions from meetings of the institutions pursuing these very objectives all point to the need for the Member States to ensure that immigrant and asylum-seeking children have a positive educational experience. For example, Council conclusions on the establishment of common basic principles for immigrant integration policy in the European Union state that efforts in education are critical to preparing immigrants, and particularly their descendants, to be more successful and more active participants in society.[171] Equally the Decision establishing an action programme in the field of lifelong learning includes support for projects relating to intercultural education

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[165] For a comprehensive analysis of the exact nature and extent of EU competence in the area of education, see: G. Gori *Towards an EU Right to Education*, (Kluwer:The Hague, 2001)

[166] See, for example: Article 3(1)(g) Council Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180/22, 19.07.00

[167] See, for example: Article 14 Charter

[168] Article 152 EC Treaty (Article 168 TFEU, post-Lisbon)

[169] Article 144 EC Treaty (Article 160 TFEU, post-Lisbon)

[170] The Lisbon Strategy aims to "make Europe, by 2010, the most competitive and the most dynamic knowledge-based economy in the world". See further the Commission's *Strategic Framework for Education and Training*, information available at < http://ec.europa.eu/education/lifelong-learning-policy/doc28_en.htm> (last accessed 16 June 2010

[171] Conclusions of the Council and the Representatives of the Governments of the Member States on the establishment of common basic principles for immigrant integration policy in the European Union. Doc. 16238/1/04 REV 1

and the integration of migrant pupils. [172] Other initiatives relate to the adaptation of educational measures to the needs of children with a migrant background and reducing school failure;[173] and ensuring efficiency and equity in education and training.[174] For the institutions, the ECJ included, to support a restrictive approach to the education of young immigrants would seem to run counter to, indeed undermine, ongoing policies in these areas.[175]

Were the Court to have the opportunity to consider the scope of education provisions under Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon), perhaps the very absence of a potentially constraining framework of values offers a golden opportunity to explore the status of the best interests principle in determining the scope of child-focused provisions in EU law. Whilst the Court certainly championed the right of the *Baumbast* children to access schooling, and to do so under favourable conditions, the free movement arguments in this case somewhat superseded any exploration of the children's rights principles underpinning their educational entitlement.[176] It is, of course, a children's rights pipedream that the Court would ever be as influenced by the

[172] Decision No 1720/2006/EC of the European Parliament and of the Council of 15 November 2006 establishing an action programme in the field of lifelong learning

[173] Conclusions of the Council and the Representatives of the Governments of the Member States on integration policies in the European Union, Doc. 15251/08

[174] Conclusions of the Council and the Representatives of the Governments of the Member States, meeting within the Council, on efficiency and equity in education and training, OJ C 298, 8.12.2006, at p.3

[175] In fact, in light of all these measures, and the limited success of Directive 77/486, *Op. Cit.* n.149, the Council called upon the Member States and the Commission to shore up measures on the education of children with a migrant background. See further: Council conclusions of 26 November 2009 on the education of children with a migrant background (2009/C 301/07)

[176] *Op. Cit.* n.13

principles of the UNCRC (even ones that are replicated in the Charter) as it would be by one of the fundamental freedoms enshrined in its own Treaty. However, some exploration of these issues would certainly lend the rhetoric of the Strategy some much needed credibility. That said, a cursory glance at the decision in *Parliament v Council* quickly reminds one that, regardless of the children's rights' principles in play, the Court has thus far shown itself to be far more likely to swing in favour of a restrictive interpretation of asylum and immigration provisions.[177]

Before concluding this discussion, a final note on the educational entitlement of asylum-seekers is warranted. It is recalled that rather than a right to access education on the *same* basis as nationals of the host Member State, asylum seekers' entitlement is instead on a *similar* basis. The significance of this distinction would appear to be more than a question of semantics given that, as was previously alluded to, such phrasing would allow the equal treatment principle to be eschewed in relation to this group of children. If this were to be the case, it surely significantly weakens their educational entitlement, as compared to other groups of children for whom the equal treatment principle triggers an entirely different framework of interpretation.

3.4: Exploring the limits of EU intervention in the educational experiences of asylum-seeking and immigrant children

As has been discussed, the EU's powers to enact provisions on the educational entitlements of asylum-seeking and immigrant children are

[177] *Op. Cit.* n.35. Acknowledgement must, however, be given to the Advocate-General's opinion in C-374/03 *Gürol* [1005] ECR I-6199, which states that the educational rights of the children of Turkish workers lawfully resident in a Member State are more extensive than those of ordinary third-country nationals, but fall short of those of EU citizens, reflecting a deliberate choice in the part of the legislature to maintain differences in the equal treatment rights of the various categories of migrant

influenced by a complex set of competence agendas. In effect, its powers are implied from general Treaty provisions permitting intervention on the rights and entitlements of third-country nationals, but it remains bound by the restrictions of Article 149 EC (Article 165 TFEU, post-Lisbon) by which Member States retain control of policies in relation to the content of teaching and organisation of education systems. It is, therefore, probably not particularly surprising - and perhaps perfectly desirable - that the EU legislature has limited itself to regulating the access rights of immigrant and asylum-seeking children, and not become involved in the potentially thorny area of wider support measures. Pushing an agenda in relation to this latter category could result in measures that are more about the content of the curriculum and the organisation of the classroom, than they are the regulation of asylum and immigration. Therefore, perhaps when engaging with their educational rights, there is a point at which these children cross the boundary from being addressees of asylum and immigration regulation - and, therefore, the concern of the EU legislature - to becoming young people who as legal residents on the EU territory are entitled to attend schools (and, as such, covered by national education policy). This illustrates perfectly the interaction between law and policy at a European and domestic level and the need to respect these boundaries.

This argument should not, however, be taken to mean that the EU has no role in improving the educational experiences of immigrant and asylum-seeking children beyond their basic right to access schooling. This could be achieved through a better utilisation of the coordinating/sharing of best practice role ascribed by Article 149 EC (Article 165 TFEU, post-Lisbon). This role is particularly apt here given the challenges presented by providing appropriate education for immigrant and asylum-seeking children: surely mobilising efforts at European level would help Member

States shoulder this particular burden. We should be wary of viewing the potential of the EU as lying solely in its role as a top-down, legislative harmoniser: indeed 'soft-law' approaches have provided some of the most tangible EU-origin entitlements for the benefit of children, particularly in the education arena.[178] Furthermore, the basic principle that where the EU intervenes in the lives of children it has an obligation to do so in a way that respects and upholds their rights, is really brought to life when we consider the (non-legislative) flanking measures that can support the Member States in implementing legislative provisions in a way that is sensitive to the needs of children.

The analysis presented above has revealed that the EU's competence in the education domain is not a straightforward one and so a formal equality approach that leaves things fairly ambiguous beyond that is perhaps all that can be achieved in the specific context of Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon). This does not mean, however, that a further role cannot be found for the EU, or even that it is acceptable for it not to ensure efforts to support Member States in implementing these provisions in the most effective way possible.

4. A CRITIQUE OF CHILDREN'S HEALTH CARE ENTITLEMENTS UNDER TITLE IV, PART THREE EC

The final area related to the welfare of child immigrants and asylum-seekers to be addressed by this chapter is health care. The previous domains of family life and education each relate in a unique way to

[178] See, for example, programmes such as Comenius which seeks to develop knowledge and understanding among young people and educational staff of the diversity of European cultures , languages and values – through both classroom based initiatives (with a pan-European dimension), as well as pupil and teacher exchanges. For further details, see: <http://ec.europa.eu/education/programmes/llp/structure/comenius_en.html>

young people: the former because of the special place reserved for children in family structures and the latter because it is primarily aimed at those of school age. Health care, on the other hand, is a concern for the immigrant population as a whole, something that is reflected in an ongoing legal and political debate in relation to the extent of entitlements for non-nationals. As Carballo notes, health care provision for immigrants and asylum-seekers inevitably raises significant tensions between the rights and needs of individuals and the inherent financial cost of provision in the area:

> How the process of migration can best be made a healthy and socially productive process will depend on whether countries can respond in ways that enhance equity while respecting national resource limitations.[179]

In relation to children, in particular, there is extensive recognition of the universal importance of health to young people, underpinned by the belief that without this they will struggle to fulfil their potential. This reinforces the need for states to ensure that health care entitlements are extended to non-nationals - and, where appropriate, are sensitive to their age and needs. Article 24(1) UNCRC, for example states that:

> 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.

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[179] Carballo, M. et al. (1998) 'Migration and Health in the European Union' 12(3) *Tropical Medicine and International Health* pp.936-944, at p.941

This definition emphasises both the universality of health care - it should be available to *all* children - and the importance of ensuring *access* to services.[180] Further, since 1948, the World Health Organisation (hereafter WHO) has suggested that health is understood as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity".[181] Therefore, when assessing the law and policy in relation to health care, it is important to take a holistic view of both mental and physical health and to recognise that a young person's health is inextricably linked to the wider environment in which they live.

This section begins with a brief discussion of EU activities in the health care field, in a general sense, to provide a clearer picture of the possibilities and limitations of intervention at European level. This is followed by an outline of the health care needs of asylum-seeking and immigrant children, thus providing a framework of analysis for the appropriateness of provisions under Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon). This latter point is the subject of the final part of this section.

4.1: Health care and the EU

At EU level, Article 35 of the Charter recognises both a right to preventative healthcare and to treatment of illness, whilst acknowledging that conditions for accessing these are determined at national level. Notwithstanding these sensitivities surrounding competence, the article continues by expressing commitment to incorporating a 'high level of

[180] Underdown, A., (2007) *Young Children's Health and Well-Being*, Open University Press, at p.3

[181] Preamble to the Constitution of the World Health Organization as adopted by the International Health Conference, New York, 19 June - 22 July 1946

human health protection' into all Union policies and activities in the Charter.[182] As far as binding, harmonised legislative intervention in the health care arena is concerned, it has centred on cross-border access to health care services, alongside regulation of the pharmaceutical industry. Whilst the former has had little impact upon young people, [183] the latter has lead to a range of measures that address children as consumers of health-related products such as paediatric medicines[184] A wider, perhaps more prominent, role has been found in the soft-law arena, in particular coordinating the promotion of public health across Europe. A legal base for this activity is found in Article 152 EC which grants the Community complementary competence in the area of public health, including the prevention of human illness and diseases and the obviation of sources of danger to human health. [185] Article 152(1) EC states that actions should include promoting research, health information and education; and Article 152(2) EC indicates that the Community's role is to 'encourage cooperation between the Member States'. In relation to children, this has led to a series of public health programmes targeting 'high-risk' behaviour, such as smoking, consumption of alcohol, drug-taking and obesity.[186] More recently, the EU has entered into the mental health

[182] Article 35 Charter. This general health care provision is further shored up by an article on young people at work, which ensures labour conditions do not harm children's health (Article 32 Charter)

[183] A body of legislation and case-law exists in relation to cross-border access to health services within the EU, however this has had little impact upon young people (for more see Special Issue on 'The Impact of Migration on Healthcare Systems in the European Union' (2007) 14 *Maastricht Journal of European and Comparative Law* 207)

[184] Regulation (EC) No 1901/2006 of the European Parliament and of the Council of 12 December 2006 on medicinal products for paediatric use and amending Regulation (EEC) No 1768/92, Directive 2001/20/EC, Directive 2001/83/EC and Regulation (EC) No 726/2004, OJ L 378/1, 27.12.2006

[185] The provisions of Article 152 EC are found in Article 168 TFEU, post Lisbon

[186] See, for example: the European Network on Young People and Tobacco (ENYPAT) which ran from 1993 to 2006; Council Recommendation of 5 June 2001 on the drinking

arena with the 2008 European Pact for Mental Health and Wellbeing, which includes a section on 'Mental Health in Youth and Education', and is aimed at '...promoting good mental health and wellbeing in the population, strengthening preventative action and self-help, and providing support for people who experience mental health problems and their families.'[187] Many of these programmes have arisen from, or been linked to, EU-funded research,[188] allowing experts to collaborate on strategies to combat pan-European issues relating to young people's health.

In spite of a number of initiatives in the area, it cannot, however, be ignored that healthcare remains a sensitive issue at EU level – both in terms of delineating the boundaries between national and EU competence, and in absorbing the potentially heavy burden of generous entitlements on the public purse. This latter point is particularly significant in the context of migration, an area in which the financial implications of EU level intervention extending healthcare entitlements to nationals of other Member States has provided food for thought. Discussion in this area has focused upon intra-Community cross-border access to healthcare. In the case of the cross-border social security coordination system, which confers certain rights to emergency and non-

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of alcohol by young people, in particular children and adolescents, OJ L 161/38, 16.06.2001; the EU Drugs Action Plan 2005-08 (OJ C 168/1, 8.7.2005), which contains provisions on children; and the White Paper on a Strategy for Europe on Nutrition, Overweight and Obesity related health issues COM(2007) 279 final

[187] The Pact came out of the EU High-Level Conference, 'Together for Mental Health and Wellbeing', Brussels, 12-13 June and is available at < http://ec.europa.eu/health/ph_determinants/life_style/mental/docs/pact_en.pdf> (last accessed 12 January 2009)

[188] See, for example, the work of the European Heart Network on 'Children and obesity and associated avoidable chronic diseases' which was supported by the European Commission Public Health Programme (more information available at <www.ehnheart.org> (last accessed 12 January 2010)

emergency medical treatment between Member States, third country nationals are now entitled to (almost) the same benefits as EU citizens.[189] However, such equivalence does not extend to the rights associated with cross-border healthcare under Article 49 EC (Article 56 TFEU, post-Lisbon) on the freedom to receive services as construed by the ECJ in landmark cases such as *Peerbooms* and *Watts*.[190] Furthermore, in the current context there is the added burden that children themselves are an expensive healthcare endeavour requiring targeted and tailored provision. Physiological and developmental differences between children and adults mean that it is insufficient to assume that young people's healthcare needs will automatically be met by wider policies aimed at the population as a whole. This is something that has been recognised at European level, with the EU public health portal stating that:

> 'Babies and children are a special case when it comes to health issues and cannot simply be treated as "mini-adults". They are more vulnerable and it is particularly important that they are protected and provided with the best possible physical and social environment.'[191]

One cannot, therefore, help but observe how such a potentially unpalatable burden as that presented by the need for healthcare provision in relation to third-country national children, contrasts so sharply with the

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[189] Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality, OJ L 124/1, 20.5.2003. Broadly speaking, this provision allows legally resident third-country nationals to access provisions on cross-border healthcare if the sole reason for excluding them is their nationality

[190] Case C-157/99 *Peerbooms* [2001] ECR I-5473; Case C-372/04 *Watts* [2006] ECR I-4325

[191] See: <http://ec.europa.eu/health-eu/my_health/babies_and_children/index_en.htm> (last accessed 15 January 2010)

worthiness – and, indeed necessity – of any such endeavour. In other words, whilst EU intervention here is fraught with challenges in relation to the financial commitment it could require from Member States, the healthcare needs of children is hardly something that can be ignored when setting down standards for a common European asylum and immigration system. To understand more fully what this commitment would entail the following section considers the challenge of finding appropriate healthcare provision in relation to immigrant and asylum-seeking children.

4.2: The health care needs of immigrant and asylum-seeking children

One of the difficulties in outlining the health care needs of immigrant and asylum-seeking children is that they do not constitute a homogenous group. For example, it is fair to assume that many children, particularly those who have migrated with their family through choice (for their parents' work, for example) and enjoy a relatively comfortable standard of living, have every chance of benefiting from fairly good health. At the very least, their health care needs may be more analogous to those of the native population than, for example, an asylum-seeker who has a more traumatised background. Here, the issue may simple be one of accessing medical treatment, a point that will be returned to below. On the other hand, a significant body of evidence exists suggesting that some groups of immigrant and asylum-seeking children have a greater than average risk of experiencing certain health issues when compared to their native peers.[192]

[192] This is not to say that immigrant and asylum-seeking children are necessarily less healthy than their host-country peers, indeed there is some evidence that the opposite may be true (see, for example, Beiser, M. et al. 'Poverty, Family Processes, and the Mental Health of Immigrant Children in Canada' 92(2) *American Journal of Public Health* pp. 220-227, at 220). This section merely seeks to identify those health care issues that are particularly relevant for non-native children

Carballo notes that communicable diseases have received the most attention from policy-makers seeking to respond to the demands of population movement.[193] In particular, concerns relating to the prevalence of tuberculosis and HIV in immigrants have become somewhat of a preoccupation for media and governments alike.[194] In addition, studies looking at children who have recently arrived in the West from high risk areas such as sub-Saharan Africa have identified hepatitis B, parasitic infections, anaemia, dental caries and unsafe levels of lead as concerns.[195] Equally, changes in the eating habits of immigrant and asylum-seeking children have been shown to present significant health problems, including illnesses related to both vitamin deficiency and obesity.[196] Furthermore, there is significant evidence that wider social factors such as a lack of education in relation to health care and poor housing

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[193] Carballo, *Op. Cit.* n.179, at p.936.

[194] See articles from the BBC ('Immigrants May Face HIV Tests', 2nd January 2004, available at http://news.bbc.co.uk/1/hi/health/2756849.stm); The Guardian ('Boris Johnson Aide 'Deeply Regrets' Immigration Articles', Hélène Mulholland, 16th December 2008); the Daily Mail ('3 in 4 New HIV Cases in African Immigrants', Jenny Hope, 22nd November 2006); and The Times ('All Immigrants to Have Compulsory HIV Tests as Cases Rise', Oliver Wright and Anthony Brown, 13th February 2003). Some of these articles discuss plans by the UK government - which now appear to have been shelved - to introduce compulsory testing of immigrants for HIV. For another example, see the French government programme *Programme national de lutte contre le VIH/sida en direction des étrangers/migrants vivant en France 2004/2006* (for more information and a summary of French government programmes in relation to immigrants and HIV/AIDS, see: <http://crips.cirm-crips.org/crips/dossiers/migrant.pdf> (last accessed 16 June 2010)

[195] Carballo, *Op. Cit.* n.179; Huerga, H. (2002) 'Infectious Diseases in Sub-Saharan African Immigrant Children in Madrid, Spain' 21(9) *Paediatric Infectious Disease Journal* pp.830-4;Hernandez, D. (1999) 'Chapter 1: Children of Immigrants: Health, Adjustment and Public Assistance' in Hernandez, M. (ed.) *Children of Immigrants: Health, Adjustment and Public Assistance* National Academies Press (USA), pp. 1-18, at p.8; Fazel, M. and Stein, A., 'The Mental Health of Refugee Children', (2002) 87, *Archives of Disease in Childhood*, pp.366-370, at p.367

[195] Hernandez, *Ibid.*, at p.5

[196] Carballo, *Op. Cit.* n.179, at pp.938-9.

conditions exacerbate health problems amongst young immigrant populations.[197]

In addition to a number of areas of concern in relation to the physical health of some immigrants and asylum-seekers, mental health can also be a problem for young people. This, Carballo explains, can stem from the process of uprooting and feelings of isolation that can be experienced by any young migrant:

> Psychiatric morbidity among children may be linked to a range of family, personal and environmental circumstances, including culture conflict, job insecurity, regrets about leaving home, family disruption and uncertain future opportunities.[198]

These factors can impact on immigrant children from a range of backgrounds and can result in low feelings of self-efficacy and self-esteem, as well as a sense of alienation from the native population.[199] In addition, it has been shown that more common traumatic events associated with childhood, such as parental divorce, tend to have a greater impact on children from immigrant populations.[200]

The most acute mental health problems, however, are experienced by young people who have fled their country of origin, with the mental scars of these experiences leaving a devastating imprint in many cases. The very nature of forced migration, and the fact that the foundation of

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[197] Carballo, *Ibid.* Huerga, *Op. Cit.* n.195, at p. 831; Hernandez, *Op. Cit.* n.195, at p.3

[198] Carballo, *Ibid.*, at p.941

[199] Hernandez, *Op. Cit.* n.195, at p.9

[200] Carballo, *Op. Cit.* n.195, at p.940

refugee status lies in establishing persecution in the country of origin, means severe psychological trauma is very common (if not universal) in young people who fall within this category. A study of 218 separated children in Europe originating from 28 different countries identified armed conflict or serious civil disturbances and flight from persecution as the principal reasons why young people left their country of origin.[201] This meant that a significant number had undergone experiences such as: forced recruitment or abduction to become child soldiers; direct attack or bombardment; inter-tribal violence; witnessing the death or rape of relatives; and persecution because of their (or a family member's) political opinion, their ethnic origin or religion.[202]

One factor that makes the complex health care needs of many asylum-seeking and refugee children all the more of a challenge for service providers is the extent to which they differ from those of the native population. As Fazal and Stein comment:

> Assessing the treatment needs of refugee children can often seem overwhelming to those involved as they do not easily fit with prescribed care packages.[203]

Even where service providers have expertise in dealing with traumatised children, this experience tends to be with young people whose needs differ from those who have been subjected to prolonged and repeated ill-

[201] Ayotte, *Op. Cit.* n.66, at pp.24-71

[202] Ayotte, *Ibid.*, at pp.24-25

[203] Fazel and Stein, *Op. Cit.* n.195, at p.368

treatment, perpetuated by loneliness and isolation.[204] Additionally, when working with young asylum-seekers and refugees there is often the need to collaborate with a range of professionals and agencies such as interpreters, legal/immigration teams, voluntary organisations, ethnic support groups, social services, and schools.[205] In response to the complexity of their needs, a range of treatment techniques, many innovative, have been successfully utilised: for example, a combination of group and individual sessions; cognitive behavioural therapy; and therapy through play, art, music and story-telling.[206] In spite of the successes of this sort of treatment, it is clear that finding the most appropriate method for treating the psychological difficulties faced by young refugees and asylum-seekers is an area that would benefit from further research.[207]

Underlying the treatment of any illness are issues of access to health care provisions: this requires both a basic right, and the provision of adequate information about how to go about exercising it. There is, however, evidence that even where they are entitled to do so, non-native children are less likely than the rest of their peer group to visit the doctor.[208] The potential consequences of this are explained by Hernandez:

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[204] Fazal and Stein, *Ibid.*, at p.367, comment that there is little research on children and prolonged and repeated trauma (most has been in single events such as floods and school shootings, therefore presenting a different problem)

[205] Fazal and Stein, *Ibid.*, at p.368

[206] Fazal and Stein, *Ibid.*, at p.367

[207] Fazal and Stein point out, for example, that there is dearth of research on the benefit of group treatment which have been utilised successfully in other circumstances (above note 406, at p.368).

[208] Hernandez, D., *Op. Cit.* n.195, at p.5.

> Access to health care services, particularly for children, is essential to ensure that preventative services are provided as recommended, acute and chronic conditions are diagnosed and treated in a timely manner, and health and development are adequately monitored so that minor health problems do not escalate into serious and costly emergencies.[209]

Some commentators have explained this reluctance to seek out health care with reference to wider problems of stigmatisation and marginalisation amongst immigrant populations,[210] but they may also be reflective of a lack of accessible information. In relation to young people, particularly those who are unaccompanied, there is little likelihood of full engagement with available services if information on both the operation of health care provisions in the host country and associated rights of access are not presented in a child-friendly format. Indeed, as with education, access is only meaningful where flanking measures exist to facilitate the exercise of this right. In the same way that a school environment may be alien to third-country national children, European health care systems may be equally bewildering, particularly for those unused to the provision of 'free' medical treatment. Furthermore, as Hernandez's comments above demonstrate, a more fruitful engagement by policy-makers in ensuring that child immigrants and asylum-seekers access appropriate health care provisions has benefits beyond the obvious ones for the young people themselves. Early intervention in treating illness has long been valued for its net cost-effectiveness in a range of contexts and there is no reason not to apply the same argument here. Although many immigrant and asylum-seeking children face an uncertain future as far as their continuing residence in the host country is

[209] Hernandez, *Ibid.*

[210] Derose, K. (2007) 'Immigrants and Health Care: Sources of Vulnerability' 26(5) *Health Affairs* pp.1258-1268, at p.1262

concerned, many will be granted a long-term, if not permanent, right to remain. It would seem, therefore, at best short-sighted and at worse ethically questionable not to commit fully to meaningful health care access for all young people regardless of their particular immigration status. The discussion now turns to an analysis of how effectively EU provisions have responded to these legal and policy challenges relative to the health of immigrant and asylum-seeking children.

4.3: Health care provisions for children under Title IV, Part Three EC

On the one hand, health care provisions in EU asylum and immigration legislation guarantee a fairly low floor of rights for children, with only those given recognised refugee status entitled to unfettered access. On the other hand, however, in relation to mental health and rehabilitative care for victims of trauma, the provisions are far more generous and, in fact, require Member States to provide extensive support tailored to the specific needs of these children.

Recognised refugees are entitled to access health care under the same eligibility conditions as nationals of the Member State which has granted them protection.[211] In principle, beneficiaries of subsidiary humanitarian protection have the same health care rights[212] however Member States may choose to limit their eligibility to "core benefits".[213] The level of entitlement granted to asylum-seekers is slightly lower, extending only to "necessary health care", which at minimum must include "emergency

[211] Article 29(3)(1) refugee qualification Directive, *Op. Cit.* n.58

[212] Article 29(3)(1) refugee qualification Directive, *Ibid.*

[213] Article 29(3)(2) refugee qualification Directive, *Ibid.*

care and essential treatment of illness".[214] Under the provisions of the returns Directive, an illegally staying third-country national who is the subject of a decision to return them to their country of origin (or other third-country) is also entitled to "emergency health care and essential treatment of illness" during the period granted for voluntary departure.[215] Where the Member State concerned resorts to detention of the migrant,[216] this same entitlement applies only to vulnerable persons, which, the Directive states, includes minors.[217] In addition, there is a general obligation to take due account of the health of the third-country national concerned when implementing the returns procedure outlined in the Directive.[218] When the provisions of the temporary Directive are in force, following a mass-influx of displaced persons into the territory of the EU, beneficiaries will be entitled to "necessary assistance" in a number of social welfare areas, health care included.[219] Neither the trafficking Directive, nor the long-term residents Directive make explicit provision for health care. In respect of the latter, eligible third-country nationals must possess sickness insurance for themselves and their family members in any event (however, it is omitted from the list of areas in which long-term residents are entitled to equal treatment).

For most child immigrants and asylum-seekers an option to limit health care access to "core", "necessary" or "essential" treatment is certainly

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[214] Article 15(1) asylum reception Directive, *Op. Cit.* n.60

[215] Article 14(1)(b) returns Directive, *Op. Cit.* n.136

[216] Following the provision in Article 15 returns Directive, *Ibid.*

[217] Article 16(3) returns Directive, *Ibid.* Article 3(9) of the same provision states that the definition of 'vulnerable persons' includes minors

[218] Article 5(c) returns Directive, *Ibid.*

[219] Article 13(2) temporary protection Directive, *Op. Cit.* n.64

questionable. The most obvious explanation for the use of such vague terminology is to allow national legislatures the maximum discretion in determining what the health care entitlement of each category of young immigrant encompasses. The lack of definition of these terms also ensures these provisions are sensitive to variants in the organisation and structure of national health care systems across Europe. However, such indefinite rights open the door to a level of entitlement that fails to respond to the health care needs of children. The very minimum Member States can choose to offer asylum-seekers and illegally staying immigrants, for example, is "emergency care" and "essential treatment of illness". Surely, it is possible to argue that this only encompasses treatment of immediately life-threatening conditions: would it, for instance, cover long-term care of illnesses such as HIV, or the provision of programmes that address dietary problems in immigrant children? This would not seem to uphold the obligation in Article 24(1) UNCRC to recognise the child's right to the 'highest attainable standard of health' and the importance attached to accessing health care in the same provision.[220] Instead, reading across these provisions one is left with a sense that, in respect of those who face uncertainty as to the length of their stay in the host state (asylum-seekers or those subject to a return order, for example), a reluctance to invest in the long-term health of has made it more palatable to endorse a fairly low-level of health care entitlement.

Interestingly, this reluctance to endow asylum-seekers and immigrants with extensive rights in relation to their physical health stands in direct

[220] Of course, Member States are still subject to the provisions of the UNCRC when transposing EU legislation into domestic law, however it is hardly representative of an approach that ensures full compatibility of all legislative texts with the Convention (as promised in *Communication from the Commission: Towards an EU Strategy on the Rights of the Child* COM(2006) 367 final, at p.8)

contrast with really very generous provisions in relation to the mental health of children. An acknowledgement of the need for Member States to provide targeted health care for child migrants is found in provisions in relation to asylum-seekers, refugees and those benefiting from the temporary protection Directive. There is a general obligation to provide adequate (or "necessary" in the case of the temporary protection Directive) health care to those with special needs, with particular reference being made to "torture, rape or other serious forms of psychological, physical or sexual violence". The most far-reaching provision is found in the asylum reception Directive which contains the following extensive provision on mental health care for children:

> 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 health care is developed and qualified counselling is provided when needed.[221]

In respect of the entitlement to rehabilitation services and qualified counselling, although this level of support may be a necessary and appropriate response to children who have undergone such severe trauma as that associated with an asylum claim, it seems that this is by no means standard practice in the Member States. Fazel and Stein point to deficiencies in the UK system in this regard:

> Refugee children are at significant risk of developing psychological problems, and although in the UK they will have arrived in one of the

[221] Article 18(2) reception Directive, *Op. Cit.* n.60

richest countries in the world, the services potentially available to them are often ill equipped to address their needs.[222]

Indeed, when the depth and complexity of the problems suffered by these children is considered, it is clear that the provision of rehabilitation services, qualified counselling and appropriate health care require enormous investment on the part of the Member States.[223] In particular, providing this sort of care will throw up a gamut of challenges that young people's support services in most of Europe are simply not accustomed to dealing with.[224] Therefore, what this provision does is require Member States to ensure that dedicated services tailored to the specific needs of this group are in place, thus providing an example of the EU legislature acknowledging the limitations of an assimilative approach to the needs of child immigrants and asylum-seekers. The question, however, is how effectively service providers at national and regional level will be able to implement this provision, and indeed how receptive Member State governments will be to the EU setting down a trailblazing standard of care for young asylum-seekers and refugees.

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[222] Fazel and Stein, *Op. Cit.* n.195, at pp.366-370. This observation is particularly pertinent in light of the recently reignited debate in the UK on the detention of child asylum-seekers. The devastating impact of this practice on the psychological well-being of young people is well-established (see: Crawley, H. and Lester, T., *No Place for a Child*, (London: Save the Children, 2005). Campaigners welcomed the announcement in May 2010 by the new government that detention of minors was to cease, but have since been frustrated that it appears this process will take months to be realised (see: Slocock, C., 'Border Agency breaking rules over detention of children in Yarl's Wood' *The Guardian*, 20 May 2010)

[223] Fazel and Stein, *Ibid.*, at p.368

[224] This is a real-life example lifted from Ayotte's study of 218 separated children arriving in Western Europe: Ayotte, above note 414, at p.29.

4.4: Pushing the boundaries of the EU's role in the children's rights arena through health care provision?

Although, in general terms, the legislature is clearly in no hurry to set a high standard of health care provision in relation to immigrants and asylum-seekers across Europe, in relation to children specifically, there are really quite ground-breaking provisions contained within the Common European Asylum System. It should not be forgotten though that these are very much limited to the mental health arena. What makes this interesting is that it represents the only example within this body of legislation of measures that recognise the welfare needs of young immigrants and asylum-seekers *over and above* those of the native population. This represents an interesting contrast to the previous models of discrimination and assimilation found in respect of family and education respectively. No explanation for this departure from the limited role of children's rights within this legislation in relation to a discrete area of health care is immediately apparent. Indeed, health care is ultimately an extremely expensive endeavour, particularly in relation to the extent of specialist knowledge, and tailored provision, required in relation to the mental health of refugee children. Furthermore, very similar competence sensitivities exist in the health care arena as in relation to education, an area in which a decidedly less interventionist approach was endorsed. A number of reasons for this apparent anomaly can, however, be speculated upon. First, this provision seems indicative of a 'victim mentality' approach; one that is, indeed, evident elsewhere in this legislation (as discussed in *Chapter Two*). Torture of young people provokes such a surfeit of compassion which may have compelled more extreme action than seen in other areas, even if this does place a heavy burden on Member State welfare systems. Secondly, the provision of psychological rehabilitation services would seem to reflect a desire to

respond to the most immediate and acute needs of recently arrived asylum-seeking children. In this sense, it is perhaps indicative of a 'quick-fix', or short-termist, approach to meeting the welfare needs of this group of young people (even though, in reality ongoing and long-term support is vital). Finally, the explanation for the contrast between provisions in relation to education and mental health is maybe even as simple as the inherent differences between the two as state-funded welfare services. Children interact with education on a group basis, therefore subsuming the migrant population into existing school structures might be seen as the most straightforward option. Furthermore, it has the additional appeal of minimising resource implications for Member States and may be underpinned by the worthy aim of integration, even if ultimately misguided in methods for achieving this. In contrast, every child (native or immigrant) experiences health care on a highly individualised basis – and, so, where their needs are unique (as is the case with victims of trauma), the legislation has simply recognised this. Perhaps its willingness to do so is the greatest cause for optimism in this legislation in relation to children's rights, representing an example of a legislative approach to young people at EU level that accommodates diversity in a way that has rarely been seen before.

As a final point, however, if this vanguard approach in relation to the mental health of refugee children is to be realised at the local level, policy-makers may wish to give some serious thought to their role as 'supporting and coordinating Member State efforts' in the health care arena. The interface between domestic and EU provision is at its most strained when measures that are resource intensive come into play. Here, there is certainly an opportunity for the supra-national body to spearhead research and knowledge exchange at a pan-European level, thus mobilising efforts to improve health care in what is ultimately a highly-

specialised area. Here, the collision of distinct legal and political agendas – in relation to children's rights, asylum and immigration, and health care provision – has welcome, and unusual, potential for fruitful outcomes.

5. CONCLUSION

This chapter has demonstrated the extent to which the position of the child in EU asylum and immigration law is a more legally complex and politically challenging area than is perhaps immediately apparent. The introduction to this chapter set the scene for the exploration of three models of EU intervention in the lives of young people, a point that can be further elaborated in conclusion. In relation to provisions on family life, it was shown that even where an unequivocal competence exists, one which offers the supra-national legislature near complete autonomy to set the tone and content of provision, little was achieved with regard to the respect and promotion of children's rights. Then, provisions on education were shown to endorse an assimilative approach to child immigrants and asylum-seekers that, whilst remaining slightly ambiguous because of the uncertain scope of the equal treatment concept, seems to do little to accommodate the diverse needs of immigrant and asylum-seeking children. Finally, provisions on health demonstrate that, where the will exists, a somewhat surprising model of EU intervention can be produced that, if implemented sensitively, has the potential to far exceed the usual impact of EU law and policy in relation to children. This analysis has, therefore, been the vehicle for exposing not just where children's rights provision fall short, but also for understanding the sometime limited capacity of the EU to deliver on a children's rights agenda through formal legal provision. Perhaps then, where the children's rights model disappoints, it should be remembered that endeavours to influence the substantive content of regulatory provision

always risk being undermined by any number of legal and political factors. Therefore, efforts might better be concentrated on questioning the processes that lie behind the law to ensure that they incorporate a children's rights perspective at every stage of their formulation and evaluation. This appeal of this approach is that, where carried out successfully, it would ensure that all legislative and policy proposals fully consider the rights and welfare of the children that would be affected by them. So, rather than a preoccupation with the deficiencies in regard to young people that are identified through an analysis of the scope and content of the provisions discussed in the first part of this thesis, a potentially more fruitful enquiry would be to assess what governance mechanisms are in place to ensure that an effective children's rights model is endorsed throughout the process. Thus, this thesis moves from issues of regulation, to those of governance.

PART II

A CHILD-FOCUSED APPROACH TO GOVERNANCE OF EU ASYLUM AND IMMIGRATION LAW

Introductory remarks

Part II of this thesis sees a shift in focus away from analysis of the scope, content and efficacy of legal intervention in the lives of child immigrants and asylum-seekers at EU level, towards a discussion of the law-making methods employed by EU institutions to ensure that asylum and immigration provisions are sufficiently child-sensitive. Across the western world, legal analysis has repeatedly pointed to the tendency of Member States to allow restrictive immigration regimes to dominate attempts to endow child migrants with a comprehensive set of rights and entitlements. Resisting this trend, in an effort to deliver on states' commitments to upholding the rights of the child, is a challenge that requires dedicated and tailored approaches to governance, which themselves recognise the unique position of children *vis-à-vis* the legal regimes governing them. In the context of this thesis, any such discussion calls into question the compatibility of the EU's law-making processes with an active children's rights agenda. Consideration of this point is all the more pertinent given that these two areas - children's rights, on the one hand, and effective EU regulation, on the other - have received significant attention in recent years. The aim of this second part of the thesis, therefore, is to provide an analysis of how effectively these two objectives are used in combination to improve the legal regime governing child immigrants and asylum-seekers at EU level.

1. CHILD MIGRANTS: A TRICKY GROUP FOR EU LAW?

It has often been said that asylum-seeking and immigrant children face the 'double jeopardy' of their status as both migrants and children.[1] The extent of their rights, entitlements and freedoms - as well as their status within society - is shaped by both their nationality and their age. This is especially acute in respect of the most vulnerable child migrants (unaccompanied minors or separated children, stateless children, illegal migrants and victims of trafficking, for example) for whom complex interactions with the recognised organs of society - such as the family, schools, health care provision and even immigration officials - leads to further potential for marginalisation. Perhaps not surprisingly, therefore, it has often been noted that immigration laws and policies are notoriously age and gender skewed,[2] predicated on assumptions that credible asylum-seekers are politically active men, and economic migrants fit the prototype of a bread-winning father. Put differently, although increasing numbers of children are involved in migratory processes, the legal regimes to which they are subject on arrival are simply not designed with young people in mind.

To overlook asylum-seeking and immigrant children in the law-making process is problematic for a number of reasons.[3] First, and most

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[1] Bhabha, J. (2001) 'Minors or Aliens? Inconsistent State Intervention and Separated Child Asylum-Seekers *European Journal of Migration and the Law*, 32(3):283-314

[2] T. Spijkerboer and S. Van Walsum (eds) *Women and Immigration Law: New Variations on Classical Feminist Themes* (2006) Taylor and Francis; Bhabha, J. (2004) 'Demography and Rights: Women, Children and Access to Asylum' *International Journal of Refugee Law*, 16(2):227-243; Askola, H., *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union* (Oxford: Hart Publishing, 2007)

[3] Mooten, N. (2006) *Making Separated Children Visible: The Need for a Child-Centered Approach* Irish Refugee Council.

obviously, migrant children have very particular welfare needs. As was seen in Part I, tailored responses to the education, health-care provision and facilitation of family life is needed for young people who have migrated to the host state in which they reside: child migrants are neither in the same position as adult migrants, nor are they easily subsumed within wider laws and policies governing host state national children. Secondly, even where supposedly age-neutral provisions are in place, children can experience these differently from adults. For example, a child navigating the asylum determination process, subject to questioning and fingerprinting, will do so with a very different set of life skills from an adult. Thirdly, child migrants are an especially heterogeneous group. The law classifies children, and therefore sets the boundaries of their legal entitlements, according to their immigration status (or that of their parents) but within and across these categories are a multitude of differing needs and experiences. Research in recent years has supported this argument pointing to the increasingly complex migratory patterns of children and families.[4] This requires a level of adaptability in legal provisions that allows them to be sensitive to individual needs. In light of this, the unique way in which children experience asylum and immigration law should not be reflected simply by the insertion of sporadic child-focused measures into legislative texts, indeed the limitations of this approach were outlined in the previous section. Instead, a more sophisticated approach to law-making that challenges the

[4] On family and child migratory patterns: Ackers, L. and Stalford, H. (2007) 'Managing Multiple Life Courses: The Influence of Children on Migration Processes in the European Union', in Clarke, K. et al. (eds.) *Social Policy Review 19: Analysis and Debate in Social Policy, 2007*, Policy Press; Ackers, L. and Stalford, H (2004) *A Communiry for Children? Children, Citizenship and Internal Migration in the EU.* Ashgate; Orellana, M. et al. (2001) 'Transnational Childhoods: The Participation of Children in Processes of Family Migration' *Social Problems*, 48(4): 572-591; Hashim, I. (2005) *Working Paper T12: Exploring the Linkages Between Children's Independent Migration and Education – Evidence from Ghana.* Development Research Centre on Migration, Globalisation and Poverty (Brighton, UK)

appropriateness of a governance culture, from the point of view of its capacity to implement children's rights, needs to be fostered. The following example, in relation to asylum-seeking children, illustrates the specificity of children's rights, arguing that a tailored approach to implementing these provisions is required:

> Children's rights are human rights, but they need much more thought, effort and political will to function as the tools they were designed to be. As the discussion on the merits of requiring direct interviews of child asylum-seekers by state officials demonstrates, the connection between human rights provisions and policies that actually respect rights must be crafted, not assumed.[5]

To borrow Bhabbha's terminology, the question of whether the EU has the necessary structures in place to ensure this careful 'crafting' of its laws and policies in relation to children, requires some consideration of the current governance culture at EU level.

2. EU GOVERNANCE CULTURE

Since the 1990s the EU has engaged in an "ongoing and self-conscious" attempt to improve the way in which it regulates.[6] This process has seen attempts to move away from the hierarchical, top-down style of governing with which the EU (or EC) was traditionally associated, towards a more democratic Europe that it is hoped will be seen as being

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[5] Bhabha, J., (2009) Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights? 31(2) *Human Rights Quarterly* pp.410-451, p.450.

[6] Craig, P. and De Búrca, G. (2008) *EU Law: Text, Cases and Materials(4th Edition)*, OUP, at p.148. See 'Chapter 5: New Forms of Governance' (pp.144-166) for a general discussion of new governance and the Better Regulation strategy.

closer to its citizens. Much of the motivation behind this move was disquiet at the perception of the EU as a cumbersome system of governing, beset by bureaucracy and red-tape that was "remote and at the same time too intrusive",[7] as well as an acknowledgement that as EU competence stretched into new areas, particularly those with a social dimension, traditional regulatory strategies needed to be challenged. Since 2002, a programme of initiatives grouped together as *Better Regulation Strategy* has been in place. This strategy seeks to: (i) promote the design and application of better regulation tools at the EU level; (ii) work more closely with Member States to ensure that better regulation principles are applied consistently throughout the EU; and (iii) reinforce the constructive dialogue between stakeholders and all regulators at the EU and national levels.[8] At the same time, the Lisbon Agenda - with its vision to create "the most competitive and dynamic knowledge-based economy" in the world - enshrined a number of social goals under the umbrella of *Modernising the European Social Model and Building an Active Welfare State*.[9] A new policy instrument, the Open Method of Coordination (OMC), was introduced at this point, representing a shift towards methods of governance that are focused more upon decentralisation, sharing best practice and involving civil society in the elaboration and evaluation of EU agendas.[10] As a result of these changes

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[7] Commission *European Governance: A White Paper* COM(2001) 428 final, at p.3

[8] See: the Commission's Better Regulation homepage, available at <http://ec.europa.eu/governance/better_regulation/index_en.htm.> (last accessed 26 February 2010)

[9] Paragraphs 24-34, Presidency Conclusions of the Lisbon European Council, 23 and 24 March 2000

[10] For further discussion of the Open Method of Coordination, see: Beveridge, F. and Velluti, S. (eds.) Gender and the Open Method of Coordination: Perspectives on Law, Governance and Equality in the EU (Aldershot:Ashgate, 2008); Chalmers, D. and Lodge, M., *The Open Method of Coordination and the European Welfare State* (London School of Economics and Political Science, 2003)

to the EU's governance culture, a number of strategies related to the law-making process have, to varying degrees and in diverse contexts, been developed in an attempt to improve European-level regulation. Amongst others, these include: impact assessment, mainstreaming, consultation of civil society, target-setting and monitoring.

Interestingly, both the content of, and the ethos behind, these developments resonate clearly with the new sociology of childhood developed over the past twenty years and, yet, there has been virtually no attention devoted to the question of EU governance strategies and the rights of the child. In particular, whilst there is a growing literature considering governance methods in a soft-law context,[11] there is little consideration of the EU's social agenda when it intersects with a binding harmonisation approach to regulation. On the one hand, this is understandable given the roots of *Better Regulation* in the drive towards economic growth and the creation of jobs; but, on the other, it is hard to defend in the face of the EU's developing *Strategy on the Rights of the Child.*[12] In particular, alongside singling-out substantive areas for enhanced EU intervention, the Commission document on the strategy also explicitly identifies objectives at the governance level. Furthermore, in the specific context of immigrant and asylum-seeking children, the Tampere objective of according third-country nationals' rights and obligations comparable to those of EU citizens, should be borne in mind. Although inextricably bound up with notions of citizenship, there is no reason, in light of the Tampere ethos, for moves towards greater

[11] For an extensive discussion of some of the key literature on governance methods in soft-law, see Mörth, U. (2004) *Soft Law in Governance and Regulation: An Interdisciplinary Analysis* (Edward Elgar: UK).

[12] *Communication from the Commission: Towards an EU Strategy on the Rights of the Child* COM(2006) 367 final

accountability and democracy to be for the exclusive benefit of EU citizens.

3. CONCLUSION

So far, the only sign of a child-focused approach to law-making in relation to asylum and immigration law has been through statements from the Commission that children's rights have been mainstreamed. *Chapter Four* considers what a children's rights mainstreaming strategy on the part of the EU would consist of; and then addresses the extent to which this approach has been applied successfully in the context of asylum and immigration. *Chapter Five* then looks at the need for the EU to engage in more effective monitoring of the impact of its asylum law and policy on children: initial attempts in this regard are considered, and suggestions for a more comprehensive approach are put forward.

Chapter Four

INTEGRATING CHILDREN'S RIGHTS INTO THE PROCESS OF FORMULATING ASYLUM AND IMMIGRATION LAW: A CRITIQUE OF MAINSTREAMING

1. INTRODUCTION

At its most basic level, mainstreaming simply consists of taking into account a particular concern in the formulation, implementation and evaluation of law and policy.[1] The central tenet of this chapter is that any discussion of children's rights in EU asylum and immigration law must move beyond an analysis of child-focused provisions in legislative texts (the subject of Part I), and question the very cultures surrounding the formulation of law and policy. Mainstreaming has emerged as an important mechanism for framing the process by which a particular concern is integrated into law and policy, and has come to be associated with a level of comprehensiveness that ensures its impact is felt at every stage and at every level of the process. Although applied in a multitude of contexts,[2] it has garnered particular attention and popularity in recent

[1] Mainstreaming as an equality issue has been defined as the "integration of equality considerations into all aspects of policy formulation, implementation and evaluation" (Bell, M. "Equality and the European Union Constitution" 33 (2004) *Industrial Law Journal* p.242, p. 252)

[2] At EU level, it is best known for its achievements in the gender equality arena, enshrined in Article 3(2) EC (see discussion below). It finds further statutory expression at domestic level: s.75(1) The Northern Ireland Act 1998 imposes a duty on all public authorities to "have due regard to the need to promote equality of opportunity" in carrying out its functions; s.2 Race Relations Act contains a similar duty

years at EU level, and has now emerged as a key governance strategy in promoting the rights of the child,[3] particularly in relation to asylum and immigration law and policy. A significant factor in explaining the level of attention that has been lavished on mainstreaming, from within the children's rights arena and beyond, is its perceived successes in advancing the position of women in EU law and policy. Whether the template offered by gender mainstreaming can usefully be applied elsewhere is a question that has attracted some comment,[4] but there has been very little specifically addressing its use in relation to young people.[5]

Attempts to assess mainstreaming children's rights in EU asylum and immigration law quickly come up against some significant hurdles. First of these is that, although in principle a simple concept, mainstreaming has evolved into a complex, multi-dimensional, multi-levelled, and often highly technocratic, process. Understanding and delineating its requirements has provided academic fodder, particularly amongst feminist lawyers who have theorised, debated, criticised and praised both the concept itself and its implementation by the EU institutions.[6] This

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[3] *Communication from the Commission: Towards an EU Strategy on the Rights of the Child* COM(2006) 367 final, at pp. 6-7

[4] J. Shaw "Mainstreaming Equality and Diversity in European Union Law and Policy" 58 (2005) *Current Legal Problems* p. 255

[5] The most notable exception in this regard is a section devoted to 'Mainstreaming children's rights in the European Union' in H. Stalford 'Constitutionalising Equality in the European Union: a Children's Rights Perspective' (2005) 8 *International Journal of Discrimination and the Law* p.53-73

[6] On the EU see, in particular: The 2002 special edition of *Feminist Legal Studies* (F. Beveridge and J. Shaw (eds) 'Mainstreaming Gender in European Public Policy *Feminist Legal Studies* 10(3-4) (2002)); F. Beveridge (2007) 'Building Against the Past: The Impact of Mainstreaming on EU Gender Law and Policy' 32(2) *European Law Review* pp.193-212; Shaw, *Op. Cit.* n.4; Woodward, A.E. (2008) 'Too Late for Gender Mainstreaming? Taking Stock in Brussels' 18 *Journal of European Social Policy*, pp.289-302, at p.289. For more general feminist analyses of mainstreaming, see: M.

literature, whilst engaging and illuminating in itself, requires significant paring down and often simplification in order to be applied to a form of mainstreaming that is still very much in its infancy. Secondly, in spite of the enthusiasm with which the application of mainstreaming to a children's rights context has been met, attempts to define children's rights mainstreaming, either by the institutions themselves or in academic literature, remain limited. An important feature of this analysis, therefore, is to reach a better understanding of what children's rights mainstreaming does, and should, entail, and to assess the extent to which it is an appropriate and effective governance strategy in the context of asylum and immigration.

The chapter is divided into three main parts. First, it outlines the rhetoric surrounding mainstreaming and discusses the extent to which it has rapidly become accepted as a governance strategy in the EU children's rights arena, in spite of a fairly limited understanding of its requirements in practice. Second, it considers what mainstreaming has entailed in the wider context of EU law and policy, looking, in particular, to the example of gender equality. Third, it addresses whether, and how, this knowledge and experience of mainstreaming can be applied in a children's rights context, looking at the area of asylum and immigration to illustrate the discussion. This analysis takes place first at the theoretical level, then goes on to consider practical hurdles to children's rights mainstreaming in EU asylum and immigration law.

Daly 'Gender Mainstreaming in Theory and Practice' 8 (2005) *Social Politics: International Studies in Gender, State & Society* p.433; J. Squires 'Is Mainstreaming Transformative? Theorizing Mainstreaming in the Context of Diversity and Deliberation' (2005) 12 *Social Politics: International Studies in Gender, State and Society*, p.366

2. THE RHETORIC OF MAINSTREAMING CHILDREN'S RIGHTS IN EU ASYLUM AND IMMIGRATION LAW

The idea that mainstreaming is *the* tool of governance that holds the key to the promotion of children's rights in the EU has reached almost universal acceptance amongst policy-makers and campaigners alike. As early as 2001, five years before the *Strategy on the Rights of the Child*,[7] and when the common European asylum and immigration system was still in its infancy, the Commissioner for Justice and Home Affairs publicly stated the importance of integrating the needs of children into asylum and immigration law:

> To take into consideration the specific situation of groups with special needs, and in particular children, must be a key concern for the development of immigration and asylum policies that are both fair and efficient.[8]

This commitment was later reinforced by the Commission, which identified "more efficient mainstreaming of children's rights in EU policies, strategies or programmes" as a principal challenge and a key objective of the Children's Rights Strategy.[9] The aim of this process, it argues, would be to ensure full compatibility of all legislative and non-legislative action with the principles of the UNCRC.

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[7] *Op. Cit.* n.3

[8] António Vitorino, Commissioner for Justice and Home Affairs, speech at seminar on 'Children affected by armed conflict and forced displacement', Norrköping, 2 March 2001 as cited in Ruxton, S. (2003) *Separated Children in EU Asylum and Immigration Policy* Save the Children, at p.18

[9] *Op. Cit.* n.3, pp. 6-7

Wider institutional support is found, for example, in the Parliament's response to the Commission's Strategy which states that "it is essential that children's rights be incorporated and protected (mainstreamed) in all EU policies affecting children directly or indirectly".[10] To further progress this issue, mobilise support and begin work on a more concrete strategy, in November 2007 the European Parliament brought together politicians, NGO representatives and academics in Brussels to debate the future of an EU children's mainstreaming agenda.[11] Additionally, the European meeting of Children's Ministers, held in Brussels in 2001, added its collective voice of support to efforts to better incorporate the UNCRC into law-making at EU level, arguing that this would go some way to redressing the lack of a concrete Treaty basis for activities promoting the rights of the child.[12]

Outside of the institutions, all the major NGOs and charities engaged in lobbying for a more coherent and pro-active children's rights agenda at EU level have identified the need for mainstreaming. UNICEF state that any such strategy must ensure children are addressed as a distinct and visible concern within EU budgets, policies, laws, programmes and relations with third countries.[13] EURONET which, until its disbanding in May 2009, was the principal EU-level children's rights coalition, stated that mainstreaming is essential to move beyond an *ad hoc*, uncoordinated

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[10] Paragraph D, European Parliament Resolution of 16 January 2008, *Towards an EU strategy on the rights of the child* (2007/2093(INI))

[11] 'Mainstreaming Children's Rights in EU Policy', European Parliament, Brussels, 9th October 2007

[12] Final Report, European Meeting of Ministers for Children's Affairs, 9th November 2001, Brussels, available at <http://www.childoneurope.org/about/pdf/Brussels_declaration_en.pdf> (last accessed 26 January 2010), at p.4

[13] 'Press release: UNICEF welcomes new European Union commitment on children's rights', available at < http://www.unicef.org.uk/press/news_detail_full_story.asp?news_id=725> (last accessed 26 January 2010)

approach to young people.[14] Save the Children link mainstreaming to a raft of specific strategies that will promote children's rights at EU level, such as training and capacity building for all those involved in implementing the Strategy on the Rights of the Child.[15]

It is striking both the extent to which mainstreaming has been accepted in so many quarters as having a crucial role to play in the delivery of an EU children's rights strategy, and also the level of belief in its potential for success. It is somewhat surprising, therefore, that there have been few attempts to define what it would entail in practice. In other words, much has been written about mainstreaming and young people, but on the whole this has simply pointed to *the need to do it*, with little guidance on *how to go about it*. Whilst this is, to a certain extent, understandable given the difficulties in reaching a workable definition in other areas, a concept that eludes definition is problematic when it has been so universally accepted within the EU children's rights arena and, indeed, forms the cornerstone of activities outlined in the Communication on the Strategy. Save the Children offer a starting point when they state that "mainstreaming, in a children's rights context, can simply be defined as integrating a children's perspective into EU law and policy making". EURONET elaborate slightly on what is meant by a 'children's perspective' when they point to the need to use the UNCRC as the foundation for incorporating young people into EU law and policy:

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[14] EURONET *Progressing the Mainstreaming of Children's Policies and the Rights Of The Child in All Policies of the Union*, 22nd April 2004, available at <http://www.crin.org/docs/ProgressingMainstreaming.pdf> (last accessed 26 February 2010)

[15] Save the Children *Proposal for the EU Strategy on the Promotion and Protection of the Rights of the Child* Exact URL inaccessible, available via the Save the Children website (<www.savethechildren.net>) (last accessed 26 February 2010)

> Without systematic reference to the Convention on the Rights of the Child as a yardstick by which to judge the extent to which actions and policies promote children's rights, there is no means by which to be sure that children's rights are being upheld and promoted...Integration of the principles of the Convention on the Rights of the Child would act as a 'child-proofing tool' and ensure that the EU was under the same obligations as its Member States.[16]

In addition, to reflect the multi-level and multi-dimensional nature of mainstreaming, it has been suggested that the following definition provides a useful starting point: "[t]he incorporation of children's rights, needs and welfare, according to the principles of the UNCRC, at all stages and at all levels of EU law and policy-making."[17] However, as with other attempts to define mainstreaming, these statements rather simplify the issue. Mainstreaming has come to be understood as a concept that is felt at the planning, formulation and implementation stages and is adopted by all actors in the process. Furthermore, it is clear that those who advocate its use do so with the anticipation that it implies a range of sub-categories of activity that go way beyond a straightforward incorporation of children's rights principles into legislative texts, addressing issues as wide as resource provision, decision-making and knowledge enhancement. Aside from references to the UNCRC, existing definitions do not really engage with the specificity of children's rights - and, indeed, the interaction of young people with law and policy - and how these might be incorporated into a mainstreaming agenda. It would

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[16] EURONET (2000) 'Recognition of the Rights of the Child in the Charter of Fundamental Rights – submission to the drafting group for an EU Charter of Fundamental Rights', available at: <http://www.crin.org/docs/EUCharterFundRights_EURONETsubmission.pdf> (last accessed 26 February 2010), at p.7

[17] Stalford, H. and Drywood, E., 'Coming of Age? Children's Rights in the European Union' (2009) 46 *Common Market Law Review*, pp.143-172, at p.163

be wholly naive to assume that existing models of mainstreaming could be transposed onto an area such as children's rights without meaningful engagement in how to adapt its tools and methods to the specific context.

In summary, the buzz created by the idea of mainstreaming children's rights has not, as one might expect, prompted a great deal of analysis in the area: despite the fact the EU claims to have carried it out in relation to asylum and immigration law. Essentially, two points merit further discussion in relation to mainstreaming children's rights in EU asylum and immigration: first, there is a need to better understand, in general terms, what mainstreaming in EU law and policy has entailed in other areas to which it has been applied; secondly, a discussion of how these strategies, or processes, can be adapted to the specific context (that is, the intersection of children's rights and asylum and immigration law). It is to these two points we now turn.

3. UNDERSTANDING MAINSTREAMING IN EU LAW AND POLICY

It has already been stated that, in its most basic terms, mainstreaming is the integration of a particular perspective into wider EU policies. The aim of this section is to consider previous activities associated with mainstreaming to better understand what it entails in practice. Mainstreaming is more established in the governance culture of the EU than it is often given credit for, and, in relation to a number of areas, it is enshrined in the Treaty itself. Whilst mainstreaming is perhaps best known and most theorised in relation to its contribution to gender

equality, in this guise it is relatively young,[18] with a longer tradition stemming from the duty found in the Single European Act 1987 to incorporate environmental protection into wider Community policies.[19] Similar obligations are now found in relation to health care,[20] as well as employment,[21] culture,[22] consumer protection[23] and sustainable development.[24] The aim here is less about equality and more concerned with integration in wider EU policies, such that it serves as a guide for the Community's policy objectives and activities, and their implementation.[25] This integrative style of mainstreaming has had mixed

[18] This can only be traced back to the late 1990s, see: Commission, *Incorporating Equal Opportunities for Women and Men into all Community Policies and Activities* COM (1996) 67

[19] 'Environmental protection requirements shall be a component of the Community's other policies.' Ex Article 130r(2) EC. Now more clearly articulated in Article 6 EC (Article 11 TFEU, post-Lisbon): "Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development"

[20] Article 152(1) EC (Article 168(1) TFEU, post-Lisbon): "a high level of human health protection shall be ensured in the definition and implementation of all Community policies and activities".

[21] Article 127(2) EC (Article 147(2) TFEU, post-Lisbon): "The objective of a high level of employment shall be taken into consideration in the formulation and implementation of Community policies and activities."

[22] Article 151(4) (Article 167(4) TFEU): "The Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures."

[23] Article 153(2) EC (Article 12 TFEU): "Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities."

[24] Article 178 EC: "The Community shall take account of the objectives referred to in Article 177 in the policies that it implements which are likely to affect developing countries". This provision was repealed by Treaty of Lisbon 2007. A similar statement is now found in Article 208(1) TFEU: "The Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries."

[25] P. Davies *European Union Environmental Law: An Introduction to Key Selected Issues*, Ashgate, 2004, at pp.32-36.

success: for example, progress with environmental concerns has been described as "slow",[26] whereas in the context of health care, Hervey and McHale credit mainstreaming with the wide-ranging Treaty bases that have been utilised to adopt measures protecting health.[27]

Although a wide-ranging set of mainstreaming style duties exist, it is achievements in the gender equality arena, and subsequent analysis by feminist lawyers, that can be credited with the most extensive unpacking of the concept: as such, this particular mainstreaming incarnation has provided the most revealing case-study to support the research for this chapter. The duty to mainstream a gender perspective is found in Article 3(2) EC which provides that "in all the activities referred to in this Article [i.e. a list of E.C. policies], the Community shall aim to eliminate inequalities, and to promote equality, between men and women". Probably the most widely cited definition of gender mainstreaming comes from the Council of Europe and states that it is:

> ...the (re)organisation, improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in all policies at all levels and at all stages, by the actors normally involved in policy-making.[28]

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[26] *Ibid.*, at p.36.

[27] Hervey, T. and McHale, J., *Health Law and the European Union* (CUP, 2004) at pp.83-87. See, for example, cited rulings in which the Court of Justice have held that Article 37 EC is the appropriate base for health protection measures on food law as they are a part of the common agricultural policy: Cases 68/86 *UK v Council (Hormones in Beef)* [1988] ECR 855; C-131/87 *Commission v Council (Animal Glands and Organs)* [1989] ECR 3743; C-331/88 *R v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte Fedesa and Others* [1990] ECR I-4023.

[28] Council of Europe, *Gender Mainstreaming: Conceptual Framework, Methodology and Presentation of Good Practices, Final Report of the Activities of the Group of Specialists on Mainstreaming*, EG-S-MS(98)2, (Strasbourg: Council of Europe, 1998)

The Commission provides an addendum to this definition, and arguably adds a somewhat visionary element, when it states that:

> [Gender mainstreaming] is the way to make gender equality a concrete reality in the lives of women and men creating space for everyone within the organisations as well as in communities - to contribute to the process of articulating a shared vision of sustainable human development and translating it into reality.[29]

Beveridge notes the remarkable ascendency of the concept, which she argues has now been "adopted and integrated into the language and discourse of the European Commission".[30] In spite of its clear articulation in the Treaty, numerous attempts to define it and a vast literature analysing it, one of the acknowledged difficulties of mainstreaming lies in delineating its requirements: "everyone understands the idea but no one is sure what it requires in practice".[31] For the purposes of this analysis, two principal difficulties have been encountered in reaching a clear understanding of mainstreaming. First, it means many different things to many different people: as Beveridge points out, it has been viewed as integrationist or transformative, as expert-bureaucratic and democratic-participatory and, more recently, as an aspect of governance.[32] She has described mainstreaming as "rather amorphous and 'fuzzy'", going on to argue that it can only really be understood

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[29] Definition provided of gender mainstreaming provided by the Commission on Europa, available at <http://ec.europa.eu/social/main.jsp?catId=421&langId=en> (last accessed 26 February 2010)

[30] Beveridge (2007), *Op. Cit.* n.6, p.193.

[31] Beveridge, F. and Nott, S., 'Mainstreaming: A Case for Optimism and Cynicism', (2002) 10(3-4) *Feminist Legal Studies*, pp.299-311, at p.299.

[32] Beveridge (2007), *Op. Cit.* n.6, at p.201

through an analysis of its implementation.[33] Second, it is multi-faceted: not only are its effects felt at different stages of the law and policy making process, but the methods used to support the incorporation of a gender perspective have varied enormously. This analysis does not, therefore, set out to present a comprehensive list of gender mainstreaming's achievements and shortcomings. Instead, it provides an analysis of the central activities underpinning its practice. As such, the analysis focuses on some of the key ways in which gender equality has been promoted through activities associated with mainstreaming. The discussion is structured around three areas: (1) it looks at the stage of formulating law and policy; (2) it considers impacts at the level of institutions, through structural changes and increased representation of women's issues; and (3) it focuses on strategies to facilitate mainstreaming, such as efforts to enhance knowledge through research and data-gathering, engaging with civil society and financing equality initiatives.

3.1. The design of law and policy

At the stage of formulating law and policy, the effect of mainstreaming has been threefold. First, it has ensured that gender is a constant factor in the design of EU activity. As such, gender mainstreaming has required the Commission to move beyond specific measures targeted at enhancing the status of women to "mobilising all general policies and measures specifically for the purpose of achieving equality".[34] This has been

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[33] Beveridge (2007), *Ibid.*, at p.193.

[34] Commission, *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: A Roadmap for equality between women and men, 2006-2010*, COM(2006) 92 final, at p.5

described as a "dual track"[35] approach whereby initiatives and programmes designed with the sole of aim of enhancing gender equality are complemented by a cross-sectoral strategy in which the position of women and men is considered in the design of all Community policies.[36] This has had an impact across the Community's increasingly broad areas of competence, including those that were previously considered to be 'gender blind'.[37] Currently, the 2006 Roadmap for equality between women and men sets out the priorities for the period 2006-2010 in the gender arena.[38] Beveridge argues that this document sees a "further widening and deepening of the policy agenda" to integrating gender into new fields such as health and domestic violence.[39]

Secondly, the Commission has ensured that, in addition to gender equality being a factor in agenda-setting activities, a degree of accountability is introduced through monitoring the achievement of these objectives. A gender perspective is incorporated into the initial agenda-setting stage through a combination of an annual work programme - outlining mainstreaming initiatives that will be introduced and actions

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[35] Mazey, S., 'Gender Mainsteaming Strategies in the EU: Delivering on an Agenda' (2002) 10(3-4) *Feminist Legal Studies*, at pp.227-240, at p.234

[36] Commission, *Towards a Community Framework Strategy on Gender Equality (2001-2005)* COM(2000) 335 final

[37] Mazey, *Op. Cit.* n.35, at p.236, gives the following examples of new areas in which the impact of mainstreaming has been felt: world trade and globalisation, social exclusion, the environment, fisheries and, interestingly, asylum and refugee policy. Bell, however, is less convinced that gender mainstreaming has had any positive impact in the area of asylum and refugee law (M. Bell "Mainstreaming Equality Norms into European Union Asylum Law" 26 (2001) *E. L. Rev.* p.20, at p.22, discussed further below)

[38] Commission *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: A Roadmap for equality between women and men, 2006-2010*, COM(2006) 92 final, above note 479

[39] Beveridge (2007), *Op. Cit.* n.6, at p.451

that will be taken in favour of the under-represented sex in each policy area[40] - and more general, cross-cutting strategies that identify priorities to be met by each Directorate-General.[41] The use of periodic Framework Strategies in the early days of gender mainstreaming has now been replaced with the 2006 Roadmap. These goals then form the basis of indicators against which subsequent achievements are measured. As such, the Commission is able to produce an Annual Report on Equality between Women and Men.[42] This, in combination with a Gender Scoreboard, constitutes ongoing monitoring of activities and achievements.[43] Beveridge also points to evidence of self-critical review within the Commission whereby good practice in certain Directorate-Generals is identified with a view to replication elsewhere.[44]

Thirdly, the incorporation of a gender perspective into the design of law and policy is underpinned by a number of more technical processes that that have been termed 'gender methodologies'.[45] Otherwise put, these are approaches to governance that support the incorporation of a gender perspective into law-making. For example, Mazey reports that the Commission adopted a strategy in 2001 whereby their legal service systematically gender-proofed texts.[46] More recently, there has been a

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[40] Mazey, *Op. Cit.* n.35

[41] See, for example: *Communication from the Commission to the Council and the European Parliament: Framework Strategy on Gender Equality Work Programme for 2001*, COM (2001) 119 final

[42] For example, see: *Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Equality Between Women And Men, 2009* COM(2009) 77 final

[43] Beveridge (2007), *Op. Cit.* n.6, at p.199.

[44] Beveridge (2007), *Ibid.*, at p.200.

[45] *Op. Cit.* n.38

[46] Mazey, *Op. Cit.* n.35, at p.236.

move towards the new integrated impact assessment, by which the Commission's most significant legislative and non-legislative proposals have been screened for their potential economic, social and environmental consequences;[47] a process which, in the 2006 Roadmap, the Commission identifies as requiring reinforced implementation of a gender perspective.[48] The Commission has now produced guidelines on how to perform a gender impact assessment.[49] Finally, the Roadmap recognises the importance of a financial commitment underpinning the incorporation of gender into law and policy, through introducing an equality perspective into the budgetary process.[50]

3.2. Institutional changes

Mainstreaming has been credited with changing the very culture surrounding gender issues at an institutional level, both in relation to the structures underpinning decision-making and the expertise of the personnel involved. Mazey notes that these changes are "designed to strengthen the institutional capacity of the administration to deliver mainstreaming",[51] and Beveridge has described their effect as ensuring that both the political impetus is maintained, and responsibility is taken, for mainstreaming's implementation.[52] The 1990s saw the creation of a number of high-level groups within the institutions, felt most keenly in the Commission, to oversee equality (principally, though not exclusively,

[47] Further discussion of the impact assessment procedure and children's rights in found in *Chapter Five*

[48] *Op. Cit.* n.38, at p.6

[49] Available at <http://ec.europa.eu/social/main.jsp?catId=421&langId=en&pubId=43&type=2&furtherPubs=yes> (last accessed 18 Feb 2010)

[50] *Op. Cit.* n.38, at p.12

[51] Mazey, *Op. Cit.* n.35, at p.233.

[52] Beveridge (2007), *Op. Cit.* n.6, at p.198

of women and men). Spearheading these changes was the creation, in 1995, of the Commissioner's Group on Equal Opportunities responsible for ensuring the overall coherence of EU equal opportunities policies. With a specific gender remit is the Inter-Service Group on Gender Equality in which fifty-five Commission officials from across the Directorates-General meet to ensure that gender issues are mainstreamed across policy areas. Longer established is the Advisory Committee on Equal Opportunities for Women and Men which assists the Commission in formulating and implementing EU activities geared towards gender equality: as well as fostering ongoing exchange of experiences, policies and practices (including between the Member States), it also delivers opinions to the Commission on issues of relevance to the promotion of gender equality.[53] Beveridge has noted that whilst these groupings "mainly comprise Commissioners, officials and experts there are instances where representatives of other interests are present". She gives the example of the presence of employers' organisations, workers' organisations and the European Women's Lobby in an Advisory Committee on equal opportunities.[54] More recently, agreement was reached for the creation of a European Institute for Gender Equality, the tasks of which are to collect and analyse comparable data on gender issues, to develop methodological tools (in particular for the integration of the gender dimension in all policy areas), to facilitate the exchange of best practices and dialogue among stakeholders, and to raise awareness among EU citizens.[55]

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[53] Commission Decision of 9 December 1981 relating to the setting up of an Advisory Committee on Equal Opportunities for Women and Men, OJ L 020/35, 28.01.82

[54] Beveridge (2007), *Op. Cit.* n.6, at p.198.

[55] Regulation (EC) No 1922/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a European Institute for Gender Equality, OJ L 403/9, 30.12.2006

In addition, there are prominent initiatives to increase the number of women at a senior level of the decision-making and policy formulation process. This is in response to arguments that gender mainstreaming could only succeed if measures were taken to combat the under-representation of women in both national and EU decision-making bodies.[56] With this in mind targets were set by the Commission to be achieved by 2005: to double the number of women in senior management positions and to ensure that expert groups and committees established by the Commission have at least 40% of each sex membership.[57] Renewed commitment to this endeavour is found in the 2009-2010 Work Programme on equality between men and women which outlines enhancing women's participation in politics and in economic decision making as a priority.[58] In 2008, the Commission launched a European-level network of experts with experience of drawing women into high-level positions: it provides a platform for cooperation, exchange of information and experience, mutual learning and sharing of best practice.[59] Organisational changes to enhance the status of women have taken place in a number of institutions other than the Commission: the Committee of the Regions, the Committee of the Permanent Representatives within the Council and the Parliament's administrative services. Interestingly, in light of the comments in chapter 3 about the lack of children's rights expertise at the ECJ, it is worth noting that reports on the impact of mainstreaming on both the composition and

[56] Mazey, *Op. Cit.* n.35, at p.234

[57] Mazey, *Ibid.*, at p.234

[58] *Commission Staff Working Paper, Roadmap for equality between women and men (2006-2010)*, 2009-2010 Work Programme SEC(2009) 1113 final.

[59] For a news item on the launch of the network, see: <http://ec.europa.eu/social/main.jsp?langId=en&catId=418&newsId=133&furtherNews=yes> (last accessed 18 February 2010)

expertise of the Court, from a gender perspective, have been far from glowing.[60]

As a final point on institutional changes, Mazey notes that whilst much expertise at the Commission has been provided by consultants and academic experts (so-called 'flying gender experts'), some in-house gender awareness training has been given to selected officials.[61] The Commission itself has more recently identified the need for this training to be more systematic.[62] As Beveridge argues, the very nature of mainstreaming is that it is carried out "by the actors normally involved in policy-making",[63] thus underlining the importance of ensuring this training takes place.[64] Where specific training has not been provided, guidelines aimed at policy makers are published within the Commission on carrying out gender impact assessments, gender-proofing of documents and inserting gender into policy proposals.[65]

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[60] On the composition of the Court, see: Kenney, S. (2002) 'Breaking the Silence: Gender Mainstreaming and the Composition of the European Court of Justice' 10 (3-4) *Feminist Legal Studies*, pp.257-270. For a critique of the content of its judgments from a gender mainstreaming perspective, see: J. Shaw "The European Union and Gender Mainstreaming: Constitutionally Embedded or Comprehensively Marginalised" 10 (2002) *Feminist Legal Studies* p.213, particularly pp.219-224.

[61] Mazey, *Op. Cit.* n.35, at p.234

[62] Beveridge (2007), *Op. Cit.* n.6, at p.204.

[63] Indeed, this is a key component of the Council of Europe definition of mainstreaming, *Op. Cit.* n.28

[64] Beveridge (2007), *Op. Cit.* n.6, at p.204.

[65] Mazey, *Op. Cit.* n.35, at p.233.

3.3. Facilitating mainstreaming: information gathering, engaging civil society and funding

A number of cross-cutting activities underpin gender equality work at EU level: these are clustered around information gathering, engaging civil society and securing funding. First of all, gender mainstreaming has been active in increasing the visibility of women in the Union through engaging with women in research and incorporating a gender perspective into statistics. For example, gender differences have been highlighted through statistics on agricultural employment, childcare services and national asylum and refugee figures.[66] In addition, a number of Directorates-General have carried out studies that "have drawn women into the policy-making process for the first time": an example from a traditionally 'gender blind' sector is the consultation of women by DG FISH on their role in the fisheries sector.[67]

Secondly, gender mainstreaming has secured a practice of engaging with 'civil society' or interest groups to further equality within the Union, thus drawing on an expertise and energy to promote a particular interest that may not otherwise be present in the institutions. The 2006 Roadmap identifies "reinforced EU-level cooperation with NGOs, including dialogue with women's organisations and with other civil society organisations" as a key area for action in improving governance for gender equality.[68] Most notable is the role played by the European Women's Lobby.[69] This group has become not only the principal activist

[66] Mazey, *Ibid.*, at p.236

[67] Mazey, *Ibid.*, at p.236 (original citation not available)

[68] *Op. Cit.* n.38, at p.12.

[69] For more detail on the activities of this group, see the website of the European Women's Lobby, available at < http://www.womenlobby.org/> (last accessed 26 February 2010)

for women's rights in the Union, but also an influential consultant providing expertise for the Commission. As Mazey points out, the under-representation of women at the policy formulation stage has led the Women's Lobby to flex its muscles through "constant harassment" of Commission officials and participation in technical, detailed policy-making.[70] In addition, the last ten years have seen a feminisation of the EU policy agenda with the Lobby becoming increasingly active in a number of new policy areas (such as, for example, globalisation and trade, EU enlargement) and EU Treaty and institutional reform.[71]

Finally, to be realised, gender-related activities must be underpinned by a financial commitment. A key success of mainstreaming has been in securing resources to be used by a range of actors, such as the Member States themselves, local and regional authorities, the social partners, universities and research organisations, NGOs and the media to promote the equality of women and men. For example, a positive framework strategy underpinned the Framework Strategy 2001-2005 for which a budget of EUR 50 million was available.[72] The PROGRESS programme which provides financial support for the implementation of EU objectives related to employment, social affairs and equal opportunities, identifies gender equality and mainstreaming activities as one of five target areas.[73]

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[70] Mazey, *Op. Cit.* n.35, at p.238.

[71] Mazey, *Ibid.*

[72] Mazey, *Ibid.*, at p.235.

[73] Decision No 1672/2006/EC of the European Parliament and of the Council of 24 October 2006 establishing a Community Programme for Employment and Social Solidarity – Progress, OJ L 315/1, 15.11.2006

Additionally, budgetary support for gender equality activities is available through the European Social Fund.[74]

To summarise, in very general terms, the success of gender mainstreaming lies in its transformative nature: that is, its capacity to bring about wholesale changes to the approach of the EU institutions. In a more practical sense, it can be credited with the development of a set of tools to promote equality between women and men in all areas of EU activity. It is hardly surprising, then, that those engaged in the promotion of children's rights at EU level have been so inspired by gender mainstreaming activities. As Woodward has observed, "the proof [of gender mainstreaming's success] is in its imitation and adoption by other equality movements".[75] The following section moves on to consider how this extensive knowledge and experience can be adapted to the specific context of children's rights in EU asylum and immigration law.

4. ADAPTING MAINSTREAMING TO THE CONTEXT OF CHILDREN'S RIGHTS IN ASYLUM AND IMMIGRATION LAW

At a theoretical level, there is every reason to believe that mainstreaming has the potential to significantly enhance the extent to which children's rights' norms are integrated into EU asylum and immigration law. However, in practice, certain barriers must be overcome, not least because asylum and immigration legislation has, thus far, not shown itself to be particularly receptive to any sort of mainstreaming activities. This section begins by outlining the theoretical foundations of children's rights

[74] See the website of the European Social Fund for more information on its activities, available at <http://ec.europa.eu/employment_social/esf/.> (last accessed 26 February 2010)

[75] Woodward, *Op. Cit.* n.6, at p.289.

mainstreaming - within the specific context of the EU's asylum and immigration competence - and then moves on to consider, in practical terms, the challenges faced in any such endeavour, with reference to activities in the first ten years of the Common European Asylum and Immigration system.

4.1: The theoretical foundations of a children's rights mainstreaming strategy in EU asylum and immigration law

Whilst further consideration is needed of how to adapt previous mainstreaming models to the children's rights context, there are a number of reasons suggesting that, in very general terms, mainstreaming provides a potentially fruitful governance tool to ensure that young people are integrated into EU law and policy. The first of these reasons is purely pragmatic: successes in the gender equality arena have led activists in other areas to believe that a culture of mainstreaming - and the structures needed to deliver on its promises - is already in place and ripe for exploitation.[76] The familiarity of mainstreaming as a concept within the institutions, particularly the Commission, lends it great appeal as far as its application to other areas is concerned. Furthermore, mainstreaming in the gender context is linked to efforts to promote substantive equality between women and men by getting to the very root of discrimination and marginalisation in law and policy,[77] an endeavour that clearly resonates with children's rights advocates. This is not least because of the well-established (albeit oft-debated) link between women's and children's rights. Indeed, it has been argued by Olsen that "the extension of rights to children is in one sense simply a more or less logical next step

[76] Shaw, *Op. Cit.* n.4

[77] Beveridge and Nott (2002), *Op. Cit.* n.31, at pp.304-306.

after the extension of rights to women".[78] This link is very much played out at EU level. The traditional argument is that law and policy has focused on the model of a worker citizen, prioritising policies that promote a mobile workforce, thus overlooking those who are less economically empowered:[79] a tendency that has hampered the visibility of both women and children. Given that gender mainstreaming is the major tool by which an enhanced status for women in EU activity has been sought, it is hardly surprising that it is an appealing tool in relation to young people. Stalford has argued that developments in the arena of European social policy in the years following the Amsterdam Treaty and the Lisbon Council "may have assuaged concerns as to the gender-neutrality of EU law and policy", but that "there is little evidence of any comparable attempt to address [its] age-neutrality".[80] She also raises doubts as to the capacity of the EU institutions to deliver on a children's rights' agenda, given their historical indifference to young people in the elaboration and implementation of law and policy. Therefore, a strategy that seeks to "reorganize, improve, develop and evaluate policy processes in order to incorporate a gender equality perspective"[81] holds great appeal in also breaking down an underlying institutional and procedural bias against the incorporation of young people into law and policy. To borrow Olsen's terminology from the citation above, perhaps the use of a governance approach such as mainstreaming in relation to children is simply a logical next step after its use in relation to women.

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[78] F. Olsen "Children's Rights: Some Feminist Perspectives approaches to the United Nations Convention on the Rights of the Child" (1992) 6 *International Journal of Law and the Family* p.192, at p.196

[79] See, for example: Ackers, H.L. (1994) 'Women, Citizenship and European Community Law: The Gender Interpretation of the Free Movement Provisions', 16(4) *Journal of Social Welfare and Family Law*, 391-406

[80] Stalford, *Op. Cit.* n.5, at p.54.

[81] Taken from the Council of Europe definition of gender mainstreaming, *Op. Cit.* n.28

Two obstacles, however, stand in the way of this initial optimism. The first of these is that whilst the promotion of children's rights at EU level may have much to learn from the gender equality arena, there are some fundamental differences between the two agendas. These differences mean that a straightforward transposition of the tools deployed with a gender equality aim in mind may be inappropriate in a children's rights context. Most notable in this regard is the absence of a strict equality paradigm underpinning the desire to advance the status of young people in EU law. Whilst mainstreaming has been talked about in a number of equality contexts, this has been in order to achieve parity between two or more groups (women and men, the disabled and able-bodied, members of different racial groups), whereas this is not the aim in relation to children. Put simply, it is not desirable to attempt to align the status of children with that of adults. Stalford makes a similar observation in the context of the Treaty's prohibition on age-based discrimination:

> ...the language of non-discrimination underpinning Article 13 EC (Article 19 TFEU, post-Lisbon) does not sit comfortably with children's rights discourse which acknowledges that children *have* to be treated differently *precisely because of* their age.[82]

This is not to say that mainstreaming does not have the capacity to respond to the challenge of incorporating children's rights – it is a familiar concept outside the equality arena – but it is simply that the ultimate aim is more complex. It requires the incorporation of a combination of enhanced entitlements, as well as limitations on young people's freedoms, that reflect both their need to have their

[82] Original emphasis. *Op. Cit.* n.5, at p.60

developmental capacities nourished and their right to be protected. It is for precisely this reason that attempts to define mainstreaming in a children's rights context have used the principles of the UNCRC, which do indeed reflect this complexity, as a benchmark for mainstreaming, rather than the achievement of equality. Perhaps the best illustration of the way in which this essential difference between children's rights and equality campaigns requires a slight rethinking of some mainstreaming tools is children's "universal disenfranchisement and their perceived political immaturity".[83] This, of course, makes their direct participation in the elaboration of law and policy difficult to achieve. Unless the institutions meaningfully engage in imaginative approaches to overcoming such hurdles, mainstreaming risks becoming an ill-fitting approach to governance in the children's rights arena.

The second, and potentially more problematic difficulty faced by children's rights mainstreaming, relates to the specific context of asylum and immigration law. It has been noted that mainstreaming of other equality agendas seems to have had little success in the arena of asylum and immigration at EU level. Bell has commented that:

> [Little] attention has been paid to mainstreaming in the area of asylum law. In 1998, the Commission endorsed a mainstreaming approach in relation to combating racism, but only minimal attention was given to the potential relevance of immigration and asylum issues. A similar picture exists in the Commission's gender mainstreaming programme. Asylum and gender issues have been expressly acknowledged but the measures taken appear more limited in their overall impact.[84]

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[83] Stalford, *Op. Cit.* n.5, at p.65

[84] Bell, *Op. Cit.* n.37, at p.22

This is perhaps explained by the nature of asylum and immigration regulation. Its very basis is the imposition of legitimised differentiations on the rights and entitlements of individuals because of their nationality.[85] It is also an acutely top-down style of regulation in which the power of the authorities stands in direct contrast to the complete subjugation of individuals to this control in relation to almost every area of their life. As such, the processes surrounding the formulation of this area of law may not be particularly receptive to mainstreaming strategies aimed at challenging the *status quo*. Furthermore, the highly politicised nature of the area - one which is dominated by securitisation and criminalisation agendas - may prove resilient to attempts to alter the governance culture such that it is more child-focused. Perhaps, then, the asylum and immigration arena will prove to be the most challenging for the relatively new children's rights mainstreaming agenda at EU level.

The second part of this section looks at how these theoretical obstacles to mainstreaming have played out on a practical level. In particular, it considers the extent to which the challenge of adapting the mainstreaming concept to a children's rights context has resulted in sufficiently robust mechanisms to withstand the often illiberal area of asylum and immigration law.

[85] Bell, *Ibid.*

4.2: The challenges to successful children's rights mainstreaming in EU asylum and immigration law

This section now considers how the theoretical perspective on children's rights mainstreaming play out at a practical level in relation to asylum and immigration law.

4.2.1: Agenda-setting and law and policy formulation

As far as the process of developing and formulating law and policy is concerned, the results seem to lack rigour and robustness. At a cross-sectoral level there is little evidence of a formalised process of agenda-setting in relation to children's rights, save a peculiar set of 'urgent' priority areas for action identified in the Communication; these seemed more reflective of the current whim of the Commission than an underlying coherent strategy.[86] In the asylum and immigration context, there is patchy evidence that children's rights related areas have been identified in the formulation process and acted upon with concrete legislative responses. The Commission has a page on the Europa website in which it outlines how it pays attention to the special needs of minors within its asylum and immigration competence, identifying a number of areas of importance. [87] For example, the way in which interviews with child asylum-seekers are conducted, access to education, the best interests of child refugees and the recognition of child-specific forms of persecution are all explicitly discussed. At first glance, this reads like an

[86] *Op. Cit.* n.3, at p.7. These consist of: ensuring the availability of one single six digit telephone number within the EU for child helplines, and another for hotlines dedicated to missing and sexually exploited children; supporting the banking sector in combating the use of credit cards to purchase sexual images of children on the Internet; launching an Action Plan to address their priority needs in developing countries; and the promotion of a clustering of actions on child poverty in the EU

[87] Available at <http://ec.europa.eu/justice_home/fsj/asylum/specific_clauses/fsj_asylum_specific_clauses_en.htm> (last accessed 18 January 2010)

agenda-setting activity, outlining the ways in which EU asylum and immigration legislation will incorporate children, and providing a list against which future progress can be assessed. However, a closer reading reveals that it is more of a summary of past achievements, outlining ways in which children have already been addressed in legislation. In addition, as the discussion of the slightly haphazard use of the best interests and participation principles in chapter 2 illustrated, insertion of references to children's rights in legislative texts seems more an accidental quirk of the negotiation process than reflective of a systematic incorporation of young people's perspective. Furthermore, analysis of the preparatory documents shows that legislative proposals under Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon) are repeatedly watered down during the negotiation process such that suggestions for incorporating children's rights are lost in the final texts, suggesting that even if formal mechanisms are in place they are insufficient to withstand the political agendas at play in the Council.

4.2.2: Representation of children at institutional level

Institutional representation of children at EU level, of course, presents more challenges than in relation to women. The legal status of children means that one of the key aims of gender mainstreaming - increasing the number of women at senior decision-making levels - is simply not a realistic prospect in this context. That said, the idea that children can play a meaningful role in legal and policy decision-making is one that has garnered much support in recent years, as the participative ethos of the UNCRC embeds itself in democratic processes.[88] Although the EU institutions have, in many ways, been reticent to adopt a children's participative approach to governance, there have been a number of

[88] See Landsdown, G. (2001) *Promoting Children's Participation in Democratic Decision-Making* UNICEF Innocenti.

initiatives to give a voice to children on European issues. In particular, 2007 saw the first EU Youth Summit, the aim of which was to involve young people in the "development of the youth messages for the future of the EU".[89] In addition, since 1987, a European Youth Parliament has met two or three times a year to debate issues on cotemporary European society and to promote democratic citizenship.[90] Finally, Europa contains a section specifically for children - the European Youth Portal[91] - which provides news, information and a forum for exchanging ideas amongst young people in Europe. Interestingly, this includes a link to a section entitled 'Your Rights as an Immigrant' which, ironically, provides more comprehensive information for young immigrants than anything on the main Europa site does for adults.

Surely, however, as worthy as initiatives to increase participation of children in shaping EU policy may be, there must be serious questions as to their capacity to really drive these agendas. In spite of a prominent social inclusion agenda at European level, there are few examples of attempts to involve the children that these initiatives address in formulating the agenda. The notable exception in this regard being the YES Forum, a network of organisations across EU countries committed to social inclusion and active participation of children and young people who experience disadvantage and exclusion, and which is partly financed by DG Education and Culture.[92] Certainly in the asylum and immigration

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[89] Held in Rome, 24-25 March 2007. More information available at: http://www.youthforum.org/en/youthsummit/youthsummit.htm (last accessed 26 February 2010)

[90] More information is available on the European Youth Parlaiment's website <http://www.eypej.org/> (last accessed 26 February 2010)

[91] Available at <http://europa.eu/youth/> (last accessed 26 February 2010)

[92] More information on the Forum's activities is available on its website: <http://www.yes-forum.eu/> (last accessed 26 February 2010)

context, however, there is no evidence of the programmes outlined above influencing the agenda in any meaningful way. Furthermore, such endeavours in relation to asylum and immigration law seem unlikely to include the very group this legislation addresses. One of the criticisms levied at Youth Parliaments whether at local, national or European level is that they can attract what may be termed 'professional participants' - that is, children who are articulate, well-educated and interested in the political process - who frequently participate in such initiatives.[93] This can effectively exclude huge swathes of the young population whose social, economic and educational backgrounds make them far less likely to become involved in such activities. Indeed, the precarious residence status of many immigrant children - which can be temporary or, at the very least, uncertain - make it difficult for them to become involved in participative programmes, particularly those at a European level, which may involve foreign travel. It is, therefore, not surprising that, to date, there is no evidence of young immigrants and asylum-seekers participating in any significant way in the formulation of law and policy arising from Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon).

4.2.3: Building institutional capacity

If participation of children in the formulation of EU laws and policies in relation to children has limited scope for success in the asylum and immigration context, this may be somewhat mitigated by ensuring that personnel with the appropriate level of knowledge of children's rights are in place. However, there is scant evidence that developments in the children's rights arena at EU level in recent years have prompted more

[93] For an illuminating analysis of youth parliaments in the UK see: T. O'Toole and R. Gale (2006) 'Participative governance and youth inclusion: the case of youth parliaments', available online at <http://www.childhoodstudies.ed.ac.uk/research/TOToole.doc.> (last accessed 26 February 2010)

targeted recruitment and training of personnel with specific expertise or knowledge. Within DG Justice Freedom and Security, the post of Children's Rights Coordinator has been created to provide a focal point for activities in relation to young people and encourage communication, co-operation and exchange between the Directorates-General in relation to their respective children's rights activities. Whilst the symbolism of this role may be welcomed, the influence of this post in relation to asylum and immigration activity has been limited for a number of reasons. First, in contrast to Children's Commissioners at national level, this post is more of an administrative role and is generally occupied by highly-skilled Commission employees with (by their own admission) little prior experience or knowledge of children's rights, particularly within the highly specialised area of asylum and immigration. Secondly, the scale of the task confronting anyone charged with providing a focused and coherent children's rights agenda which had previously developed in an *ad hoc*, piecemeal way, often impervious to basic children's rights principles, can prove a barrier to genuine achievements. Thirdly, the agenda pursued by this office - which comes under the broader umbrella of Freedom, Security and Justice - has not been entirely divorced from the politics of the Commission with time and energy targeted towards more high profile agendas - such as the campaign for an abduction hotline and the fight against child pornography - at the expense of the perhaps more mundane area of asylum and immigration.

However, these efforts need to be underpinned by greater coordination: at the moment there is not much sign of a joined-up approach to children's rights across the Commission, the Parliament, and the various EU-funded agencies. Directorates-General busily pursue their own, distinct agendas either for political reasons - with many reluctant to prioritise children's rights issues over more 'pertinent' issues - or simply due to a lack of

awareness of related activities in other departments. As was seen in chapter 3, there are significant limitations to a regulatory approach that fails to recognise the contribution from other areas to improving the EU's policy in relation to child immigrants and asylum-seekers (from, for example, the DG Education and Culture and DG Employment, Social Affairs and Equal Opportunities).

4.2.4. Engaging with civil society

In direct contrast to the EU's relative inexperience with children's rights issues, a wealth of experience exists amongst NGOs, charities and international organisations working with, and on behalf of, immigrant and asylum-seeking children. From the early days of the common European asylum and immigration system, consultation of special interest groups was identified by the Commission as having a crucial role to play in the elaboration of EU immigration and asylum policy:

> Representatives of civil society, associations, non-governmental organisations and local authorities and communities must also be partners in the new system as actors and vectors of asylum values in Europe.[94]

An analysis of the preparatory documents for the principal legislative instruments in the common European asylum and immigration system suggests that, to varying degrees, this has taken place. The proposal for the refugee qualification Directive specifically mentions a leading children's rights charity in the list of bodies that have participated in the formulation of the legislation:

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[94] Commission *Communication from the Commission to the Council and the European Parliament: Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum* COM(2000) 755final, at p.18.

> Within this context the Commission consulted in addition to Member States, UNHCR, expert non-governmental organisations in the field such as the European Council on Refugees and Exiles (ECRE) and Amnesty International, specialised non-governmental organisations such as the European Women's Lobby and Save the Children, academic experts such as the ODYSSEUS academic network for legal studies on immigration and asylum in Europe, and representatives of the judiciary such as the International Association of Refugee Law Judges.[95]

Whilst there is evidence of some consultation of charitable organisations and NGOs in relation to a number of other proposals, it is not clear whether these included ones with particular expertise in relation to children's rights.[96] As far as the temporary protection and trafficking Directives are concerned, there is no record that any representatives of civil society contributed to their development.[97]

The Commission's commitment to full and productive engagement with children's rights experts has recently been bolstered by the 2006 *Strategy on the Rights of the Child.* This document paved the way for the creation of the European Forum on the Rights of the Child,[98] bringing together Member States, UN agencies, the Council of Europe, civil society and

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[95] Commission *Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection* COM (2001) 510 final

[96] The reception directive COM (1999) 638 final; the family reunification directive COM (1999) 638 final; Dublin II; long-term residents Directive COM (2001) 127 final

[97] Temporary protection directive; trafficking directive COM (2002) final

[98] *Op. Cit.* n.3

children themselves to "contribute to the design and monitoring of EU actions and act as an arena for exchange of good practice".[99] Since the first meeting in June 2007, the Forum has held three further events. Whilst it is steadily attracting the interest and participation of a growing number of NGO representatives, as well as staff from the institutions themselves, to date the activities of the Forum have focused on the exploitation of children, sexual offences against children, child pornography, social exclusion and poverty and child participation.[100] There is no evidence of any substantial discussion having taken place specifically on asylum and immigration issues, somewhat surprising given that this is arguably the area of EU competence in which it has produced the greatest volume of legislation directly impacting upon children's lives.

4.2.5: Levying resources for the benefit of children through the European Refugee Fund

Underpinning any area of EU activity is a financial programme which supports both the pursuit of Union objectives at a European level, as well as the domestic implementation of Community law and policy. Effective mainstreaming of children into EU asylum and immigration legislation requires young people to be visible in budgetary allocations. This is the case, first of all, because levying of resources has constituted an integral part of previous mainstreaming activities, as shown in relation to gender in the last section. Secondly, particular attention must be paid to financial planning as distribution of resources amongst the Member States underpins the Community's competence under Title IV, Part Three EC

[99] *Ibid.*, at p.7.

[100] A list of participants and agendas are available at <http://ec.europa.eu/justice_home/fsj/children/forum/fsj_children_forum_en.html> (last accessed 26 February 2010)

(Chapter 2, Title V, Part III TFEU, post-Lisbon) in a fundamental way. At the very core of the common European asylum and immigration system are the principles of burden sharing and financial solidarity amongst the Member States (see, for example, Article 63(2)(b) EC Treaty; now expressed in Article 80 TFEU, post-Lisbon). In 2005, the Commission described these as "enshrined in the Constitution as governing principles for the development of common policies on border checks, asylum and immigration".[101] Thirdly, full engagement with the rights and entitlements of child asylum-seekers and migrants necessitates considerable financial commitment on the part of the Member States. For example, the frequency of provisions that ensure Member States take the best interests of the child into account, or are sensitive to the vulnerability of minors, in areas such as provision of accommodation, health care and access to the asylum application process,[102] require considerable targeted spending for the benefit of young people. Therefore, in light of such commitments, and with financial solidarity at the centre of a harmonised approach to asylum and immigration, there is a legitimate expectation that children will feature prominently in financial planning within the EU's asylum and immigration activities.

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[101] Communication from the Commission to the Council and the European Parliament establishing a framework programme on Solidarity and the Management of Migration Flows for the period 2007-2013 COM(2005) 123 final, at p.4. Provisions which are now replicated in Article 80 TFEU, post-Lisbon: 'The policies of the Union set out in this Chapter *[Policies on border checks, asylum and immigration and their implementation]* shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States'

[102] See for example Articles 17(1) and 18 Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers OJ L 31/18, 6.2.2003; Article 20(5) and 30 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted OJ l 304/12, 30.9.2004; Article 17 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status OJ L 326/13, 13.12.2005

The European Refugee Fund has existed since 2000 in order "to support and encourage the efforts made by the Member States in receiving and bearing the consequences of receiving refugees and displaced persons".[103] Measures are to target areas such as conditions for reception, asylum procedures, integration of asylum seekers and refugees and repatriation of third-country nationals.[104] The total available under the fund for the seven year period from 2000 to 2006 was 330 million Euros. As far as any commitment to children is concerned, whilst the documents establishing the fund were silent on the matter, since 2005 they have been identified as requiring particular attention:

> Actions should take account of the specific situation of vulnerable persons which as minors, unaccompanied minors...and persons who have been subjected to torture, rape and other serious forms of psychiatric, physical or sexual violence.[105]

Whilst replicating the familiar 'take account of the specific situation of minors and unaccompanied minors' formulation, there is no obligation, nor even suggestion, that projects benefiting children should receive priority in decisions on resource allocation: that said, key projects have received financial backing from the fund. Notably, the Separated Children in Europe Programme - a joint initiative of UNHCR and Save the Children, which has been one of the chief advocates for lone asylum-seeking and immigrant children in Europe - is supported by the European

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[103] Article 1(1) Council Decision of 28 September establishing a refugee fund (2000/596/EC), OJ L252/12, 6.1.0.2000.

[104] Article 4(1) Decision 2000/596/EC, *Ibid.*; Article 4(1) Council Decision of 2 December 2004 establishing the European Refugee Fund for the period 2005 to 2010 (2004/904/EC), OJ L381/52, 28.12.2004

[105] Article 4(3) Decision 2004/904/EC, *Ibid.*

Refugee Fund.[106] On the research front, the 2003 report *Separated Children and EU Asylum and Immigration Policy*, the first significant critical review of EU activity in this area was also provided with financial assistance.[107]

As of 2007, the European Refugee Fund has fallen under the umbrella of a wider framework programme on 'Solidarity and the Management of Migration Flows', which brings together four financial programmes with the common aim of supporting the area of Freedom, Security and Justice.[108] In addition to extending the Refugee Fund to 2013, the framework programme also establishes funds on external borders, integration of third-country nationals and return of third-country nationals. These funds are more proactive in promoting children's rights and supporting their particular needs through financial support. For example, both the integration and return funds specifically identify activities that benefit children as eligible for funding.[109] In addition, the latter contains a general duty to respect the obligations derived from the UNCRC in actions under the fund.[110] The new refugee fund also refers to

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[106] See the Programme's website for more information, available at: <http://www.separated-children-europe-programme.org/index.html.> (last accessed 28 February 2010)

[107] Ruxton, *Op. Cit.* n.8

[108] Communication from the Commission to the Council and the European Parliament establishing a framework programme on Solidarity and the Management of Migration Flows for the period 2001-2013 COM(2005) 123 final

[109] Article 4(2)(c) Council Decision (2007/435/EC) of 25 June 2007 establishing the European Fund for the Integration of third-county nationals for the period 2007 to 2013 as part of the General programme 'Solidarity and Management of Migration Flows OJ L 168/18, 28.6.2007; Article 5(2) Decision No 575/2007/EC of the European Parliament and of the Council establishing the European Return Fund for the period 2008 to 2013 as part of the General Programme 'Solidarity and Management of Migration Flows' OJ L 144/45, 6.6.2007

[110] Recital 15 of the preamble to Decision No 575/2007/EC, *Ibid.*

the Convention stating that the "best interests of the child should be a primary consideration" when implementing its provisions.[111] Most significantly, however, is the provision of 4000 Euros of additional support for Member States from the refugee fund in respect of each unaccompanied minor or vulnerable child they have on their territory.[112]

Annual Work Programmes under this new framework have shown a willingness towards supporting activities that address the specific situation of children. In both 2008 and 2009, the "promotion of common measures to address specific needs, including their educational needs, of vulnerable groups...such as minors and unaccompanied minors" was identified as a priority area for action.[113] As a result, examples at Member State level of projects addressing children that are supported under the fund can be identified. In the UK, two projects were successful in the 2008 round: Peacemakers in Manchester received £90,000 for an integration project to support refugees, including children, through intercommunity mentoring projects, volunteering opportunities and sessions aimed at challenging prejudice; whilst the Ethnic Minority Achievement Service was granted £35,744 to support fifteen vulnerable refugees at secondary school in Brighton and Hove through provision of

[111] Recital 5 of the preamble to Decision No 573/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme 'Solidarity and Management of Migration Flows' and repealing Council Decision 2004/904/EC, OJ L144/1, 6.6.2007

[112] Articles 13(3)(b) and (c) Decision No 573/2007/EC, *Ibid.*

[113] Commission Decision of 18 December 2008 adopting the annual work programme for Community actions within the framework of the European Refugee Fund for the year 2008 C(2008)8375, Annex 1, at p.8; Commission Decision of 10 June 2009 adopting the annual work programme for Community actions within the framework of the European Refugee Fund for the year 2009 C(2009)4395, Annex 1, at p.5

individualised access and participation programmes.[114] As a further example, in Spain, the Mercedarios Provincia Castilla Comunidad received 90,840 Euros for work on the reception of young asylum-seekers and refugees.[115]

5. CONCLUSION

The first part of this chapter discussed the rhetoric surrounding mainstreaming young people in EU law and policy, pointing to its rapid ascendency to the status of a central principle in the emerging children's rights strategy. The next part was essentially concerned with further exploration of mainstreaming as a governance tool in order to better understand what it entails in practice. The chapter culminated in considering whether this matrix could be adapted to a children's rights context, drawing on examples from the law-making process in relation to asylum and immigration law. The picture that emerges suggests that mainstreaming young people in asylum and immigration law, whilst far from being devoid of any practical substance, perhaps lacks the rigour and robustness needed to stand firm in the face of an illiberal legislature. Whist most certainly evident in a range of activities relating to each of the case-studies outlined above, to date efforts to mainstream children's rights do not seem to have had the transformative effect at institutional level that many have observed in relation to gender. For example, attempts to install children's rights 'experts' in the institutions, to train personnel and to provide a forum for civil society to engage in the

[114] Details of successful UK projects under the European Refugee Fund are available at: <http://www.bia.homeoffice.gov.uk/aboutus/workingwithus/workingwithasylum/integration/european-refugee-fund/erfiii-fund-list-2008/> (last accessed 26 February 2010)

[115] As above, details of successful Spanish projects under the European Refugee Fund are available at: <http://www.mtin.es/en/migraciones/Integracion/Fondo_Solidaridad/FONDO_REFUGIADOS/index.htm> (last accessed 26 February 2010)

elaboration of law and policy, have led to some structural changes. There is a real sense, however, that these initiatives are in their early stages and have not yet succeeded in embedding a culture of children's rights within the institutions. Therefore, currently, it is difficult to conclude that their capacity to influence the scope and content of asylum and immigration law is anything other than very much in its infancy. The domain of asylum and immigration has offered a particularly revealing case-study for assessing children's rights mainstreaming because the number of often competing agendas at play in this area pose a genuine challenge to its mechanisms. In fact, significant doubts remain as to whether a systematic mainstreaming process is in place to the extent that it would ever provide the sort of governance culture in which a regulatory choice would be made because of its children's rights appeal, rather than what it offers in terms of effective and efficient immigration regulation. Is it not the very essence of mainstreaming that it has the capacity to persuade law and policy-makers to make sometimes politically difficult choices for the benefit of the targeted concern? If this does not happen – and, in other words, regulation continues as it would without efforts to incorporate the perspective of an under-represented group – it would seem to render the concept empty. Thus, the issue returns to the lack of conceptual clarity surrounding mainstreaming generally, but particularly evident in the context of children's rights. The institutions, particularly the Commission, have been far more zealous in their use of the word mainstreaming in a multitude of policy documents, than in their efforts to engage in meaningful articulation of the concept. One suspects, therefore, that when the Commission vaunts its commitment to mainstreaming young people in asylum and immigration law – and claims that this promotes its wider allegiance to the UNCRC – it is referring as much to the somewhat sporadic insertion of references to

children's rights principles in legislative texts, as it is to the underlying governance strategies that mainstreaming demands.

Chapter Five

MONITORING THE IMPACT OF EU ASYLUM AND IMMIGRATION LAW ON CHILDREN

1. INTRODUCTION

This chapter considers how the EU engages in ongoing monitoring activities to assess the impact of its asylum and immigration law and policy on children. This work is often classified under the wider mainstreaming umbrella and, thus, this discussion is very much an extension of the analysis carried-out in the previous chapter. A fairly wide view of the idea of monitoring is adopted here: recognising its influence at various stages of the law-making process; and its diverse guises as both a fairly technocratic process at the institutional level, and a more flexible and pragmatic style of empirical research at the level of the social phenomenon. Efforts to assess the impact of EU law and policy should be seen as part of wider evaluation activities within the development of good governance strategies. It is, therefore, an ongoing and dynamic process that should facilitate 'better' decision-making in relation to the development of agendas. Whether the governance landscape of the EU is structured so as to be able to accommodate a children's rights perspective in this process, is the subject of this analysis.

The Commission explains both the operation, and purpose of, efforts to evaluate its laws and policies thus:

> Evaluation gives a judgement of interventions according to their results and impacts in relation to the needs they aim to satisfy and the resources mobilised. Evaluation can be carried out in a prospective (ex ante evaluation) as well as a retrospective (ex-post evaluation) perspective, or in a combination of both. Evaluation generates relevant information that is essential for planning, designing and implementing EU policies. It is the main tool used by the Commission to assess the extent to which EU interventions reach the set policy objectives and how their performance can be improved in the future.[1]

This aim is indicative of a wider-turn towards greater accountability of legislatures and policy-makers, reflected in the pre-eminence of evidence based policy-planning that gathered pace in the latter years of the last century. This is reflected in the following comment from the Commission:

> Moreover, where evaluation results are communicated properly, they enhance transparency and democratic accountability. Therefore, evaluation can also support the Commission in better communicating the added value of the European Union to the European citizen.[2]

The philosophical foundations of this approach to law-making have particular resonance in both the migration and children's rights arenas. Largely as a consequence of the signing and subsequent ratification of the UNCRC twenty years ago, shifts in perceptions of children and childhood have emphasised the principles of participation and accountability in

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[1] See the Evaluation section of the better regulation pages on Europa, available at: http://ec.europa.eu/governance/better_regulation/evaluation_en.htm (last accessed 26 February 2010)

[2] *Ibid.*

relation to law and policy affecting young people. It is, therefore, not surprising that the Commission's Communication *Towards and EU Strategy on the Rights of the Child* repeatedly emphasises the need to consider the impact of all EU laws and policies on children, thus linking its children's rights agenda to this aspect of governance.[3] Equally, in relation to migration policy, Ardittis and Lackzo link monitoring and evaluation activities to a more fundamental need to address a lack of transparency and political accountability in this particular field:

> The development of increasingly more complex, cross-national and multi-stakeholder legal and policy instruments in the field of migration has given impetus to the need for appropriate systems to monitor and evaluate the relevance, efficiency, effectiveness and impact of public interventions, both at national and regional levels. This was further determined by the growing emphasis placed on evidence-based policymaking since the late 1990s and by the need to increase public confidence and accountability in such a politically sensitive area as migration and asylum.[4]

Although linked to wider governance issues, a chapter of this thesis has been devoted to the question of monitoring the impact of asylum and immigration law and policy on children because of the complexity of this task. To a certain extent, it implies stepping out of the corridors of the institutions, representing law and policy making processes, and into the real world, by considering the effect of law in terms of actual experience. Because of this, the tone of this chapter, at times, differs slightly from the

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[3] *Communication from the Commission: Towards an EU Strategy on the Rights of the Child* COM(2006) 367 final

[4] Ardittis, S and Laczko, F., (Eds.) *Assessing the Costs and Impacts of Migration Policy: An International Comparison* (Switzerland: International Organisation for Migration (IOM) and Eurasylum Ltd, 2008), at pp.6-7

rest of the thesis, as it steps into the world of research methods, essential to understand the challenges of engaging in child-focused monitoring of law and policy.

The chapter begins by outlining in general terms the mechanisms that exist at EU level to monitor the impact of EU activity on children, drawing examples from the law-making process in relation to asylum and immigration. One discrete element of this - the use of social indicators - is then developed in the children's rights context in the second section. Finally, the chapter ends by identifying persistent obstacles to the effective monitoring of law and policy in relation to child immigrants and asylum-seekers at EU level.

2. EU MECHANISMS FOR ASSESSING THE IMPACT OF LAW AND POLICY ON CHILDREN

Under current mechanisms there are three instances at which the institutions consider the impact of their asylum and immigration law and policy on children specifically. At the formulation stage the impact assessment tool requires consideration of the likely future consequences of a proposed activity, with a view to selecting the 'best' regulatory option. Whilst associated with broader mainstreaming strategies, the use of this tool sits better within the discussion found in this chapter because of its emphasis upon impact, as well as the importance of ensuring law-making has an empirical foundation. Secondly, the Commission's role in monitoring the implementation of this law at Member State level has, in practice, led to wider debates on the direction of the EU asylum and immigration agenda which consider its impact in relation to child-focused provision. Finally, a more in-depth *ex post facto* evaluative exercise takes

place under the framework set down by social indicators, particularly those that have recently emerged in the children's rights arena.

Directly preceding the signing of the Treaty of Amsterdam, Ruxton observed that a culture of integrating children's rights into this process was almost entirely lacking from the governance landscape at the time: "Neither children themselves nor child welfare agencies have much to say in the Union's elaborated policy consultation procedures".[5] This section briefly considers the mechanisms outlined above in turn, considering the extent to which they have, or can, be adapted to the task of incorporating a children's rights perspective into the EU's broader monitoring activities.

2.1. *Ex ante* evaluation: the impact assessment procedure and children

The concept of impact assessment is, of itself, a relatively simple one, defined by the International Association for Impact Assessment as "the process of identifying the future consequences of a current or proposed action".[6] It is, thus, firmly embedded at the initial policy design stage and has led to the development of a number of complex and highly technocratic processes at EU level, that seem subject to constant review and refinement. Before the relatively recent introduction of recast impact assessment procedures, there was little evidence of a robust approach to ensuring that the possible implications of asylum and immigration legislation upon children were fully considered at the point of formulation. Even now, the Integrated Impact Assessment (IIA) tool -

[5] Ruxton, S., *Children in Europe* (London: NCH Action for Children, 1996), at p.16

[6] This definition is taken from the Association's website, available at: <www.iaia.org.> (last accessed 26 February 2010)

introduced to a fanfare of "improving the quality and coherence of the policy development process" - seems ill-equipped to perform this task.[7] Under the umbrella of the Better Regulation Strategy, the IIA, whilst having its roots in sustainable development, nowadays has a more far-reaching application: indeed, it is now *the* method by which the Commission draws on a range of views representing an increasingly complex set of interests and agendas, and allows trade-offs between them in an effort to reach the best regulatory compromise. In light of the frequent observation in this thesis – that children's rights have struggled to stand firm in the face of restrictive immigration regulation – at first sight the IIA seems as though it may be exactly the governance tool that is needed to ensure a more reasoned balance can be reached. A brief glance at the procedures involved however, quickly tempers any such optimism.

The IIA must be carried out in relation to all major initiatives, defined by the Commission as everything appearing in its "Annual Policy Strategy or its Work Programme, be they either regulatory proposals or other proposals having an economic, social and environmental impact".[8] Since 2002, when the process began to gather pace, it has been used in the asylum and immigration arena in relation to the returns Directive,[9] and proposals for a recast Dublin II Regulation and reception Directive.[10] The

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[7] *Communication from the Commission on Impact Assessment*, COM(2002) 276 final, at p.1.

[8] *Ibid.*, at p.6.

[9] Impact Assessment: Commission staff working document - Annex to the Proposal for a European Parliament and Council directive on common standards on procedures in Member States for returning illegally staying third country nationals, SEC(2005) 1057

[10] Impact Assessment: Commission Staff Working Document Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions Policy Plan

guidelines suggest that the reports are to be structured around an assessment of three categories of impact: economic, environmental and social.[11] From the early days, it has seemed that fundamental rights are to be primarily addressed within the category of social impacts,[12] seemingly implying that children's rights would be found as a sub-category within. As the process has been further refined and developed, guidance has been provided on completing social impact assessments, by DG Employment and Equal Opportunities, which does make fleeting reference to children as a group who are particularly vulnerable to the effects of poverty and social exclusion within proposed initiatives.[13] There is little evidence, however, of any attempt to foster a rights-based approach to weighing up the regulatory options in relation to child-focused provisions in asylum and immigration law. Perhaps, then, it is assumed that this role will be discharged by the statements of fundamental rights compliance that now accompany major policy proposals. Doubts have been expressed in relation to the capacity of the impact assessment procedure to uphold fundamental rights, particularly given their position as a sub-category within the wider social impact analysis. [14] Toner argues that due to the diversity and specificity of fundamental rights, they surely merit a

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on Asylum: An Integrated Approach to Protection Across The EU, SEC(2008) 2029/2; and Impact Assessment: Commission Staff Working Document Accompanying the Proposal for a Directive of the European Parliament and of the Council Laying Down Minimum Standards for the Reception of Asylum Seekers, SEC(2008) 2944

[11] See Annex 1, *Ibid.*, at p.12.

[12] Commission *Handbook on How to do an Impact Assessment,* (European Commission, 2002), at p.20, and its technical annexes at pp.22-23, which list impacts on fundamental rights under possible social impacts

[13] Guidance for assessing Social Impacts within the Commission Impact Assessment system, (2009)326974 - 17/11/2009, available at: <http://ec.europa.eu/governance/impact/key_docs/key_docs_en.htm> (last accessed 26 February 2010)

[14] Toner, H., 'Impact Assessments and Fundamental Rights Protection in EU Law', 2006 (3), *European Law Review*, pp.316 - 341

category of their own.[15] Perhaps one of the benefits of this approach would be to increase the potential for children's rights to have a more visible presence in the process of weighing up the pros and cons of various regulatory options. In light of these points one is left with the suspicion that looking for a reference to children's rights in an IIA, would be akin to the proverbial search for a needle in a haystack. The following paragraph considers the few examples of IIA in relation to asylum and immigration to see if these fears are founded.

Initial signs on the incorporation of children's rights into the impact assessment procedure were fairly discouraging. There is virtually no reference to young people in the report on the returns Directive, completed in 2005.[16] Indeed, given that this was the first major instrument under Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon) to be subject to this kind of scrutiny - but also the one that has perhaps been most maligned by children's rights commentators - it is little wonder that questions were raised over the level of regard given to the particular position of young people in the completion of the report.[17] Since then, however, things have begun to look up slightly. The impact assessments on the proposals for a recast asylum reception Directive and Dublin II Regulation contain several references to the needs of vulnerable asylum-seekers, particularly young people.[18] In addition, there is discussion of the use of the best interests principle in the impact assessment on the recast Dublin II Regulation,

[15] *Ibid.*

[16] *Op. Cit.* n.9

[17] Toner, H., 'Impact Assessments: a useful tool for better lawmaking in EU immigration and asylum law', in Baldaccini, A., Guild, E., and Toner, H. (Eds.) *Whose Freedom, Security and Justice? EU Immigration and Asylum Law since 1999,* (Portland, USA: Hart, 2007)

[18] *Op. Cit.* n.10

suggesting that the framework of the UNCRC is beginning to embed itself in wider governance strategies at EU level.[19] Perhaps, it is unsurprising, therefore, that both of these recast Directives make some fairly positive and welcome suggestions for improving the regulation of young people in the asylum system,[20] thus underlining in practical terms the value of embedding the impact assessment procedure in a children's rights framework.

2.2. Children and the Commission's monitoring of legislative progress

In its role as the guardian of the treaties (Article 211 EC (replaced, in substance, by Article 17(1) TEU, post-Lisbon)), the Commission engages in a process of monitoring compliance with EU law and policy. Whilst not a mechanism traditionally associated with evaluative activities, this has stimulated a wider debate within the Commission on the achievements, and future direction, of EU law and policy in relation to asylum and immigration. The implementation question has therefore developed from the simple inquiry of 'has it happened?', to also encompassing an assessment of 'what are its broader impacts?'. As such, the resulting documents contain some interesting pronouncements on the impact of child-focused provisions within asylum and immigration law. Moreover, they have required the Commission to engage in consultation with a wide range of stakeholders to reach informed conclusions in

[19] *Ibid.*, at p.15

[20] See, for example: Article 6 Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member states by a third-country national or a stateless person (Recast), COM(2008) 820 final; and Article 10 Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum-seekers (recast) COM(2008) 815 final

relation to the position of children in the relevant legislation. For example, in late-2007, the Commission produced a report on the application of the reception Directive.[21] This report outlines the implementation of specific procedures in Member States, identifying failures where appropriate, and lists those countries against which infringement procedures have been taken. Children are addressed in the report in relation to Articles that make specific provision for minors, most notably the obligation to take into account the needs of vulnerable persons (Article 19) and the right to education (Article 10). Interestingly, a raft of deficiencies are noted in respect of both provisions,[22] but the report limits itself to identifying non-implementation, stopping short of any more reflective assessment of the adequacy and appropriateness of the law.

More encouragingly, the report on the application of the Dublin II Regulation takes a much more evaluative approach:[23] it was written on the basis of wide consultation of stakeholders,[24] and is fairly forward-looking in the sense that it identifies where there is scope for improvement in the legislation. Following this report the Commission has tabled a proposal for a recast Regulation.[25] This represents a more rigorous approach than that which is in evidence in relation to other

[21] Commission, 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 the Asylum Seekers COM(2007) 745 final

[22] *Ibid.* at pp.8-9.

[23] Commission, Report from the Commission to the European Parliament and the Council on the Evaluation of the Dublin System COM 2007(299)

[24] The methodology for the preparation of this report is outlined in the accompanying document: Commission staff working document accompanying document to the Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system SEC(2007) 742

[25] *Op. Cit.* n.20

instruments. This is perhaps because there is a greater sense of responsibility on the part of the Commission to engage in monitoring the impact of Regulations, flowing from their direct applicability in the Member States. In relation to children, the report notes diverging interpretations in the 2nd paragraph of Article 6 which states that, in the absence of family members in another Sate, an unaccompanied minor should be sent back to the State where (s)he originally lodged the asylum application.[26] In its evaluation, the Commission identified that the concept of 'best interests' needed clarification, the result being that, in the proposed amendments to the Dublin II Regulation, a new Article 6(3) lists factors that must be taken into account by Member States in determining the child's best interests.[27] In addition, on the back of evaluation of the previous system, it is proposed that the concept of family is extended, such that the Dublin system can be used to reunify unaccompanied minors with family members beyond the nuclear family.[28]

In addition to producing reports on specific pieces of legislation, the commission monitors the achievement of broader policy objectives. The primary mechanism for this is the scoreboard, agreed at Tampere, requiring biannual reports outlining progress in relation to the central objectives of the area of freedom, security and justice. Given that there is only a cursory reference to upholding the rights of children in the Tampere conclusions, it is unsurprising that little can be gleaned from

[26] *Op. Cit.* n.23, at p.7

[27] These factors are: (a) family reunification possibilities; (b) the minor's well-being and social development, taking into particular consideration the minor's ethnic, religious, cultural and linguistic background; (c) safety and security considerations, in particular where there is a risk of the child being a victim of trafficking; (d) the views of the minor, in accordance with his/her age and maturity (Article 6(3) Proposal for recast Dublin II Regulation, *Op. Cit.* n.20)

[28] Article 8(2) Proposal for recast Dublin II Regulation, *Ibid.*

these reports in relation to the impact of EU asylum and immigration law upon this group. Certainly the vast remit of the scoreboard (the entirety of the area of freedom, security and justice), both in the Tampere and, subsequently, the Hague eras, means that analysis is at the level of broader objectives, with little scope to hone in on particular provisions that address children specifically.[29]

More positively, the Commission Green Paper on the future direction of the common European asylum system, which can be viewed as monitoring of sorts as it is builds upon previous evaluations "to allow for an informed reflection and debate",[30] is more representative of the prominence of child-focused processes in the Common European Asylum System. It provides insight into the impact of the EU agenda on young people, albeit fleeting, when it is stated that:

> It appears that serious inadequacies exist with regard to the definitions and procedures applied by Member States for *the identification of more vulnerable asylum seekers* and that Member States *lack the necessary resources, capacities and expertise* to provide an appropriate response to such needs.[31]

The document invites interested parties to contribute to a wide public consultation, in particular identifying the role that may be played by

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[29] The monitoring of broader policy objectives by the Commission may have a more child-focused approach in the future given the emphasis on the rights of the child found in the Stockholm Programme (Council of the European Union, *The Stockholm Programme: An open and secure Europe serving and protecting the citizens*, 2 December 2009 (17024/9))

[30] Commission, *Green Paper on the Future Common European Asylum System* COM(2007) 301 final, at p.2

[31] Original emphasis. *Ibid.*, at p.7.

"national, regional and local authorities, candidate countries, third country partners, intergovernmental and non-governmental organisations, all state actors and private service providers involved in the asylum process, academia, social partners, civil society organisations and individuals". The result was 89 submissions from a range of stakeholders, including children's rights organisations (most notably the Save the Children Brussels office, a prominent lobbyist of the EU on asylum and immigration related issues). The Green Paper states that this will form the basis of future policy direction in the Common European Asylum System. It is certainly welcomed that this monitoring activity is linked to the wider mainstreaming ideal of engagement with civil society, a process which should inform the development of a child-friendly immigration and asylum agenda over the coming years.

2.3. *Ex post facto* evaluation: the use of social indicators to measure the impact of law and policy

Generally speaking, in its drive to better understand the impact of its laws and policies on European citizens, the EU has increasingly turned to social indicators,[32] defined by Atkinson and colleagues as "an important tool for assessing a country's level of social development and for assessing the impact of policy". Social indicators are now linked to *ex post facto* evaluations of EU law and policy, a key strategy within the governance landscape of the EU:

> The European Commission has a mature evaluation system which is well embedded in its departments and has generated a wealth of relevant information. The Commission can build on these

[32] See Atkinson, T., et al., *Social Indicators: The EU and Social Inclusion* (Oxford: OUP, 2002).

achievements for its Better Regulation agenda, which, for example implies that planned interventions are regularly assessed in advance to determine their 'real world impacts'. Ex-post evaluations of legislation can help in providing a better evidence base for new initiatives.[33]

In this sense, then, they complement the broader analysis of the achievement of policy objectives carried out by the Commission outlined in the previous section. Here, however, the focus is more upon grounding the monitoring at the level of the social phenomenon the law and policy addresses and is, as such, largely divorced from the more technical institutional procedures discussed above. Initially the EU was a little slow on the uptake in relation to indicators. As far back as the 1960s what has now been termed the 'social indicators movement' began to emerge.[34] This responded to a period of "rapid social change", during which there was a growing expectation of accountability based public policy, and social indicators became "widely accepted as an important tool in shaping social policies".[35] Whilst this tool had become commonplace in the Member States, it was not until the new millennium, and the Lisbon Council of March 2000,[36] that social indicators came to the fore at EU level. To monitor the achievements of programmes to enhance social inclusion in the Member States, the Council requested regular reporting

[33] See the 'Evaluation' section of the EU's Better Regulation webpages, available at: <http://ec.europa.eu/governance/better_regulation/evaluation_en.htm.> (last accessed 26 February 2010)

[34] Atkinson, *Op. Cit.* n.33, at 1.

[35] A. Ben-Arieh 'Beyond Welfare: Measuring and Monitoring the State of Children: New Trends and Domains' (2000) 52 *Social Indicators Research* 235-257, at 237.

[36] At which the EU set itself the challenge to 'become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion' within a decade (Paragraphs 24-34, Presidency Conclusions of the Lisbon European Council, 23 and 24 March 2000)

from the Commission. The result was the establishment of an Indicators' Sub-Group within the Social Protection Committee, which has developed and adopted indicators in the areas of social exclusion and poverty, social cohesion, pensions, economic growth and job opportunities.[37] Elsewhere the Commission has developed indicators to monitor progress with regard to the challenges laid down in the EU's Sustainable Development Strategy,[38] and in health care with, for example, the European Community Health Indicators.[39] Despite the growing prominence of indicators to monitor EU law and policy, until very recently, it was only the Indicators' Subgroup's work on child poverty that had really engaged in the application of this governance tool in relation to children and, in this instance, only in relation to a discrete area of EU law and policy.[40] This is somewhat surprising given that the international children's rights community is itself increasingly turning to this method to monitor the state of children in national legal systems and on a global scale.[41] In

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[37] More information can be found on the Indicators' SubGroup web pages, available at: <http://ec.europa.eu/employment_social/spsi/spc_indicators_subgroup_en.htm> (last accessed 26 February 2010)

[38] For the strategy see the Annex to the Council's Note 10117/06 *Renewed EU Sustainable Development Strategy*, 9 June 2006, Brussels

[39] See the Commission's *Strategy on European Community Health Indicators*, 5-6 July 2004, Luxembourg

[40] EU Social Protection Committee Indicators Subgroup, *Child Poverty and Well-Being in the EU - Current status and way forward*, January 2008; EU Social Protection Committee Indicators Subgroup, *Report on Indicators in the field of poverty and social exclusion*, October 2001. More information is available on the Subgroup's website, *Op. Cit.* n.37

[41] For example, since 1997 UNICEF has published its State of the World's Children reports which bring together data and statistics on an annual basis to assess a key issue affecting children. Recent topics include maternal and newborn health (2009), child survival (2008) and gender equality (2007). UNICEF has also produced a series of Innocenti Report Cards designed to monitor and compare the performance of the OECD countries in securing the rights of their children, the most significant of which is the seventh that looks at child well-being (UNICEF, Child poverty in perspective: An overview of child well-being in rich countries, *Innocenti Report Card* 7, 2007 UNICEF Innocenti Research Centre, Florence). Finally, the state reporting mechanism outlined in

2007, however, the Commission requested that activities begin to produce a set of EU children's rights indicators that could be used to measure the implementation, protection, respect and promotion of the rights of the child in relation to areas of EU activity.

The following section moves on to discuss the development of a set of children's rights indicators for the EU in greater detail, specifically considering their contribution to efforts to monitor the impact of asylum and immigration law on young people. Although indicators are just one aspect of the mechanisms that exist to assess the impact of EU law and policy, the work discussed in the next section is the only real attempt to embed any monitoring activities in a genuine children's rights framework that is endorsed by the EU institutions. In other words, legislative monitoring and the Integrated Impact Assessment both approach the task from the stance that children's rights must be made to fit the EU's existing governance tools, whereas the indicators project below takes the child as its starting point, or unit of analysis, and seeks to apply this framework to assessing EU law and policy. This is certainly innovative as far as efforts to tailor the EU's governance strategies to children are concerned and, as such, merits further consideration. Equally, my own involvement in the project has offered additional insight into the challenges of formulating appropriate systems for monitoring the impact of law and policy on children, particularly asylum-seekers and immigrants – and, specifically, the task of setting this within the context

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the UNCRC (Article 43), prompted a search for effective and comprehensive children's rights monitoring systems, resulting in, for example, Childwatch's International Indicators for Children's Rights Project to identify and develop indicators relating to the entire Convention (see J. Ennew *Monitoring Children's Rights: Indicators for Children's Rights Project*, 1997, Childwatch International (available at <http://www.childwatch.uio.no/projects/thematic-groups/monitoring-children's-rights/> (last accessed 26 February 2010), at 11))

of a multi-level, cross-national polity such as the EU. The final section of this chapter, which looks at obstacles to monitoring the impact on EU law and policy on asylum-seeking children, therefore draws extensively on the insight gleaned through this research.

3. DEVELOPING THE CHILDREN'S RIGHTS FOUNDATION FOR MONITORING ASYLUM AND IMMIGRATION LAW THROUGH INDICATORS[42]

In the documents accompanying the Strategy on the Rights of the Child, the Commission outlined the need to develop indicators to measure the impact of EU law and policy upon children:

> All relevant EU action, legislative as well as non-legislative, should be examined to review their impact on children. The assessment would be made on the basis of a set of appropriate indicators. The indicators would be both qualitative and quantitative and would cover the internal as well as the external dimension. They would include, amongst others, the effect on children's health, economic situation, education, participation, living conditions and the enjoyment of civil rights. This study on these effects would be updated every five years in order to check for progress. To remain realistic, the study would gradually tackle some critical areas, rather than attempting to cover all areas of relevance from the start.[43]

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[42] Parts of this section are based upon the report of the European Union Agency for Fundamental Rights *Developing Indicators for the Protection, Respect and Promotion of the Rights of the Child in the European Union*, March 2009 (available at <http://fra.europa.eu/fraWebsite/attachments/RightsofChild_summary-report_en.pdf> (last accessed 23 January 2010) to which the author of this thesis contributed

[43] Commission Staff Working Document Accompanying the Communication from the Commission - Towards an EU Strategy on the Rights of the Child - Impact Assessment, COM(2006) 367 final, at p.19.

In 2007, the Commission directed the European Union Agency for Fundamental Rights (FRA) to carry-out this work. Established in 2007, the FRA provides assistance and expertise relating to fundamental rights to the EU institutions when they are deciding upon legislative or policy activities.[44] I was a member of a team of researchers commissioned by the FRA, in December 2007, to develop a set of indicators that could be used to measure the implementation, protection, respect and promotion of the rights of the child in relation to areas of EU activity.[45] I was initially appointed as an Expert, with particular responsibility for asylum and immigration issues within the project, a role which I carried out for its duration. Additionally, I provided maternity cover for the Senior Expert over the first few months of the project, thus playing a major role in determining the scope and direction of the research. Finally, I contributed a number of sections to the final report, as published by the FRA in March 2009.[46] This research will be referred to as the *EU Child* project in this discussion.

3.1. The *EU Child* research: process and methodology

From the outset this work was based on the premise that the indicators developed during 2008-09 were to be a starting point in the EU's ongoing endeavour to engage more fruitfully with the impact of its laws and

[44] See Council Regulation EC No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights OJ L 53/1, 22.2.2007. The FRA was previously the European Monitoring Centre on Racism and Xenophobia, before its remit was recast in 2007

[45] This research was jointly carried out by the Centre for the Study of the Child the Family and the Law, University of Liverpool and the Ludwig Boltzmann Institute for Human Rights, Vienna.

[46] *Op. Cit.* n.42

policies upon young people. The project itself was as much about developing a workable methodology for the ongoing development of indicators as it was the end-product. The final report, therefore, has been described as an "initial toolkit to evaluate the impact of EU law and policy on children's status and experience across various fields".[47] Additionally, a key aim of the work is to highlight where there are gaps in current EU provision and available data thereby providing a springboard for future legal, policy and research development.

It was agreed between the FRA and the research team that indicators would be clustered around the following four themes: (1) family environment and alternative care; (2) protection from exploitation and violence; (3) education, citizenship and cultural activities; and (4) adequate standard of living. The rationale behind the selection of these substantive domains was primarily to chime with areas in which EU activity had been most abundant in relation to children. Additionally, they were designed to correspond as closely as possible to the reporting clusters developed by the Committee on the Rights of the Child in their monitoring of the implementation of the UNCRC, referred to above. Interestingly, there was an ongoing debate amongst the researchers who worked on the project as to how the EU's activities in the area of asylum and immigration fitted into the framework above. Some were of the view that the volume of child-focused provisions found in legislation under Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon) justified the inclusion of 'asylum and immigration' as a domain in its own right. Others felt that cross-cutting themes, each of which was relevant to every child, regardless of their particular circumstances, were preferable. In the end, the latter approach was chosen to broaden to scope

[47] Morten Kjaerum (Director, European Union Agency for Fundamental Rights), Introduction to the final report, *Op. Cit.* n.42, at p.4

of application of the indicators to the widest possible category of children.

Both the research, and the indicators themselves, have been grounded in a specific conceptual framework which is characterised by five key features. The first of these is that they are child *rights*, not child *well-being* indicators.[48] Because of this they are to be distinguished from the extensive work that has been carried-out assessing the 'state' of children's lives,[49] some of which has adopted a European cross-national perspective, ranking countries according to the 'happiness' of their children.[50] Instead, children's rights indicators focus on the interaction between children, the state and society. The second feature is that the UNCRC is adopted as a normative framework,[51] to ensure that the collection and analysis of data is approached from a children's rights perspective, and not that of the more limited and adult-focused stance of

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[48] For a discussion of the essential features of children's *rights* indicators, see: J. Ennew and P. Miljeteig 'Indicators for Children's Rights: Progress Report on a Project' (1996) 4 *International Journal of Children's Rights* 213-236; and E. Carvalho 'Measuring Children's Rights: An Alternative Approach' (2008) 16 *International Journal of Children's Rights*, pp.545-563

[49] See, for example, Bradshaw, J., Hoelscher P., Richardson D., *Comparing Child Well-Being in OECD Countries: Concepts and Methods* (Florence: UNICEF Innocenti Research Centre, 2006); Andrews, A. B., & Ben-Arieh, A. (1999). Measuring and Monitoring Children's Well-Being across the World. *Social Work.* 44(2), 105-115; Ben-Arieh, A. and Frones, I. (Eds.), *Indicators of Children's Well-Being*, (Springer; 2008); Ben-Arieh, A. (1999) "The International Effort to Measure and Monitor the State of Children: A Summary and Agenda for the Future" in A.B. Andrews & N.K. Kaufman (Eds.) *Implementing the U.N. Convention on the Rights of the Child: A standard of living adequate for Development* (Westport: Praeger, 1999), pp. 33-46; Hanafin, S. and Brooks, A., *Measuring Child Well-Being – An Inventory of Key Indicators, Domains and Indicator Selection Criteria to Support the Development of a National Set of Child Well-Being Indicators* (Dublin: The Stationery Office, 2005)

[50] Such as Bradshaw, J. et al. 'An Index of Child Well-Being in the European Union' (2007) 80 *Social Indicators Research* pp.133-177

[51] For a more in-depth discussion of the use of the UNCRC as a framework for monitoring children's rights, see: Kilkelly, U. and Lundy, L., 'Children's Rights in Action: Using the Convention on the Rights of the Child as an Auditing Tool', (2006) 18(3), *Child and Family Law Quarterly*, pp.331-350

EU law and policy. This allows the indicators to measure the extent to which EU provisions accommodate distinctly child-focused concepts such as empowerment or participation, non-discrimination and best interests; principles which, in some areas, are overlooked in formal legislative provision and, in others (such as asylum and immigration), are deployed in a less than convincing manner.[52] Consistent with the children's rights ethos of the work, the project adopts the child as the unit of analysis, seeking to monitor the impact of law and policy from their specific perspective. Crucially, this implies "beginning with the child and moving outward, separating, at least for measurement purposes, the child from his or her family".[53] Thirdly, whilst the project and the indicators are grounded in a children's rights framework, they respect the limits of EU competence. Within the remit of this project, there was no value in developing indicators in areas in which the EU has no capacity to intervene. Therefore, it was never an aim of this work to use indicators to challenge the boundaries of EU intervention in the lives of young people, instead it was to enhance accountability by highlighting where existing activity does not have desirable children's rights consequences.[54] Finally, it was crucial throughout this work to ensure that the research builds-on and complements other indicators sets, rather than needlessly replicating existing work.

The research underpinning the development of the indicators was conducted in three interlinked phases: mapping of the conceptual framework; expert consultation; and development and refinement of the

[52] See the discussion in *Chapter Two* of this thesis

[53] Ben-Arieh, A., 'The Child Indicators Movement: Past, Present and Future', (2008) 1, *Child Indicators Research*, pp.3-16, at p.7

[54] It is acknowledged that this is often a difficult line to draw. However, where possible the indicators focus upon areas in which the EU is active

indicators. The project began with a detailed mapping and analysis of the relevant conceptual framework, notably the legal, sociological, methodological, ideological and ethical issues surrounding children's rights, with a specific emphasis on indicators research and EU law and policy in relation to children. The second phase of the research identified and engaged with a network of children's rights experts at international, EU and domestic level and contained elements of direct face to face interaction, and feedback through a dedicated website forum.[55] To ensure the study's comprehensiveness in terms of perspectives and experience, experts were drawn from a range of disciplinary backgrounds: those involved in developing indicators in a diverse range of contexts; researchers engaging directly with young people; and policy-makers with expertise in targeting children. The aim here was both to enhance the knowledge and experience upon which the project as a whole was able to draw, as well as to give relevant civil society a stake in the project. On the latter point, 'getting the word out' that the project was taking place was a priority in terms of maximising its eventual impact, and to give key actors an active interest in the eventual success of the work. Throughout the consultation process, the research team sought to gain further insight in two principal areas: procedural questions linked to development and application of indicators; and more substantive ones relating to the social phenomena, and legal and policy framework, that the indicators sought to measure. First of all, the online discussion forum brought together 140 experts to contribute to a series of discussions centred around six thematic headings over a six week period (a screenshot of the online

[55] This website was accessible through subscription (the research team issues each expert with a username and password) and hosted by the University of Liverpool 'Sharepoint' system, known as VOCAL, which includes a platform for collaborative research with internal and external partners.

forum can be found in *Appendix B*).[56] Running concurrently, an online survey gave a snapshot of views in relation to the key issues (again, a screenshot of the online survey is provided in *Appendix B*). This aspect had the dual benefit of maximising access and coverage, given the limited time available to complete the research; as well as providing the research team with quantitative data to present to the FRA and Commission. Subsequently, the initial findings of the online discussion forum and survey, as well as some preliminary thoughts on the indicators were presented to an invited group of UN, NGO and EU representatives at a meeting held in Vienna on 25th April 2008. The meeting served to establish important collaborative links with those engaged in parallel activities at UN and Council of Europe level with a view to synchronising, rather than replicating, relevant work. Finally, during the course of the project several one-to-one interviews were carried out with officials from the European Commission, UNICEF Innocenti Research Centre, individual experts and representatives from European networks such as ChildONEurope, EURONET and several NGOs. The relative intimacy of this form of consultation was particularly useful for providing an environment in which key participants were able to articulate with a degree of honesty potential obstacles to the development and implementation of child rights indicators at EU level, allowing the research team to consider how these may be overcome. For example, the openness of the Children's Rights Coordinator in DG Freedom, Security and Justice about the overwhelming volume of tasks with which she had been presented since taking over the role a few months previously, underlined for the project team the need to keep the indicators in as short,

[56] The headings were: indicators and the rights of the child; the EU and the rights of the child; indicators in a wider context; child trafficking; children and cross-national family breakdown; child poverty and social exclusion

concise and digestible format as possible if they were to have any chance of engaging staff at an institutional level.[57]

The final phase of the work consisted of formulating, selecting and presenting the indicators in a format that respected the parameters of the project and was conducive to their future application by those charged with the collation of data. The FRA and the Commission had requested that no more than ten indicators were produced in each area, which required the team to be fairly ruthless in paring down the final list. Priority was given to those that sought to measure areas children themselves had identified as important and that responded to an issue that either affects a significant number of young people, or requires an urgent response. Equally, as these were the first set of children's rights indicators to be produced on behalf of the EU, the team strategically focused on indicators that resonate with current areas of EU activity and, as such, had the maximum chance of influencing the agenda.

The indicators are formulated in accordance with an internationally recognised matrix, consisting of structural, process and outcome measures. [58] Structural indicators seek to capture the impact of EU law

[57] Interview with Anna Zeto, carried out by Sandy Ruxton, summer 2008.

[58] This tripartite model has been adopted in other indicators work by, among others, the Office of the High Commissioner for Human Rights (UN-OHCHR's *Report On Indicators For Promoting And Monitoring The Implementation Of Human Rights*, HRI/MC/2008/3, 6 June 2008) and Save the Children (Haydon, D., and Boyce, S., (2007) *Child Rights Indicators Guidance and Framework*, Save the Children July 2007). These categories of indicators could also incorporate baseline indicators (indicators that measure the current situation so that progress can be monitored from that starting point, ex. girls in primary school as % of total) and target indicators (benchmarks setting down a particular standard or goal that should be achieved within a particular time period, ex. Increasing the proportion of 5 year olds in compulsory education to 95% by 2010). For further information about approaches and typologies of indicators from a human rights perspective, see: Malhotra, R. and Fasel, N. 'Quantitative Human Rights Indicators: A Survey of Major Initiatives', submitted for the Oslo Workshop on Developing Justice

and policy at the level of ratification and adoption of legal instruments. Furthermore, they are concerned with the existence of basic institutional and budgetary mechanisms deemed necessary for facilitating the realisation of particular children's rights provision. Process indicators consider the next stage at which EU level provision may be felt, by measuring efforts made at state and regional level to implement the structural provisions. This includes the implementation of European policy measures, programmes of action, training initiatives, campaigns and other activities that are aimed at realising particular children's rights. Finally, outcome indicators capture individual and collective attainments that reflect the status of children's rights in the specific context, as well as the extent to which children have benefited from interventions and programmes of action. The tabular format in which these indicators were presented can be seen in the example indicators provided in *Appendix C*.

3.2. The application of the *EU Child* indicators to asylum-seeking and immigrant children

The following discussion will outline the operation of those indicators that capture the impact of provisions stemming from the legal framework under Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon); that is, those addressing asylum-seeking and immigrant children. A list of relevant indicators is found in *Appendix C*: this is to provide the reader with greater detail and to facilitate ease of reference. It should be noted, however that this is an edited version of the full set of indicators encompassing only those that impact upon the current analysis.[59] Of the

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Indicators (15-16 May 2006), available for download at <http://www.jus.uio.no/forskning/grupper/humrdev/indicators.html.> (last accessed 26 February 2010

[59] The full version is available in the final report, *Op. Cit.* n.42

five indicator areas covered by the project the one that interacts the most with asylum-seeking and immigrant children is 'family environment and alternative care', because of the consideration given here to separated children. Within this area, indicators have been grouped into the following categories:

- Participation of children in immigration process;
- Adaptability of immigration processes to the vulnerabilities of separated children;
- Existence of provision favouring family reunification for children where it is in their best interests;
- Existence of expedited family reunification procedures for cases involving children;
- Existence of provision to safeguard the welfare of the child following family reunification.

Additionally, indicators relating to the situation of asylum-seeking and immigrant children are found in the area of 'protection from exploitation and violence', in relation to victims of child-trafficking. Finally, the area of 'education, citizenship and cultural activities' has given rise to indicators on education provisions, some of which focus upon immigrant and asylum-seeking children.

Crucially, the UNCRC context is provided in relation to each group of indicators, such that the appropriate children's rights benchmark against which to assess the data that is gathered is clear. For example, consider the following indicators on existence of expedited family reunification provisions for cases involving children:

- Existence of agencies/bodies to advise and support children seeking family reunification;
- Rates of family reunification involving children achieved in a one year period (as a proportion of all applications involving children);

- Average length of time lapsed between initial application and the accomplishment of reunification in cases involving children;
- Rates of reunification with relatives/children living in another Member State accomplished in a one year period (under Dublin II Regulation).[60]

Article 10(c) UNCRC states that applications for family reunification 'shall be dealt with by States Parties in a positive, humane and expeditious manner', and is cited along with the indicators themselves. This is the standard against which the EU legislative and policy-making institutions, when drawing conclusions about the data, should measure the impact of their activities. Thus, these indicators avoid the presumption that the legal provision expressed at EU level is itself UNCRC compliant, requiring that adherence to children's rights principles be reflected both in formal legislative measures (in essence the role of mainstreaming) and that this has trickled down to implementation at the national and regional level, and at the level of the child.

Because they adopt this approach these indicators are aspirational, allowing progress in the children's rights arena to be monitored over time. Therefore, whilst firmly grounded within areas of EU competence, the level of children's rights protection that they endorse is not limited to the confines of current legislative and policy activity. So, for example, the indicators on protection of victims of child trafficking measure the 'existence of legal provisions ensuring a right to stay to trafficking victims irrespective of cooperation with police or courts'. This is despite the legal framework, at least as it exists at EU level,[61] making a residence

[60] Data collected in relation to these latter three is to be disaggregated by age, gender and nationality of child, to reflect the non-discrimination principle underpinning these indicators

[61] Under the provisions of the trafficking Directive.

permit conditional upon the victim's willingness to participate in this latter activity, and the derogation Member States are allowed in respect of offering this possibility to child victims of trafficking.[62] Similarly, there is a group of indicators that assess the existence of provision to safeguard the welfare of the child following family reunification, even though there is no obligation to do so in the Directive.

To facilitate the role of these indicators, in informing the ongoing process of assessing the impact of law and policy, they are presented alongside corresponding EU activity, in order that where an impact is identified it can be traced back to the relevant policy area. So, in relation to the above example, the family reunification Directive is, of course, referenced. To consider another example, indicators on education will, most obviously, provide the EU with information of the impact of provisions granting a right to access under Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon) legislation (as discussed in *Chapter Three*). Equally, however, their emphasis on the need for adaptability, as well as accessibility, allows them to capture some of the effects of wider policy initiatives outlined in the Commission's *Green Paper on migration and mobility*,[63] as well as non-discrimination provisions.[64] Thus, data gathered from these indicators ought to feed into the ongoing development of these agendas which have the potential to complement

[62] Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities OJ L 261/19, 6.8.2004

[63] Commission Green Paper – Migration and Mobility: Challenges and Opportunities for EU Education Systems, COM(2008) 423 final

[64] In particular, proposed Directive on equal treatment (Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM (2008) 426)), extending protection against discrimination to education

and dovetail with the formal legal entitlements stemming from Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon) legislation, thus reinforcing one of the concluding arguments to the education section of *Chapter Three*.

These indicators measure the impact of immigration law and policy in a way that centres on the specific needs of the child and assesses provisions from their particular perspective. Therefore, one of the indicators on the participation of children in immigration processes considers 'the existence of national laws ensuring ongoing and *independent* legal representation', thus measuring entitlements that address the child as an individual and do not assume their needs are met by wider age-neutral provision that may be better suited to adults. The same can be said for those that assess the adaptability of legal representation to the specific vulnerabilities of separated children. Equally, one of the indicators in relation to family reunification measures 'the existence of a right for children to immediate access to key services (education, health care, financial support, counselling) following family reunification with their parents in an EU Member State'. This acknowledges that immigration provision can sometimes overlook the needs of children within families, assuming that these are met by those granted to the wider family unit, ignoring the autonomous rights of the child.

Of course, the primary weakness of the *EU Child* indicators in relation to asylum and immigration is that they offer only a partial assessment of the impact of Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon) legislative measures, for the simple reason that they do not cover every substantive issue addressed by the legislation. This underlines the status of the project as a starting point in a more long-term endeavour to develop EU indicators on children's rights and, as such,

future development of this work was anticipated during the selection of the scope of the indicators and their formulation. The reaction of the Commission to the indicators work since the completion of this initial project has, however, been somewhat mixed. Whilst ostensibly showing enthusiasm for, and support of, the project, there is little evidence of attempts to develop it in the months since its publication.[65] Anecdotally, some have explained this as a consequence of the stepping-down of Vice-President Franco Frattini as a Commissioner in May 2008. Vice-President Frattini was a key proponent of children's rights within the Commission, and particularly the development of this agenda within the area of freedom, security and justice. Furthermore, it is believed he was a player in the decision to commission the *EU Child* project, his retirement from European politics coming a few months into its commencement. Whilst others have since taken the reins in DG Justice, Freedom and Security, and made laudable efforts to develop the children's agenda, they perhaps see it as evolving in a slightly different direction. Most significantly, research "evaluating the impact of the EU instruments affecting children's rights with a view to assessing the level of protection and promotion of children's rights in the EU" was recently put out to tender by the Commission, the supporting documentation to which made no reference to how the indicators work relates to this new endeavour.[66] This only serves to highlight the extent to which the development of this agenda is

[65] On the other hand, its reception amongst other EU institutions such as the Committee of the Regions and, less surprisingly, the FRA itself has been more encouraging. The Committee of the Regions has recently commissioned the Centre for European Policy Studies to write a 20 page note on 'Local and Regional Cooperation to Protect the Rights of the Child in the European Union' which seeks to assess the application of the *EU Child* indicators by local and regional authorities. The FRA has used the indicators as a framework of reference for a recent project addressing separated asylum-seeking children (further information is available on the FRA's website <http://fra.europa.eu/fraWebsite/research/research_projects/research_projects_en.htm> (last accessed 26 February 2010)

[66] Open invitation to tender JLS/2009/D4/006, JLS/D/4/EB/jd/D(2009)6002, Brussels, 08/06/2009

at the whim of the fluctuating politics of the Commission, a factor which serves to undermine the fostering of robust, rigorous and sustained child-focused governance strategies.

The second crucial factor in shaping the success of these indicators is both the availability and quality of the data upon which they draw. An aspect of the *EU Child* project was to highlight existing information sources and identify gaps in relation to available data, with a view to stimulating the collection of more child-focused information. This proved to be a particular challenge in relation to indicators addressing the situation of chid immigrants and asylum-seekers. Indeed, this is reflective of underlying themes that hamper the collection of both qualitative and quantitative data in this regard, but that can nonetheless be overcome if the EU demonstrates full commitment to monitoring the impact of its asylum law and policy on children. The final section of this chapter addresses these broader issues.

4. PERSISTENT BARRIERS TO MEASURING THE IMPACT OF EU ASYLUM AND IMMIGRATION LAW ON CHILDREN

The first two parts of this section point to gaps in the availability of both qualitative and quantitative information that can be used to support monitoring activities in relation to the impact of EU asylum and immigration law on children. The discussion on statistics shows that changes to redress this deficiency are already in motion. In relation, however, to the availability of empirical data on the way in which EU provision impacts on the experiences of child immigrants and asylum-seekers, it is argued that barriers persist. Specifically, the EU has failed to support the use of child-focused, participative methods in relation to this group, something it is argued, in the final part of this section, hampers

efforts to reach a full understanding of the impact of EU law and policy on children.

4.1. Children and EU statistics on asylum and immigration: the invisible group *par excellence*?[67]

The collection of statistical data capturing the specific situation of children has historically hampered efforts to better understand their situation at EU level. Ruxton observed in 1996 that "Union statistics on children and childhood are often inadequate compared to data gathering on other issues".[68] This both reflects and perpetuates the relatively hands-off approach to young people in the early days of the Union: little comparative policy analysis was carried out in relation to children because, as a group, they did not feature prominently on the European agenda. This in turn stifled the demand for transparent and coherent data. With no supporting statistical evidence, it is, therefore, harder to identify issues in relation to children – and, consequently, mobilise action at EU level. Historically, Eurostat has not routinely collected age-disaggregated data in relation to asylum and immigration. As a consequence, it is extremely difficult to reach conclusions about young migrants that are backed up with quantitative evidence. Given statistics are not collected at EU level, there is a reliance on secondary data sources which, whilst having cost and practicality advantages, bring with them further

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[67] Qvortrup makes the following observation: "I was naive enough to think that obtaining good, sufficient and reliable information on children was more or less a matter of routine since interest in children, if discussions in the media were to be taken as an indicator, was so conspicuous. Very soon, however, I had to realize that children are the invisible group *par excellence* in our society". (Qvortrup, J. 'A Voice for Children in Statistical and Social Accounting: A Plea for Children's Right to be Heard', in A. James and A. Prout (eds.) *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood* (2nd Edition) (Falmer, 1997), at p.88

[68] Ruxton, *Op. Cit.* n.5, at p.16

complications. Even apparently simple questions, such as the number of unaccompanied children who have sought asylum in the EU in a given year, can be tricky to ascertain due to divergent definitions at Member State level. For example, there is no consensus across Europe as to the age at which young migrants are to be regarded as adults for the purposes of asylum determination. Whilst there is broad agreement across Europe that majority is reached at 18 years,[69] which is applied in relation to most law and policy for the benefit of young people, this is not always the case with immigration regimes, some of which draw a line at 16, or even 14 years.[70] Equally, there is no consistency as to whether children who arrive in the Member States with a relative such as an aunt or uncle, are to be classed as 'unaccompanied', the harmonised definition found in the legislation being sufficiently vague as to accommodate these divergences.[71] Equally, Ackers and Stalford observe that cross-national data is only as effective as the national sources from which it is extrapolated, therefore the quality, availability and clarity of data produced will vary significantly from one country to another.[72] Indeed, in relation to the collation of statistics on migration, there are suspicions (albeit anecdotal) that certain countries vastly underestimate the number

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[69] Following the passing of the Children's Law Modification Act 2000 in Austria which lowered the age of majority from 19 years to 18

[70] Smith, T. (2003) *Separated Children in Europe: Policies and Practices in European Union Member States: A Comparative Analysis*, Save the Children, at p.9. Whilst EU asylum and immigration legislation states that unaccompanied minors are 'persons below the age of 18' (Article 2(h) Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status OJ L 326/13, 13.12.2005, for example), this definition has not always filtered down to the level of categorisations for the purposes of statistical collation

[71] "'unaccompanied minor' means a person below the age of 18 who arrives in the territory of the Member States unaccompanied by an adult responsible for him/her whether by law or by custom, and for as long as he/she is not effectively taken into the care of such a person..." (Article 2(h) asylum procedures Directive, *Ibid.*)

[72] See, further: Ackers, L. and Stalford, H (2004) *A Community for Children? Children, Citizenship and Internal Migration in the EU.* Ashgate

of young asylum-seekers on their territory for political reasons, preferring for these children to be absorbed into wider child protection regimes. This latter point is indicative of a wider-tendency for 'irregular' migrants to remain invisible in statistics.[73] Furthermore, there is a risk that, when secondary data is relied upon in a cross-national context, an element of 'sanitisation' takes place. In other words, researchers may seek to 'disentangle the social, cultural, economic and political variables' inherent in data from diverse country sources, in an effort to ensure statistical comparability.[74]

The need for child-focused information on asylum and immigration, and the perils of relying on secondary data in this regard, highlight the need for a standardised approach to its collection and classification at EU level. Such issues are highlighted by the Commission in its 2006 Communication, *Towards a Strategy on the Rights of the Child*.[75] The plea for better, more comparable child-focused data is also reinforced by the Parliament in its Resolution on the Strategy in which it:

> Calls on the Commission, the Agency and the Member States to work in cooperation with relevant UN agencies, international organisations and research centres towards improving the gathering of comparable

[73] On the difficulties of collecting data on illegal migrants, see: M. Jandl (2004) 'The Estimation of Illegal Migration in Europe' *Migration Studies*, vol. XLI, No. 153, pp.141-155. On more general barriers to the collection of data on migrants, see: R. Billsborrow *at al.* (1997) *International Migration Statistics: Guidelines for Improving Data Collection Systems* International Labour Organisation.

[74] Hantrais, L. and Mangen, S. (1999) 'Cross-national Research', *International Journal of Social Research Methodology: Theory and Practice*, 2(2), pp.91-92, at p.91

[75] *Op. Cit.* n.3

statistical data on the situation of children in the EU, if necessary by extending Eurostat's mandate.[76]

Clearly, then, there is an institutional commitment to addressing this problem. Furthermore, it is anticipated that it will be somewhat alleviated following the adoption of a new Regulation relating to statistics on migration and international protection.[77] The instrument establishes common rules for the collection and compilation of Community statistics: on '...administrative and judicial procedures and processes in the Member States relating to immigration, granting of permission to reside... asylum and other forms of international protection and the prevention of illegal immigration'.[78] Crucially, the Regulation also imposes an obligation on Member States to disaggregate migration statistics in accordance with age (Article 3(1)), such that the situation of children should become clearer within data sets. It does, however, remain to be seen the extent to which these will capture divergences and trends within data on children as a single group in relation to, for example, race, gender, country of origin and Member State of residence. It is, however, possible that we are, at the very least, on the cusp of a culture change within Eurostat, that in the future will ensure greater availability of EU level data on child immigrants and asylum-seekers.

[76] Paragraph 12, European Parliament Resolution of 16 January 2008, *Towards an EU strategy on the rights of the child* (2007/2093(INI))

[77] Regulation (EC) No 862/2007 of the European Parliament and of the Council of 11 July 2007on Community statistics on migration and international protection and repealing Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers

[78] Article 1(c) Regulation 862/2007, *Ibid.*

4.2. Additionally, insufficient efforts/information in relation to the empirical status of these children:

The data deficiencies identified in relation to statistics on child immigrants and asylum-seekers in the EU, are equally played out in the qualitative context. It cannot, however, be denied that there is a considerable corpus of research into the impact of legal provisions on young immigrants and asylum-seekers. The problem instead lies in the fact that, whilst each provides a glimpse of the situation, by identifying and investigating a discrete element of the lives of these children, this is rarely conducted at the European level such that conclusions about EU provision can be reached. So, the extensive body of existing research examines the issue from a variety of perspectives: sometimes addressing a limited geographical scope[79] or category of children, at other times with a focus on a particular ethnic group[80] or substantive issue (such as education[81] or detention)[82]. There is even research that looks at the implementation of international children's rights standards within asylum and immigration provision.[83]

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[79] This may be national (e.g. W Ayotte and L Williamson, 2001, *Separated Children in the UK*, Save the Children; K Juhlén, 2003, *Separated Children – a survey in Sweden*, Save the Children) or regional (e.g. 2004, *Offering more than they borrow: Refugee children in London*, Greater London Authority; 2004, *My mum is now my best friend ...*, Save the Children)

[80] Hannan, L., *A Gap in their Hearts: the experience of separated Somali children*, (UN Office for the Coordination of Humanitarian Affairs, 2003)

[81] Rutter, J. and Jones, C., (Eds.) *Refugee Education: Mapping the Field*, (Trentham Books Ltd, 1988)

[82] Crawley, H. and Lester, T., *No Place for a Child*, (London: Save the Children, 2005)

[83] 2006,*UNHCR Guidelines on Formal Determination of the Best Interests of the Child*, UNHCR

There is some work on child immigrants and asylum-seekers that has been carried out a European level. This has tended to be in the form of cross-national comparisons of the position of young migrants in each Member State. Most significant in this regard is the work of the Separated Children in Europe Programme (SCEP), which whilst limited in its scope as far as the children it addresses is concerned (that is, no information on children in families is collected).[84] In 1999 SCEP began to collate national assessments of the policies and practices concerning separated children seeking asylum across most western European, and some central European and Baltic, states. These profiles outline the legal position in domestic legislation in relation to a number of substantive areas: for example, amongst others, appointment of guardians, use of detention, age assessment, health, education and family reunification. In addition, information is collected on broader principles, such as the right of separated children to be heard. Furthermore, a number of comparative reports that draw upon the national assessment have been produced, outlining examples of good practice and highlighting those countries whose provisions are either weak, or poorly implemented, from a children's rights angle. These have used the framework of SCEP's own 'Statement of Good Practice' aimed at assisting policy-makers to implement asylum and immigration legislation in a child-friendly, rights-based way, as a framework of analysis. What these assessments have not really been able to do is to link findings on the basis of comparisons, or examples of good practice, back to the scope and content of the EU legal and policy framework. No existing analysis frames the question precisely within the confines of the specific impact of EU level provision in

[84] Established in 1997, under the auspices of Save the Children Denmark, the aim of this organisation is to advocate on behalf of, and carry out research into, separated children with the "aim of improving their situation". See, for further infomraiton, the Programme's website, available at <http://www.separated-children-europe-programme.org/index.html.> (last accessed 26 February 2010)

relation to child immigrants and asylum-seekers, and therefore does not ask what can be termed the 'EU question'.

4.3. Overcoming data availability issues: promoting child-focused, EU level research on young immigrants and asylum-seekers

Essentially, then, the problem that remains is that there is simply insufficient information in the field engaging in qualitative analysis of the impact of EU asylum and immigration law on children. Whilst any such endeavour is somewhat outside the comfort zone of the EU when set within the broader context of evaluation activities supporting good governance, it is nonetheless an achievable and worthwhile aim. This debate has been lent added currency by the recent announcement that the FRA is to undertake exactly this sort of endeavour. Whilst the results of this work are keenly anticipated, the discussion below reinforces the need for research into the impact of EU law and policy and immigrant and asylum-seeking children that is grounded in a child-focused, participative methodology. Moreover, it is argued that the rhetoric of good governance demands that endeavour must be facilitated and supported at institutional level, rather than passing the buck to the charitable and NGO sector.

For a number of years now, there has been a trend towards promoting the use of participative methods that involve direct consultation with children in research, including in the development and evaluation of policies and practices affecting them.[85] Conversely, this has not been borne out at EU level where there is little evidence of and, until recently, interest in, adopting this approach. Perhaps this is not altogether surprising given that children have only recently become a genuine policy concern.

[85] See Hallett, C. and Prout, A. (Eds.) *Hearing the Voices of Children: Social Policy for a New Century* (Routledge Farmer, 2003)

Moreover participative research with children is associated with 'messy' methodological and ethical issues to be overcome in a cross-national context to allow for this research.

The trend towards increasing use of evidence-based policy planning has developed alongside an evolving sociology of childhood.[86] At the same time as policy-makers have emphasised the need for research in the field of social science to inform their work, methodological approaches to involving children in this process have also changed. Traditionally, children were viewed as passive receivers of welfare services, with little recognition of their role as active participants in society. Because of this young people were largely "objectified" in social science research, such that they remained "muted".[87] This approach became known as the 'caretaker thesis': a process by which "childhood and children's lives have been explored through the views and understandings of their adult caretakers".[88] The increasing recognition of the need to elicit children's views on matters affecting them, which gathered pace as Article 12 UNCRC embedded itself in national law and policy, started to permeate the social science research community during the 1990s.[89] As Ackers and

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[86] On the growth of evidence-based policy planning see: Young, K. *et al.* (2002) 'Social Science and the Evidence-based Policy Movement' 1(3) *Social Policy and Society*, pp.215-224; and the webpages of the Information Centre about Asylum-Seekers and Refugees which includes a section on government research and policy planning in the specific context (available at < http://www.icar.org.uk/?lid=2304> (last accessed 24 January 2009>). For a summary of the evolving sociology of childhood see chapter two in Thomas, N., *Children, Family and the State: Decision-Making and Child Participation* (Macmillan, 2000), pp.5-20

[87] A. James and A. Prout 'A New Paradigm for the Sociology of Childhood? Provenance, Promise and Problems' in A. James and A. Prout (eds.) *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood*, 2nd ed., Falmer, 1997, at p.7.

[88] Thomas, *Op. Cit.* n.86, at p.2.

[89] Alderson, P. and Morrow, V., *Ethics, Social Research and Consulting with Children and Young People* (Ilford: Barnados, 2004), at p.11

Stalford note, "the use of proxies to relay what children want, think and like has been increasingly discredited".[90] Thomas too observes that the view that information collected from children is less reliable has also been challenged.[91] In recent years greater funding for research that consults directly with children has been made available,[92] as governments recognise the value in facilitating the participation of children in the evaluation of their laws and policies. In the UK, for example, this was the case with the launch of the *Every Child Matters* strategy in 2003. This programme sought to improve local service provision for young people through a 'joined-up' approach to education, culture, health, social care, and justice. Participation of children was seen as an integral part of enhancing the accountability of services aimed at young people: "Real service improvement is only obtainable through involving children and young people and listening to their views".[93]

Certainly, there is a consensus that, rather than compromising research, the direct participation of children in fact enhances it. As a result, the question for any researcher engaged with work looking at the lives of children is no longer 'why consult?', instead it is 'why not consult?'. It seems, then, appropriate to dwell a little more on why there is so little evidence of this approach at EU level.

First of all, in certain quarters there is a perception that statistical data has a level of objectivity and inherent truthfulness that cannot be delivered by

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[90] Ackers and Stalford, *Op. Cit.* n.72, at p.34

[91] Thomas, *Op. Cit.* n.86, at p.104.

[92] Alderson and Morrow, *Op. Cit.* n.89, at p.10

[93] *Every Child Matters: Summary* (2003), at p.12, available at: http://publications.everychildmatters.gov.uk/eOrderingDownload/ECM-Summary.pdf (last accessed 25th January 2009).

qualitative research. Certainly, the economic roots of European cooperation have meant that there is a tradition at EU level that emphasises the 'economic' over the 'social'. Ackers and Stalford cite a prominent EUROSTAT statistician on asylum and immigration and argue that an over-emphasis on econometric and quantitative methods is a reflection both of traditional approaches to migration research and an emphasis of the economic over the social at EU level.[94] Secondly, the lack of a wider children's rights infra-structure has resulted in somewhat of a skills and expertise vacuum at institutional level; therefore a simple lack of awareness and understanding of the value of participative research amongst relevant policy-makers provides a further explanation. Thirdly, there is a perception that involving children in research is inherently resource intensive and delivers messy and unwieldy data. This has on occasion manifested itself in outright denial of the capacity of research engaging children to ever hold sufficient weight so as to influence the development of law and policy in relation to children on the part of Commission personnel.[95] This somewhat flies in the face of 30 years of development of ideas surrounding the interaction with children and the law. It is however acknowledged that, for those with no experience of designing child-focused research methods it may seem a daunting task to implement this sort of work at a pan-European level.

Why, then, is there a need to change this culture, given the abundance of explanations for a reluctance at the level of the EU institutions to embrace child-focused participative research? From a very general point of view, as the EU develops its notions of citizenship and democracy - and strives towards a goal of bringer Europe closer to its citizens - it

[94] Ackers and Stalford, *Op. Cit.* n.72, at p.14

[95] This informal observation is made on the basis of an exchange between the author and high-level Commission personnel at the *EU Child* meeting in Vienna in April 2008

would seem to be moving towards an ethos that would support evaluative activities involving the subjects of its laws and policies. In the UK context, Roberts has identified the growth of citizenship as a policy issue as underpinning the turn to participative methods in the development of policy relating to children:

> Government statements on a stakeholder democracy and the resurgence of interest in the concept of citizenship have contributed to a search for new ways of involving young people as members of their communities and as citizens.[96]

In other words, if the *Strategy on the Rights of the Child* emphasises the need for monitoring the impact of laws and policies on young people,[97] then the current governance ethos at EU level surely supports a participative child-focused approach to this endeavour. More specifically, in relation to asylum law and policy, the EU has exercised its regulatory competence in a way that has enormous potential to impact the lived-experiences of young people. Thus, what we are presented with is an example of an area in which the interaction between regulation at EU level and the day-to-day lives of children is at its most vivid. Furthermore, the child-focused measures found in EU asylum legislation represent an acknowledgement that children experience legal provisions differently from adults. It is therefore entirely contradictory to argue that it is acceptable to apply adult filters to the collection of information on the particular impact of these provisions on children. This debate has recently been brought to life by the inception of the EU Fundamental

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[96] Roberts, H. 'Children's Participation in Policy Matters' in Hallett, C. and Prout, A. (*Eds.*) (2003) *Hearing the Voices of Children: Social Policy for a New Century* Routledge Farmer, at p.27

[97] *Op. Cit.* n.3

rights agency which, for the first time in the EU's history, means that an institutional body exists with the appropriate remit - and, indeed, skills and capacity - to support this sort of research.

5. CONCLUSION

This chapter has developed the broader arguments outlined in relation to mainstreaming in the context of the related area of monitoring the effects of law and policy on children. It began by critiquing the capacity of existing mechanisms to incorporate a children's rights perspective, pointing to the sense in which neither the impact assessment procedure, nor the Commission's monitoring of legislative progress in relation to asylum and immigration were particularly well-adapted to this endeavour. The first section acknowledged the turn towards the use of social indicators by the EU to assess the *ex post facto* impact of its law and policy, suggesting that this style of monitoring was perhaps better adapted to the ethos surrounding both children's rights and the drive towards more democratic and accountable law-making. The central section of this analysis explored the possibilities offered by the initial set of children's rights indicators produced by the *EU Child* project, specifically in relation to better understanding the impact of asylum and immigration legislation on young people. The final section argued that certain underlying factors continue to hamper efforts to assess young people's experiences of EU law and policy at a more local and individual level, ending with a plea to enhance the participatory element of monitoring activities in relation to children in line with contemporary theories on childhood and children's rights. The final point made in this regard was the capacities and expertise of the FRA support the realisation of what is acknowledged to be an ambitious ideal. As with mainstreaming, the migration arena has provided an especially insightful

forum in which to situate this analysis. The range of fluctuating political, economic and cultural dynamics shaping the area ensure that the practical experiences of immigrant and asylum-seeking children are constantly changing. As such, what may seem to the legislature to be essentially *static* legal provisions have the potential to produce drastically different effects across time and space. This reinforces the need for monitoring processes at every stage of the elaboration and implementation of law and policy to be sensitive to the rights and needs of children.

Chapter Six

CONCLUSION

The story behind the evolution of this PhD provides an illuminating lens through which to view its themes and, ultimately, its concluding arguments. When the research began, my intention was to write a much narrower thesis exploring the rights of unaccompanied minors under EU law, tracking the implementation of these provisions into domestic law. The result, however, is something entirely different – and is the product of a journey that I travelled which, in many ways, mirrors the evolution of the EU children's rights strategy that occurred simultaneously. In the early days, as a 'rookie' doctoral researcher and a relative newcomer to the issue of EU children's rights, I was still wedded to the idea that the sole value of research into supra-national legislation lay in providing a reference point for assessing its national implementation. It had not, at that stage, occurred to me that fundamental questions could be asked about the very foundations – constitutional and ideological – of EU intervention in the lives of young people. In late 2004, when this research began, although the Common European Asylum and Immigration System, with its plethora of child-focused provisions, was in full-swing, very few people foresaw the rapid ascendance of children's rights in the EU political agenda which was to take place in the coming years. At this point, very little capacity-building work was taking place at EU institutional level in relation to children's rights. Equally there was no hint of the forthcoming Commission Communication on a Children's Rights Strategy and the Court was yet to accept the role of the UNCRC in determining general principles of Community law. As institutional interest in children's rights began to gather pace, and I continued to

monitor the evolution of a corpus of immigration and asylum law relating to children at EU level, my interest in the regulatory and governance story behind this legislation developed. The culmination of this was my involvement in the *EU Child* project during 2008 which brought me into direct contact with key children's rights actors within the institutions. Here, I observed firsthand the extent to which an endemic skills deficit in relation to children's rights pervaded the very processes that lie behind the law, and, to a certain extent, the actors involved in it. This cemented in my mind a belief that my primary interest in studying children within asylum and immigration law lay in questioning the entire law-making culture surrounding this area of EU activity. At the same time, I was inspired by the thirst for change which, whilst stemming originally from the NGO and academic communities, was gradually embedding itself in the institutions amongst those who, whilst lacking background and experience in children's rights, demonstrated a real willingness to engage in a more meaningful children's rights dialogue. The result has been that my initial interest in asylum and immigration law has given way to a broader appetite for better understanding the emerging EU children's rights agenda, and to exploring it in a relatively novel way. In this regard, whilst no longer the primary focus of the research question, activity under Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon) has provided an illuminating and rewarding case-study. Somewhat surprisingly, therefore, this is no longer a thesis about asylum and immigration; instead, this latter area serves as a vehicle for a far broader discussion about the ideological and constitutional foundations of an EU children's rights agenda.

That is not to say, however, that the issue of asylum and immigration is incidental to the discussion in this thesis. On the contrary, it is exactly *because* asylum and immigration has provided such a fertile case-study

for children's rights at EU level that the arguments here have been able to evolve. The first reason for this is that instruments adopted under Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon) contain the most developed set of substantive, child-focused provisions anywhere in EU law. Indeed, the Common European Asylum System, with its numerous articles on unaccompanied minors, remains the only area in which a comprehensive set of entitlements, accessed by young people as the principal rights holders, has emerged at EU level. The presence of a group of young people who are not part of a family unit, and whose needs cannot, therefore, be subsumed into wider adult-focused policies, has steered the EU into largely unchartered waters. Tightly drawn competence boundaries in relation to legal intervention in young people's lives have ensured that this area remains the only one in relation to which Member States have ceded control of children's legal entitlements across such a comprehensive range of areas: rights to entry and residence in the EU, access to health, education and legal representation, opportunities to enjoy family life. The wide-ranging and voluminous examples of child-focused provisions that have been available to draw on as illustrations have allowed the arguments in this thesis to grow and evolve.

Secondly, the multi-faceted nature of migration lends added interest to an analysis of the EU's children's rights agenda when it is viewed through the lens of asylum and immigration law. The discussion in this thesis has repeatedly emphasised the heterogeneity of migrant children as a group: their diversity of background, experience and needs presents a particular challenge for the legislature in formulating child-sensitive law and policy. With this in mind, a conscious decision was made to include all areas within the competence granted by Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon) that relate to young people: this

encompasses a wide-spectrum of individuals – from the children of long-term resident third-country nationals, to families benefiting from temporary or subsidiary protection and the ubiquitous unaccompanied minor – allowing the appropriateness of the law to be challenged from a range of perspectives. Furthermore, the case-study of young immigrants and asylum-seekers has exposed particularly neatly some of the central challenges of incorporating children's rights principles into EU law. For example, the reconciliation of the UNCRC's best interests and participation was shown to pose a particular challenge for the EU legislature in relation to children who, on the one hand, can be acutely vulnerable, but on the other, can have capacities and experiences far outside those of a normal childhood. A second example is that the principle of non-discrimination, or universality, underpinning the application children's rights, can run somewhat counter to an area of law that is predicated on legitimising limitations on individuals' rights and entitlements on the basis of their nationality. Embarking upon an ambitious legislative agenda in relation to these young people with their complex set of rights and needs, before the emergence of a fully crafted children's rights agenda, was nothing short of an ambitious jump straight in at the deep end.

Thirdly, all of this is set against an area of competence, asylum and immigration, that sits at the intersection of a number of competing agendas, many of which tend to run counter to efforts to endow children with a comprehensive set of rights and entitlements. Asylum and immigration has been shown to be a notoriously political area, increasingly subject to an illiberal securitisation agenda in the post-9/11 world and beset by national fears of welfare systems that will become over-burdened by immigration. The challenges this presents to the successful implementation of a children's rights agenda makes it a

particularly revealing area in which to assess the rigour and robustness of mechanisms to ensure that young people's interests are incorporated. Finally, the interest in this particular case-study is further fuelled by its contemporary relevance: both the new EU asylum and immigration system and the evolving children's rights agenda began to emerge at the turn of the millennium lending this research a very appealing timeliness.

So what has this analysis of the child in EU asylum and immigration law told us about wider regulatory, governance and constitutional issues? The thesis began by contrasting the volume of child-focused provisions found within Title IV, Part Three EC (Chapter 2, Title V, Part III TFEU, post-Lisbon) legislation with the somewhat disappointing children's rights model they endorsed. Measures in relation to young people were shown to be largely derogatory, selective, discretionary and vague in nature, a finding which raised real questions about the purpose of EU intervention in this area. Subsequent analysis sought to set this criticism in the wider context of the complex, and sometimes competing, competence agendas at play in relation to family life, education and healthcare. This revealed three different models of intervention in the lives of child immigrants and asylum-seekers by the EU legislature and explored the interface between domestic and EU level obligations in relation to this group of children. Whilst recognition was given to the EU's limited competence in certain arenas, and acknowledgement made of the role it can play as a coordinating and overseeing (rather than legislative) body, the extent to which the sensitivities of asylum and immigration regulation took precedence over a children's rights agenda remained a constant factor. Whilst far from being impervious to the need for asylum and immigration law to contain child-focused provision, scratch below the surface of repeated references to the need to take the child's best interest into account, and the importance of responding to the

vulnerability of unaccompanied minors, and there is little evidence of a well-engendered children's rights strategy in this legislation. In this sense, the content of child-focused provisions in EU asylum and immigration law can be summarised as a triumph of style over substance.

The second part of this thesis moved on to what is perhaps its defining argument: that substantive provision is just one part of the children's rights landscape at EU level and that, equally, if not more, important are questions about process and governance. The argument posited was that children's rights advocates may be barking up the wrong tree when they seek to influence the regulatory content of EU provision, ignoring the potentially more fruitful avenue of developing a child-sensitive approach to EU governance. The familiar tool of mainstreaming was explored in this regard, and supplemented by an in-depth analysis of mechanisms for assessing the impact of EU law and policy on immigrant and asylum-seeking children. Both of these chapters concluded with a consideration of underlying barriers to the effective integration of children's rights and needs into the law and policy making process. Significantly, a number of themes emerged in this regard. First, is that the mechanisms as they currently exist, lack the rigour and robustness to ensure that children's rights stand firm in the face of an illiberal asylum and immigration regime. Secondly, that there is little sense of a children's rights culture having embedded itself at institutional level. A third, and related, observation is that the very principles of best interests, participation and accountability, ones that the legislature so willingly espoused in the legislation, are sadly lacking in the governance ethos of the institutions. Because of this, children's rights continue to rely to too great an extent on political will to push forward the agenda; a will that fluctuates with the ever-changing political and economic landscape of the EU and is frequently lacking in the context of asylum and immigration.

So, where political impetus wanes, what chance then of broader constitutional principles providing a stimulus for change? It seems almost ironic that *Parliament v Council*, a significant case in evolving the position of children's rights in the Community legal order through the recognition it gave to the principles of the UNCRC, is one that so let down the immigrant children who were the ultimate beneficiaries (or not, as it turned out) of its ruling. Nonetheless, this decision can be situated in a sluggishly evolving line of case law from the ECJ which began with the Advocate-General's tentative foray into the world of children's rights in *Garcia Avello*, and has more recently been revived with the decision in *Dynamic Median* applying the principles of the UNCRC in the somewhat unexpected context of free movement of goods.

The insertion of a reference to children's rights into the Treaties by Lisbon (Article 3 revised TEU) was met with a fanfare of optimism amongst children's rights advocates, on the basis that it offers a host of new opportunities for EU intervention in the lives of children. Whilst it is undoubtedly a step-forward in explicitly embedding children's rights in the constitutional make-up of the EU for this first time, it certainly falls well short of enshrining a legal obligation on the part of the Member States to intervene in the lives of children (and, given the legal and political sensitivities, rightly so). Whilst it offers the opportunity of a clear and explicit legal base where political consensus exists to act in relation to a certain area, one struggles to conceive of a challenge to the EU's legislative activity, based on a breach of children's rights principles, that was not previously possible under the provisions of the Charter or the general principles of Community law. So, has much really changed? Perhaps future legislative activity and, indeed, judicial interpretation may be persuaded of the need to engage in a meaningful, rather than

tokenistic, analysis of children's rights principles on the back of this provision. Indeed, this may even allow these principles to stand firm in the face of challenges from illiberal asylum and immigration legislation, but for this regulatory effect to be achieved, it must be accompanied by an approach to governance that is tailored to the specific needs and situation of children.

The analysis within this thesis should not, however, imply that it is only the EU that is to be held to account in upholding the respect and promotion of children's rights. Whilst it has been outside the scope of this analysis to address implementation of these provisions at national level, the willingness of the Member States to execute an EU children's rights agenda remains an important question. After all, what is the value of a well engendered and comprehensive approach to child immigrants and asylum-seekers at EU level, if Europe's nation states are ambivalent to such endeavours? In line with the arguments outlined in Chapter 5, the manifestation of EU provisions at domestic and local level, as well as their impact on the children they address, clearly represents an appealing and potentially fruitful area for future research.

To conclude, the essence of this argument lies in the mainstreaming principle – that is the need to bring children to the fore of the EU agenda through sustained and rigorous processes. Consistent with this very principle, this analysis ends by stepping outside the specific context of asylum and immigration, to comment on the cross-cutting issues facing children's rights in the EU. The final undertaking of this thesis, then, is a plea for a rethink of the wider philosophy underpinning the area. For the institutions, this would require a genuine shift in culture away from a Union that regards children's rights as a discrete policy area; one to which sporadic tokenistic allegiance is paid, but which is primarily

viewed as a distraction from the serious business of governing the EU, and remains far too subject to the whims of ever-changing Commission agendas. This is unlikely, however, to take place if EU legal scholars, a community that has in the past been guilty of dismissing the discussion of children's rights as a worthy but somewhat 'woolly' diversion, does not galvanise in support of this endeavour. It is hoped that by outlining and promoting a rigorous academic framework for its study, incorporating the analysis of fundamental constitutional and ideological issues relating to both regulation and governance, this thesis will convince sceptics of the status of EU children's rights as a legitimate and valued area of scholarship.

POSTSCRIPT

This thesis discusses EU law and policy in relation to child immigrants and asylum-seekers during the first decade of European harmonisation, up until 1 September 2010. For pragmatic reasons, developments since this date are not considered in the main analysis. However, the legal landscape in this area is constantly changing and recent developments have added further food for thought, some of which merit brief comment.

The Stockholm Programme,[1] agreed by the Council in December 2009, like Tampere and Hague before it, represents a shift in emphasis in the emerging agenda on the Area of Freedom, Security and Justice. The most striking features of this document are the greater prominence of fundamental rights, alongside recognition of the positive aspects of migration. Whilst this discourse clearly flows somewhat more freely in relation to the migratory rights of EU citizens and their families,[2] it is also evident in relation to immigration and asylum policy. The Tampere vision of granting legally resident third-country nationals "rights and obligations comparable to those of EU citizens", lacking from the Hague Programme, finds new expression at Stockholm.[3] In relation to asylum, specifically, this is complemented by a renewed commitment to establishing the Common System by 2012.[4] Of particular significance to this thesis, is an explicit commitment to "systematically and strategically" take the rights of the child into account in the Area of Freedom, Security

[1] Council of the European Union, *The Stockholm Programme: An open and secure Europe serving and protecting the citizens*, 2 December 2009 (17024/9)

[2] Section 2.2: Full exercise of the right to free movement, Stockholm Programme, *Ibid.*, at pp.11-13

[3] *Ibid.*, at pp.11-13

[4] *Ibid.*, at pp.59 and 69-70

and Justice, supported by a renewed commitment to the 2006 Strategy.[5] Finally, the emphasis on the position of children in future legal developments is further bolstered later on in the programme when the Council calls upon the Commission to develop an action plan on unaccompanied minors.[6]

Wasting little time, the Commission published its *Action Plan on Unaccompanied Minors (2010-2014)* in May 2010.[7] This document is underpinned by a more child-focused approach to the Common European Asylum System; one which purports to be shaped by the best interests principle and the need to protect young people.[8] The document outlines a number of areas for action. In terms of substantive areas for EU activity it identifies three priorities: prevention of unsafe migration and trafficking; reception and procedural guarantees; and the need for durable solutions. From a children's rights perspective, there is much to be optimistic about: primarily, the commitment to "higher standards of protection for unaccompanied minors" through revisions to the asylum *acquis*.[9] On the other hand, concern has been raised about the priority given to returning the child to their country of origin as a form of durable solution, with doubts expressed as to the mechanisms in place to ensure that this is in their best interests. [10] It should be noted, however, that the Action Plan does emphasise that return is just one option, as well as pointing to a

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[5] Section 2.2.3: Rights if the child, Stockholm Programme, *Ibid.*, at pp.15-16

[6] *Ibid.*, at p.68

[7] *Communication from the Commisison to the European Parliament and the Council: Action Plan on Unaccompanied Minors (2010-2014)*, COM(2010) 213 final

[8] *Ibid.*, at p.3

[9] *Ibid.*, at p.9

[10] *Ibid.*, at pp.12-14. See: Travis, A. 'UK to deport child asylum seekers to Afghanistan' *The Guardian*, 7 June 2010

number of financial resources aimed at supporting child-friendly approaches to return.[11]

A further priority in the Action Plan, consistent with the problems noted in *Chapter Five* of this thesis, is the need to ensure the availability of "comprehensive, reliable and comparable data" on child migrants.[12] In the few months between the writing of this thesis and its examination, the availability of research on the impact of EU asylum and immigration law on children has begun to improve. In April 2010 the Fundamental Rights Agency published its report on *Separated, Asylum-Seeking Children in European Union Member States* which used qualitative child-centred participatory research to capture the experiences of young people in relation to their living conditions and the legal issues and procedures to which they were subject.[13] A complementary study by the European Migration Network, published the following month, provides a comparative analysis of policies in these areas in 22 Member States.[14] The aim of both of these documents is to "fill a significant knowledge gap, and provide added-value assisting on-going policy-making at EU level, related to separated, asylum-seeking children".[15] The renewed commitment from the Commission in its Action Plan, therefore, is particularly welcome in providing an impetus to continue the process of ensuring that future law-making is supported and enhanced by a solid empirical basis.

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[11] *Ibid.*, at p.12

[12] *Ibid.*, at p.3

[13] Fundamental Rights Agency *Separated, Asylum-Seeking Children in European Union Member States* (FRA, 2010)

[14] European Migration Network *Policies on Reception, Reutrn and Integration arrangements for, and numbers of, Unaccompanied Minors – an EU Comparative Study* (EMN, 2010)

[15] *Op. Cit.* n.13, at p.10

Interestingly, the achievement of the aims outlined above is underpinned by a perceptible change in the legal and policy *methods* to be used utilised. Whilst ensuring implementation of the asylum and immigration *acquis* remains important, there is a new emphasis upon tools more often associated with soft law governance. For example, the importance of "objective and impartial evaluation", "regular dialogue with representative associations and civil society" and the need to ensure training on EU-related matters for the judiciary, law enforcement officials, customs officers and border guards, are all discussed.[16] Equally, the Council highlights the importance of coherence between migration policies and other areas of EU activity – such as policies in the areas of trade, employment, health, education, and foreign and development policy – in order to find what are termed "practical solutions".[17] One might speculate that these more flexible approaches are a necessary change in tack if the aspects of the Common European Asylum and Immigration System that have thus far proved tricky to achieve are to be realised. However, they have the added benefit of supporting governance strategies in this area that, it was argued in this thesis, have the potential to promote a more children's rights based approach than that previously seen. For example: dialogue with civil society can go some way to redressing the children's rights deficit that exists at institutional level; the emphasis on evaluation can enhance accountability and effectiveness in law-making; and recognising the interrelationship between different areas of EU law and policy promotes a more holistic approach to the rights of the child.

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[16] *Op. Cit.* n. 1, at pp.5-11

[17] *Ibid.*, at p.59

So, there is much to suggest a change in the EU legal and policy approach to young immigrants and asylum-seekers. Indeed, there is reason to be optimistic that future developments, to both the regulatory and governance landscapes, may be more effective in upholding the rights of the child. The introductory chapter to this thesis, however, pointed to the importance of understanding the law in its wider political and economic context – and it is this context that provides a distinctly sobering perspective as we look to the future of the Commission's new Action Plan on unaccompanied minors. In the weeks during which the final preparation of this thesis took place, the UK media was flooded with stories about a European economy in decline and the crippling effect of the global recession upon the status and experiences of child asylum-seekers. [18] As legal aid budgets are slashed and cost-effective approaches to migration policies sought, the reality of ensuring a higher level of protection and respect for rights of child asylum-seekers seems increasingly distant. One cannot help but fear that the "practical solutions" pointed to in the Action Plan will be motivated more by a need to find a response that fits the economic environment, than one that is committed to upholding the rights of the child (something that can often be an expensive endeavour). It was argued in this thesis that the relationship between EU and domestic provision can be at its most strained when the supra-national body requires the implementation of laws and policies which have significant resource implications. At this point, one of the final arguments of the concluding chapter should be borne in mind: a well-engendered EU children's rights strategy means very little if the Member States do not, or cannot, commit to its effective implementation at the domestic level. It is with great interest, then, that

[18] See, for example: Robins, J. 'Denying Child Asylum Seekers a Legal Lifeline' *The Guardian*, 10 June 2010; Moynihan, T. 'Child Asylum Seekers 'Denied Food and Medicine' *The Independent*, 23 March 2010; Travis, *Op. Cit.* n.10

the future impact of the EU's increasingly explicit and ambitious agenda in relation to child immigrants and asylum-seekers on the real-life experiences of these young people will be observed.

E.W.D., Liverpool, June 2010

APPENDIX A: TABULAR SUMMARY OF CHILD-FOCUSED PROVISIONS IN LEGISLATION UNDER TITLE IV, PART THREE EC

Provisions are categorised according to legislative instrument. Instruments appear in chronological order.

Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention OJ L 316/1, 15.12.2000

Article 4(1)	Asylum applicants over 14 years	Each Member State shall promptly take the fingerprints of all fingers of every applicant for asylum of at least 14 years of age and shall promptly transmit the data referred to in points (a) to (f) of Article 5(1) to the Central Unit. The procedure for taking fingerprints shall be determined in accordance with the national practice of the Member State concerned and in accordance with the safeguards laid down in the European Convention on Human Rights and in the United Nations Convention on the Rights of the Child.
Article 8(1)	Irregular migrants over 14 years	Each Member State shall, in accordance with the safeguards laid down in the European Convention on Human Rights and in the United Nations Convention on the Rights of the Child, promptly take the fingerprints of all fingers of every alien of at least 14 years of age who is apprehended by the competent control authorities in connection with the irregular crossing by land, sea or air of the border of that Member State having come from a third country and who is not turned back.

Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on

measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof OJ L 212/12, 7.8.2001

Article 2(f)	Unaccompanied minors	'Unaccompanied minors' means third-country nationals or stateless persons below the age of eighteen, who arrive on the territory of the Member States unaccompanied by an adult responsible for them whether by law or custom, and for as long as they are not effectively taken into the care of such a person, or minors who are left unaccompanied after they have entered the territory of the Member States;
Article 13(4)	Health care	The Member States shall provide necessary medical or other assistance to persons enjoying temporary protection who have special needs, such as unaccompanied minors or persons who have undergone torture, rape or other serious forms of psychological, physical or sexual violence.
Article 14(1)	Education	The Member States shall grant to persons under 18 years of age enjoying temporary protection access to the education system under the same conditions as nationals of the host Member State The Member States may stipulate that such access must be confined to the state education system.
Article 15	Family reunification	1. For the purpose of this Article, in cases where families already existed in the country of origin and were separated due to circumstances surrounding the mass influx, the following persons shall be considered to be part of a family: (a) the spouse of the sponsor or his/her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens; the minor unmarried children of the sponsor or of his/her spouse, without distinction as to whether they were born in or out of wedlock or adopted; (b) other close relatives who lived together as part

of the family unit at the time of the events leading to the mass influx, and who were wholly or mainly dependent on the sponsor at the time.

2. In cases where the separate family members enjoy temporary protection in different Member States, Member States shall reunite family members where they are satisfied that the family members fall under the description of paragraph 1(a), taking into account the wish of the said family members. Member States may reunite family members where they are satisfied that the family members fall under the description of paragraph 1(b), taking into account on a case by case basis the extreme hardship they would face if the reunification did not take place.

3. Where the sponsor enjoys temporary protection in one Member State and one or some family members are not yet in a Member State, the Member State where the sponsor enjoys temporary protection shall reunite family members, who are in need of protection, with the sponsor in the case of family members where it is satisfied that they fall under the description of paragraph 1(a). The Member State may reunite family members, who are in need of protection, with the sponsor in the case of family members where it is satisfied that they fall under the description of paragraph 1(b), taking into account on a case by case basis the extreme hardship which they would face if the reunification did not take place.

4. When applying this Article, the Member States shall taken into consideration the best interests of the child.

Article 16(1) Representation

The Member States shall as soon as possible take measures to ensure the necessary representation of unaccompanied minors enjoying temporary protection by legal guardianship, or, where necessary, representation by an organisation which is responsible for the care and well-being of minors, or by any other appropriate representation.

Article 16(2)	Accommodation	During the period of temporary protection Member States shall provide for unaccompanied minors to be placed: (a) with adult relatives; (b) with a foster-family; (c) in reception centres with special provisions for minors, or in other accommodation suitable for minors; (d) with the person who looked after the child when fleeing. The Member States shall take the necessary steps to enable the placement. Agreement by the adult person or persons concerned shall be established by the Member States. The views of the child shall be taken into account in accordance with the age and maturity of the child.

Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers OJ L 31/18, 6.2.2003

Article 1(d)	Definition of family members	'family members' shall mean, in so far as the family already existed in the country of origin, the following members of the applicant's family who are present in the same Member State in relation to the application for asylum: (i) the spouse of the asylum seeker or his or her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens; (ii) the minor children of the couple referred to in point (i) or of the applicant, on condition that they are unmarried and dependent and regardless of whether they were born in or out of wedlock or adopted as defined under the national law;
Article	Definition of	'unaccompanied minors' shall mean persons

1(h)	unaccompanied minors	below the age of eighteen who arrive in the territory of the Member States unaccompanied by an adult responsible for them whether by law or by custom, and for as long as they are not effectively taken into the care of such a person; it shall include minors who are left unaccompanied after they have entered the territory of Member States
Article 10	Education	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 for 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.
Article 14	Housing	2. Member States shall ensure that applicants provided with the housing referred to in paragraph 1(a), (b) and (c) are assured: (a) protection of their family life;... 3. Member States shall ensure, if appropriate, that

		minor children of applicants or applicants who are minors are lodged with their parents or with the adult family member responsible for them whether by law or by custom.
Article 17(1)	Specific account to be taken of vulnerable persons	Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, in the national legislation implementing the provisions of Chapter II relating to material reception conditions and health care.
Article 18(1)	Best interests	The best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Directive that involve minors.
Article 18(2)	Rehabilitation and mental health	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.
Article 19(1)	Representation	Member States shall as soon as possible take measures to ensure the necessary representation of unaccompanied minors by legal guardianship or, where necessary, representation by an organisation which is responsible for the care and well-being of minors, or by any other appropriate representation. Regular assessments shall be made by the appropriate authorities
Article 19(2)	Accommodation (including keeping siblings together)	Unaccompanied minors who make an application for asylum shall, from the moment they are admitted to the territory to the moment they are obliged to leave the host Member State in which the application for asylum was made or is being examined, be placed: (a) with adult relatives;

		(b) with a foster-family; (c) in accommodation centres with special provisions for minors; (d) in other accommodation suitable for minors. Member States may place unaccompanied minors aged 16 or over in accommodation centres for adult asylum seekers. As far as possible, siblings shall be kept together, taking into account the best interests of the minor concerned and, in particular, his or her age and degree of maturity. Changes of residence of unaccompanied minors shall be limited to a minimum.
Article 19(3)	Family tracing	Member States, protecting the unaccompanied minor's best interests, shall endeavour to trace the members of his or her family as soon as possible. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis, so as to avoid jeopardising their safety.
Article 19(4)	Training for those working with unaccompanied minors	Those working with unaccompanied minors shall have had or receive appropriate training concerning their needs, and shall be bound by the confidentiality principle as defined in the national law, in relation to any information they obtain in the course of their work.

Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national OJ L 50/1, 25.2.2003

Article 2(h)	Unaccompanied minors	'Unaccompanied minor' means unmarried persons below the age of eighteen who arrive in the territory of the Member States unaccompanied by

		an adult responsible for them whether by law or by custom, and for as long as they are not effectively taken into the care of such a person; it includes minors who are left unaccompanied after they have entered the territory of the Member States;
Article 2(i)	Family members	'Family members' means insofar as the family already existed in the country of origin, the following members of the applicant's family who are present in the territory of the Member States: (iii) the father, mother or guardian when the applicant or refugee is a minor and unmarried;
Article 6	Criterion for children	Where the applicant for asylum is an unaccompanied minor, the Member State responsible for examining the application shall be that where a member of his or her family is legally present, provided that this is in the best interest of the minor. In the absence of a family member, the Member State responsible for examining the application shall be that where the minor has lodged his or her application for asylum.
Article 15	Humanitarian clause for children	1. Any Member State, even where it is not responsible under the criteria set out in this Regulation, may bring together family members, as well as other dependent relatives, on humanitarian grounds based in particular on family or cultural considerations. In this case that Member State shall, at the request of another Member State, examine the application for asylum of the person concerned. The persons concerned must consent... 3. If the asylum seeker is an unaccompanied minor who has a relative or relatives in another Member State who can take care of him or her, Member States shall if possible unite the minor with his or her relative or relatives, unless this is not in the best interests of the minor.

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification OJ L 251/12, 3.10.2003

Preamble recital (9)	Nuclear family	Family reunification should apply in any case to members of the nuclear family, that is to say the spouse and the minor children.
Preamble recital (10)	Optional to extend to wider family	It is for the Member States to decide whether they wish to authorise family reunification for relatives in the direct ascending line, adult unmarried children, unmarried or registered partners as well as, in the event of a polygamous marriage, minor children of a further spouse and the sponsor...
Preamble recital (11)	Particular respect for the rights of women and children	The right to family reunification should be exercised in proper compliance with the values and principles recognised by the Member States, in particular with respect to the rights of women and of children; such compliance justifies the possible taking of restrictive measures against applications for family reunification of polygamous households.
Preamble recital (11)	Possibility of limiting provisions in respect of children under the age of 12	The possibility of limiting the right to family reunification of children over the age of 12, whose primary residence is not with the sponsor, is intended to reflect the children's capacity for integration at early ages and shall ensure that they acquire the necessary education and language skills in school.
Preamble recital (15)	Granting of an independent status	The integration of family members should be promoted. For that purpose, they should be granted a status independent of that of the sponsor, in particular in cases of breakup of marriages and partnerships, and access to education, employment and vocational training on the same terms as the person with whom they are reunited, under the relevant conditions.
Article 2(f)	Unaccompanied minors	'Unaccompanied minor' means third country nationals or stateless persons below the age of eighteen, who arrive on the territory of the Member States unaccompanied by an adult responsible by law or custom, and for as long as they are not effectively taken into the care of such a person, or minors who are left unaccompanied after they entered the territory of

the Member States.

Article 4(1) Definition of family

1. The Member States shall authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, as well as in Article 16, of the following family members:

(a) the sponsor's spouse;

(b) the minor children of the sponsor and of his/her spouse, including children adopted in accordance with a decision taken by the competent authority in the Member State concerned or a decision which is automatically enforceable due to international obligations of that Member State or must be recognised in accordance with international obligations;

(c) the minor children including adopted children of the sponsor where the sponsor has custody and the children are dependent on him or her. Member States may authorise the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement;

(d) the minor children including adopted children of the spouse where the spouse has custody and the children are dependent on him or her. Member States may authorise the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement.

The minor children referred to in this Article must be below the age of majority set by the law of the Member State concerned and must not be married.

By way of derogation, where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member State may, before authorising entry and residence under this Directive, verify whether he or she meets a

condition for integration provided for by its existing legislation on the date of implementation of this Directive.

2. The Member States may, by law or regulation, authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, of the following family members:

(a) first-degree relatives in the direct ascending line of the sponsor or his or her spouse, where they are dependent on them and do not enjoy proper family support in the country of origin;

(b) the adult unmarried children of the sponsor or his or her spouse, where they are objectively unable to provided for their own needs on account of their state of health.

3. The Member States may, by law or regulation, authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, of the unmarried partner, being a third country national, with whom the sponsor is in a duly attested stable long-term relationship, or of a third country national who is bound to the sponsor by a registered partnership in accordance with Article 5(2), and of the unmarried minor children, including adopted children, as well as the adult unmarried children who are objectively unable to provide for their own needs on account of their state of health, of such persons.

Member States may decide that registered partners are to be treated equally as spouses with respect to family reunification.

4. In the event of a polygamous marriage, where the sponsor already has a spouse living with him

		in the territory of a Member State, the Member State concerned shall not authorise the family reunification of a further spouse.
		By way of derogation from paragraph 1(c), Member States may limit the family reunification of minor children of a further spouse and the sponsor.
		5. In order to ensure better integration and to prevent forced marriages Member States may require the sponsor and his/her spouse to be of a minimum age, and at maximum 21 years, before the spouse is able to join him/her.
		6. By way of derogation, Member States may request that the applications concerning family reunification of minor children have to be submitted before the age of 15, as provided for by its existing legislation on the date of the implementation of this Directive. If the application is submitted after the age of 15, the Member States which decide to apply this derogation shall authorise the entry and residence of such children on grounds other than family reunification.
Article 5(5)	Best interests	When examining an application, the Member States shall have due regard to the best interests of minor children.
Article 10(3)	Unaccompanied minors	If the refugee is an unaccompanied minor, the Member States:
		(a) shall authorise the entry and residence for the purposes of family reunification of his/her first-degree relatives in the direct ascending line without applying the conditions laid down in Article 4(2)(a);
		(b) may authorise the entry and residence for the purposes of family reunification of his/her legal guardian or any other member of the family,

		where the refugee has no relatives in the direct ascending line or such relatives cannot be traced
Article 15(1)	Autonomous residence permit	Not later than after five years of residence, and provided that the family member has not been granted a residence permit for reasons other than family reunification, the spouse or unmarried partner and a child who has reached majority shall be entitled, upon application, if required, to an autonomous residence permit, independent of that of the sponsor.

Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents OJ L 16/44, 23.1.2004

Preamble recital (14)	Education	The Member States should remain subject to the obligation to afford access for minors to the educational system under conditions similar to those laid down for their nationals.
Article 11(1)(b)	Equal treatment in accessing education	Long-term residents shall enjoy equal treatment with nationals as regards education and vocational training, including study grants in accordance with national law

Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities OJ L 261/19, 6.8.2004

Article 3(3)	Excludes children, unless derogation	This Directive shall apply to the third-country nationals concerned having reached the age of majority set out by the law of the Member State concerned.
		By way of derogation, Member States may decide to apply this Directive to minors under the conditions laid down in their national law.

Article 10 (a)	Best interests	Member States shall take due account of the best interests of the child when applying this Directive. They shall ensure that the procedure is appropriate to the age and maturity of the child. In particular, if they consider that it is in the best interest of the child, they may extend the reflection period.
Article 10(b)	Education	Member States shall ensure that minors have access to the educational system under the same conditions as nationals. Member States may stipulate that such access must be limited to the public education system.
Article 10(c)	Unaccompanied minors (establish identity etc., trace families, legal representation)	In the case of third-country nationals who are unaccompanied minors, Member States shall take the necessary steps to establish their identity, nationality and the fact that they are unaccompanied. They shall make every effort to locate their families as quickly as possible and take the necessary steps immediately to ensure legal representation, including representation in criminal proceedings, if necessary, in accordance with national law.

Council Directive 2004/83/EC of 29th April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted OJ l 304/12, 30.9.2004

Preamble recital (12)	Best interests when implementing Directive	The 'best interests of the child' should be a primary consideration of Member States when implementing this Directive.
Preamble recital (20)	Child-specific persecution	It is necessary, when assessing applications from minors for international protection, that Member States should have regard to child-specific forms of persecution.
Article 2(h)	Definition of family members	'Family members' means, insofar as the family already existed in the country of origin, the following members of the family of the beneficiary of refugee or subsidiary protection

		status who are present in the same Member State in relation to the application for international protection: — the spouse of the beneficiary of refugee or subsidiary protection status or his or her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens, — the minor children of the couple referred to in the first indent or of the beneficiary of refugee or subsidiary protection status, on condition that they are unmarried and dependent and regardless of whether they were born in or out of wedlock or adopted as defined under the national law;
Article 2(i)	Definition of unaccompanied minors	'Unaccompanied minors' means third-country nationals or stateless persons below the age of 18, who arrive on the territory of the Member States unaccompanied by an adult responsible for them whether by law or custom, and for as long as they are not effectively taken into the care of such a person; it includes minors who are left unaccompanied after they have entered the territory of the Member States;
Article 9(2)(f)	Child-specific persecution	Acts of persecution as qualified in paragraph 1, can, *inter alia*, take the form of...acts of a gender-specific or child-specific nature.
Article 20(5) *(CHAPTER VII, ARTICLES 20-34: CONTENT OF INTERNATIONAL PROTECTION: General Rules)*	Best interests when implementing chapter	The best interest of the child shall be a primary consideration for Member States when implementing the provisions of this Chapter that involve minors.
Article 27(1)	Access to education	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.
Article 27(3)	Recognition of	Member States shall ensure equal treatment between beneficiaries of refugee or subsidiary

	qualifications	protection status and nationals in the context of the existing recognition procedures for foreign diplomas, certificates and other evidence of formal qualifications.
Article 29(3)	Health care	Member States shall provide, under the same eligibility conditions as nationals of the Member State that has granted the status, adequate health care to beneficiaries of refugee or subsidiary protection status who have special needs, such as pregnant women, disabled people, persons who have undergone torture, rape or other serious forms of psychological, physical or sexual violence or 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.
Article 30	Unaccompanied minors: representation; accommodation (views of the child); family unity (best interests); family tracing; training for those working with unaccompanied minors	1. As soon as possible after the granting of refugee or subsidiary protection status Member States shall take the necessary measures, to ensure the representation of unaccompanied minors by legal guardianship or, where necessary, by an organisation responsible for the care and well-being of minors, or by any other appropriate representation including that based on legislation or Court order. 2. Member States shall ensure that the minor's needs are duly met in the implementation of this Directive by the appointed guardian or representative. The appropriate authorities shall make regular assessments. 3. Member States shall ensure that unaccompanied minors are placed either: (a) with adult relatives; or (b) with a foster family; or (c) in centres specialised in accommodation for minors; or (d) in other accommodation suitable for minors. In this context, the views of the child shall be taken into account in accordance with his or her

age and degree of maturity.

4. As far as possible, siblings shall be kept together, taking into account the best interests of the minor concerned and, in particular, his or her age and degree of maturity. Changes of residence of unaccompanied minors shall be limited to a minimum.

5. Member States, protecting the unaccompanied minor's best interests, shall endeavour to trace the members of the minor's family as soon as possible. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis.

6. Those working with unaccompanied minors shall have had or receive appropriate training concerning their needs.

Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status OJ L 326/13, 13.12.2005

Preamble recital (14)	Special procedural guarantees for unaccompanied minors, best interests primary consideration	In addition, specific procedural guarantees for unaccompanied minors should be laid down on account of their vulnerability. In this context, the best interests of the child should be a primary consideration of Member States.
Article 2(h)	Definition of unaccompanied minor	'Unaccompanied minor' means a person below the age of 18 who arrives in the territory of the Member States unaccompanied by an adult responsible for him/her whether by law or by custom, and for as long as he/she is not effectively taken into the care of such a person; it

includes a minor who is left unaccompanied after he/she has entered the territory of the Member States

Article 17 Guarantees for unaccompanied minors: representative at interview; interview carried out by someone with appropriate skills; use of medical examinations; best interests primary consideration

Guarantees for unaccompanied minors

1. With respect to all procedures provided for in this Directive and without prejudice to the provisions of Articles 12 and 14, Member States shall:

(a) as soon as possible take measures to ensure that a representative represents and/or assists the unaccompanied minor with respect to the examination of the application. This representative can also be the representative referred to in Article 19 of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers;

(b) ensure that the representative is given the opportunity to inform the unaccompanied minor about the meaning and possible consequences of the personal interview and, where appropriate, how to prepare himself/herself for the personal interview. Member States shall allow the representative to be present at that interview and to ask questions or make comments, within the framework set by the person who conducts the interview. Member States may require the presence of the unaccompanied minor at the personal interview, even if the representative is present.

2. Member States may refrain from appointing a representative where the unaccompanied minor:

(a) will in all likelihood reach the age of maturity before a decision at first instance is taken; or

(b) can avail himself, free of charge, of a legal adviser or other counsellor, admitted as such under national law to fulfil the tasks assigned above to the representative; or

(c) is married or has been married.

3. Member States may, in accordance with the laws and regulations in force on 1 December

2005, also refrain from appointing a representative where the unaccompanied minor is 16 years old or older, unless he/she is unable to pursue his/her application without a representative.

4. Member States shall ensure that:

(a) if an unaccompanied minor has a personal interview on his/her application for asylum as referred to in Articles 12, 13 and 14, that interview is conducted by a person who has the necessary knowledge of the special needs of minors;

(b) an official with the necessary knowledge of the special needs of minors prepares the decision by the determining authority on the application of an unaccompanied minor.

5. Member States may use medical examinations to determine the age of unaccompanied minors within the framework of the examination of an application for asylum. In cases where medical examinations are used, Member States shall ensure that:

(a) unaccompanied minors are informed prior to the examination of their application for asylum, and in a language which they may reasonably be supposed to understand, of the possibility that their age may be determined by medical examination. This shall include information on the method of examination and the possible consequences of the result of the medical examination for the examination of the application for asylum, as well as the consequences of refusal on the part of the unaccompanied minor to undergo the medical examination;

(b) unaccompanied minors and/or their representatives consent to carry out an examination to determine the age of the minors concerned; and

(c) the decision to reject an application for asylum from an unaccompanied minor who refused to undergo this medical examination shall

		not be based solely on that refusal. The fact that an unaccompanied minor has refused to undergo such a medical examination shall not prevent the determining authority from taking a decision on the application for asylum. 6. The best interests of the child shall be a primary consideration for Member States when implementing this Article.

Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals OJ L 348/98, 24.12.2008

Preamble recital (22)	Best interests	In line with the 1989 United Nations Convention on the Rights of the Child, the 'best interests of the child' should be a primary consideration of Member States when implementing this Directive. In line with the European Convention for the Protection of Human Rights and Fundamental Freedoms, respect for family life should be a primary consideration of Member States when implementing this directive.
Article 5	Importance of best interests and family life	When implementing this directive, Member States shall take due account of: (a) the best interests of the child; (b) family life
Article 7(2)	Children's school and family links factor when extending period of voluntary departure	Member States shall, where necessary, extend the period for voluntary departure by an appropriate period, taking into account the specific circumstances of the individual case, such as the length of stay, the existence of children attending school and the existence of other family and social links.
Article 10	Unaccompanied minors and return decisions	**Return and removal of unaccompanied minors** 1. Before deciding to issue a return decision in respect of an unaccompanied minor, assistance by appropriate bodies other than the authorities enforcing return shall be granted with due consideration being given to the best interests of

		the child. 2. Before removing an unaccompanied minor from the territory of a Member State, the authorities of that Member State shall be satisfied that he or she will be returned to a member of his or her family, a nominated guardian or adequate reception facilities in the State of return.
Article 16(3)	Vulnerability a factor in detention	**Conditions of detention** 3. Particular attention shall be paid to the situation of vulnerable persons *[includes unaccompanied minors]*. Emergency health care and essential treatment of illness shall be provided.
Article 17	Detention of minors and families	**Detention of minors and families** 1. Unaccompanied minors and families with minors shall only be detained as a measure of last resort and for the shortest appropriate period of time. 2. Families detained pending removal shall be provided with separate accommodation guaranteeing adequate privacy. 3. Minors in detention shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age, and shall have, depending on the length of their stay, access to education. 4. Unaccompanied minors shall as far as possible be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age. 5. The best interests of the child shall be a primary consideration in the context of the detention of minors pending removal.

APPENDIX B: SCREENSHOTS FROM THE CONSULTATION PHASE OF THE *EU CHILD* PROJECT

B.1. The Online Discussion Forum

University of Liverpool and Ludwig Boltzmann Institute of Human Rights

UNIVERSITY OF LIVERPOOL

Consultation on Children's Rights Indicators

Thank you for visiting our experts' discussion forum: developing EU indicators on the rights of the child

The European Fundamental Rights Agency has commissioned a study on indicators measuring the **implementation, protection, respect** and **promotion** of children's rights in the European Union. For full details of the project click here

PLEASE CLICK ON THE LINKS ON THE RIGHT HAND SIDE OF THIS PAGE TO GIVE US YOUR VIEWS ...

We would like to hear your thoughts on a number of areas:

The use of indicators
Monitoring children's rights
The EU and children's rights

Even if you have no direct experience of the EU and children's rights, we are still interested in what you have to say about indicators in a more general context.

In the coming weeks, we hope to produce sample indicators on the following topics, so are keen to hear from experts who have worked in these areas:

Child trafficking
Social exclusion and young people
Children and cross-national family breakdown

We will widen the topics as the project progresses so, if you have expertise in other areas, do get in contact.

We have structured the consultation around a number of themes; each one leading to a few statements that we hope will stimulate a discussion. Please click on any topic you think you may be able to comment on - using the links on the right hand side of this page.

Thank you!

Child Rights Indicators Survey

Ludwig Boltzmann Institute of Human Rights

Section A. Page 1 of 2.

0% 100%

Q1. How much do you agree or disagree with the following statements:

		Strongly agree	Slightly agree	Neither agree nor disagree	Slightly disagree	Strongly disagree	No opinion / N.A.
A.	The European Union should be involved in the development of children's rights indicators ...more	○	○	○	○	○	○
B.	Children should be involved in the development of children's rights indicators ...more	○	○	○	○	○	○
C.	It is impossible to develop meaningful qualitative indicators ...more	○	○	○	○	○	○
D.	We should develop indicators for the whole child population ...more	○	○	○	○	○	○
E.	We should construct indicators only for those children who are disadvantaged or at risk ...more	○	○	○	○	○	○
F.	Child rights indicators should focus on outcomes and achievements ...more	○	○	○	○	○	○
G.	Children's organisations, and those working with children, should be involved in the creation of indicators ...more	○	○	○	○	○	○
H.	Indicators are not an appropriate basis for the development of policy ...more	○	○	○	○	○	○
I.	Indicators should highlight progress, rather than violations ...more	○	○	○	○	○	○
J.	The UN Convention on the Rights of the Child is the most appropriate basis on which to model children's rights indicators at EU level ...more	○	○	○	○	○	○

Continue

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survey updated March 25th, 2008

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APPENDIX C: INDICATORS SUMMARY TABLE

INDICATOR AREA	Indicator Groups
FAMILY ENVIRONMENT AND ALTERNATIVE CARE	Participation of children in immigration process
	Adaptability of immigration processes to the vulnerabilities of separat children
	Existence of provision favouring family reunification for children wh it is in their best interests
	Existence of expedited family reunification procedures for cases involving children
	Existence of provision to safeguard the welfare of the child following family reunification
PROTECTION FROM EXPLOITATION AND VIOLENCE	Protection of victims of child trafficking
EDUCATION, CITIZENSHIP AND CULTURAL ACTIVITIES	Accessibility of education
	Adaptability of education

INDICATOR AREA	FAMILY ENVIRONMENT AND ALTERNATIVE CARE

INDICATOR GROUP	PARTICIPATION OF CHILDREN IN IMMIGRATION PROCESSES
INDICATOR TYPE	Structural/Process
INDICATORS	➢ Existence of national laws ensuring ongoing and independent legal representation of separated children in all immigration processes, regardless of their status; ➢ Existence of assessment and review mechanisms to ensure that legal representation for separated children is both empowering and operates in their best interests; ➢ Provision of training for individuals in representing the rights and needs of separated children; ➢ Existence of legal obligation to provide information to separated children on their rights, including both social and civil; ➢ Existence of financial and other support to assist children in accessing legal representation.
INDICATOR CONTEXT	<u>Corresponding asylum and immigration provision:</u> A number of EU Directives specify that separated children, defined in particular as unaccompanied asylum-seeking minors, have a right to adult assistance and representation during immigration processes. Such provision includes: ▪ Article 19(1) Council Directive 2003/928 ▪ Article 30(1) Directive 2004/8329 ▪ Article 10(c) Directive 2001/5530 ▪ Article 17(1)(b) Directive 2005/8531
	<u>Why it is important to measure:</u> Assistance for separated children in ensuring their voices are heard whilst navigating complex and unfamiliar legal systems is essential if immigration procedures are to protect the rights of children. The above measures on legal representation impose clear obligations on Member States in accordance with their national procedures. As far as *legal* representation is concerned access to free services is of particular importance, alongside the provision of specialist training for those offering support, information and advice to separated children.
	<u>CRC reference:</u> Articles 2, 3, 6, 12 (CRC general principles, in particular child participation and nondiscrimination); 9 (rights in family separation cases), 10 (family reunification), 13 (child right to information), 8 (identity documentation), 16 (respect for child's privacy), 18 (joint parental responsibilities), 20/21

	(alternative family environment/adoption); 30 (rights of minorities, including in relation to language); General Comment No.6 (2005) on treatment of unaccompanied and separated children outside their country of origin.

INDICATOR GROUP	ADAPTABILITY OF IMMIGRATION PROCESSES TO THE VULNERABILITIES OF SEPARATED CHILDREN
INDICATOR TYPE	Process/Outcome
INDICATORS	➢ Evidence of immigration procedures that are adapted to the age, gender and linguistic and cultural background of the child; ➢ Regular monitoring and review of immigration procedures to ensure that they are operating in the best interests of all categories separated children (regardless of age, gender, linguistic and cultural background and immigration status); ➢ Provision of specialist training for personnel involved in determining the immigration status of children (legal professionals, interpreters, officials of the competent authorities etc.); ➢ Average length of time between a child lodging an asylum application and receiving a decision.
INDICATOR CONTEXT	<u>Corresponding asylum and immigration provision:</u> This indicator group reflects the EU's general competence to determine the conditions for accessing different immigration statuses (Articles 61(1) and 61(3) EC). More specifically, the indicator will measure the impact of the asylum procedures Directive which outlines minimum guarantees in the asylum process, including: ▪ **Articles 8(2)(a) and 9(2)**: Regardless of age, reasoned, individual, objective and impartial decision must be communicated to the asylum applicant; ▪ **Articles 10(1)(a) and (b)**: Asylum procedures must also be sensitive to the native language of the applicant; □ ▪ **Articles 12 and 17(4)(a)**: Asylum applicants have the right to a personal interview with the competent authorities which, in the case of children, must be carried out by an official who has necessary knowledge of minors' needs; ▪ **Article 17**: Includes 'guarantees for unaccompanied minors'.
	<u>Why it is important to measure:</u> The very fact that many of these provisions are age-neutral, makes it all the more important to consider how they impact upon children specifically, especially in

	light of the obligation to implement guarantees for unaccompanied minors in the best interests of the child (**Article 17(6)** the asylum procedures Directive). The transient nature of childhood, and the impact of prolonged immigration procedures upon children, makes it crucial that a decision is reached within the shortest time possible.
	CRC reference: Articles 2, 3, 6, 12 (CRC general principles, in particular non-discrimination and child participation); 9 (rights in family separation cases), 10 (family reunification), 13 (child right to information), 8 (identity documentation), 16 (respect for child's privacy), 18 (joint parental responsibilities), 20/21 (alternative family environment/adoption); 30 (rights of minorities, including in relation to language); General Comment No.6 (2005) on treatment of unaccompanied and separated children outside their country of origin.

INDICATOR GROUP	EXISTENCE OF PROVISION FAVOURING FAMILY REUNIFICATION FOR CHILDREN WHERE IT IS IN THEIR BEST INTERESTS
INDICATOR TYPE	Structural/Process
INDICATORS	➢ Existence of law/policy allowing *de facto* family members to be reunited with the child in the host state, independent of biological connection; ➢ Existence of clear guidelines to assist in determining how and where family reunification can be achieved in the interests of the child, including a full risk and security assessment.
INDICATOR CONTEXT	Corresponding asylum and immigration provision: This indicator group will test how the EU provisions on family reunification are reflected in national law and whether national law extends the definition of 'family' in a way that reflects more accurately the reality of children's family life. Specifically, this indicator corresponds with: ▪ Articles 4 and 10(3) Directive 2003/8639 ▪ Articles 6 and 15 Regulation 343/200340

	▪ Article 23(5) and 30 Directive 2004/8341 ▪ Articles 5 and 10 Directive 2008/11542
	Why it is important to measure: The EU has formulated a number of provisions to facilitate family reunification but the scope of these differ according to nationality, economic capacity of the migrant, and the nature of the relationship between the family members. Much of the EU legislation allowing family members to be reunited ascribes to a narrow definition of 'family' which has been criticised for endorsing a distinctly nuclear, heterosexual and western stereotype. The narrow EU definition of 'family' could have consequences for children, particularly those from culturally diverse regions where dependent family life can include members of the wider community, including those with no biological or legal tie to the child. In addition, the EU makes provision for the return of illegally staying children to their families in either the country of origin or a third country, whilst endorsing relatively weak safeguards in relation to their welfare following return.
	CRC reference: Articles 2, 3, 6, 12 (CRC general principles, in particular non-discrimination and child participation); 10 (family reunification in a positive, humane and expeditious manner), 9 (rights in family separation cases), 13 (child right to information), 8 (identity documentation), 16 (respect for child's privacy), 18 (joint parental responsibilities), 20 (alternative family environment); 30 (rights of minorities, including in relation to language); General Comment No.6 (2005) on treatment of unaccompanied and separated children outside their country of origin.

INDICATOR GROUP	EXISTENCE OF EXPEDITED FAMILY REUNIFICATION PROCEDURES FOR CASES INVOLVING CHILDREN
INDICATOR TYPE	Process/Outcome
INDICATORS	➢ Existence of agencies/bodies to advise and support children seeking family reunification; ➢ Rates of family reunification involving children achieved in a one year period (as a proportion of all applications involving children) (disaggregated by age/gender/nationality of child); ➢ Average length of time lapsed between initial application and the

	accomplishment of reunification in cases involving children (disaggregated by age/gender/nationality of child); ➢ Rates of reunification with relatives/children living in another Member State accomplished in a one year period (under Dublin II Regulation) (disaggregated by age/gender/nationality of child).
INDICATOR CONTEXT	Corresponding asylum and immigration provision: The Family Reunification Directive contains specific measures in relation to minors, both those who wish to join their parents (Article 4(1) and those who wish to be joined by their parents (Article 10(3)). The Directive states that Member State authorities must consider the best interests of minors when examining an application for family reunification (Article 5(5))
	Why it is important to measure: Family is critical for children's development. Sustained periods of separation from immediate family which are exacerbated by time consuming family reunification processes can impact significantly on children's well-being and development.
	CRC reference: Articles 2, 3, 6, 12 (CRC general principles, in particular non-discrimination and child participation); 10 (family reunification in a positive, humane and expeditious manner), 9 (rights in family separation cases), 13 (child right to information), 7 (right to be cared by parents), 8 (identity documentation), 16 (respect for child's privacy), 18 (joint parental responsibilities), 20 (alternative family environment); 30 (rights of minorities, including in relation to language); General Comment No.6 (2005) on treatment of unaccompanied and separated children outside their country of origin.

INDICATOR GROUP	EXISTENCE OF PROVISION TO SAFEGUARD THE WELFARE OF THE CHILD FOLLOWING FAMILY REUNIFICATION
INDICATOR TYPE	Structure and Process
INDICATORS	➢ Provision requiring the appointment of a specially-trained social worker or other professional to offer support and information and monitor the welfare of

	the child following family reunification in an EU Member State; ➢ Existence of a right for children to immediate access to key services (education, health care, financial support, counselling) following family reunification with their parents in an EU Member State; ➢ Existence of national procedures to assess the adequacy of reception conditions for children who are returned to their country or origin, or to a third country, for the purposes of family reunification
INDICATOR CONTEXT	Corresponding asylum and immigration provision: ▪ Articles 5 and 10 returns Directive; ▪ The family reunification Directive
	Why it is important to measure: Notwithstanding the clear importance attached to children's family life in the context of forced migration, and the emphasis on family reunification, EU law makes no reference to Member States' obligations to monitor the health and welfare of the child following family reunification or deportation. This indicator group will test whether such provision is in place anyway at national level or whether children would benefit from more explicit reference at EU level of the importance of monitoring their welfare in the longer term.
	CRC reference: Articles 2, 3, 6, 12 (CRC general principles, in particular non-discrimination and child participation); 10 (family reunification in a positive, humane and expeditious manner), 20 (alternative family environment), 9 (rights in family separation cases), 13 (child right to information), 7 (right to be cared by parents), 8 (identity documentation), 16 (respect for child's privacy), 18 (joint parental responsibilities), 24 (right to health), 27 (adequate living standard), 28, (right to education), 30 (rights of minorities, including in relation to language); General Comment No.6 (2005) on treatment of unaccompanied and separated children outside their country of origin.

INDICATOR AREA	PROTECTION FROM EXPLOITATION AND VIOLENCE

INDICATOR GROUP	PROTECTION OF VICTIMS OF CHILD TRAFFICKING
INDICATOR TYPE	Structural/Process
INDICATORS	➢ Existence of legal provisions ensuring a right to stay to trafficking victims, irrespective of cooperation with police/courts; ➢ Existence of legal provisions prohibiting administrative detention/detention pending deportation for children; ➢ Evidence of a formalised best interest determination process, which directly involves the child concerned, for identification of appropriate interim care and of durable solutions, including risk and security assessment prior to a possible return of the child to the country of origin; ➢ Existence of assessment mechanisms on quality of services (accommodation, access to health care, access to education, meaningful occupation), which directly involves the children concerned in its assessment.
INDICATOR CONTEXT	Corresponding asylum and immigration provision: The trafficking Directive of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities
	Why it is important to measure:
	CRC reference: Articles 32ff (economic and sexual exploitation, sale of children); 2, 3, 6, 12 (CRC general principles); 17 (role of media), 19, 37 (protection from all forms of violence, exploitation, torture and other forms of maltreatment), 39 (rehabilitation), 27, 24, 26, 28, 29, 31 (adequate living standard, access to health services, social security, education, rest); CRC General Comment No. 6 (2005)

INDICATOR AREA	EDUCATION, CITIZENSHIP AND CULTURAL ACTIVITIES

INDICATOR GROUP	ACCESSIBILITY OF EDUCATION
INDICATOR TYPE	Structural/Output
INDICATORS	➢ Existence of legal right for separated/immigrant children to access education at all levels on an equal basis as nationals; ➢ Children cared for outside the family system (ISCED level 0), as a percentage of all children in the same age group; ➢ Children attending mainstream schools (ISCED levels 1, 2) as a percentage of all children in the same age group; ➢ 15- to 19-year-olds participating in upper secondary education (ISCED level 3) or training as a percentage of the population in the same age group.
INDICATOR CONTEXT	<u>Corresponding asylum and immigration provision:</u> A number of EU provisions in the field of free movement, immigration and asylum law reinforce migrant children's right to access education, including: ▪ For refugees and beneficiaries of subsidiary humanitarian protection (Article 27(1) the refugee qualification Directive); ▪ For asylum-seekers (Article 10 the asylum reception Directive); ▪ For children who fall within the scope of the Directive on temporary protection in the event of a mass-influx of displaced persons (Article 14(1) the Temporary Protection Directive).
	<u>Why it is important to measure:</u> Available data suggests persistent shortcomings in children's and young people's access to education from early childhood to upper secondary level. Children from families suffering socio-economic disadvantage and children from a migrant or ethnic minority background are particularly vulnerable to educational exclusion and underachievement.
	<u>CRC reference:</u> Article 28 (education), 29 (aims of education), 31 (right to rest and play, access to cultural activities; 2, 3, 6, 12 (CRC general principles, in particular non-discrimination and participation); General Comment No. 5(2003) on General measures of implementation; General Comment No. 9 (2006) on rights of children with disabilities.

INDICATOR GROUP	ADAPTABILITY OF EDUCATION
INDICATOR TYPE	Process/outcome
INDICATORS	➢ Provision of specialist support in schools for non-native children that is sensitive to age, gender, culture and linguistic acquisition (ex. financial support, travel assistance, supplementary language classes); ➢ Children with disadvantages (due to low socio-economic status, migrant background, etc.) receiving additional resources, as a percentage of all children at the same educational level.
INDICATOR CONTEXT	Corresponding asylum and immigration provision: ▪ Directive 77/486 (Articles 2 and 3) and Commission's Green Paper 'Migration & mobility: challenges and opportunities for EU education systems' (COM(2008) 423 final); ▪ Proposed Directive on equal treatment (COM (2008) 426) extending protection against discrimination to education.
	Why it is important to measure:
	CRC reference: Article 28 (education), 29 (aims of education), 30 (rights of minorities), 31 (right to rest and play, access to cultural activities); 2, 3, 6, 12 (CRC general principles, in particular non-discrimination); General Comment No.1 (2001) on aims of education; General Comment No. 5(2003) on General measures of implementation.

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