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Submission from Save the Children Europe Group  
on the Commission Green Paper on the  
Future of the Common European Asylum System  
(COM (2007) 301)

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## **SECTION I: INTRODUCTION TO SAVE THE CHILDREN AND ITS EXPERIENCE IN THE FIELD OF ASYLUM**

1.1 Save the Children (“SC”) is an international children’s rights NGO working in over one hundred countries worldwide. The SC Europe Group comprises the national SC organisations working in eleven European countries. SC, partner NGOs in 30 European countries and UNHCR work together in the Separated Children in Europe Programme (“SCEP”) – a programme to realise the rights of separated children within Europe, including in asylum seeking situations.

1.2 In Brussels and at national level throughout most of its European member organisations, SC monitors and engages in advocacy on national, EU and international policy and legal measures in the field of asylum.<sup>1</sup> SC also engages in research and studies in the field.<sup>2</sup> At national level, SC engages in a range of field work, including the provision of services to asylum seeking children.

1.3 Consequently, SC’s contribution to the debate stimulated by the Commission’s Green Paper on the future Common European Asylum System (“CEAS”) will concern the situation of children (in particular, separated children<sup>3</sup>). SC’s comments derive from a children’s rights based approach rooted in the 1989 UN Convention on the Rights of the Child (and its Optional Protocols) (“CRC”).

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<sup>1</sup> SC and SCEP have previously commented on EU initiatives in the field. See respectively on our website ([www.savethechildren.net/alliance/where\\_we\\_work/europegrp\\_pubs.html](http://www.savethechildren.net/alliance/where_we_work/europegrp_pubs.html)): Save the Children Europe Group, “Comments on Proposal for a Council Regulation on 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 (COM 2001) 447 final”, December 2001, Separated Children in Europe Programme & Save the Children, “The implementation of the Dublin II regulation and the best interests of separated children”, March 2006, Save the Children Europe Group, Submissions on “Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status COM (2002) 326 final”, January 2003, Save the Children Europe Group, “Comments 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”, 20 May 2003, Separated Children in Europe Programme & Save the Children, “Comments on the Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals”, September 2005.

<sup>2</sup> For example, SC asylum studies include “Cold Comfort” (2001) qualitative study for practitioners and policy makers of young separated refugees in England, “Uncertain Futures: children seeking asylum in Wales” (2005), and “No place for a child: children in UK immigration detention centres” (2005); Children’s own reasons for asylum (written by Karin Juhlén for Save the Children Sweden, 2003) Children’s own reasons for asylum, a follow-up mapping 2005 (written by Eva Rimsten within a project concerning support to separated children, driven by Save the Children Sweden and Rådgivningsbyrån för asylsökande och flyktingar).

<sup>3</sup> Separated children are defined by the SCEP Statement of Good Practice to be children under 18 years of age who are outside their country of origin and separated from both parents or their previous legal/customary primary caregiver.

## **SECTION II: INTRODUCTION TO SC SUBMISSIONS TO THE GREEN PAPER**

2.1 UNHCR estimates that children make up over half of the world's refugee population.<sup>4</sup> Children in refugee situations may be travelling with their family or may be separated from their family and seeking reunification with their family and/or seeking asylum alone. It is estimated that, currently, 4-5% of asylum applications in industrialised countries are submitted by unaccompanied and separated children.<sup>5</sup>

2.2 The rights of children in these situations are governed by a variety of international law instruments, chief amongst them, the CRC, which has been ratified by all EU Member States, and the Convention Relating to the Status of Refugees<sup>6</sup> and the Protocol Relating to the Status of Refugees<sup>7</sup>, (hereafter the "Geneva Refugee Convention").

2.3 More particularly, Article 22 (1) of the CRC provides that "*State Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.*"

2.4 A variety of Guidelines have been developed in particular to address the situation of separated and unaccompanied children outside their country of origin including when they are seeking asylum.<sup>8</sup>

2.5 The European Commission itself has identified effective protection of the rights of children as a particular priority for it, as discussed in its Communication towards an

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<sup>4</sup> UNHCR, Evaluation and Policy Analysis Unit, *Meeting the Rights and Protection Needs of Refugee Children – An Independent Evaluation of the Impact of UNHCR's Activities*, P. iii in conjunction with its Footnote 3, dated 6 May 2002, at <http://www.unhcr.org/research/RESEARCH/3cd6363aa.pdf>

<sup>5</sup> See UNHCR *Statistical Yearbook 2002 – Chapter III: Asylum and Refugee Status Determination*, dated 16 August 2004, P. 41, at <http://www.unhcr.org/statistics/STATISTICS/41206f790.pdf> and UNHCR, "Trends in unaccompanied and separated children seeking asylum in industrialized countries, 2001-2003", dated 1 July 2004, P.4, at <http://www.unhcr.org/statistics/STATISTICS/40f646444.pdf>. Unaccompanied and separated children accounted for about 5% during 2002 and 4% during 2003 of asylum applications submitted in 28 industrialised countries (27 European countries and New Zealand).

<sup>6</sup> 28 July 1951, 189 U.N.T.S.150.

<sup>7</sup> 4 October 1967, 606 U.N.T.S. 267.

<sup>8</sup> These include the CRC General Comment No. 6 (2005) on Treatment of Unaccompanied and Separated Children outside Their Country of Origin, SCEP Statement of Good Practice 2004, the UNHCR Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum February 1997, the UNHCR Guidelines on Formal Determination of the Best Interests of the Child, the Inter-Agency Guiding Principles on Unaccompanied and Separated Children, and the Recommendation CM/Rec (2007)(of the Committee of Ministers of the Council of Europe) to member states on life projects for unaccompanied migrant minors.

EU Strategy on the Rights of the Child<sup>9</sup> and ongoing follow up actions. As regards asylum specifically, the Communication acknowledges that “*another challenge is to ensure that the rights of children as immigrants, asylum seekers and refugees are fully respected in the EU and in Member States’ legislation and policies.*” Moreover, it is anticipated that any future Reform Treaty will include the protection of the rights of the child as one of its objectives.

2.6 SC welcomes the declaration in the Green Paper itself that “*it is imperative to take account of the special needs of vulnerable people*” (including children) in the CEAS. SC supports the Green Paper’s acknowledgement that “*it is necessary to prescribe in more depth and detail the ways in which the special needs of the most vulnerable asylum seekers should be identified and addressed in all stages of the asylum process.*”

2.7 More broadly, SC welcomes the Commission’s Green Paper statement that “*the ultimate objective pursued at EU level is ... to establish a level playing field, a system which guarantees to persons genuinely in need of protection access to a high level of protection under equivalent conditions in all Member States while at the same time dealing fairly and efficiently with those found not to be in need of protection.*”

2.8 These submissions address many of the general issues discussed in the Green Paper and, in particular, the specific questions raised by the Commission at Questions 15 and 16 of the Green Paper, namely:

***“15. How could the provisions obliging Member States to identify, take into account and respond to the needs of the most vulnerable asylum seekers be improved and become more tailored to their real needs? In what areas should standards be further developed?”***

***16. What measures should be implemented with a view to increasing national capacities to respond effectively to situations of vulnerability?”***

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<sup>9</sup> COM (2006), 367 final, 4 July 2006, at [http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006\\_0367en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0367en01.pdf)

### **SECTION III: KEY SC RECOMMENDATIONS IN RESPONSE TO THE COMMISSION'S GREEN PAPER**

In response to the Green Paper, SC's key recommendations are as follows:

1. In designing the CEAS, the Commission must ensure:
  - (1) **meaningful and ongoing consultation with civil society** both on the forthcoming additional evaluations of existing EC asylum measures and ongoing EC asylum studies as well as on future proposals for EU measures in the field; in particular, SC proposes that the Commission organise expert consultative meetings on themes of central importance to children within the asylum process;
  - (2) **meaningful consultation with children (in collaboration with appropriate actors, such as NGOs) on their experience and needs within the asylum system** in order to ensure that the asylum process is child-friendly and properly takes account of child specific issues.

(See [Section IV](#) below.)

2. The EU should play a key role in:
  - establishing high standards in the asylum process which ensure **full compliance with both the Geneva Convention and the UN Convention on the Rights of the Child**;
  - ensuring **proper and adequate implementation of these high standards using all of the Commission's powers**, including the ability to take Member States to the European Court of Justice for their failure to implement EU Directives properly; this may include a monitoring role for a European Asylum Support Office.
  - providing fuller access for national courts to obtain **interpretative rulings by the European Court of Justice on EU asylum measures**.

More broadly, SC further believes in the value of EU solidarity and coordination in the field, including, for example:

- actively fostering regular exchange of **best practices between relevant stakeholders (including NGOs) concerning, for example, the creation of detailed guidelines on issues such as child specific forms of persecution and conditions in countries of origin**;
- engaging in **regional training**, for example, to ensure child-friendly procedures of a high standard;
- facilitating **capacity building**, for example, to provide proper systems of guardianship;
- **regional monitoring** of the quality of reception conditions.

- **regional funding** to support national protection systems for separated children, in particular, in areas where the volume of incoming separated children is high; and
- fostering **EU wide cooperation on durable solutions** for separated children, at a minimum, through coordination of more effective family reunification procedures.

(See Section V below.)

3. The design of the CEAS should take into account the fact that a **common approach in relation to the treatment of all separated children outside their country of origin** should be taken to matters that arise because of the status of the child as separated. Matters of urgent and common concern to all separated children include:

- access to the territory;
- application of the best interests principle in line with Article 3 CRC to all decisions concerning their situation;
- children's right to be heard;
- identification, age assessment, registration and documentation;
- appointment and role of guardians;
- family tracing and reunification;
- freedom from detention;
- reception conditions (shelter, health, education and training).

(See Section VI below.)

4. Within the asylum process itself, **standards concerning procedure and qualification for asylum for children must be raised very significantly if a meaningful process is going to be achieved**. SC believes that the asylum law in particular should:

- ensure **adequate access to asylum procedures** for children, for example, through ensuring children are informed about asylum options and, where relevant, granted free legal representation;
- ensure that the **best interests of the child** in line with Article 3 CRC properly guide all actions of Member States as regards asylum seeking children, whether they be with their families or separated, through both systematic consideration of the principle in all actions and the establishment of clear modes and parameters of determination;
- ensure detailed guidelines on **child specific forms of persecution**; in the case of children within families, to ensure children's individual reasons for asylum are satisfactorily investigated and considered;
- ensure due consideration of **children's views** in decisions in their regard;
- ensure broader and more effective opportunities for **family reunification**, particularly as regards separated children;

(See Section VII below.)

## **SECTION IV: DESIGNING THE COMMON EUROPEAN ASYLUM SYSTEM: ESSENTIAL PROCESS**

4.1 SC notes that the CEAS should be designed pursuant to an appropriate legislative and policy process, with particular regard to: (i) meaningful consultation with civil society and (ii) consultation with children.

### **(i) Meaningful Consultation with Civil Society**

4.2 It is critical that the Commission should engage in further, thorough consultations with all actors post the September 30 deadline for responses to the Green Paper. Many of the issues raised in the Paper are discussed in a very open-ended and general way and in anticipation of ongoing evaluations (of the so-called first phase EU asylum instruments)<sup>10</sup> and studies (for example, as regards joint processing and the future feasibility study on measures of practical support). Consequently, detailed future consultation on all aspects of the asylum system will be essential.

4.3 More specifically, SC proposes that, separate to its Public Hearing, the Commission organise a series of expert consultative fora to address specific aspects in the procedure. These should be structured in a thematic way, include a wide range of relevant actors (including NGOs) and be organised in a manner and timeframe which allows for appropriate preparation and follow up submissions. Only this type of consultation will allow for an efficient and thorough consideration by the Commission of key issues.

From the perspective of children, focussed thematic discussions might include, for example:

- essential procedural safeguards relating to children in asylum procedures (for example, free legal representation);
- child specific forms of persecution;

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<sup>10</sup> The key first phase asylum instruments deal with the jurisdiction of Member States to assess asylum applications [the Council Regulation No 343/2003/EC 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], the establishment of minimum standards in relation to the reception conditions for asylum seekers within the EU [Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers], the procedures applicable in relation to asylum seekers [the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status] and the necessary eligibility criteria and content of the protection standards granted [the 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]. SC emphasises that it is essential that the second phase in the establishment of the CEAS is indeed based on a full and proper evaluation of the operation of the first phase instruments. SC's comments on these instruments point to a range of serious and common deficiencies and gaps in the instruments themselves which are highly relevant to the design of any future system. The evaluations will also reveal best and worst practices in the implementation approaches of individual Member States and this clearly should inform the development of any proposed new or changing obligations for Member States.

- the mode and nature of best interests assessments in the context of the asylum process;
- the treatment of children within asylum seeking families;
- the treatment of separated children as a whole.

(ii) Meaningful Consultation with Children

4.4 Involving children in the design of the CEAS would both fulfil a commitment of the European Commission and provide a key tool for ensuring the design of an effective CEAS. Only by understanding and taking into account the views and concerns of children on asylum processes will the EU be able properly to address their special needs.

4.5 The Commission's Communication towards A Strategy on the Rights of the Child indicated that the "*Commission will promote and strengthen networking and children's representation in the EU and globally, and it will gradually and formally include them in all consultation and actions related to their rights and needs.*"<sup>11</sup> The Communication commits the Commission to involving children in the decision-making process from 2007 onward.

4.6 The draft report of the European Parliament "Towards an EU Strategy on the rights of the child" calls for the Commission "*in accordance with what it announced in its communication, to set up, with the assistance of the organisations and persons closest to children, a rapid, efficient and effective mechanism for consultation/involvement of children on all matters affecting them directly*"<sup>12</sup>.

4.7 Given the far reaching implications of the debate launched by the Green Paper on children, and given that children's right to express their view and have it given due weight is often violated in asylum processes, it is vital that the Commission engage as early as possible in soliciting the views of children on key issues. These might include, for example, how access for children to asylum procedures can be improved.

4.8 SC stands ready to advise the Commission on possible concrete modes of child participation in the design of the CEAS. SC has significant prior experience both at national and EU level in such projects. For example, in 2007, and to contribute to the European Parliament's work on the Strategy of the Rights of the Child, SC organised a child participation project in which around 1000 children throughout the EU provided

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<sup>11</sup> The Communication refers to Article 12(1) CRC provides that "State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child". Article 24 of the Charter of Fundamental Rights, which the Commission has committed to observe, also refers to child participation: "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".

<sup>12</sup> European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Draft Report, PRO/2007/2093(INI), 28 June 2007; text can be found in [http://www.europeanchildrensnetwork.org/euroenet/policies\\_activities/policy.asp?PolicyID=1018](http://www.europeanchildrensnetwork.org/euroenet/policies_activities/policy.asp?PolicyID=1018)

their views on how the EU Strategy should be put into action and how children might participate. In practical terms, the consultation involved the creation of a child friendly version of the Commission's communication on the rights of the child (two versions aimed at different groups), translation of the document into most of the official EC languages; development and field testing of a questionnaire aimed at identifying priority areas of action and modes of participation and translation of the questionnaire into 11 EU languages and English and Romanian by SC. These documents were then made available on a specially created website to which national Save the Children websites, MEP websites and EP political groups' websites posted links. It was further circulated to other child rights NGOs and networks. These groups promoted, disseminated and organised consultations among children and young people. The results of this project have been reflected in our report *You Could Always Begin by Listening to Us*. The Report's findings are helping to shape the European Parliament's consideration of the priorities for action in the forthcoming EU Strategy on the rights of the Child.

4.9 In the field of asylum, a target group for consultation could be both children involved in the asylum procedures (as a priority) and children and young people's groups who themselves work with asylum seeking children in a range of Member States. SC could assist in the design and production of child friendly information and the design and support of the consultation process with specified partners.

## **SECTION V: THE ROLE OF THE EU IN CREATING AN EFFECTIVE ASYLUM SYSTEM**

5.1 SC emphasises that EU action should play a central role, in terms of both legislation and practical measures of support, to foster full and transparent discharge by Member States of their obligations under international law to children in the asylum process. A number of key points must be borne in mind.

5.2 First, from a child rights' perspective, the EU should expressly base its measures in the field on the rights flowing from the CRC (which all Member States have ratified) rather than the European Charter of Fundamental Rights which potentially has a more limited scope of application as regards child's rights.

5.3 Second, the Green Paper acknowledges 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*”. However, inadequacies in asylum systems at Member State level stem in part from the fact that current EU asylum instruments intended to harmonise national laws accomplish only inadequate minimum standards or do not provide sufficiently detailed regulation.<sup>13</sup> Meaningful protection of children's rights in the asylum process requires standards in EU measures to be significantly raised.<sup>14</sup>

5.4 Third, it will be critical to choose the right vehicle for raising standards. In certain circumstances, only mandatory EU obligations, with no possibility for derogations, should be used (for example, as regards essential safeguards on access for children to the asylum procedure). In other instances (such as addressing child-specific forms of persecution), guidelines (which could be subject to periodic consultation and revision) may be more appropriate. In other instances, practical means of cooperation may prove instrumental to ensuring better processes (for example, EU-wide training on certain issues). SC supports the position in the Green Paper that a comprehensive approach to addressing the treatment of vulnerable persons within the asylum laws must be found.<sup>15</sup>

5.5 Fourth, the design of the CEAS should take into account the fact that that a common approach to the treatment of all separated children (regardless of their protection status) should be taken. SC believes that the EU, through its current asylum and migration competences and its duty to safeguard fundamental human rights, including those of children, has the necessary competence,<sup>16</sup> and duty, to address the

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<sup>13</sup> The European Parliament draft report “Towards an EU Strategy on the Rights of the Child” also draws attention to the fact that “*Even though the instruments which currently exist already contain provisions to protect children, they are not always adequate and problems exist with their application*”.

<sup>14</sup> For example, the UNHCR discussion paper on the Dublin II Regulation reveals a series of diverse national State practices under the Dublin Regulation. Its Executive Summary points to the fact that “*expert discussion and principled political and legal guidance*” would be beneficial to the application of certain rules therein, including the principle of the best interest of the child, and the so-called sovereignty and humanitarian clauses.

<sup>15</sup> Para. 2.4.1 of the Green Paper.

<sup>16</sup> Moreover, any future EU Treaty will likely provide an express legal basis to act more broadly to ensure the protection of children and indeed as regards asylum and migration issues.

situation of separated children from third countries, including asylum-seeking separated children, as a whole. Section VI below discusses this further.

5.6 Fifth, the implementation of high standards into national law must be carefully monitored by the European Commission moving forward, with the Commission using all of its powers to ensure full implementation (as necessary taking Member States to the European Court of Justice for failing to implement, or incorrectly implementing, EU directives). This might be supported by an active monitoring role being assigned to a European Asylum Support Office.

5.7 Sixth, SC believes that the European Court of Justice should be given full jurisdiction to provide interpretative rulings on EU asylum instruments to all national courts, rather than allowing requests for such interpretative rulings only from the final national court of appeal. There is a proposal to this effect under consideration at EU level, although the Green Paper does not refer to the point. SC points out that access to such European Court of Justice guidance is essential to safeguard the rights of asylum seekers. Moreover, it will foster uniform application of the law throughout the EU.

5.8 Seventh, regional action across the EU coordinated by the EU institutions will allow for resources to be leveraged across the region. This might include the EU:

- (a) actively fostering regular exchange of best practices, including the creation of detailed guidelines on issues such as child specific forms of persecution and conditions in countries of origin; as well as the role and responsibilities of guardians;
- (b) engaging in regional training, for example, to ensure child-friendly procedures of a high standard;
- (c) facilitating capacity building, for example, to provide proper guardianship systems; and
- (d) actively monitoring reception conditions for separated children.

SC would urge the EU to involve all relevant stakeholders (including NGOs) in these processes.

5.9 Eighth, more fundamentally as regards EU action, the concept of a common European asylum system in part anticipates the provisions of the draft Reform Treaty and it is as yet unclear what the character of a Common European Asylum System will be. Indeed, the Green Paper itself raises questions concerning broader burden sharing and solidarity questions within the EU. From the perspective of separated children, SC believes that, at a minimum, regional funding should be applied to support national protection systems for all separated children, in particular, in areas where the volume of incoming separated children is high. More generally, SC submits that there is also a need to foster EU wide cooperation on durable solutions for separated children, including, through the coordination of more effective family reunification procedures.

**SECTION VI: SAFEGUARDING THE RIGHTS OF ALL SEPARATED CHILDREN OUTSIDE THEIR COUNTRIES OF ORIGIN, INCLUDING ASYLUM SEEKING CHILDREN: WHAT THIS MEANS FOR THE DESIGN OF THE CEAS**

6.1 Section VII below discusses more fully the substance of future higher standards within the CEAS. As a preliminary point, SC addresses how the CEAS, as it applies to asylum seeking children, must root in a coherent approach by the EU to the situation of separated children as a whole.

6.2 The debate launched by the Green Paper takes place against the backdrop of discussions concerning the practical and political tensions between the objective of fighting irregular migration and the obligations to provide international protection to certain categories of persons. From a children's rights perspective, SC's position in this debate is clear.

6.3 SC recognises that, subject to non-refoulement obligations, EU Member States are entitled to enforce immigration laws against irregular migrants. SC does not advocate a general policy of open borders for the EU.

6.4 However, there is one important caveat. Under the CRC, Member States do have a legal obligation to make the best interests of children a primary consideration in all actions concerning them, regardless of their immigration status.<sup>17</sup> Moreover, States have to provide special protection and assistance to separated children.

6.5 This overriding obligation of Member States to take as a primary consideration the best interests of the child in all actions in their regard implies specific obligations to *all* children in asylum seeking situations as is discussed in section 7 below. Moreover, specifically as regards *separated* children, their treatment within the asylum process should form part of a broader context of treatment of separated children generally. This is borne out by a number of factors.

First, regardless of whether separated children are asylum seekers/beneficiaries of subsidiary protection, victims of trafficking or economic migrants, their general needs for, and rights relating to, assistance are broadly similar, by virtue of the fact that they are separated children.

Second, many of these needs arise before the appropriate protection route or durable solution options are known.

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<sup>17</sup> Some countries (including, for example, the UK), perhaps recognising the extent and significance of this obligation, have sought to exclude the application of the CRC in the context of the application of immigration law through a general reservation to the CRC. However, in its General Comment No 6 addressing the treatment of unaccompanied and separated children outside their country of origin, the Committee on the Rights of the Child firmly expresses the interpretation that reservations made by States should not in any way limit the rights of unaccompanied and separated children and that such reservations be reviewed with the objective of their withdrawal.

Third, if the best interests of separated children are to be pursued across all actions in their regard, it is important to take a holistic approach to their situation, from access to the territory to achieving durable solutions in their regard. This approach would reduce the risks that that:

- Separated children will not benefit from coherent and meaningful guidance on the various different procedures that might apply to them (including asylum, amongst other options);
- The rejection of an asylum application may deliver separated children into legal limbo or indeed lead to consideration of a durable solution to their situation only in a “default mode”, for example, only in the context of deportation procedures;
- A durable solution for a separated child will not be arrived at in an appropriate time frame.

6.6 As a consequence, it is desirable to define a common approach to matters that arise because of the status of the child as separated and the attendant duties of Member States, rather than addressing the situation of separated children in a variety of ways across diverse laws.

6.7 The design of the CEAS, as it applies to separated children, should take this into account. SC discusses a number of potential alternative scenarios for doing so below. These include: (i) a dedicated comprehensive instrument addressing the situation of separated children from third countries, from their point of admission into the EU to the assessment of durable solutions; (ii) a dedicated framework instrument which houses just those provisions which are relevant to all separated children but leaves durable solutions to be addressed in specific instruments concerning asylum, migration and trafficking; and (iii) uniform principles for protecting the rights of children which would be reflected through all relevant instruments (asylum, migration, trafficking).

6.8 SC emphasises that such a common approach does not mean that all separated children have a right to remain in the EU territory ultimately. The assessment of durable solutions will be guided by the best interests of the child which, in certain circumstances, may imply repatriation to the country of origin and to the child’s family.

(i) A Dedicated Comprehensive Instrument for Separated Children

6.9 Consideration should be given to desirability of the EU adopting a ***dedicated comprehensive instrument addressing the situation of separated children from third countries from their point of admission into the EU to the assessment of durable solutions***. This would be the simplest method of ensuring the situation of separated children is addressed in an integrated way.

6.10 The instrument would concern the issues set out in 6.15 below. It would also include the assessment of durable solutions, including potentially asylum, as well as the modalities of any eventual repatriation, if return is determined to be in the best interest. SC is of the view that an appropriate assessment of durable solutions could be achieved by a single procedure which would cover not only assessment of asylum claims and claims for subsidiary protection but also cover any other possible durable solution,

including return, integration into the host country on humanitarian grounds or resettlement in a third country. In due course, SC would be happy to explore further with the Commission how such a single procedure might function.

(ii) A Framework Instrument for Separated Children

6.11 Consideration could be given to ***a dedicated framework instrument which houses just those provisions which are relevant to all separated children.*** These would cover all of the issues set out in 6.15 below. They would not include the grounds and procedures for durable solutions which would be addressed in distinct asylum, migration and trafficking laws.<sup>18</sup> Child right principles would then need to be reflected in those distinct laws to ensure that procedures and substantive assessment under these laws fully respect the rights of the children. (Section VII below discussed further child right principles as regards the asylum process itself.)

6.12 Moreover, it would be important to consider whether there could be some form of ***integrated application of the distinct laws that affect separated children*** in order to ensure that failure to achieve a durable solution under one legal instrument (for example, asylum) leads to the application of the next appropriate procedure (for example, assessment of the applicability of other forms of international protection). Only this will allow for a holistic and time-sensitive treatment of the situation of separated children.

(iii) Uniform Principles

6.13 A common approach to separated children could also take the form of reproducing, throughout all general instruments susceptible of affecting separated children, a series of uniform principles intended to ensure full compliance with the CRC. These might take the form of guidelines which would address *inter alia*:

- (a) a **common mode of defining and identifying separated children**;
- (b) a **common underlying aim and guiding principle** in both short and long term action (best interests of the child);
- (c) **common content and standards with respect to reception conditions** (appointment and role of a guardian, shelter, health, counselling, education, potentially access to labour market);
- (d) **common procedures** relating to assessments of the situation of separated children; and
- (e) **common standards and modes of assessment** (for example, presumption in favour of the child in certain circumstances).

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<sup>18</sup> The Opinion of the Committee of the Regions on the Situation of unaccompanied minors in the migration process – the role and suggestions of regional and local authorities (2007/C 51/07) believes it is necessary to introduce EU legislation that recognises the status of unaccompanied minors, including those seeking asylum and those who are victims of trafficking, which recognises the fundamental rights of minors and their particular need for protection by means of clear rules regarding, *inter alia*, the age and identity of the minor, specific terms for appointing a guardian, the search procedure for tracing family members with the aim of family reunification.

6.14 One significant drawback of such an approach would be that there is no guarantee that the principles would be reproduced in all relevant legislation. In addition, establishing general principles would not ensure the integrated application of the diverse laws to a separated child, raising some of the risks identified in 6.5 above, in particular, the absence of well-rounded information and advice on possible durable solutions and the possibility of ending up in a legal limbo between procedures.

(iv) Key issues confronting separated children

6.15 Some key issues which the situation of separated children raises are as follows (issues specific to the asylum process are addressed in Section VII below):

- Defining separated children in a broad way (i.e. addressing both children who are unaccompanied and children who are accompanied by adults who do not have responsibility for them);
- Safeguarding access to the EU territory for separated children;
- The means of identifying separated children through initial screening processes to identify that they are both (i) separated and (ii) children;
- No detailed interviews should be conducted by immigration authorities at the point of entry,
- The means of carrying out age assessments;
- The key conditions for the appointment of a guardian for separated children (appointment should be systematic, fast, long term and involve someone with expertise or awareness, *inter alia*, of refugee issues; see in this regard General Comment No. 6 of the CRC)
- The definition of the role of the guardian;<sup>19</sup>
- Family tracing and reunification;
- Creating and maintaining adequate reception conditions (shelter, health, education and training);
- Children should not be detained save in extraordinary circumstances;
- The central importance of education for separated children (it should not be provided in a reception centre, save for a limited period, so as to avoid marginalisation; basic training in the language of the host Member State should be provided; respect for cultural heritage should be achieved);
- Access to the labour market on the same basis as children who are nationals of the country of destination;

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<sup>19</sup> According to the CRC General Comment No. 6, a guardian or adviser “*should have the necessary expertise in the field of childcare so as to ensure that the interests of the child are safeguarded and that the child’s legal, social, health, psychological, material and educational needs are appropriately covered by agencies/individuals who provide the continuum of care required by the child. Agencies or individuals whose interests could potentially be in conflict with those of the child’s should not be eligible for guardianship. For example, non-related adults whose primary relationship to the child is that of an employer should be excluded from a guardianship role.*”

- The right of the child to be heard and for his/her view to be taken into consideration;
- The application of the benefit of doubt to certain assessments involving children;
- Formal best interests determinations in certain circumstances with right of appeal;
- “Ageing out” situations due to delays beyond the child’s control should be addressed fairly, potentially by using the date of application as the relevant date for consideration of the durable solution;
- If granting residence permits on humanitarian grounds, children should be granted, as far as possible, permanent as opposed to temporary residence permits. In the alternative, permits should be as long term as possible to ensure a degree of stability and security for separated children;
- Inclusion of child-friendly mechanisms for complaints and
- The essential role of data collection to provide information essential to ensure monitoring of the treatment of children, targeted capacity building and potential prevention.

**SECTION VII: THE CRITICAL NEED SIGNIFICANTLY TO RAISE STANDARDS IN ORDER TO ENSURE A MEANINGFUL SYSTEM OF ASYLUM FOR CHILDREN**

7.1 SC believes that the current system of asylum in the EU suffers from a wide range of deficiencies as regards the treatment of children. This is evidenced by the relatively low level of recognition rates for asylum seeking children in certain countries.<sup>20</sup>

7.2 SC previously provided the Commission with comments in relation to several of the so-called first phase EU asylum instruments, when they were in draft form. Although it is welcome that there are provisions in these instruments dealing with children and indeed distinct chapters dealing with the situation of “unaccompanied minors” in these instruments, these are nonetheless deficient in a variety of ways which may lead to the frequent violation of the rights of children.<sup>21</sup>

7.3 First and foremost, although the best interests principle is sometimes raised in special provisions concerning the treatment of children, there is no detailed guidance as to what the application of the principle means and how it should be applied in relation to different actions and steps in the procedure.

7.4 Similarly, there are no standard obligations to ensure proper access to the asylum system for children, for example, through the obligation to provide children with adequate information, legal representation if necessary or the creation of child-friendly procedures. Crucially, there is no clear obligation concerning the appointment and role of a guardian for separated children. Nowhere are essential qualifications of the guardian/representative set out, nor is there a clear specification of its role. Furthermore, a representative acting on behalf of a national organisation responsible for the care and well-being of minors or any other appropriate representative appointed to ensure his/her best interests might substitute itself for a guardian. In addition, there is no exemption from special border procedures or expedited procedures for separated children. There is a dearth of provisions relating to special training for those working with children generally.

7.5 Similarly, there is no consistent treatment of whether and how the views of the child should be heard and taken into account. This is a particularly sensitive issue, given the issues which can arise: (a) in recognising child specific forms of persecutions and (b) in ensuring that children can communicate on what has happened to them or the risks that they might face on return.

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<sup>20</sup> For example, in the UK, only 12% of asylum claims made by children get an initial positive decision on their asylum claim compared to 9% of adults (Asylum Statistics: UASCs Quarter 1 2006 Home Office). In Ireland, statistics from ORAC show that from 2003 – 2006 there were 174 positive decisions out of 698 on first instance and 105 positive decisions in 814 appeals. (Irish Refugee Council report “Making Separated Children Visible?”) In Germany in 2005, the recognition rate for separated children was 5.6% {do we know how this compares with the adult rate?}

<sup>21</sup> The Report on “*Seeking Asylum Alone*”, a comparative study by Jacqueline Bhabha and Mary Crook of unaccompanied and separated children and refugee protection in Australia, the UK and the US discusses in some detail practices in relation to the treatment of children in the asylum process and points to the various ways in which deficiencies in asylum processes arise.

7.6 Family reunification possibilities typically are defined narrowly and have proved difficult to apply in practice given the evidentiary difficulties which often arise.

7.7 Finally, at a number of points, Member States are allowed simply to derogate from the CRC. For example, they may apply adult provisions to separated children over 16 but under 18 (for example, as regards accommodation and legal representation). Many provisions do not apply to children who are married, even where they are separated.

7.8 SC believes that, in any future CEAS, standards for procedures and qualification for children must be raised significantly. In Section 6 above, we outlined some of the key concerns of all separated children which would apply here also to asylum seeking separated children. These include the appointment of guardians and appropriate reception conditions. In addition to these, and focussing more specifically on the asylum process and indeed on the situation of both children within families and separated children, SC has the following broad recommendations:

(a) Best interests: Once more, the best interests principle should be identified as the core guiding principle in all actions regarding the child, whether the child is with his/her family or separated. More detailed guidance as to standard and modes of application of the best interests principle in the asylum process should be established at EU level. The UNHCR Guidelines on Formal Determination of the Best Interests of the Child outline useful principles in this regard.

(b) Access to asylum processes for children must be safeguarded, *inter alia*, through:

- exemption for separated children from expedited procedures;
- exemption for separated children from special border procedures;
- proper availability of information to children on asylum procedures;
- the appointment of free legal representatives for separated children; and
- exemption from safe third country concepts.

(c) Expression of the child's views: there must be a full acknowledgement of the child's right to participate in decisions affecting him or her, having regard to his/her age and maturity and to receive information in a manner appropriate to the child. In this regard, there should be recognition of the special considerations which should be taken into account when conducting an interview or assessing a child's testimony, taking into account the emotional, psychological and physical development, as well as the traumatic experience, of the child. Equally, provision should be made for independent expert assessment on the child's ability to articulate fear of persecution.

(d) Qualification of children as refugees: detailed guidelines on child-specific forms of persecution should be developed. In the case of children with their families, children's individual reasons for asylum should be satisfactorily investigated and considered.<sup>22</sup>

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<sup>22</sup> Two studies of children's own reasons for asylum in 2003 and 2005 which were carried out in 2003 and 2005 by Save the Children Sweden came to the conclusion that children are often treated exclusively in the context of their parents' circumstances. A third study is currently being conducted by Save the Children Sweden.

(e) Child-friendly procedures: The creation of child friendly procedures should be set out in detail. This should include mandatory training for officials across the spectrum of State actions susceptible of affecting children. The timeframe for processing asylum applications for children should be thoroughly investigated. The goal must be significantly more efficient processing without risking the quality in the handling and decision making. Long waiting times in the asylum process can lead to mental distress and obstruct the possibilities for future integration, in particular, in the case of children who, in many instances, live through their central developing years waiting for the outcome of asylum applications. This should take into consideration both cases of separated asylum-seeking children and children within asylum seeking families. There should also be child-friendly modes of complaints concerning the asylum system.

(g) Trafficked children: safeguards should be put in place to ensure that the particular circumstances of trafficked children are taken into consideration.

(h) A guarantee of adequate reception conditions should extend beyond the period of first instance applications into any appeal period.

(i) No penalties: There should be safeguards to ensure that there are no “penalties” for children when making asylum claims, such as the risk of disadvantages in securing a residence permit for children seeking asylum.<sup>23</sup>

(j) Integration: There should be appropriate integration efforts post grant of status, taking into account the status as child and refugee.

(k) Family reunification: there should be a fuller right to family reunification, *inter alia*, through:

- broader scope to the definition of “family” for the purposes of separated children asylum seekers being reunited with family in the context of the Dublin Regulation;
- a right to family reunification in the event of subsidiary protection status;
- broader scope of definition of “family” for the purposes of children of refugees being reunited with them; (a child must be unmarried and dependent; the notion of family is restricted to the core family).

In this regard, there should be a broader use of the humanitarian clause under the Dublin Regulation to facilitate family reunification.

(l) Detention: there should be no detention of children, separated or within families, save in extraordinary circumstances.

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<sup>23</sup> The Report of Human Rights Watch *Unwelcome Responsibilities, Spain’s Failure to Protect the Rights of Unaccompanied Migrant Children in the Canary Islands* identifies the practical disadvantages for asylum seeking children in that they do not automatically qualify for a temporary residence after nine months in Spain but rather only after nine months following the rejection of the child’s asylum request. The Report also identifies a host of other deficiencies in both the asylum process as it applies to separated children and to the general treatment of separated children in the temporary reception centres on the Canary Islands.

SC looks forward to discussing the above submissions and recommendations further with the European Commission and to addressing in more detail specific aspects of the situation of children in the asylum system.

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