

REAL PEOPLE, REAL PROBLEMS:

CHILDREN LEFT WITHOUT
HUMAN RIGHTS?



BY NELLEKE GROEN ESMEIJER

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the influence and relevance of children's human
rights on the economic, social and cultural
rights of refugee children

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A B S T R A C T

Central to this thesis is the question what protection is afforded to refugee children under the international refugee system and the international human rights system. Both the Convention on the Rights of the Child and the Refugee Convention afford protection to refugee children, and the implementation of the latter is guided by the former. The holistic and comprehensive character of the CRC brings up the question how the permitted limitation of economic, social and cultural rights to the maximum extent of available resources relates to the provisions that are not subjected to it and to the Convention as a whole.

This question relates to the general issue of 'indivisibility of human rights', but the limitation that is afforded to states under the CRC is different from the one included in general treaties on economic, social and cultural rights. As this study shows, limiting the economic, social and cultural rights of children in the same manner as those of adults may in fact entail a violation of their rights under the CRC – and their rights must therefore be met to a higher standard. Because of the absolute principle of non-discrimination and the particular importance of economic, social and cultural rights for refugee children, this conclusion can be drawn in respect of both national children and refugee children, and even with respect to illegal children.

The objection that children may become a source of income and a vehicle for immigration cannot convince otherwise. Other ways must and can be found to discourage people from illegal immigration or choosing illegality after they are denied refugee status.

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INTRODUCTION

“MANKIND OWES THE CHILD THE BEST THAT IT HAS TO GIVE.”

EXTRACT FROM THE 1959 DECLARATION OF THE RIGHTS OF THE CHILD

Refugees are of all times and all places. Keeping peaceful relations amongst people has always been a challenge, and the abuse of power – be it by state-entities or other parties – has caused great suffering in all parts of the world. People are forced to leave their homes, their livelihoods, their communities and countries to seek security somewhere else. This fate does not only affect adults – in fact, more than half of the refugee population today are children.

Children are vulnerable, susceptible to disease, malnutrition and physical injury. They are dependant, unable to support and care for themselves. They need the support of adults for their physical survival, as well as for their psychological and social well-being and development. Refugee children are in even greater demand of our protection and help than the average child, for the dangers and threats they face are far greater. Their lives have been turned upside down; they have seen violence and may have experienced it themselves. Families and communities have broken down, unable to provide for an adequate support system. Nevertheless, it is this group of *children* that is so often forgotten, even though they request our fullest attention. It is also this group of *refugees* that is marginalised, whose needs and requests are commonly overlooked.

At a time that their dual vulnerability should bring about twice as much protection, the opposite occurs as neither protection system steps up. This thesis will examine the protection that should be afforded to refugee children. The international community boasts itself for having created a refugee protection system and for the significance that is accorded to children's human rights – yet countries are reluctant to take on the corresponding responsibilities. Therefore, I will first review the general refugee protection system that has been set up by the international community, and the role and meaning of human rights law for refugees. This analysis does not focus solely on

children, so subsequently I will concentrate on the position of the refugee child in both systems.

Then, chapter two will elaborate on the international human rights standards that apply to children and the obligations of state parties that follow from these standards. The particularities of the human rights convention that covers children's rights, the Convention on the Rights of the Child, calls for a discussion of the particularities of a certain type of human rights – economic, social and cultural rights. While the views in relation to this category have been changing over the past decades, mitigating the implications of their presumed inferior character, most studies on this matter have focused solely on the general human rights instruments. Consequently, the special character of the children's rights instrument and the extra protection it aims to afford are neglected. The final part of the second chapter will therefore explore the question whether there are grounds to assume that the state's obligations that follow from the economic, social and cultural rights of children may be of a more absolute nature than the corresponding rights of adults.

The third chapter will integrate the outcomes of the two chapters, the particular issues of refugee children and the rights that all children -including refugee children- are afforded, to assert what the human rights of refugee children are. This integration of standard and its practical application will be illustrated by several judicial cases that have demonstrated just that.

C h a p t e r 1

R E F U G E E C H I L D R E N

Soon after the establishment of the United Nations and the memories of the second World War only just beginning to fade, the international community set up a system to regulate the protection of refugees. This chapter analyses the protection that is offered by the international refugee protection system as existing in international law today, to determine what it affords children on account of their position as a refugee.

The general refugee protection system that has been set up by the international community will be examined, after which an elaboration of the role and meaning of human rights law for refugees will be carried out. This analysis concerns the standards of all refugees and the final part therefore pays attention to the position of the refugee child in both systems.

1 . 1 T h e R e f u g e e

At this moment, about two-thirds of the countries in the world are party to the 1951 Convention Relating to the Status of Refugees (Refugee Convention) and its 1967 Protocol.¹ Under the terms of the Refugee Convention, someone is a refugee and entitled to the rights granted in the Convention when he or she, “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.”²

There are many concerns as to whether the Convention and Protocol actually still capture today's refugee problems and are sufficiently able to address them. A returning

¹ United Nations Convention Relating to the Status of Refugees, 28 July 1951, as updated by the Protocol Relating to the Status of Refugees, 31 January 1967. The Convention as updated by the Protocol will be referred to as “Refugee Convention”.

² Article 1(2) Refugee Convention.

critique from the developing world considers the Convention “outdated and eurocentric and thereby of limited reference in dealing with refugee problems in less developed countries.”³ At the same time, the narrow interpretation of the definition of refugee is questioned in both the developing and developed world and at times, the limited explanation given to it and subsequent policy measures are considered in contradiction with the Convention. Despite the many critiques however, the Convention and Protocol remain the principal body of international law of refugees⁴ and must therefore be taken into account.

Looking at the framework set by the Convention and Protocol, a few points must be made. Firstly, someone who fulfils the criteria of article 1(2) of the Refugee Convention as mentioned above is a refugee. This status is not dependant on the recognition by any state of such facts or otherwise determined – this recognition is merely a declaratory act. However, while a refugee is immediately entitled to the protection and assistance of the country where he requests asylum, most states have a slightly different view. They consider that since it is not clear or not whether a “genuine” refugee has crossed their border seeking asylum, they are not yet required to offer this person full assistance.

At this moment, the principle of *non-refoulement* becomes relevant. This principle is also known as “the prohibition of expulsion or return”⁵ and holds that refugees may not be expelled or returned to a state “where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”⁶ Therefore, someone who is asking for asylum⁷ can, in principle, not be returned to their country of origin, simply because it is unclear whether this person is a refugee according to the Refugee Convention and thus entitled to its protection or not.⁸ The prohibition of *refoulement* applies unconditionally until it has been determined that the person concerned is not in need of international protection. Otherwise, a government

³ Brian Gorlick, Human Rights and Refugees: Enhancing Protection through International Human Rights Law, in «Nordic Journal of International Law», volume 69, no. 2, 2000, p. 120.

⁴ On a regional level however, the Refugee Convention is supplemented by regional instruments such as the 1969 Convention Governing the Specific Aspects of Refugee Problems of the Organisation of African Unity (OAU Refugee Convention) and the 1984 Cartagena Declaration on Refugees for Latin America (Cartagena Declaration).

⁵ Article 33 Refugee Convention. In addition, the prohibition of *refoulement* is also included in article 3 of the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), article 7 International Covenant on Civil and Political Rights (ICCPR) and, as decided by the European Court for Human Rights in *Soering v. UK* (7 July 1989), implicitly follows from article 3 of the European Convention on Human Rights (ECHR).

⁶ Article 33(1) Refugee Convention.

⁷ In other words, someone who is asking for international protection.

⁸ The second paragraph of article 33 however, holds an exception when there are 'reasonable grounds' to suspect that someone poses a danger to the security or to the community of the country where he requests asylum.

would be able to avoid and withdraw from the obligation of *non-refoulement* by simply not determining a person's status.

Countries tend to observe the principle of *non-refoulement* quite decently, if only because they consider that at this moment there is no real obligation to fully observe the other requirements of the Convention with regard to (possible) refugees.⁹ However, at the same time, states “that should be able to offer security are increasingly trying to keep refugees out” and “complicated rules are enforced to prevent asylum-seekers from gaining access to asylum procedures.”¹⁰ Access to the territory of the country is being restricted by imposing visa requirements accompanied by carrier sanctions aimed at penalising companies by imposing heavy fines for transporting people without proper documentation.¹¹ In addition, access to the refugee status determination procedures is restricted through the introduction of principles as “safe third country”¹² and “safe country of origin”¹³ and special procedures such as the “accelerated” and “manifestly unfounded” procedures.¹⁴ Though, in itself, the goals of such policy measures are not always necessarily objectionable, “the implementation of the measures turns them into

⁹ A possible other reason for this fairly strict observance is the fact that, as considered in note 5, the principle of *non-refoulement* is not only guaranteed by the Refugee Convention but also by other international instruments. For the European countries it may for instance be more determinant that the European Court of Human Rights determined in the case *Soering v. UK* of 7 July 1989 that states “may not expel or extradite persons to countries where there exists a real risk that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.”

¹⁰ Amnesty International, *A Stolen Future: Protecting the rights of refugee children*, 1997, p. 3.

¹¹ As was the case when conflicts broke out in former Yugoslavia in 1991. Only after the UNHCR intervened, did Western European countries re-open their borders to those fleeing, offering the limited option of “temporary protection”, instead of access to refugee determination procedures under the Refugee Convention. Later, the UNHCR stated that almost all Bosnian refugees would have qualified as refugees under the Convention: UNHCR Information Note, “Temporary Protection”, 20 April 1995, para. 11.

Equally important, as was rightly pointed out by the Irish Refugee Council, “international standards of refugee protection recognise that people fleeing human rights violations are rarely in a position to obtain the proper documentation. Sometimes the need for flight is so urgent that to do so through normal channels is impossible.” <<http://www.irishrefugeecouncil.ie/press01/carriersliabilitypr.html>> on 2 June 2006.

¹² A *safe third country* must be distinguished from that of a *first country of asylum*. According to the Executive Committee of the UNHCR, if “someone has protection in a given State (a ‘first country of asylum’), and has moved irregularly from that State to another State, where a further asylum application is lodged, then [...] return may be acceptable, so long as protection is still available and the conditions under which the person receiving protection lives are acceptable.” (ExCom Conclusion No. 58 (XL), 1989). In contrast, where a person has transited a state, or where there is simply a state where a person could have applied for protection (a ‘safe third country’), the situation is very different and therefore, considerably more safeguards are necessary.

¹³ The *safe country of origin* principle considers that that if a person came from a given state of origin then it was impossible for them to be a refugee, because that state did not produce refugees. Though it does not, by definition, have to be a barrier to access to procedures if not for its implementation prior to any further substantive determination of the asylum claim. As the UNHCR suggests, “during the substantive determination of the claim, the individual would have the opportunity to ‘rebut a general presumption of safety in his/her individual case’ [therefore] if applied to the substantive determination of the claim ... the principle would not necessarily be so problematic.” (Joanne Van Selm, Access to Procedures ‘Safe Third Countries’, ‘Safe Countries of Origin’ and ‘Time Limits’, 2001, para. 7).

¹⁴ On the basis of fore mentioned principles, or on the exceeding of time limits for the submission of asylum applications instituted by many states, *accelerated and manifestly unfounded procedures* reject a person's asylum application without a substantive determination. This practice is considered justified due to the perceived -but debated- fairness of the ‘safe country’-determinations.

practices to which a range of objections can and must be raised, as they deny access to procedures for persons in need of protection, and may lead to *refoulement*.”¹⁵ Consequently, countries are obstructing the process of international protection by introducing barriers on the entrance to the asylum process or to the country itself. In fact, the right to seek asylum is implicitly and explicitly being denied to certain groups of people, leaving too little guarantees for those that are entitled to international protection.

The fact that there is no legally binding international instrument that guarantees people the right of seeking asylum to fall back on is a complicating factor in this issue. Obviously, it is implicitly granted by the Refugee Convention, in the sense that when people possibly have a right to be internationally protected, they have a right to ask for that protection – how else would they get it? Also, the Universal Declaration of Human Rights grants everyone the right to “seek and to enjoy in other countries asylum from persecution.”¹⁶ Though the Universal Declaration is not legally binding as such, it does have great moral force¹⁷ and as such it supports the implicit reading in the Refugee Convention of the right to seek asylum.

Nonetheless, the fact that there exists no definition of asylum seeker in international instruments and that there is no international instrument of protection of asylum seekers, is telling for the treatment of those asking for international protection. As briefly mentioned above, it is generally accepted that the standards of treatment of asylum seekers in most countries is (far) below the standard set by the Refugee Convention. They are not always given proper assistance and their shelter often is poor. A small but growing number of governments have a policy of mandatory detention of asylum seekers, and the refugee determination procedures are not always in accordance with the demands of the Convention – or even with national standards. Interpreters to inform people of their rights and case are not always at hand and legal assistance is not always available. In addition, the procedures can take a very long time before a final decision is taken, sometimes taking up to several years before people have any certainty. In the meantime, assistance is not improved, people are prohibited from providing for themselves and their lives are on hold.

¹⁵ Joanne van Selm, Access to Procedures..., cit., para. 9.

¹⁶ Article 14(1) Universal Declaration on Human Rights (UDHR).

¹⁷ The UDHR is considered the basis of the human rights system, and it forms the *International Bill of Human Rights* together with the two general human rights conventions, the ICCPR and ICESCR. (Fact Sheet No.2 (Rev.1): The International Bill of Human Rights, Geneva, United Nations, 1996, para. 1).

Equally important, while narrowing the group of people that are considered to fulfil the criteria of the Refugee Convention's definition of article 1(2),¹⁸ states have simultaneously acknowledged and introduced so-called “subsidiary¹⁹ means of international protection”. The concept of *temporary protection* for instance, is a measure that serves to grant groups of asylum seekers entrance and a permission to stay in the country without assessing their asylum request. They are not sent back to their country of origin, usually on the basis of the terrible situation in their country of origin, but neither is their asylum request processed – leaving them unable to receive refugee status under the Refugee Convention. There is no clear consensus at the international level as to what exactly is meant by temporary protection and when it might be or might not be an appropriate measure, nor is it mentioned in any legally binding international instrument. Obviously, as long as the level of protection and rights offered is equal or higher than that under the Refugee Convention, there are scarcely any problems. This is not the case though, as people granted temporary protection are generally given far less rights than those granted refugee status under the Refugee Convention. In addition, their temporary protection status can be ended by the host state far more easily than refugee status. Most of the time, those offered temporary protection do not get the opportunity to have their individual asylum claim examined – not at the moment they arrive in the country of refuge, nor at the moment of termination of their status, before being sent home.²⁰

Moreover, states have more and more come to acknowledge protection on the basis of humanitarian grounds or because of a prohibition of *non-refoulement* derived from another (human rights) convention than the Refugee Convention.²¹ However, this has less the character of expanding international protection, than an opportunity to place a greater group of people under a less demanding regime. That is, a less demanding

¹⁸ This, in addition to the fore mentioned measures, is also done by a limited and narrow interpretation of the article itself. See for further discussion of this point: Amnesty International, *Refugees: Human Rights Have No Borders*, London, Amnesty International Publications, 1997 and UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Geneva, Office of the UNHCR, 1992.

¹⁹ Subsidiary (complementary) to the international protection of the Refugee Convention.

²⁰ An extensive Nordic study on the comparative practices in the Nordic countries with regard to temporary protection of Bosnian refugees, conducted in the 1990s, considered that the level of protection under the temporary protection regimes did not amount to that of the Refugee Convention. In addition, it reached the same conclusion as the UNHCR in 1995 (see footnote 11), namely that most refugees would have qualified as refugees under the Refugee Convention, though they were not granted the procedures to request for this status. (Grete Brochmann, *Bosnian refugees in the Nordic countries*, Oslo, Det Kongelige Kommunal- og Arbeidsdepartement, 1995). Despite such considerations, “there is no such standard for the termination of temporary protection, which means that states which host refugees on a temporary basis are not held accountable for the ending of temporary protection.” (Amnesty International, *Refugees: Human Rights Have...*, cit., p. 81).

²¹ As discussed in note 5 above.

regime for the state, seeing as here too the level of protection and assistance often falls short from what is granted to those with “convention refugee status”. Though it seems obvious, the increased consideration of such subsidiary measures prompted the Executive Committee of the UNHCR Programme (the body of states representatives that reviews and approves UNHCR's programmes and budget and advises on international protection – including the interpretation and implementation of the Refugee Convention) to explicitly remind states that “the 1951 Convention relating to the Status of Refugees and the 1967 Protocol remain the foundation of the international refugee regime” and that the complementary forms of protection adopted by some states, “a pragmatic response to ensure that persons in need of such protection receive it”, does not detract from “the importance of full application of the 1951 Convention and the 1967 Protocol by States Parties”.²² Furthermore, in their comments on European Union law and policy development on asylum and refugee protection, the UNHCR frequently reminds the member states that “measures to provide subsidiary protection are implemented with the objective of strengthening, not undermining, the existing global refugee protection regime” and that it is “only in situations where such violations have no link to a Convention ground that subsidiary forms of protection are required.”²³

Finally, questions have been raised about the process of harmonisation of European asylum law. The last agreed directive in the first phase of this process, setting the minimum norms on how decisions on asylum claims in EU member states should be made, “may lead to breaches of international refugee law if no additional safeguards are introduced”²⁴ according to the UNHCR. Besides the UNHCR, the European Parliament and several international NGOs expressed their concern of violation of international

²² ExCom Conclusion No. 89 (LI), 2000.

²³ “In this connection, it is important that measures to provide subsidiary protection are implemented with the objective of strengthening, not undermining, the existing global refugee protection regime. This presupposes that individuals who fulfil its criteria are granted Convention refugee status, rather than being accorded subsidiary protection. [...] The Directive’s provisions on subsidiary protection comprise grounds that would indicate a strong presumption for Convention refugee status in certain cases. [...] It is only in situations where such violations have no link to a Convention ground that subsidiary forms of protection are required. [...] UNHCR would therefore prefer a clarification to the effect that subsidiary protection should apply only if there is no link between the risk or threat of harm and any of the five Convention grounds (“... for reasons outside the scope of the refugee definition.”). The office understands, however, that the use of the term “subsidiary”, the definition in Article 2(e) and the headline of the chapter are to ensure that subsidiary protection only comes into play after a negative decision on the application for refugee status or when an applicant explicitly confines his/her application to subsidiary protection.” (UNHCR Annotated Comments on the EC 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, 28 January 2005, comment on Article 15).

²⁴ “EU directive may trigger downgrading of asylum standards”, UNHCR Press Release of 2 December 2005.

obligations and warned against the wider implications of the directive and pointed at the danger of eroding international standards of refugee protection far beyond the EU.²⁵

On the whole, it is clear that many states seek to limit their duties under the international refugee protection system. Still, states should observe their legal obligations – which are in fact broader than just those under international refugee law. Most of the states that are party to the Refugee Convention, have since then signed and ratified one or more of the international human rights treaties, which spell out people's fundamental human rights. While on the one hand, this results in additional obligations impacting the rights of those in need of international protection, it is equally important that existing obligations take these new developments into account. The next paragraph will therefore concentrate on the general human rights of refugees.

1.2 The Refugee and Human Rights

As Hathaway already pointed out, “a treatment of refugee law which takes no account of more general human rights norms would clearly present an artificially narrow view of the human rights of refugees.”²⁶ The development of human rights law has filled many critical gaps in the Refugee Convention's rights regime. Furthermore, the UNHCR's Executive Committee has observed that the modern duty of protection goes beyond simply respecting the norms of refugee law, but also includes the obligation for states “to take all necessary measures to ensure that refugees are effectively protected, [...] in compliance with their obligations under international human rights and humanitarian law instruments bearing directly on refugee protection.”²⁷

The human rights treaty system is at the core of the international system for the promotion and protection of human rights. Human rights derive from the mere fact of being human – they are not the gift of a particular government or legal code. Nonetheless, the standards being proclaimed internationally can only become reality when they are implemented and applied by countries within their own legal systems. It is largely through the work of the United Nations that the universality of human rights has been clearly established and recognised in international law.

²⁵ “European Union: Asylum Proposal Violates Basic Rights”, Human Rights Watch Press Release of 29 March 2005; “European Union: Letter Calling Withdrawal of the Asylum Procedures Directive”, NGO letter of 22 March 2004.

²⁶ James C. Hathaway, *The Rights of Refugees under International Law*, Cambridge, Cambridge University Press, 2005, p. 8.

²⁷ ExCom Conclusion No. 81 (XLVIII).

The United Nations Charter emphasised human rights among the purposes of the United Nations and proclaimed that human rights are “for all without distinction”. Three years later, the General Assembly of the United Nations adopted the Universal Declaration of Human Rights, affirming the consensus on a universal standard of human rights. Universal human rights are further established by the two international covenants on human rights, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). It is the legal character of these rights that places them at the core of the international system of human rights protection, as they impose legal duties upon state actors.

Besides the aforementioned ICCPR and ICESCR, there have been a number of international conventions guaranteeing specific human rights. Currently, five specific human rights treaties have been concluded under the UN system – the Convention on the Elimination of all forms of Racial Discrimination (CERD), the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW). These treaties firstly serve to elaborate on rights already protected by one of the general treaties, and in addition specify the concrete legal obligations with regard to a certain group of people. In addition, the need and wish to protect a vulnerable group has motivated the international community to conclude specific conventions. And, mostly, it is a combination of such incentives that motivates and grounds their creation.²⁸

1.3 The Refugee Child

When we consider a human rights approach to the protection of refugee children, the Convention on the Rights of the Child (CRC) is the primary human rights instrument and the necessary starting point. As was pointed out by Dennis McNamara, “the CRC is a reminder that refugee children are first and foremost children.”²⁹ Indeed, with regard

²⁸ CERD and CEDAW, for instance, elaborate on the general prohibition of discrimination, while the CAT works out the prohibition of torture and other cruel and inhuman treatment. At the same time, CEDAW in essence only considers the rights of women (in relation to men). The ICRMW concerns specifically the rights of migrant workers and thus elaborates on the general human rights treaties, but does so, obviously, for the reason that they form a particularly vulnerable group in most societies.

²⁹ Statement by Mr. Dennis McNamara, Director of the UNHCR Division of International Protection, on 14 November 1998 at the London School of Economics: A Human Rights Approach to the Protection of Refugee

to refugee children, “we have a unique package in our hand, with the Refugee Convention, the CRC (with its record ratifications), and the monitoring mechanisms established under the various human rights instruments, especially the Committee on the Rights of the Child.”³⁰

Nowhere in the Refugee Convention is there a mention of any age-related criteria that could exclude child asylum seekers from consideration under the Convention. Its standards are thus equally applicable to children. At the same time, like most international instruments, the Convention focuses mainly on adults and essentially it at no point takes into account any particular vulnerability of children, or the special needs they have. The CRC on the other hand, has specifically been concluded to elaborate on the human rights standards that they, as human beings, are entitled to under the general human rights conventions and declarations in order to ensure that their special needs are taken into account. Children must be able to depend on the adult world to take care of them, to defend their rights and to help them to develop and realize their potential. In the CRC, this has been concretised to specific obligations relating to children's needs intended to better guarantee their rights, but also, and even more importantly, to identify concrete actions and considerations that are needed to fulfil states parties' obligations towards children.

Article 2(1) of the CRC holds that state parties “shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.” In principle, every person below the age of 18 is a child.³¹

The words “within their jurisdiction” further define to which children the Convention applies. The use of the term jurisdiction indicates that the rights recognised in the Convention “are applicable with respect to any child residing or otherwise present in the territory of the State party, whether or not the child is a national of that State”.³² The wording of the article follows that of article 2(1) ICCPR, which has been interpreted by

Children.

³⁰ Ibidem.

³¹ Article 1 CRC: “For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”

³² Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child*, The Hague, Kluwer Law International, 1999, p.69.

the Human Rights Committee with regard to the position of aliens, holding that: “In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.”³³ In other words: governments must take measures to ensure that the rights in the Convention apply without discrimination “to all children in the State, including visitors, refugees, children of migrant workers and those in the State illegally.”³⁴ Consequently, on several occasions has the Committee on the Rights of the Child “raised the issue of ‘alien’ children and pointed out that the Convention accords them equal rights”³⁵ and the UNHCR has adopted the Convention as its guiding principles, incorporating its standards in UNHCR policy on refugee children.

Children encounter many of the same problems and human rights abuses as adults do, but because of their dependency and vulnerability they also experience additional difficulties. Firstly, most refugee children arrive in countries of asylum with their families, and their claims to refugee status are based on the claims of their parents – they are being considered merely as dependants. Some children however, flee because of abuses directed at them in their own right. This is often not considered separately, not during the initial asylum request by the parents, nor when this request is denied. Especially in the latter case it is highly important to consider, as in essence the child right to non-refoulement is violated if it is sent back with its parents when it has a valid claim of its own. In addition, the procedures for the determination of a family's refugee status, or the child's own refugee status, can last a very long time. During that time, their lives are 'on hold' – a situation that is exceptionally detrimental to the child, not in the last place because during the determination process their rights are seriously restricted.³⁶

Further, a particular area of concern is the scarcity of special criteria that are applied to the determination of children's cases or any other criteria that take into account their particular vulnerabilities and their different ways of articulating a “well-founded fear of persecution”. Policies and procedures are based on the situations and particularities of adults, even though the determination of children's cases in general, and those of

³³ United Nations Human Rights Committee, General Comment 15, the position of aliens under the Covenant, 11 April 1986, para. 2.

³⁴ Rachel Hodgkin, Implementation handbook for the Convention on the Rights of the Child, Geneva, UNICEF, 2002, p. 26.

³⁵ Ibidem, p. 26.

³⁶ Even more important is the fact that this restriction of assistance and support is particularly troublesome for the fact that exactly these children are exceptionally vulnerable and need additional support, rather than less.

unaccompanied and separated children in particular, requires specific considerations.³⁷ Moreover, the special needs of unaccompanied and separated children, who lack the support and guidance of their parents and are therefore a particularly vulnerable group of refugee children, are most often consistently overlooked.

And even for those children who are recognised as refugees under the Refugee Convention, while they are having far better guarantees of protection, these are not always translated into better treatment. The national standards of protection are often unclear and guidelines, including those of the UNHCR, are not always taken into account.

The fore mentioned problems are not simply worrying, but in fact a violation of the CRC on two accounts. Refugee children have the same needs for care, education and special consideration as other children (possibly even greater) – and under the Convention they are entitled to such because they are children. It is not in line with the Convention to consider children under adult standards and procedures, without assessing their special requests and needs. Moreover, whether accompanied by their parents or not, refugee children are a particularly vulnerable group with special needs. This has been recognised by the CRC in article 22, where it is held that a child seeking refugee status or that has been granted this status should be ensured “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.” It is equally important to note the different conclusions of the UNHCR Executive Committee to this effect, emphasising and elaborating on this issue.³⁸ All children, including refugee children, asylum-seeking children, migrant and illegal children, are entitled to protection under both national child and youth welfare laws and international laws and standards. Their rights as outlined in the Convention should not come in second place to asylum and immigration policies.

³⁷ The Committee on the Rights of the Child considered in this respect that it is the obligation of state parties to “enact legislation addressing the particular treatment of unaccompanied and separated children and to build capacities necessary to realize this treatment in accordance with applicable rights”. United Nations Committee on the Rights of the Child, General Comment 6, Treatment of unaccompanied and separated children outside their country of origin, 3 June 2005, CRC/GC/2005/6, para. 64.

³⁸ The Executive Committee has considered the special situation of refugee children in several general and specific conclusions, for example ExCom Conclusions no. 47 (1987) on Refugee Children; no. 59 (1989) on Refugee Children; no. 84 (1997) on Refugee Children and Adolescents and no. 88 (1999) on Protection of the Refugee’s Family. See also ExCom Conclusions no. 79 (1996), no. 87 (1999) and no. 89 (2000) on General Issues and no. 85 (1998) on International Protection.

1 . 4 C o n c l u d i n g R e m a r k s

As follows from this chapter, the Refugee Convention and the international refugee protection system are fully applicable to children, but they lack in specific understanding of children's situation and particular needs. There are hardly any criteria that set the standards on how to deal with refugee children as opposed to adults.

This does not mean there are no standards in international law that explicate the obligations of governments in relation to children. International human rights standards apply, in principle, to everyone present in a state provided that that state is a party to the convention in question – a requirement that is nearly always met in regard to the Convention on the Rights of the Child, as virtually all states have signed and ratified this Convention.

Consequently, where children are concerned, the Refugee Convention's provisions and implementation must be understood in light of the provisions of the CRC. It is for this reason that the following chapter will elaborate on the CRC and a state's obligations that emanate from it.

C h a p t e r 2

C H I L D R E N ' S H U M A N R I G H T S

Children's rights have been an issue of interest at the international level since the League of Nations. The Assembly of the League of Nations adopted the Declaration of the Rights of the Child, or the “Declaration of Geneva” as it became commonly known,³⁹ in 1924. Later, after the Second World War and the establishment of the United Nations, the UN General Assembly immediately took up the issue in its efforts for the protection and promotion of human rights, seeking to adopt a revised declaration of the rights of the child. Though it was able to quickly conclude its work on the Universal Declaration of Human Rights, which it adopted on 10 December 1948, it was not until 20 November 1959 that the Declaration of the Rights of the Child was proclaimed.⁴⁰

In the late 1970's, efforts to adopt legal standards relating to the rights of the child were furthered by concrete proposals for the adoption of an international convention on children's rights. It was considered that while the 1959 Declaration “had been instrumental in promoting the rights of children throughout the world, as well as in shaping various forms of international co-operation in that field, [...] it was time to take further and more consistent steps by adopting an internationally binding instrument in the form of a convention.”⁴¹ On 20 November 1989, exactly thirty years after the adoption of the Declaration, the UN General Assembly adopted the Convention on the Rights of the Child (CRC).

Before moving on to a discussion of the rights of refugee children, this chapter will take a closer look on the Convention on the Rights of the Child and its basic characteristics, after which some of the terminology regarding the nature of states obligations will be discussed. This will include a closer look at some of the aspects of economic, social and cultural rights that have lead to controversies in their applicability in concrete cases and consequently hampered their implementation. Finally, the comprehensive nature of the Convention will be examined to ascertain the similarities and dissimilarities between the

³⁹ Sharon Detrick, *A Commentary...*, cit., p. 13.

⁴⁰ United Nations General Assembly, Declaration on the Rights of the Child, 20 November 1959, resolution 1386 (XIV).

⁴¹ Sharon Detrick, *A Commentary...*, cit., p. 15.

economic, social and cultural rights in general on the one hand, and those of children's rights on the other.

2.1 The Convention on the Rights of the Child

So long as it took for a legally binding instrument on children's rights to materialise, the subsequent entry into force of the Convention took place within a year.⁴² It is important to note, that the CRC has been ratified by nearly all member states of the United Nations – as of 16 April 2003,⁴³ it had been ratified or acceded to by 192 parties.⁴⁴ This makes it the most successful human rights treaty to date, enjoying near-universal ratification. Besides the high moral status the Convention consequently possesses, this also offers ways of securing the rights of children in states that have not ratified (some of) the other human rights conventions.

Human rights apply to all people simply because they are human and consequently, the general human rights conventions apply to individual adults and children alike.⁴⁵ During the drafting of the Convention, it was brought forward that in order to avoid the danger of lowering the already applicable standards of the other human rights conventions, only those issues should be dealt with that related specifically to children. Eventually however, rights recognised in the ICCPR and ICESCR were in fact incorporated in the CRC, in part because the opposite was considered a greater danger – that not mentioning these rights would put into question their applicability to children. Also, it was considered that, since they were drawn up with adults in mind, the general human rights conventions did not cover the actions and responses required by children's specific needs and vulnerability. The CRC contains a number of innovative provisions and while some of the rights are formulated along the lines of their counterparts in the general conventions, there are also provisions that are formulated differently – giving rise to the question how their protection relates to the protection provided by the general provision.

Besides its legal force, the CRC carries great moral force and its comprehensive nature is an important and unique characteristic of the Convention. By including civil and

⁴² The Convention entered into force on 2 September 1990. (Website of the Office of the High Commissioner on Human Rights, <<http://www.ohchr.org/english/countries/ratification/11.htm>>, on 15 June 2006).

⁴³ The date of the last accession to the CRC by Timor-Leste. (Ibidem).

⁴⁴ Only the United States and Somalia have not yet ratified the CRC.

⁴⁵ See also United Nations Human Rights Committee, General Comment 17, Rights of the child (Article 24), 7 April 1989.

political rights of children, as well as economic, social and cultural rights, the Convention reaffirms the notion of indivisibility, complementarity and interdependence of human rights.⁴⁶ In addition, the framers of the Convention refrained from establishing an inventory of the rights incorporated in the Convention, underlining the equal importance of all human rights. This holistic perspective was subsequently reflected by the guidelines for reporting, adopted by the Committee for the Rights of the Child⁴⁷ (CtRC), in which the Committee decided to group together those articles that are most closely related to each other. In addition, this emphasises “that the implementation of each right should take into account the implementation of or respect for all the other rights [...] because each one is fundamental to the dignity of the child”.⁴⁸

According to the Committee, “[t]he development of a children’s rights perspective throughout Government, parliament and the judiciary is required for effective implementation of the whole Convention”⁴⁹ – in particular in the light of the general principles. The Committee has identified four articles of the Convention as such, namely article 2, the principle of non-discrimination, article 3(1), the best interests of the child, article 6, the right to life, survival and development, and article 12, respect for the views of the child.⁵⁰ While all rights are equally important for the dignity and development of the child, it are these principles that are in turn important for the understanding of each of the rights of the Convention. They must be taken into account in the implementation not only of the Convention in total, but in the implementation of the separate rights as well.

⁴⁶ Underlying the whole human rights system, this principle has most recently been affirmed during the UN World Conference on Human Rights in 1993 that adopted the Vienna Declaration and Programme of Action, stating that “[a]ll human rights are universal, indivisible and interdependent and interrelated.” (United Nations World Conference on Human Rights, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23, para. 5).

⁴⁷ The Committee on the Rights of the Child is the body of independent experts that monitors implementation of the CRC and its two optional protocols by its state parties. The Committee also publishes General Comments, the interpretation of the content of human rights provisions, and organizes days of general discussion.

⁴⁸ The current *general guidelines for reporting* can be found in UN Document CRC/C/33 (1994), “Overview of the reporting procedures”. The initial reasoning behind the thematic approach is reflected in the Committees guidelines for the initial reports in UN Document CRC/C/5 (1991) and guidelines for the periodic reports in UN Document CRC/C/58 (1996), as discussed in Sharon Detrick, A Commentary..., cit., p. 22.

⁴⁹ United Nations Committee on the Rights of the Child, General Comment 5, General measures of implementation for the Convention on the Rights of the Child, 27 November 2003, CRC/GC/2003/5, para. 12.

⁵⁰ United Nations Committee on the Rights of the Child, General guidelines regarding the form and content of the periodic reports to be submitted by States parties under article 44, paragraph 1(b), of the Convention, 1996, CRC/C/58 and United Nations Committee on the Rights of the Child, General guidelines regarding the form and content of the initial reports to be submitted by States parties under article 44, paragraph 1(a), of the Convention, 1991, CRC/C/5.

2.2 The Nature of States Obligations

The basic obligation with respect to all rights of the CRC is specified in article 2(1), holding that states shall “respect and ensure the rights set forth in the present Convention”. This dual obligation follows the wording of article 2(1) of the ICCPR, which has a long-established meaning in international law. The obligation to “respect” has a somewhat passive connotation, requiring a state party not to violate the right in question. The obligation to “ensure”, on the other hand, implies an affirmative obligation on the part of the state to take whatever measures necessary to enable individuals to enjoy and exercise the relevant rights. As such, it encompasses the obligation to “respect”, but is substantially broader.

In this regard, article 2(1) is closely related to article 4 of the Convention, which states the means by which state parties are required to satisfy the basic obligation that follows from article 2(1). According to article 4, state parties shall “undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention”. As pointed out by Alston, “[i]n conceptual terms, article 2(1) is best thought of as the general statement of the 'ends' to be achieved by the Convention (i.e. that all of the relevant rights be respected and ensured), while article 4 is the general statement of the 'means' to be used (i.e. 'all appropriate legislative and other measures')”.⁵¹

The second part of article 4 appears to incorporate an obligation of progressive achievement with respect to the economic, social and cultural rights recognised in the Convention – as opposed to the immediate obligation to “respect and ensure” the civil and political rights of children. By holding that “[w]ith regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources”, it resembles the basic obligation following from the ICESCR rather than that of the ICCPR.⁵² The wording of the basic obligation under the ICESCR reflects the belief held that the implementation of economic, social and cultural rights is to some extent dependent upon the availability of sufficient resources and could therefore only be undertaken progressively, as full and immediate realisation of all the

⁵¹ Philip Alston, *The Legal Framework of the Convention on the Rights of the Child*, in «United Nations Bulletin of Human Rights: The Rights of the Child», no. 2, 1991, p. 4.

⁵² Article 2(1) ICESCR: “Each State Party to the present Covenant undertakes to take steps, [...] to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

rights was beyond the resources of many states. Meanwhile however, this phrase has been interpreted as “allowing States excessive leeway in the implementation of their obligation”⁵³ while it “fails to take into account those provisions that may be implemented immediately”.⁵⁴

The existence of separate covenants entrenching civil and political rights and economic, social and cultural rights, and the difference in wording with regard to the nature of states obligations arising from it, has contributed to the assumption that these sets of rights are different both in nature and in value. This assumption triggered a debate about the true legal quality of economic, social and cultural rights and the initial classification of the ICESCR as promotional and non-justiciable led to its theoretical marginalisation in favour of civil and political rights. In reality however, the creation of two covenants was motivated in large part by political ideology. Besides, it is important not to overstate the difference between the covenants. As Craven pointed out, “[i]t would appear in fact, that the implementation of the ICCPR is to be undertaken 'at the earliest possible moment'” while at the same time, “[i]t is arguable that the same comment may be made about the implementation of the ICESCR, notwithstanding the reference to available resources.”⁵⁵

The views on this issue have changed over the past decades, seeking to mitigate the implications of their presumed inferior character, but studies still focus primarily on the general human rights instruments – and therefore neglect to take into account the comprehensive character of the CRC and the fact that it seeks to afford extra protection to children. In order to consider whether there may be grounds to assume that the state's obligations relating to children's economic, social and cultural rights may differ in nature as opposed to the corresponding rights of adults, the precise nature of the obligations arising under the ICESCR will first be given a closer look.

2.3 Economic, Social and Cultural Rights

As mentioned earlier, the human rights system is based on the fundamental principle that all human rights are indivisible and interdependent. In theory, no category of human rights is pre-eminent. The principle is inherent in both the UN Charter and the 1948

⁵³ Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development*, Oxford, Clarendon Press, 1995, p. 26.

⁵⁴ *Ibidem*, p. 26.

⁵⁵ *Ibidem*, p. 130.

Universal Declaration and has been more explicitly reaffirmed in numerous subsequent UN documents.⁵⁶ Furthermore, it is notable that despite the ultimate separation of the two groups of human rights by the creation of two separate Covenants, the General Assembly made a great effort to emphasise the interdependence and unity of the two.⁵⁷ Moreover, both covenants contain passages in their Preambles that are explicitly phrased in terms of interdependence and indivisibility, and by this, they emphasise the importance of the notion.

Though it is clear that the principle of interdependence was considered fundamental from the beginning of the UN, and that it has maintained a prominent position in the human rights system, this does not eliminate the controversy that still exists as to the status of economic, social and cultural rights. To understand the reasons why they have not been accorded the same importance and focus as civil and political rights, several notions require attention. First of all, relating to the types of obligations that follow from the conventions, a persistent distinction is made between positive and negative obligations – though it is questionable what the exact significance of this distinction still is. Connected to this is the issue of progressive realisation and the question what exactly this implies. Finally, the perceived non-justiciability of economic, social and cultural rights is discussed, and some concluding remarks are given.

2.3.1 A Dichotomy between Positive and Negative Rights?

In the past, a lot has been made of the dichotomy between *negative* and *positive* rights. A negative right entails freedom from interference and thus merely requires the absence of government action. Positive rights, on the other hand, require active governmental intervention and policy and a distribution of resources. For long, the perception has been that civil and political rights are exclusively negative rights, while economic, social and cultural rights entail only positive obligations.

Since then, it has been pointed out that civil and political rights also encompass resource-demanding elements and contemporary doctrine recognises that all human rights may entail both negative and positive obligations. In fact, adequate promotion and protection of human rights depends on properly financed and well-administered

⁵⁶ Most recently during the UN World Conference on Human Rights in 1993 in the Vienna Declaration and Programme of Action, cit., para. 5.

⁵⁷ See for more information Kitty Arambulo, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and Procedural aspects*, Antwerpen, Intersentia, 1999, p. 105.

government policies and programmes, with respect to both categories of rights – the differences are a matter of degree, not of substance. This conclusion has set aside the traditional dichotomy in favour of a more nuanced position, which considers that all human rights – economic, social and cultural, as well as civil and political rights – have different dimensions relating to different types of duties. Although variation exists in the typologies, in general it is held that a state is obliged to protect, respect and fulfil *every* human right. This new trichotomy of obligations bridges the two sets of rights and reconciles the apparently different obligations of civil and political rights and economic, social and cultural rights. It illustrates that “compliance with each and every human right [...] may require various measures from (passive) non-interference to (active) ensuring of the satisfaction of individual needs, all depending on the concrete circumstances.”⁵⁸

As mentioned, state obligations to realise human rights are of three types.⁵⁹ The obligation to *respect* human rights requires states to refrain from interfering directly or indirectly with people’s enjoyment of human rights. It entails respecting peoples own efforts to realise their rights and includes, *inter alia*, that governments “not torture, unduly inhibit the right to strike, arbitrarily close private schools teaching in minority languages, or carry out forced evictions without due process of law or providing alternative accommodation.”⁶⁰ Under the obligation to *protect*, states are held to ensure others (than the state) not to interfere with people's enjoyment of their rights, primarily through effective regulation and remedies. To this end, states must “prevent, investigate, punish and ensure redress for the harm caused by abuses of human rights by third parties – private individuals, commercial enterprises or other non-state actors.”⁶¹ Finally, states have an obligation to *fulfil* human rights by taking legislative, administrative, budgetary, judicial and other steps towards the full realisation of human rights. It includes the promotion of human rights, the facilitation of (full) access to rights and the provision for those that are unable to provide for themselves.

⁵⁸ Ida Elisabeth Koch, *Dichotomies, Trichotomies or Waves of Duties?*, in «Human Rights Law Review», volume 5, no. 1, 2005, p. 85.

⁵⁹ The following terminology was originally proposed by Asbjørn Eide. See for instance A. Eide, *Realization of Social and Economic Rights and the Minimum Threshold Approach*, in «Human Rights Law Journal», volume 10, 1989, pp. 35-51.

⁶⁰ Amnesty International, *Human Rights for Human Dignity: a primer on economic, social and cultural rights*, London, Amnesty International Publications, 2005, p. 19. Also available via <www.amnesty.org>.

⁶¹ *Ibidem*, p. 19. It includes such things as the regulation and monitoring of corporate use of private security firms, potentially hazardous industrial emissions, the treatment of workers by their employers, and the adequacy and appropriateness of services that the state delegates or privatises, including private medical practices and private schools.

In its development, the terminology of this typology has varied in scholarly writings, with some proposing to categorise states obligations in four or five categories, sometimes headed by different names. The Committee of the ICESCR has preferred to maintain the abovementioned three-fold characterisation of duties to respect, protect and fulfil – though it has subsequently decided to further sub-divide the latter into a duty to fulfil (facilitate), a duty to fulfil (provide) and a duty to fulfil (promote).⁶²

It has been pointed out that this new division of duties “was not supposed to become a new frozen abstraction to occupy the same rigid conceptual space previously held by 'negative rights' and 'positive rights'”⁶³ and that it may be “questioned whether the tripartite typology provides a basis for a full understanding of the many complex legal issues connected with the implementation and judicial enforcement of economic, social and cultural rights.”⁶⁴

Obviously, the question what it actually takes to secure people against the standard, predictable threats to their rights requires more than the simple acknowledgement of the different categories of duties and corresponding obligations undertaken by states. Still, the typology has clearly served to clarify the normative dimensions of the two sets of rights by pointing out that both entail both positive and negative legal obligations. Whether one uses a three-, four- or five-fold categorisation, the common feature is that they all “move along a continuum from 'negative' to more 'positive' obligations, inserting an obligation to *protect* from interferences from third parties in between.”⁶⁵ While the challenge today may indeed no longer be “to question the 'positive/negative' dichotomy, but rather how to address the fact that some human rights, of whatever kind, are more vaguely worded and more resource-demanding than others”⁶⁶, the bridge-building function of the typology by which it confirmed the indivisibility, interrelatedness and interdependence of all human rights has been indispensable.

⁶² In addition, these have been supplemented by what the Committee describes as 'essential features' of each right: the obligation to respect, protect and fulfil the availability, accessibility, acceptability and adaptability of each right. These essential features further facilitate the interpretation of the specific rights of the Covenant and are frequently referred to in General Comments – although the General Comments are not always consistent regarding the specific terminology either.

⁶³ See Shue, *Basic Rights. Subsistence, Affluence and U.S. Foreign Policy*, Princeton University Press, 1996, p. 160 and Jeremy Waldron, *Liberal Rights: Collected Papers 1981-1991*, Cambridge University Press, 1993, p. 25, as quoted in Ida Elisabeth Koch, *The Justiciability of Indivisible Rights*, in «Nordic Journal of International Law», volume 72, 2003, p. 10.

⁶⁴ Ida Elisabeth Koch, *Dichotomies...*, cit., p. 82-83.

⁶⁵ Ibidem, p. 86.

⁶⁶ Ibidem, p. 102.

2.3.2 *Immediate Obligation or Progressive Realisation?*

Relating to the issue of positive and negative rights is the issue of progressive realisation. The conception of civil and political rights as negative rights, and thus free of government expenses, has led to the belief that their fulfilment should be absolute and immediate. Economic, social and cultural rights, on the other hand, were conceived as costly, justifying a more gradual approach to the protection of these rights. The principal state obligation incorporated in article 2(1) of the ICESCR is to take steps “with a view to achieving progressively the full realization of the rights recognized”. This notion has been incorporated to reflect “the recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time”⁶⁷ for this was beyond the resources of many states.

Yet, as discussed above, the distinction between positive and negative obligations is not as absolute as is sometimes presented. As Eide puts it, “the allegation that economic, social and cultural rights differ from civil and political rights because the former requires the use of resource by the state, while the enjoyment of the latter does not [...] is a gross oversimplification.”⁶⁸ Apart from the fact that, as considered above, civil and political rights also encompass positive, resource demanding elements, it has further been stated that their implementation is in fact progressive as well. Obviously, where resources are scarce, the full implementation of the positive demands will necessarily run into similar difficulties as experienced in the case of economic, social and cultural rights. Again, as mentioned earlier, the differences between the two categories of rights are a matter of degree, not of substance.

Despite all this, the incorporation of the concept of progressive realisation in the ICESCR does allow states excessive leeway in the implementation of their obligations, which they do not have under the ICCPR. Unfortunately, the “allowance given to States by reference to 'progressive realization' and 'the maximum available resources' has been construed as an excuse for non-compliance.”⁶⁹ Concern that a reference to progressive realisation would allow states to postpone the realisation of the rights indefinitely or to entirely avoid their obligations was already expressed during the drafting of the ICESCR. However, the majority did not agree with this view and it was argued that

⁶⁷ United Nations Committee on Economic, Social and Cultural Rights, General Comment 3, the nature of States parties obligations, (Art. 2(1)), 14 December 1990, E/1991/23, para. 9.

⁶⁸ Asbjørn Eide, *Economic and Social Rights as Human Rights*, in A. Eide et al. (eds.), *Economic, Social and Cultural Rights: a textbook*, Dordrecht, Martinus Nijhoff Publishers, 2001, pp. 24.

⁶⁹ Kitty Arambulo, *Strengthening the Supervision...*, cit., p. 154.

“implementation should be continued 'without respite' so that full realisation could be achieved 'as quickly as possible'.”⁷⁰

These concerns have been reflected by the Committee on Economic, Social and Cultural Rights (CESCR), the monitoring body of the ICESCR, in its third General Comment. The General Comment aims to shed light on the nature and scope of states parties' obligations under the ICESCR. It points out that progressive realisation is indeed a “necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights.” However, it must be perceived “in the light of the overall objective”, or the *raison d'être* of the Covenant, being the establishment of clear obligations for states parties regarding the full realisation of the rights contained in the ICESCR. Therefore, the obligation imposed by the ICESCR is “to move as expeditiously and effectively as possible towards that goal.” Furthermore, the Committee emphasises that notwithstanding the element of progressive realisation, certain provisions of the Covenant in fact are capable of immediate application. With regard to the other provisions, states are under an immediate obligation not to discriminate in guaranteeing these rights and to “take steps” towards their full realisation – which “must be taken within a reasonably short time after the Covenant's entry into force for the States concerned.” Also, the effect of resource constraints does not go so far as to discharge a state from its “minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights” – especially for the most vulnerable.⁷¹

When linking the immediate obligations as specified by the Committee to the aforementioned duties to respect, protect and fulfil all human rights, it follows that the obligation to respect and protect rights will in fact impose immediate duties on the state, instead of progressive ones. States must refrain from interfering with the rights that they have acknowledged as binding, as they must withhold other (non-state) actors from doing. While the third level of the tripartite obligation, the obligation to fulfil, is subject to progressive realisation, it does follow that immediate steps must be taken to “move as expeditiously and effectively as possible towards that goal.”⁷² It further appears that a continuous improvement of conditions over time, without backward movement, is required. Indeed, the Committee has assessed that any deliberately retrogressive

⁷⁰ Matthew Craven, *The International Covenant...*, cit., p. 130-131.

⁷¹ United Nations Committee on Economic, Social and Cultural Rights, General Comment 3, cit., para. 9.

⁷² *Ibidem*, para. 9.

measures “would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.”⁷³

Although the considerations of the Committee and the tripartite categorisation of states duties have greatly clarified and enhanced the possibilities and process of monitoring the rights, the notion of progressive realisation remains a complicating factor. While failure to take any action at all may clearly be identified as a breach of state obligations, in the majority of cases it will be more difficult to evaluate whether or not a state has taken the appropriate course of action. When the situation deteriorates, this has to be directly attributed to state action or inaction for its responsibility to be invoked. At the same time though, were a situation improves, this does not necessarily mean that the state has taken the appropriate path – as here too, other contributing factors could have been paramount. It is for these reasons, among others, that the justiciability of economic, social and cultural rights has for long been questioned.

2.3.3 The Justiciability of Economic, Social and Cultural Rights

As pointed out by Scheinin, “according to Asbjørn Eide, 'the theoretical legalistic debate' on whether economic, social and cultural rights can be justiciable is 'largely of the mark' because what is the significant issue is the effective protection of the rights in question, be it through courts or through other mechanisms.”⁷⁴ Obviously, the real bottleneck in the case of economic, social and cultural rights is that there is no effective mechanism of protection on an international, regional or national level. Therefore, the reality that these rights are frequently downplayed and contravened by governments mostly remains unpunished – ignoring the fact that “economic, social and cultural rights have been laid down in the Covenant for another purpose apart from creating rights for individuals, namely to lay down the obligations of States, which must be complied with in order to protect and promote human rights.”⁷⁵ In other words, economic, social and cultural rights *are* human rights, laid down in a legally binding international treaty, which is a reality that creates direct obligations for states.

⁷³ Ibidem, para. 9.

⁷⁴ Martin Scheinin, *Economic and Social Rights as Legal Rights*, in A. Eide et al. (eds.), *Economic, Social and Cultural Rights: a textbook*, Dordrecht, Martinus Nijhoff Publishers, 2001, p. 54.

⁷⁵ Kitty Arambulo, *Strengthening the Supervision...*, cit., p. 154.

Justiciability is the phrase used to indicate “a right's faculty to be subjected to the scrutiny of a court of law or another judicial or quasi-judicial entity.”⁷⁶ When it is said that a human right is justiciable, this means “that a court of law or another type of supervisory body deems the right concerned to be amenable to judicial scrutiny.”⁷⁷ It is argued that economic, social and cultural rights, due to their nature and in contrast with civil and political rights, are not justiciable but instead a matter of social policy and that it should thus be left to political decision makers to decide the pace and extent to which social rights are realised.

The understanding of human rights as legally binding is an important aspect of their effective protection. Regardless of the fact that this recognition may not be the determining factor, the acknowledgement of their justiciability gives new impetus to the legally binding nature of economic, social and cultural rights and is therefore, in fact, a crucial contribution towards the effective realisation of the positive state obligations flowing from them and their protection in general. Accordingly, this conclusion merits an elaboration on the issue of justiciability or non-justiciability of economic, social and cultural rights.

The main arrow to hit the target of non-justiciability is the conviction that the formulation of economic, social and cultural rights is too vague and imprecise to determine the normative content of the rights and corresponding state obligations. This would subsequently leave a judicial or quasi-judicial body unable to apply them in concrete cases, because the necessary interpretation would automatically lead to social policy making. Supposedly, too many elements would need filling in to come to a viable normative content.

Though it can indeed be said that legal norms are at times vague and in need of further defining, this goes in general for international legal norms and holds true for both sets of human rights. It has been underlined by the CESCR that some economic, social and cultural rights are in fact as precise as most civil and political rights. As discussed above, the CESCR enumerated those provisions of the ICESCR capable of immediate application and, “[t]o the extent that economic, social and cultural rights create

⁷⁶ Ibidem, p. 154

⁷⁷ Ibidem, p. 57. It should be noted that, though used interchangeably, justiciability is similar to the concept of enforceability, but not identical. Arambulo points out in this aspect that “[e]nforceability of a right may also have [the connotation of amenability to judicial scrutiny], but may additionally denote that the decision of a court of law or a supervisory body regarding that right can actually be executed and put into effect, thus comprising a wider range of effects.” (Ibidem, p. 57)

immediate obligations, there can be no doubt as to their justiciability.”⁷⁸ Accordingly, the CESCR pointed out that “there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions.”⁷⁹ Moreover, Arambulo pointed out that “the vagueness of the obligations in both Covenants is not a rigid and static given, but can be diminished by means of interpretation”⁸⁰ – as is demonstrated by practices of monitoring bodies of civil and political rights as well as those of economic, social and cultural rights. Actually, it can be said that “our present understanding of civil and political rights as fairly precise is due to the fact that treaty bodies such as the European Court of Human Rights and the Human Rights Committee, via individual petition procedures, gradually have defined the legal content of the rights.”⁸¹

Evidently, the actual application in concrete cases demonstrates justiciability.⁸² Though yet to become mainstream, expanding national and international case law confirms that, in essence, there are no fundamental obstacles to the judicial enforcement of economic, social and cultural rights. Internationally, two important developments must be noted. Firstly, on a truly international level, there is the draft Optional Protocol to the ICESCR, which would enable the CESCR to review individual complaints based on the rights of the Covenant. An open-ended working group to consider the possibilities of an Optional Protocol has been established in 2004 and had its third session in February of this year. There are several merits to the establishment of an Optional Protocol, amongst which the clarification of states parties obligations under the ICESCR and assistance in the protection and promotion of the Covenant. Furthermore, it would encourage the development of domestic jurisprudence and strengthen the enforcement of economic, social and cultural rights and as such increase the possibilities for people to be remedied for infringements of their rights. As a result, the Optional Protocol would reinforce the universality, indivisibility, interrelatedness and interdependence of all human rights. Of course, it remains to be seen what the actual outcome of the process will be, but the development in itself is promising. In the meantime, it may be possible for another

⁷⁸ Eva Brems, *Human Rights: Universality and Diversity*, The Hague, Martinus Nijhoff Publishers, 2001, p. 447.

⁷⁹ United Nations Committee on Economic, Social and Cultural Rights, General Comment 9, the domestic application of the Covenant, 3 December 1998, E/C.12/1998/24, para. 10.

⁸⁰ Kitty Arambulo, *Strengthening the Supervision...*, cit., p. 97.

⁸¹ Ida Elisabeth Koch, *The Justiciability of...*, cit., p. 7.

⁸² See for instance Sandra Liebenberg, *The Protection of Economic and Social Rights in Domestic Legal Systems*, in A. Eide et al. (eds.), *Economic, Social and Cultural Rights: a Textbook*, Dordrecht, Martinus Nijhoff Publishers, 2001, pp. 55-84.

committee with competence to consider individual communications to consider issues related to economic, social and cultural rights in the context of its treaty.

Secondly, on a regional level, a complaints mechanism has been established under the European Social Charter in 1995, with the signing of a protocol establishing the right to lodge complaints of violations of the Charter with the European Committee of Social Rights. The protocol entered into force in 1998. Though the system has a few shortcomings, as it only allows for collective complaints as opposed to individual ones and then only by organisations that have been granted participatory status with the Council of Europe, it does increase the Charter's authority as a legally binding instrument – a position that has been seriously diminished in the past. The procedure itself is slightly different from that of the United Nations committees, and certainly very different from that of the other European monitoring mechanism, the European Court of Human Rights. After initial consideration of a complaint's admissibility, the Committee takes a decision on the merits of the complaints on the basis of a written procedure and, if it decides so, a public hearing. This non-binding decision is forwarded to the parties concerned and to the Committee of Ministers, which adopts a resolution on the basis of the -public- report. They may also recommend specific measures to the state concerned to bring the situation into line with the European Social Charter. This procedure shows the desire of governments to stay in charge of the outcome, by having the last word in the matter. Nonetheless, the institution of a complaints mechanism acknowledges the perception of justiciability of economic, social and cultural rights and consequently, contributes to a better understanding of such rights and the obligations stemming from them.

In recent years, domestic have adjudicated issues related to the enjoyment of economic, social and cultural rights, offering an adequate remedy to the victims. Consequently, a jurisprudence surrounding economic, social and cultural rights has gradually emerged. Indeed, today, an increasing number of countries, across all continents and legal systems, have incorporated judicial review of economic, social and cultural rights.⁸³

In its discussion concerning the validity of the new constitution, the South-African Constitutional Court noted that in their view “it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different

⁸³ These include South Africa, Finland, Argentina, Mauritius, Canada, Latvia, France, India, Bangladesh, Nigeria, and most countries in Central and Eastern Europe.

from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers.” Moreover, the Court considered that “many of the civil and political rights [...] will give rise to similar budgetary implications without compromising their justiciability” and the fact that “socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability.” Consequently, in the Court's view, “[socio-economic rights] are, at least to some extent, justiciable.”⁸⁴

In the gradual acceptance of justiciability of (some) economic, social and cultural rights, the viability and necessity of the understanding of tripartite obligations have been brought up for questioning. The CESCR itself is not always consistent in its application of the trichotomy and the picture presented inevitably is a blurry one, showing the difficulty of trying to fit obligatory measures into the typology.

Meanwhile, the tripartite typology has not been adopted by those bodies working with civil and political rights, though the common perception that human rights obligations are much more nuanced than the classical perception of economic, social and cultural rights as entirely positive and civil and political rights as merely negative, has been widely accepted. The European Court of Human Rights has a long tradition of reading positive elements into the Convention's civil and political rights. While the Court recognises that the ECHR includes both positive and negative obligations, actual cases show that the distinction between the two is blurred – resembling the analyses of the CESCR. The Court however, “abstains from trying to define the indefinable, and the unclear boundaries between the two kinds of obligations seems to be no hindrance to the ECtHR in its concrete decision-making.”⁸⁵ This would lead to the conclusion that, as “judicial bodies [...] have provided evidence of the fact that the protection of social demands does not depend on typologies”⁸⁶ it may be time “to throw typologies overboard [...] and focus on what it takes to provide proper human rights protection.”⁸⁷

However, though it is certainly true that the difficulty of defining obligations under the trichotomy may (partially) strip the typology from its applicability as an analytical tool, this leaves us somewhat caught in a vicious circle. After all, part of the reason that civil

⁸⁴ South Africa, Constitutional Court, In re: Certification of the Constitution of the Republic of South Africa, 6 September 1996, 1996 (10) BCLR 1253 (CC), para. 77.

⁸⁵ Ida Elisabeth Koch, *Dichotomies...*, cit., p. 100.

⁸⁶ *Ibidem*, p. 102.

⁸⁷ *Ibidem*, p. 103.

and political rights can be applied without having to resort to difficult mechanisms of defining obligations under a particular typology is exactly the fact that (quasi-)judicial bodies dealing with civil and political rights do not need to justify the justiciability of these rights. Due to the fact that economic, social and cultural rights have for long been considered non-justiciable without questioning, quasi-judicial bodies dealing with these rights have needed to demonstrate competence in dealing with this matter.

A much clearer point tackling the issue of perceived vagueness is the fact that to a point, it is simply not possible to delineate social rights in a very precise manner – not in international instruments, nor in national ones. In national law too, does the legislature often give up and “leaves it to the social and medical professions to format the rules on a step-by-step basis within the given financial limits often set out by local self-government.”⁸⁸ Nonetheless, it is clearly not the case that for this reason the respective executive would not be accountable to legal control. The choices made by the administration must be in accordance with human rights principles. It is the task of the judiciary to decide, not whether the choices are suitable or appropriate, but whether they fall within the constitutional and human rights framework to which the government has obliged itself. In fact, it may indeed be pointed out that “[d]emanding that courts abdicate all responsibility in the interpretation of such standards would disturb the balance between the judiciary and the executive.”⁸⁹

2.3.4 Concluding Remarks

Despite the inspiring words of international treaties and United Nations declarations, the indivisibility and interdependence has for long remained theory. Partly, this is due to the marginalisation of economic, social and cultural rights in relation to civil and political rights, to which several factors have contributed. The downplay of the legal obligations following from treaties dealing with economic, social and cultural rights can partially be blamed on the wording of the provisions in question. Their inherent vagueness, though not necessarily different to the inherent vagueness of any other international human rights provisions, combined with the qualifying element of progressive achievement and their assumed high costs, has led to the belief that they can not be applied in court. In other words, that they are not justiciable.

⁸⁸ Ida Elisabeth Koch, *The Justiciability of...*, cit., p. 33.

⁸⁹ *Ibidem*, p. 36.

Yet, it has become clear that the assumed high costs are not in all cases different from the costs of civil and political rights. The notion that these latter are completely free has for long been abandoned, and the recognition of positive obligations has brought a redefinement of the human rights obligations in general. All human rights are considered to be subject to a tripartite obligation to respect, protect and fulfil such rights. This realisation has been supplemented by a further concretisation of economic, social and cultural rights, which tackled in part the apprehension of vagueness. And, in addition, the trichotomy itself has helped in further defining of the obligations.

There is a point however, in the observation that “[t]he 'very simple tripartite typology of duties', then, was not supposed to become a new frozen abstraction to occupy the same rigid conceptual space previously help by 'negative rights' and 'positive rights'.”⁹⁰ Indeed, we must steer clear from too rigid abstractions and the wish to oversimplify the issues. At the same time though, while it is more and more commongood to assume that “[e]conomic, social and cultural rights are now widely recognized as enforceable in the courts (justiciable) under both national and international law,”⁹¹ economic, social and cultural rights still face the danger of being downplayed and, subsequently, apprehension in their legal application. Without a doubt, the focus must be to “look at what it actually takes to enable people to be secure against the standard, predictable threats to their rights”⁹² and to concentrate on the implementation of the corresponding duties. It may however be too soon to set aside the mechanism that lead to the actual re-establishment of economic, social and cultural rights – at least until the international protection mechanism has been upgraded to a genuine quasi-judicial body to do away with domestic judicial apprehension.

2.4 The Human Rights of Children

Though it is clear from the previous paragraph that reasons for the distinction between the two sets of rights are trivial, at times it remains an issue that it has so distinctively been pointed out that economic, social and cultural rights are (in part) subject to progressiveness and available resources, and not at all for civil and political rights. The two separate Covenants, an eventuality that is possibly even more trivial, seem to stress

⁹⁰ See Shue, *Basic Rights. Subsistence, Affluence and U.S. Foreign Policy*, Princeton University Press, 1996, p. 160 and Jeremy Waldron, *Liberal Rights: Collected Papers 1981-1991*, Cambridge University Press, 1993, p. 25, as quoted in Ida Elisabeth Koch, *The Justiciability of...*, cit., p. 10.

⁹¹ Amnesty International, *Human Rights for ...*, cit., p. 9.

⁹² *Ibidem*, p. 10-11.

the difference, symbolically standing in the way of the true conceptualisation of indivisibility, interrelatedness and interdependence. But, the Convention on the Rights of the Child does not have this clear distinction. Instead, all rights of children are contained in the one convention and no clear categorisation of rights exists at all. As pointed out in the first paragraph, this comprehensive nature is not only a symbolical and actual reaffirmation of the notion of indivisibility, complementarity and interdependence, and equal importance of human rights, but also a substantial outcome of the holistic perspective of the Convention's framers.

Accordingly, the Committee on the Rights of the Child instead established a division along thematic lines – first and foremost highlighting the general principles. The Committee considers that, while all rights are equally important for the dignity and development of the child, the general principles are significant for the understanding of each of the rights of the Convention. They must be taken into account in the implementation of the Convention in total, *and* in the implementation of the separate rights.

Still, article 4 of the Convention does include a limitation addressing the implementation of economic, social and cultural rights. Therefore, after taking a closer look at the general principles of the Convention, this paragraph will elaborate on the specific aspects of economic, social and cultural rights in the CRC, in order to consider the similarities and dissimilarities between this concept in general human rights law and with regard to children's rights due to the CRC's specific characteristics.

2.4.1 General Principles

As mentioned above, the Committee has identified four articles of the Convention as general principles,⁹³ which must be taken into account in the implementation of the Convention in total, and even more importantly, in the implementation of each of the separate rights recognised in it. This paragraph will consider each of the general principles separately, in order to determine their overall meaning for the rights of children.

⁹³ United Nations Committee on the Rights of the Child, General guidelines initial reports..., cit. and United Nations Committee on the Rights of the Child, General guidelines periodic reports..., cit.

Article 2: the principle of non-discrimination

In the first chapter, article 2(1) has shortly been discussed, to consider the application of the CRC to non-citizen children. It holds that “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status” and as such sets out the fundamental obligations of states parties in relation to the rights outlined in the remainder of the Convention,⁹⁴ namely to “respect and ensure” all the rights in the Convention to all children in their jurisdiction without discrimination of any kind.

However, the principle encompasses more than setting the scope of applicability of the Convention. It also sets the terms under which the provisions of the Convention must be guaranteed – namely without discrimination of any kind. The Human Rights Committee stated that the term “discrimination” should be understood to imply “any distinction, exclusion, restriction or preference which is based on any ground [...] and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”⁹⁵ However, the HRC continued to say that this does not mean identical treatment in every instance and emphasised that states will often have to take affirmative action to diminish or eliminate conditions that cause or help to perpetuate discrimination.⁹⁶ The Committee on the Rights of the Child has, in this regard, consistently underlined the need to give special attention to disadvantaged and vulnerable groups and certain articles in the Convention set out special provisions for children particularly prone to forms of discrimination.⁹⁷

The second paragraph of article 2 supplements the protection against discrimination, asserting the obligation to protect children from all forms of discrimination or punishment on the basis of the status or activities of their parents and others close to them.⁹⁸

⁹⁴ Together with articles 3(2), considered shortly hereafter, and 4, which will be considered in subparagraph 2.4.2.

⁹⁵ United Nations Human Rights Committee, General Comment 18, Non-discrimination, 10 November 1989, para. 7.

⁹⁶ Ibidem, para. 13: “Finally, the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.”

⁹⁷ This includes specific reference to refugee children in article 22.

⁹⁸ Article 2(2) CRC reads: “States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.”

Article 3: the best interests of the child

Article 3(1) CRC asserts that “[i]n 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”. In short, the article underscores that governments and public and private bodies must ascertain the impact their action's have on children, ensuring that the best interests of the child are a primary consideration, and give proper attention to children and their interests.

The article refers to “all actions concerning children” rather than to the rights recognised in the Convention and it may therefore be assumed that the article “is applicable in conjunction with each of the CRC's substantive provisions as well as with respect to actions that are not covered by express obligations pursuant to the CRC.”⁹⁹ Hence, the best interests of the child must be a primary consideration in issues noted in the Convention *and* with regard to matters directly considered in one of its provisions. Accordingly, in relation to issues where the Convention is silent or contains provisions that are insufficient for the Committee to expound on, the principle provides a basis for a broader, policy-oriented interpretation of the Convention. This way, the Committee elaborates on the issues in question, but also on the Convention as a whole. Finally, though the article's implications may be clearer when considered in conjunction with specific rights, the Committee also uses the principle as an “umbrella” principle – by way of which it should inform and give guidance to all relevant governmental activities.

The article inserts a degree of flexibility by use of the expression “a primary consideration” rather than “the primary consideration.” This indicates that the best interests of the child should be a consideration of first importance, but does not have absolute priority over other considerations. Nonetheless, this merely leaves the option open that, “at least in certain extreme cases, the interests of people other than the child or children [may] prevail”¹⁰⁰ – the overall standard remains that actions should be taken in the best interests of the child.

The second paragraph of the article outlines an “active overall obligation of States, ensuring the necessary protection and care for the child’s well-being in all

⁹⁹ Sharon Detrick, A Commentary..., cit., p. 90.

¹⁰⁰ Sharon Detrick, A Commentary..., cit., p. 91.

circumstances, while respecting the rights and duties of parents.”¹⁰¹ The provision, relating to the overall obligations of states,¹⁰² serves to fill any gaps or lacunae left by the Convention and “not simply a restatement or reiteration of the specific obligations undertaken under subsequent provisions of the Convention.”¹⁰³ Thus, “if a child's well-being is denied by virtue of an act or omission which is not specifically proscribed in the Convention, the State party would nonetheless be under an obligation, pursuant to this umbrella provision, to take 'all appropriate measures'.”¹⁰⁴

Article 3(3), finally, is rather straightforward, requiring of states parties to ensure that appropriate standards are established for all institutions, services and facilities responsible for the care or protection of children – particularly in the areas of safety, health, in the number and suitability of their staff. In addition, the state is obliged to see to it that these standards are complied with.

Article 6: the right to life, survival and development

Article 6 guarantees the child the fundamental right to life, as upheld as a universal human rights principle in other instruments – meaning that no derogation is permitted and that it is basic to all human rights.¹⁰⁵ Moreover, the article actually goes beyond the rather negative right to life as included in the general conventions, incorporating the obligation to ensure, to the maximum extent possible, the child's survival and development. The inclusion of this obligation is a direct result of the holistic approach, relating the right to life directly to the economic and social rights of children – it can be considered the platform to all other articles in the Convention dealing with economic, social and cultural rights for children.¹⁰⁶

Survival and development are linked in the sense that the child's survival should be ensured in order to realise the full development of its personality. While the right to survival indicates an obligation for the state to take positive steps to secure and prolong the life of the child, including steps such as the reduction of infant mortality, the term

¹⁰³ Philip Alston, *The Legal Framework of...*, cit., p. 9.

¹⁰⁴ Ibidem.

¹⁰⁵ The Human Rights Committee has held that no derogation is permitted of the right to life and that it is “basic to all human rights”. (Sharon Detrick, *A Commentary...*, cit., p. 126).

¹⁰⁶ “According to the CRC's *travaux préparatoires*, [the qualifying phrase “to the maximum extent possible”] was inserted in order to indicate that economic, social and cultural conditions were allowed to be taken into account by the States parties in the implementation of their positive obligation to ensure the right to survival and development.” (Ibidem, pp. 131-132)

development adds a qualitative dimension to this survival and should be understood in a broad sense, referring not only to physical health, but also to mental, emotional, cognitive, social and cultural elements.¹⁰⁷

The article is explicitly listed as a priority before other rights of the child and the concept of “survival and development” is crucial to the implementation of the whole Convention. So while the reference to “the maximum extent possible” implies a recognition that implementation requires resources, implementation of this right should nevertheless be given prime concern.¹⁰⁸

Article 12: respect for the views of the child

Article 12(1) gives “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.” This latter consideration, all matters *affecting* the child, reveals a broad application including matters that do not explicitly follow from a specific rights provision of the Convention. Moreover, article 12(1) concludes to ensure that children are not just allowed to express their views, but also to have those views taken into consideration by according that they shall be “given due weight in accordance with the age and maturity of the child.” Finally, the second paragraph of the article encompasses the right “to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body.”

Though the rights in article 12 do not provide a right to self-determination, they do grant actual involvement in decision-making. This illustrates the underlying view that the child must be regarded as an active subject of rights and that a key purpose of the Convention is to emphasize that human rights extend to children.

The general principles connected

The principles here discussed constitute the fundamentals of the CRC. As noted, they must be taken into account in the implementation of the Convention in total, *and* in the implementation of each of the separate rights.

¹⁰⁷ Already in 1982, the Human Rights Committee linked the right to life to the right to food and the right to health. United Nations Human Rights Committee, General Comment 6, the right to life (Article 6), 30 April 1982, para. 5.

¹⁰⁸ More about the nature of economic, social and cultural rights in the next subparagraph.

The underlying connections between the four principles can best be viewed as a triangle, constituted of the principles of non-discrimination, best interests of the child and respect for the child's views and assigned to protect the child's right to life, survival and development. Indeed, the Committee on the Rights of the Child sees the child's development as a holistic concept, and many articles of the Convention specifically refer to the goal of development. It forms the basis and platform for all other articles dealing with economic, social and cultural rights for children.

However, this brings us to the question what the implications are of the qualifying phrase in article 6 – insurance of survival and development *to the maximum extent possible*. Does this reflect all the limiting aspects in relation to economic, social and cultural rights that have been discussed above? And, when looking at the Convention on the Rights of the Child, does the nature of children's rights, as opposed to adults' human rights, possibly establish state obligations of a stronger variety?¹⁰⁹ In order to answer these questions, the following paragraph will consider the specific aspects of economic, social and cultural rights in the CRC.

2.4.2 Nature of Economic, Social and Cultural Rights in the CRC

As considered shortly above, the state obligations incorporated in the Convention on the Rights of the Child seem to be qualified with respect to economic, social and cultural rights – with regard to which article 4 considers that states parties shall “undertake all appropriate legislative, administrative, and other measures [...] to the maximum extent of their available resources.”¹¹⁰

The goal of the article is to address the problem of resource limitations – but not all provisions were considered to be prone to this problem. For this reason, no general limitation was included, as it would have also weakened those provisions that were not targeted, but a distinction along the line of the divide between the two general human rights covenants was made instead.

~~social and cultural rights~~, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.”

Unfortunately, the formulation of the limitation did not take into account the growing acknowledgement that economic, social and cultural rights are not the only rights demanding substantial resources, or consider the fact that some aspects are in fact not expensive. Moreover, following the ambition to uphold a holistic view of children's rights, any further distinction was avoided during the drafting of the Convention. As a consequence, it is not obvious which of the substantive articles of the Convention actually fall in this category – leaving the precise meaning of the reference to economic, social and cultural rights in this context less than clear.¹¹¹

Still, as opposed to the general obligations under the ICESCR, article 4 of the CRC does not include a clause expressing the possibility of progressive realisation. Under the CRC, the option for a gradual approach is not generally included, but in fact limited to a few specific articles.¹¹² The majority of the norms in the Convention however, including those that may have an “economic and social component”, have no such limitations. Hence, the obligation to take all appropriate legislative, administrative and other measures for the implementation of the Convention arises immediately – even though resource constraints may prevent the state from reaching complete fulfilment. Article 2 (1) of the ICESCR actually contains a comparable phrase – “to the maximum of its available resources”. The CESCR has noted in this respect that “even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances.”¹¹³ The emphasis of the phrase therefore, lies on the words *to the maximum extent*, rather than on the available resources. In addition, it must be noted that these resources “should not be seen as static [as it includes] the *mobilization* of

¹¹¹ Alston considered in this respect, that there are two indicators showing that the right in question has an “~~economic and social component~~”. Firstly, the presence of phrases such as *subject to available resources* and *within their means* would indicate as much, and secondly, a significant similarity between the formulation used in an article in the CRC and its counterpart in the ICESCR would also allow for this conclusion. (Philip Alston, *The Legal Framework of...*, cit., p. 11).

¹¹² The phrase “with a view to achieving progressively” is used in article 24(4), regarding the right to health, and article 28(1), regarding the right to education.

¹¹³ United Nations Committee on Economic, Social and Cultural Rights, General Comment 3, cit., para. 11. The CESCR noted further that the expression was intended to refer to both the resources existing within a state and those available from the international community through international cooperation and assistance. This intention very clearly follows from the CRC, as the final words of article 4 directly refer to international cooperation. The CtRC frequently refers to this aspect of article 4 in Concluding Comments, though it remains difficult to ascertain the extent to which the reference to international cooperation actually gives rise to a legal obligation on the part of the richer states parties to provide assistance to poorer states in situations where the latter are prevented from fulfilling their obligations due to a lack of resources. It falls outside the scope of this thesis, however, to elaborate extensively on this question.

resources [for the fulfilment of the rights of the Covenant]”¹¹⁴ and may include resources made available by the international community or through international cooperation.¹¹⁵

The CESCR has also established that there is a “minimum core content” with regard to each economic, social and cultural right, that all state parties are obligated to fulfil. This means that the effect of resource constraints does not go so far as to discharge a from its minimum core obligation “to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights.”¹¹⁶ With regard to children's rights, two important points can be made with regard to this obligation. First of all, the minimum core obligation of children's rights may differ from that of adults, in part because of a possible different wording of a specific article, and in part because of a different explanation as a result of the holistic approach of the CRC and the fact that key importance is accorded to children's survival and development.

Connected to the minimum core content is the question what resources of the overall budget are available for children's rights and how budgets can and cannot be trimmed during a period of recession or economic crisis. Two important international developments may offer some direction in this respect, namely the 1990 World Summit for Children and the 2002 General Assembly Special Session on Children on the one hand, and the Millennium Development Goals on the other.

The 1990 and 2002 conferences both emphasised the necessity to give high priority to programmes for the well-being of children, and additionally affirmed that children's rights must receive primary attention. The Special Session outcome document “A World Fit for Children”¹¹⁷ reaffirmed the general principles of the Convention, as outlined above, and indicated those as the core principles and objectives with regard to children's rights and policy measures. In addition, a commitment was made to the unfinished agenda of the 1990 World Summit and to achieving additional goals – particularly those of the Millennium Development Goals.

In addition, the Millennium Development Goals (MDG's) should be an important element in the consideration of budget allocation. Following from the Millennium Declaration, which was concluded at the Millennium Summit from 8-10 September

¹¹⁴ Thomas Hammarberg, Children, in A. Eide et al. (eds.), *Economic, Social and Cultural Rights: a Textbook*, Dordrecht, Martinus Nijhoff Publishers, 2001, p. 365.

¹¹⁵ See also note 113.

¹¹⁶ United Nations Committee on Economic, Social and Cultural Rights, General Comment 3, cit., para. 10.

¹¹⁷ United Nations General Assembly, *A World Fit For Children*, 11 October 2002, A/RES/S-27/2.

2000, these goals seek to set the priorities for states' action on a national and international level. The Declaration established key objectives to which special significance is assigned, such as “human rights” and “the protection of the vulnerable” and identified eight goals to direct governmental policy. In fact, three of the eight goals directly concern children¹¹⁸ and three more address issues that are of particular relevance to children¹¹⁹ – prompting UNICEF to add that the MDGs “are about children”.¹²⁰ They also indicated that “six of the eight goals [...] can best be met as the rights of children to health, education, protection and equality are protected”¹²¹ and that these same six goals match the goals set out in “A World Fit for Children”.

Neither the outcome documents of the 1990 World Summit for Children and the 2002 General Assembly Special Session, nor the Millennium Development goals are legally binding documents. Instead, they are political documents, stating the will of the governments subscribing to them. They are also policy documents – states' agreement on what can be called “international policy”, setting out the priorities amongst the different obligations and the actions that should be carried out in order to achieve these obligations. As such, they shape a state's policy, to a certain extent. The two summits, but the Millennium Development Goals even more so, demonstrate the high priority of children's rights – which should be reflected in national policy.

This priority setting actually fits closely with the immediate nature of the Convention's obligations and the wording of article 4. The CtRC held accordingly that “in the light of article 4 of the Convention [...] priority be given in budget allocations to the realisation of the economic, social and cultural rights of children, with particular emphasis on the enjoyment of these rights by disadvantaged children.”¹²² Moreover, the Committee regularly blames states for not taking adequate measures to ensure these rights to the maximum extent of their available resources.¹²³ It is important to note that the CtRC goes further here than the CESCR, which relatively rarely comments on a state's budget allocation. It is clear for the CtRC that “even if very few resources are available, these

¹¹⁸ Millennium Development Goals 2 (achieve universal primary education), 4 (reduce child mortality) and 5 (improve maternal health).

¹¹⁹ Millennium Development Goals 1 (eradicate extreme poverty and hunger), 3 (promote gender equality and empower women) and 6 (combat HIV/AIDS, malaria and other diseases). The other two goals are to ensure environmental sustainability (7) and to develop a global partnership for development (8).

¹²⁰ UNICEF, *The Millennium Development Goals: They are about children*, New York, UNICEF, 2003, p. 4.

¹²¹ *Ibidem*, p. 4.

¹²² See Eva Brems, *Universality....*, cit., p. 355.

¹²³ *Ibidem*, p. 355.

should go in the first place to the basic needs of children, including the resources deriving from international development aid.”¹²⁴

2.4.3 Concluding Remarks

The most notable characteristic of the Convention is its aim of highlighting both the aspects of the child as *holder* of fundamental rights and freedoms and as *recipient* of special protection and care. It is this combination that guarantees the child's harmonious development and constructive part of society. Children, especially when they are very young, are vulnerable and need special support to be able to fully enjoy their rights. The acknowledgement of development as a holistic concept, lying at the heart of the Convention, provides a clear answer on the question how to achieve the goal of granting children equal value while at the same time giving them the necessary protection. Moreover, the fact that the child's best interests are, where relevant, explicated with the child's active participation and form an essential part of the decision-making, contributes significantly to sustaining this intention.

Apart from serving to clarify the Convention as a whole, the general principles tie in with the immediate obligations that follow from the ICESCR. The vagueness that may still exist with regard to some of the rights of the ICESCR, is partly alleviated with regard to children because of the clear goals of the CRC. Also, it follows that the minimum core content of children's rights cannot indiscriminately be adopted/assumed from that of adults but must instead be defined along the lines of the CRC. The explicit avoidance of any categorisation along the lines of the general human rights treaties is a commendable and remarkable feat of the drafters and should not be taken lightly. The holistic approach impacts on the meaning of children's economic, social and cultural rights – as do the general principles. Aforementioned is illustrated by the priority that is assigned to children's rights by the international community, and in turn underlined by the CtRC's attention to the prioritisation of children's needs in the budget allocation of states. Where a priority is undertaken, accountability may be requested.

In essence, the CRC forms an illustration of the relationship between the general and the concrete contributing to the substantive equality of children. Not every group has precisely the same interests or needs for protection, nor does this protection necessarily take the same shape in all instances. This notion and this relationship are even more

¹²⁴ Ibidem, p. 355. With regard to international resources, see note 113.

significant for refugee children, who form a particular group for more than one reason. Not only are they children, requiring specific protection as was outlined in this chapter, they are also children with specific needs due to the fact that they are refugees. The following chapter will therefore zoom in on the needs of refugee children in particular and look specifically to the issues they face and the rights that relate to these issues, in order to determine the corresponding obligations of the host state towards these children.

Chapter 3

THE HUMAN RIGHTS OF REFUGEE CHILDREN

Refugee children are first and foremost children. This recurrent observation prominently figures in most discussions that concern their plight – but it does not always guide the actual practice that deals with refugee children. After considering the existing standards that guide refugee practice in general in the first chapter and children's human rights in the second chapter, this chapter will combine these two regimes to determine what the standards should be that apply to refugee children – particularly with respect to their economic, social and cultural rights.

In order to do so, the first paragraph will review how the obligations under the CRC and under the Refugee Convention relate to each other in the particular issues that refugee children face by discussing general and special protection measures for refugee children and their facilitation and the issue of enduring protection of refugee children. To place the different issues and protection measures in a broader perspective, the holistic structure and the economic, social and cultural component will be evaluated subsequently.

The practical application of the established principles has been determined in a number of cases. The second paragraph will go into five cases, relating to social security in general and to medical assistance, and so illustrate how principles of economic, social and cultural rights impact on the actual entitlements of refugee children and the state's correlating obligations.

3.1 The Issues and Standards

As constituted above, the Refugee Convention and the international refugee protection system are fully applicable to children, but they lack in specific understanding of children's situation and particular needs. The Refugee Convention focuses mainly on adults and does not take into account the particular vulnerability and special needs of children.

The Convention on the Rights of the Child is applicable to all children residing or otherwise present in the territory of a state party, whether the child is a national of that state or not. This means not only that governments must take measures to ensure the rights of the Convention to all children in the state, including visitors, refugees, children of migrant workers and those in the state illegally, but also that where children are concerned, the Refugee Convention's provisions and implementation, and the refugee protection system, must be understood in light of the provisions of the CRC. The CRC has specifically been concluded to elaborate on the obligations relating to children's needs and is intended to better guarantee their rights – it identifies the concrete actions that must be undertaken and considerations that must be taken into account.

Moreover, the CRC explicitly recognises refugee children as a particularly vulnerable group with special needs. According to article 22, states must ensure that they receive appropriate protection and humanitarian assistance in the enjoyment of the Convention's rights – and the rights guaranteed in other human rights and humanitarian instruments to which that state is a party.¹²⁵

Three dimensions of the article request attention before moving on to the consideration of the substantive meaning of the article. First of all, the article constitutes an additional form of protection – it recognises that this group of children has specific needs that normal children do not have and that they are particularly vulnerable for violations of their rights. Nevertheless, the general rights of the Convention are applicable in the same way as they are to regular children. Secondly, it covers children with official refugee status and children seeking this status, but as pointed out by UNICEF, “in any event the [CRC's] provisions cover **all** children within the country's jurisdiction (article 2), so even those children who have been refused refugee status are still protected as long as they remain in the country.”¹²⁶ Finally, article 22 requires states to ensure that

¹²⁵ Article 22 reads in full:

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

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.”

¹²⁶ Rachel Hodgkin, *Implementation Handbook...*, cit., p. 313.

refugee children receive protection and assistance with regard to the CRC, but also with regard to other international human rights or humanitarian instruments to which the state concerned is party. Yet, as the CRC is “the normative framework for action to protect and care for children”¹²⁷, only the CRC will be considered here.

In their latest Conclusion regarding refugee children, the UNHCR Executive Committee pointed out that due to their specific needs and vulnerability, refugee children and adolescents “need to be among the first to receive protection and assistance in any refugee situation.”¹²⁸ This “widely-recognized principle”¹²⁹ is in line with the general understanding that (all) children's rights should receive primary attention in the realisation of human rights, as was considered above. Furthermore, the Executive Committee noted specific risks for refugee children in a number of Conclusions¹³⁰ and accordingly, the Committee on the Rights of the Child (CtRC) and UNHCR have indicated several articles of the CRC that are of particular relevance for refugee children.¹³¹ Both the UNHCR Policy on Refugee Children¹³² and subsequent “Guidelines on Protection and Care”¹³³ are based on the norms of the CRC¹³⁴ and are regarded as the coordinating principles in situations where issues concerning refugee children arise – and should be applied as such.

The UNHCR Guidelines address the most important issues with regard to refugee children. Apart from the general principles and the triangle of rights on which the CRC is based – appropriately considered as key factors – the guidelines identify nine topics of specific relevance: culture, psycho-social well-being, health and nutrition, prevention and treatment of disabilities, personal liberty and security, legal status, education, unaccompanied children and durable solutions. Each of these matters is in fact related directly to the 'heart' of the triangle of rights, the right to life, survival and development,

¹²⁷ ExCom Conclusion 71 para. w

¹²⁸ ExCom Conclusion 84

¹²⁹ ExCom Conclusion 47 para. c

¹³⁰ The Executive Committee has considered three conclusions specifically on refugee children: ExCom Conclusions no. 47 (1987), no. 59 (1989) and no. 84. See also note 38.

¹³¹ United Nations Committee on the Rights of the Child, General guidelines initial reports..., cit. and United Nations Committee on the Rights of the Child, General guidelines periodic reports..., cit.

¹³² Executive Committee of the UNHCR Programme, UNHCR Policy on Refugee Children, 6 August 1993, EC/SCP/82.

¹³³ UNHCR, Refugee Children: Guidelines on Protection and Care, Geneva, UNHCR, 1994.

¹³⁴ The CtRC noted that the guidelines were “fully inspired by the Convention and shaped in the light of its general principles.” (Report on the seventh session, November 1994, CRC/C/34, p. 61).

which in turn is addressed in the comprehensive and holistic manner that is characteristic for the CRC.¹³⁵

3.1.1 Special Protection Measures for Refugee Children

The most immediate obligation that follows from article 22 is the protection of refugee children from the specific risks that they face due to their flight, in addition to the protection they are already afforded following from the CRC itself. The Executive Committee has indicated several particular risks to refugee children in its Conclusions, which are included in the UNHCR Guidelines and on the basis of which specific protection measures are considered under most headings – in particular in the chapters dealing with children's personal liberty and security, legal status and with regard to unaccompanied children. The Guidelines observe that while the safety of children is sometimes threatened or violated in normal society, this is even more so the case in refugee situations. Following the concerns of the Executive Committee, it notes that “[r]efugee children are sometimes victims of military and armed attacks, recruited into armed forces or groups, used as forced labour, abducted, irregularly adopted, physically and/or sexually abused including through torture, exploited, discriminated against, abandoned, neglected and subjected to arbitrary and inhumane detention.”¹³⁶ Additional threats to the personal liberty and security of refugee children identified by the Executive Committee are physical violence, the presence of armed elements in refugee camps or settlements, landmines and the trafficking of persons. Also, forced family separation and the risk of statelessness, specifically with regard to victims of trafficking, are frequently mentioned as well.

Finally, unaccompanied children require particular attention.¹³⁷ Where children are separated from their family, a process of tracing their relatives (family tracing) must be started as soon as possible. This also requires correct registration of children as unaccompanied and in the meantime, special care measures to ensure the child is safe and cared for. A regular problem is the refusal to consider claims of unaccompanied children under the Refugee Convention. Like all people, they are entitled to request asylum and protection under the Refugee Convention, which must be ascertained when

¹³⁵ In this respect, the guidelines point out that “[e]ach right has been placed in the Convention on the Rights of the Child because it helps answer a developmental need of children. [...] The CRC is not just a legal treaty, it is a moral statement and a practical guide to the welfare of children.” (UNHCR, *Refugee Children...*, cit., p. 28).

¹³⁶ Ibidem, p. 79.

¹³⁷ “Unaccompanied children are those who are separated from both parents and are not being cared for by an adult who, by law or custom, is responsible to do so.” (Ibidem, p. 121).

the criteria of article 1(2) have been fulfilled. Nevertheless, in many instances, the claim of the child is not considered, but instead the child is offered some form of temporary protection – resulting in fact in reduced protection.¹³⁸

3.1.2 General Protection Measures for Refugee Children

Apart from threats that may be exceptionally prevalent in refugee situations, many of the difficulties that children in general might experience are in fact endemic among refugee children – yet receive (relatively) little assistance or notice. Protection measures tend to focus mainly, if not solely, at mere direct action to preserve children's physical safety and life. However, remaining alive requires more and different action, and securing a child's survival calls for the provision of health and nutrition. While health care is an important facet in facilitating a child's health needs, and the UNHCR in this respect point out that refugee children “should have access to the national health services of the host country”¹³⁹, the key determinants of a child's health status also involve factors such as food, water, environmental sanitation and shelter.¹⁴⁰ It is important to note that this requisite for food, water, environmental sanitation and shelter does not merely follow from the right to health (article 24 CRC), but also from the right to an adequate standard of living which has specifically been included in the CRC in article 27.¹⁴¹

The child's right to an adequate standard of living is an important link between the mere survival of the child and the more comprehensive element of development. It recognises that a child's development cannot be separated from its conditions of living. Also, by listing the different components of full development – physical, mental, spiritual, moral and social – article 27 makes clear that an adequate standard of living is not limited to

3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.”

the basics of food, clothing and housing, important though these are. Development is a psychological factor unique to children. Almost daily their personalities are being formed and coping skills are learned, prompting the UNHCR to assert that “[c]hildren are never on hold: developmental needs do not wait for an emergency phase of a refugee situation to end.”¹⁴² The psychosocial well-being of refugee children is as important as their physical health and must therefore be given elaborate attention.

In any refugee situation, the focus for the developmental needs of refugee children must lay on restoring the normality and routine that is essential for a healthy development – the disruption, uprooting and insecurity inherent to such situations is a considerable impairing factor to children's development. Equally important in this respect is the fact that the opportunities for normal life activities in the artificial environment of a refugee centre or camp are impossible or, at the most, limited. Refugee children here are “restricted in their freedom of movement, grow up dependant on care and maintenance support, and often live in poor conditions with little to keep them occupied.”¹⁴³ Moreover, extended stays in camps or centres have an adverse effect on the development and emotional welfare of children due to the fact that the well-being of their adult family members is also negatively affected by the long-term stay in refugee camps and centres, consequently influencing the protection and care they can offer to children.

Restoring normality includes the provision for education: “[a]ttending school provides continuity for children, and there by, contributes enormously to their well-being. For these reasons, education is a priority in terms of protection and assistance activities.”¹⁴⁴ It goes without saying though, that education in itself serves as a vital component to the development of children, and has been recognised as a universal human right and is included in the CRC.¹⁴⁵ Consequently, the UNHCR states that “[b]eing uprooted does not negate a child's right to education nor a State's responsibility to provide it” though the fact remains “that the majority of refugee children do not receive basic education.”¹⁴⁶

¹⁴² UNHCR, *Refugee Children...*, cit., p. 38.

¹⁴³ *Ibidem*, p. 46.

¹⁴⁴ *Ibidem*, p. 110.

¹⁴⁵ The right to education is included in the CRC, in article 28 and 29. It is also provided for in the Refugee Convention, in article 22. It should be noted that the provision of education to refugee children requires overcoming many obstacles and, more importantly, faces a range of specific problems that need to be addressed. The UNHCR Guidelines refers to issues on the side of the host government, such as infrastructure or lack of teachers, and to issues concerning the children themselves, such as the lack of previous schooling and language barriers. (*Ibidem*, p. 110).

¹⁴⁶ *Ibidem*, p. 109.

Survival and development are crucial elements to children's life – such has been noted several times now. These aspects to children's lives and well-being may be even more crucial for refugee children in order to pick up where their lives were disrupted, and, equally important, to fill the gap that was created (*inter alia*, by restoring relative normality, as just now discussed). The provisions relating to health and welfare, education, leisure and culture, and an adequate standard of living, are all deduced from and therefore related to the principle of the right of the child to survival and development. They elaborate and clarify the needs and corresponding rights that are important to achieve this goal and prerogative. Still, these rights are qualified with regard to the obligations of the state to fulfil these rights, so the question remains what exactly is the role of the host state with regard to the rights of and relating to survival and development.

The upbringing and development of the child is the primary responsibility of the parent (s) or legal guardian(s) of the child.¹⁴⁷ It is their right and duty to care for the child, to secure its nutritional and other health needs, to ensure a roof over its head and see to it that the child receives appropriate education and guidance to develop to a mature and responsible adult. Yet, this does not do away with the fact that states have certain responsibilities to assist and facilitate parents, to enable them to fulfil their duties. In fact, the CRC inflicts a dual role upon the state: on the one hand, it has to respect and facilitate the parents' duties and rights towards the child to raise the child. With respect to education, for instance, this means that a school system must be set up and funded, exams and diplomas should be introduced and issued, teachers should be available and appropriately educated, et cetera. At the same time, states not only have an obligation to enable parents to fulfil to their duties, but also have their own, independent obligation towards the child to ensure that parents abide by their duties and to ensure that the opportunities that exist are up to standard to meaningfully contribute to the child's development. To return to education as an example, the obligation to ensure parents abide by their duties, requires the institution of compulsory education and verify its observance, the establishing of educational standards and goals and the inspection of schools to ensure that they fulfil the standards the governments have set. This dual obligation towards parents and children is found in all rights in any way concern the

¹⁴⁷ When a child is for some reason separated from his parents, or does not have parents anymore, a legal guardian should be appointed. This guardian then takes up the responsibilities towards the child, which normally lay with the parents. Hereinafter, whenever I reflect on the parent's role, this also means the guardian's role, where applicable.

development of the child. While parents have primary responsibility for securing this development, the child and the parents are entitled to the state's assistance to achieve this.

3.1.3 Facilitation of Protection Measures for Refugee Children

The risks and threats to the refugee child's personal security, survival and development identified above are often aggravated by the lack of personal identity documentation of refugee children and the difficulties in attaining a legal status, including the long delays before any certainty is given. The UNHCR identifies three basic methods in to determine the child's refugee claim: (1) group determination, (2) determination based on an adult's claim, and (3) determination based on the child's own claim.¹⁴⁸ Group determination will sometimes confer actual refugee status under the Refugee Convention to the child, but more often the protection offered will be some form of (limited) temporary protection. Unfortunately, the procedures for status determination do not normally take into account the special situation of children. Nonetheless, in line with the general principles of the CRC, it is in fact an obligation for states to adapt their procedures to the specific needs of children to take into account their best interests. Further, the application of the criterion of a “well-founded fear of persecution” must keep in mind the child's particular vulnerability, the fact that persecution may take a different form than in adult cases and take into account the maturity of the child – which may include a modification of the interview process and an interviewer that is trained for such cases.

While these considerations are relevant in all cases, they are particularly crucial for unaccompanied children. In most cases, the child will be accompanied by one or both parents, who can assist in the status determination process. Determining the refugee status of unaccompanied children, however, is more complicated – since the determination of facts and issues depends solely on the child in question. Moreover, because they lack support from adult family members, these children are in need of special assistance during the process. Also, because they are not legally independent, an adult should be appointed that can represent them and look after their interests, most preferably in the form of a legal guardian.

¹⁴⁸ UNHCR, *Refugee Children...*, cit., p. 98.

3.1.4 Enduring (long-term) Protection for Refugee Children

Finally, considering the effects that a prolonged stay in refugee camps or centres or camp-like situations may have on children's physical and psychological developments, it is essential that a more permanent and normal solution is realised at a certain point, sooner rather than later. This requires a quick refugee status determination and certainty about their future – keeping children *in limbo* for too long is highly detrimental. This also includes a relatively early consideration of so-called “durable solutions”. The UNHCR defines three types of durable solutions, namely voluntary repatriation, local settlement in the country of first asylum and resettlement in a third country.¹⁴⁹

Unfortunately, the willingness to find durable solutions is lessening in most countries. Though there is no general human right or entitlement in the Refugee Convention to permanent residency or similar measures in the country of refuge, most countries have afforded refugees in their territory this option after several years of legal stay. This is in their own benefit, of course, because it will allow further integration of the refugees in their new country of residence and permit them to rebuild their lives and plan their futures. Also, in a sense, it could be said that at a certain point, inclusion in the society where a person lives is indeed a human right, as it is otherwise unable to meaningfully provide for your own future and to engage in interaction with your community and influence governing powers (in line with the right to participation). Especially in the cases of temporary protection and humanitarian protection, people are left in uncertainty for an unreasonably long period of time. As was pointed out in the first chapter, there are few international rules that cover such subsidiary protection measures and countries tend to prefer such regimes as it leaves them more leeway to make their own rules that may stretch compliance with international human rights law to the maximum – or simply be in violation.

In essence, this may result in an indeterminate continuation of an insecure and unclear situation and a prolongation of the displacement, with all its difficulties and problems. Children may be born in the place of asylum, or living there from infancy, and “[t]he camp, the shelter or the house of refuge will have become their primary reference.”¹⁵⁰ The UNHCR established that with regard to cases involving children, when seeking durable solutions, “careful attention should be paid to the principles of family unity and

¹⁴⁹ Ibidem, p. 137-138.

¹⁵⁰ Ibidem, p. 138.

the best interests of the child.”¹⁵¹ It must be borne in mind though, that the child's best interests may change over time. It is a violation of the CRC to exclude children from their community of refuge and to impede their development by hampering their integration and participation¹⁵² and at a certain point, it may no longer be in their best interests to be returned to their country of origin or sent to a third country while they have spent most of their life in the country of refuge. Obviously, this is not usually the case after, say, a year – but the situation in most countries of refuge is that children have been staying for many more years than that. The UNHCR emphasises the preference for voluntary repatriation where possible, and asserts that this should be actively pursued where appropriate. However, when it is not possible, local integration – possibly resulting in long-term resettlement in the country of refuge – “should be explored.”¹⁵³ It also points out that “[r]elocation and reintegration involve disrupting and, where possible, reconstituting the delicate fabric of social, community and cultural ties that are important to children.”¹⁵⁴ Still, this goes as much for cases where children and families are integrated in their country of refuge as it goes for cases where return to their country of origin can promptly be realised.

Finally, durable solutions for unaccompanied children need particular attention. Apart from what has been considered in the chapter as a whole, their needs for special protection also extend to the need for durable solutions. With little to hold on to, it is all the more necessary to offer them long-term security as soon as this is possible. When family tracing proves unsuccessful, other permanent solutions must immediately be pursued so as to quickly give the child certainty about its future. As the UNHCR points out in this respect, “[t]he best durable solution for an unaccompanied refugee child will depend on the particular circumstances of his or her case, in light of these Guidelines.”¹⁵⁵

3.1.5 The Holistic Approach of Protection

Apart from the reason that again it is emphasised that children and their needs and rights must receive first priority in refugee situations, the UNHCR guidelines underscore the “intrinsic link between protection and assistance activities [because of which] no

¹⁵¹ Ibidem, p. 137.

¹⁵² Though there are several countries that seek to keep children, either accompanied by their parents or not, less integrated in the country of refuge, simply by keeping them in detention and separate from the local community.

¹⁵³ UNHCR, *Refugee Children...*, cit., p. 146.

¹⁵⁴ Ibidem, p. 138.

¹⁵⁵ Ibidem, p. 146.

absolute distinction is made between them.”¹⁵⁶ It indicates that assistance to children should be integrated into regular protection and assistance activities, but simultaneously notes that “protection and care of refugee children require clear policies and operational guidelines.”¹⁵⁷ Thus, it is crucial that governments consider and review as a matter of priority their refugee and assistance policies for children or, if they have none, set up such policies, to ensure that they take full account of the UNHCR guidelines and are in accordance with the CRC.

Moreover, this intrinsic link between protection and assistance activities is illustrated by the triangular relationship between child, parents and state that is embedded in the CRC. The primary responsibility that lays on parents to ensure the right of the child to an adequate standard of living in article 27 CRC, a general elaboration of the obligation of article 6 to secure the child's right to life, survival and development, is in turn qualified by the provision “within their abilities and financial capacities.”¹⁵⁸ This is “an important reminder that, where parents lack the requisite skills or resources, the State must assist the parents in meeting their responsibilities, including the provision of material assistance such as food, clothing and housing.”¹⁵⁹ This reminder is already present in article 18, which concerns the balance of responsibilities between the child's parents and the state. It particularly addresses support for parents in the performance of their responsibilities, and as such an assertion of parents' rights rather than of children's rights – like is considered above. This assertion is made though, in relation to the state's powers and termed responsibilities towards the child. Moreover, it holds that states “must take appropriate steps to assist parents in fulfilling their responsibilities [and if] parents cannot, the State must step in to ensure that the child's rights and needs are met.”¹⁶⁰

Basically, article 3(2), 18 and 27 together establish the interrelation between the obligation of the parents and that of the state towards the child to achieve fulfilment of its right to development. Article 27 already spells out three contributions to the child's development that must be secured – nutrition, clothing and housing – to which article 24 “the need for clean drinking water, health education, good hygiene and sanitation, breastfeeding, and preventive action in relation to environmental pollution, child

¹⁵⁶ Ibidem, p. 152.

¹⁵⁷ Ibidem, p. 153.

¹⁵⁸ Article 27(2) CRC.

¹⁵⁹ Rachel Hodgkin, *Implementation Handbook...*, cit., p. 392.

¹⁶⁰ Ibidem, p. 243.

accidents and harmful traditional practices.”¹⁶¹ Other components that contribute to the development of children’s social, moral, mental and spiritual development include education,¹⁶² sport and play¹⁶³ and through enjoyment of their culture and religion and the security of their family and community.¹⁶⁴

3.1.6 The Economic, Social and Cultural Component

There are several articles that are directly relevant for the survival and development of a child, that can be considered to have an “economic and social component” and are therefore subjected to the qualifier of “the maximum extent of their available resources”. Moreover, the principal article that sets the right to survival and development, article 6(2), is itself limited by the phrase “to the maximum extent possible”.

The right to survival and development however, is also one of the general principles of the CRC and a guiding principle for the interpretation of children's rights in general and the particular rights of the Convention itself. But can it be said that this right is in fact so important that limitation of this and other economic, social and cultural rights too much would be in violation of the Convention's provisions – despite the fact that the limitation may, with regard to adults, be in accordance with other standards on economic, social and cultural rights such as the ICESCR?¹⁶⁵

Actually, this question in fact relates to essential question this thesis seeks to answer. Before doing so, however, this chapter will first take a closer look as the practical application of the economic, social and cultural rights of refugee children by analysing court cases that dealt with this matter.

3 . 2 T h e P r a c t i c e

Indeed, refugee children, asylum-seeking children, migrant and illegal children are -like all children- entitled to protection under both national child and youth welfare laws and

¹⁶³ ~~CRC article 31.~~

¹⁶⁴ These include the civil rights of children of CRC articles 12-17, and the rights of CRC articles 5, 7, 8, 9, 20, 21 and 30.

¹⁶⁵ In essence, because the provisions of the ICESCR with respect to children must be read in light of the CRC, under the ICESCR they would also be better protected than adults. Though this may be less of an issue with respect to those ICESCR provisions that are also found in the CRC, in regard to those that are not the level specific protection that is afforded to children may in these cases be greater than the level of protection for adults, and require different action.

international laws and standards, and their rights as outlined in the CRC should not come in second place to asylum and immigration policies.

The practice however, is quite different. This paragraph will discuss five cases that concern economic, social and cultural rights of refugee children and so illustrate how the interpretation of these rights impacts on their actual entitlements. By this, the state's obligations in this respect with regard to refugee children will become clearer and allow for a review of the (dis)similarities in the exercise of such rights.

The discussed cases are based on international, regional and national standards. In all cases however, the rights in question are either assessed on the basis of the CRC, or the standards applied are based on and closely connected to the CRC. On the whole, in all cases the main interpretative guidance therefore derives from the CRC and so shows how its standards are brought into practice.

3.2.1 The European Social Charter and Medical Assistance and Treatment

In its report on collective complaint 14/2003, the European Committee of Social Rights decided on the question whether a limitation on the medical assistance for people “unlawfully resident” in France is in accordance with the (Revised) European Social Charter. It is argued that the restriction to state medical assistance only for those that can establish three months' continuous residence and for those who cannot, treatment only for emergencies and life threatening conditions, is in violation of articles 13 and 17 of the Charter.

Article 13 holds that those “without adequate resources and [...] unable to secure such resources by his own efforts or from other sources” are entitled to social and medical assistance, a provision that must be applied “on an equal footing with their nationals to nationals of other Parties lawfully within their territories” (article 13(4)). In addition to this, article 17 concerns children's rights in particular. It focuses on “ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities” for which the parties to the Charter undertake, *inter alia*, to ensure “the care, the assistance, the education and the training they need.”

While these provisions lay down general obligations for states, the Appendix to the Revised Social Charter allows for a restriction to these rights by indicating that the

persons covered “include foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned.” The French government argued therefore that illegal immigrants are not covered at all under the Charter, seeing particular evidence for this argument in paragraph of article 13, which states that states are held “to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Contracting Parties lawfully within their territories”. In its interpretation of the appendix however, the Committee firstly points out that the rights of the Charter complete those enshrined in the European Convention of Human Rights and interpretation of the Charter must therefore be “mindful of the complex interaction between both sets of rights.”¹⁶⁶ Restrictions on rights are to be read restrictively, so as to “preserve intact the essence of the right and to achieve the overall purpose of the Charter.”¹⁶⁷ In this regard it noted that “the restriction attaches to a wide variety of social rights [...] and impacts on them differently”¹⁶⁸ and that in this case the right in question is one of fundamental importance due to its connection to the right to life and to human dignity – constituting “indeed the core of positive European human rights law.”¹⁶⁹ The Committee therefore concludes that “legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter.”¹⁷⁰

Yet, French legislation does provide for emergency treatment, the treatment of life threatening conditions and state medical assistance for any foreign person that resides in France for an uninterrupted period of more than three months, whether lawful or not, to meet certain costs. Ambivalently therefore, the Committee concludes that, given the existence of *some* form of medical assistance benefiting foreign nationals illegally residing in the territory of a state party, there is no violation of article 13.

The Committee concludes differently with regard to article 17 though, which guarantees the rights of children and young persons and, as the Committee notes, is directly inspired by the CRC. It concludes that the article “protects in a general manner the right of children and young persons, including unaccompanied minors, to care and

¹⁶⁶ European Committee of Social Rights, *International Federation of Human Rights Leagues (FIDH) v. France*, Complaint No. 14/2003, para. 28.

¹⁶⁷ *Ibidem*, para. 29.

¹⁶⁸ *Ibidem*, para. 30.

¹⁶⁹ *Ibidem*, para. 31.

¹⁷⁰ *Ibidem*, para. 32.

assistance”¹⁷¹ – and goes on to say that for the reasons that “medical assistance to the above target group in France is limited to situations that involve an immediate threat to life [and] children of illegal immigrants are only admitted to the medical assistance scheme after a certain time,”¹⁷² the situation in France is not in conformity with article 17 and therefore holds France in violation of the Charter.

3.2.2 *The CRC and Social Security*

The cases discussed below both deal with the question of whether children may, on the basis of articles in the CRC, be entitled to (some) social security measures when they reside in a state party, though they are not in possession of a residence permit. Or, as it was formulated in the cases in question, the corresponding negative question whether refusing all forms of social security or assistance to children without a residence permit is in violation of the non-discrimination principle of article 2(1) CRC.

The first case is a Belgian case¹⁷³ decided in 2003 which concerns a preliminary question to the Court of Arbitration whether a statutory restriction to limit social assistance to urgent medical help is consistent with the principle of non-discrimination as laid down in, *inter alia*, articles 10 and 11 of the Belgian Constitution and article 2(1) CRC. The Court states that the Constitutional articles 10 and 11 must in this case be read in conformity with articles 2, 3, 24(1), 26 and 27¹⁷⁴ and concludes that a categorical refusal of social assistance to children residing in Belgium without permission may result in a violation of these articles. It must therefore be possible to afford social assistance to children who do not have a residence permit, provided that three conditions are fulfilled. It must firstly be officially confirmed that the parents are unable to (sufficiently) provide for the child and secondly, that the request for social assistance regards indispensable expenses for the child's development. Thirdly, the social assistance centre must verify that the assistance will solely be used to cover these expenses – the assistance should therefore be in kind or be expressly stipulated to serve the specific goal for which it was requested in order to avoid any possible misuse that might benefit the parents.

The second case is a case from the Netherlands of 24 January 2006¹⁷⁵ concerning a final appeal to a refusal to grant social assistance to two children without residence permit but legally residing in the Netherlands, for they are awaiting the decision on their application for such a permit. The applicants argue that this refusal, which is based on the fact that the category of aliens that these children belong to do not fall within the scope of welfare law covering social assistance, amounts to an unlawful distinction that is in violation of the principle of non-discrimination under article 2(1) CRC. The Court considers that a distinction in relation to children based on one of the grounds formulated in article 2(1) CRC, is only permitted when the goal pursued is legitimate within the framework of the CRC, and the distinction is a suitable means to attain this goal and is proportionate with regard to children. It further notes that, in order to determine whether a distinction in a concrete case can be considered proportionate with the pursued goal, the fact that children are entitled to particular protection and the other provisions of the CRC need to be taken into account – in particular article 2(2), 3 and 27 CRC. In this case, it is noted by the Court that the Dutch government has knowingly accepted that these children reside in the Netherlands for a certain period of time, which results in a duty of care following from the CRC. Furthermore, the children in question that request social assistance have no other alternative to provide for their livelihood, nor could they decide upon or substantially influence their place of residence. Hence, the Court concludes that though the general goal that is pursued with the exclusion of legal provisions is a legitimate goal, with regard to children the categorical denial to provide social assistance is not a proportionate means and therefore in violation of article 2(1) CRC. Basically, the Court says that because children cannot provide for themselves and have no choice as to where they live, they are entitled to an individual right to (some form of) social assistance.

Both cases assert, based on article 2(1) CRC read in the light of the other provisions of the CRC (concretely articles 2(2), 3, 26 and 27) that social assistance cannot be categorically refused to children who do not possess a residence permit. Still, the Dutch court differentiates between children that are in the country legitimately and those that are not, based on the argument that this might stimulate their continued stay and possibly that of their parents which would impede Dutch immigration policy which focuses on the discouragement of what is considered illegal stay. Notwithstanding the

¹⁷⁵ The Netherlands, Centrale Raad van Beroep, 24 January 2006, LJN nr. AV0197, also published with commentary by Lieneke Slingerberg in «Migrantenrecht», nr. 2, 2006, pp. 54-57.

legal obligations that follow from the CRC, the Court does not consider a categorical refusal disproportionate with regard to the latter category of children.

Yet, the argumentation given by the Dutch Court to reject the categorical refusal in the first place, is as significant for children that reside in a country illegitimately – possibly even more. Here neither, is there any other alternative to provide for (in?) their livelihood, nor have they substantial choice in their place of residence. They simply follow the illegal status of their parents. In fact, they are discriminated upon on the basis of their parents' illegal status, which is in violation of article 2(2) CRC,¹⁷⁶ over and above the fact that there is a violation of article 2(1). Hence, because there is no basis to differentiate upon (il)legitimate stay, which differentiation would in essence be further discrimination in violation of articles 2(1) and 2(2), such distinction is in violation of the CRC. The Belgian case illustrates this analysis and offers a different answer to the question how to avoid impeding a deterring immigration policy, by determining that the social assistance will be provided only under certain conditions and in a particular form. This interpretation seems to be more in line with the CRC.

3.2.3 South African Constitutional Cases

The South African Constitution includes both civil and political rights as well as economic, social and cultural rights. As mentioned before, the Constitutional Court stated in its Certification Case that these rights are, at least to some extent, justiciable.¹⁷⁷

The economic, social and cultural rights can broadly be grouped in three categories. The so-called “access” rights apply to everyone and include access to adequate housing (section 26), health care services (section 27(1)(a)), sufficient food and water (section 27(1)(b)) and social security (section 27 (1)(c)). Then, section 28 (1)(c) introduces rights of children, including the right to basic nutrition, shelter, basic health care services and social services. Section 29 provides, in addition, for a right to education. The third category, which will not be considered in detail for they are not particularly relevant here, concerns the socio-economic rights of detained persons.

¹⁷⁶ Article 2(2) reads in full:

“States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.”

¹⁷⁷ South Africa, Constitutional Court, In re: Certification of the Constitution of the Republic of South Africa, 6 September 1996, 1996 (10) BCLR 1253 (CC), para. 77.

While the rights of children afford a much stronger degree of protection, owing to the fact that they are not qualified by the availability of resources nor subject to progressive realisation, in some respects these rights also refer to a more limited form of socio-economic rights than the category of access rights. So the government cannot argue that it has not fulfilled these rights because it needs more time or has limited resources, but the rights are not as extensive as the general access rights. Two cases will be discussed to illustrate how the noted difference plays out in practice.

*Grootboom Case*¹⁷⁸

The case of the *Government of the Republic of South Africa and Others v. Irene Grootboom and Others*¹⁷⁹ deals with a group of squatters that were evicted from the private land that had been earmarked for low-cost housing and that they decided to occupy for the fact that they could no longer tolerate the deplorable living conditions of the slum they lived previously. They moved to a nearby sports field, for they could not return to their previous location because these places were taken by new people seeking for a place to put up their shack – but because their homes were bulldozed and their possessions burnt during the eviction, they could not build new adequate shelter. While the Cape of Good Hope High Court¹⁸⁰ found that the children and, through them, their parents were entitled to shelter under section 28(1)(c)¹⁸¹ and ordered the national, provincial and local authorities to immediately provide them with tents, portable latrines and a regular supply of water by way of minimal shelter, the Constitutional Court decided differently in the subsequent appeal case. It asserted that section 28 is one of the mechanisms to meet the obligations of the CRC, and noted that it obliges states to ensure that *parents* fulfil their responsibilities towards their children. While the state does have direct responsibilities with regard to children that are not in the care of their parents or families, the obligations it incurs in relation to children that are cared for by parents or families are limited to ensuring that parents and families are able to provide their children with housing, food and water (for instance in the form of projects, welfare programmes and maintenance grants) and to protect those children whose parents do not

¹⁷⁸ Though this case does not regard refugee children specifically, it considers the economic, social and cultural rights of a group of (vulnerable) children and may therefore be relevant.

¹⁷⁹ Case of the Government of the Republic of South Africa and Others v. Grootboom and Others, Constitutional Court of South Africa, 4 October 2000, CCT 11/00.

¹⁸⁰ South Africa, Constitutional Court, Government of the Republic of South Africa and Others v. Irene Grootboom and Others, 4 October 2000, CCT 11/00.

¹⁸¹ Section 28(1)(c) of the Constitution of South Africa reads:

“Every child has the right ... (c) to basic nutrition, shelter, basic health care services and social services”.

fulfil their responsibilities by deliberately refusing to meet their obligations – resulting in abuse and neglect.

The Constitutional Court did conclude that the state failed in guaranteeing the socio-economic right of access to housing in section 26.¹⁸² According to the Court, while the housing programme of the municipality did a good job in seeking to ensure access to housing on the medium and long-term, a “programme that excludes a significant segment of society cannot be said to be reasonable”¹⁸³ and for that reason, the state “fell short of the obligations imposed upon the state by section 26(2) in that it failed to provide for any form of relief to those desperately in need of access to housing.”¹⁸⁴

It follows that, in essence, the state therefore did violate the children's rights under section 28(1)(c) by not sufficiently enabling their parents to fulfil their duties towards their children. The Court noted that the right to shelter following from this section must be fulfilled by the child's parents, yet that this does not mean “that the state incurs no obligation in relation to children who are being cared for by their parents or families.”¹⁸⁵ Indeed, “the state is required to fulfil its obligations to provide families with [...] access to adequate housing in terms of section 26”¹⁸⁶ – which the Court concluded it did not.

The question remains though, what then the added value of section 28(1)(c) is. *Everyone* is entitled access to adequate housing under section 26, including children. Obviously, their right in this respect will be fulfilled by ensuring their parents such access, though this does not alter the entitlement children have in their own right. If section 28(1)(c) is to provide an additional entitlement in the form of a right to shelter that is not qualified by the availability of resources nor subject to progressive realisation only for those children who are not cared for by their parents or families, why does it afford such rights to *all* children? It seems more appropriate to me to assert the difference between “adequate housing” and “shelter” and consider the different obligations that exist with regard to each of these – while all adequate housing is form of shelter, it cannot be said that all shelter is adequate housing. Hence, while adults *and*

¹⁸² Section 28(1)(c) of the Constitution of South Africa reads:

“(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”

¹⁸³ South Africa, Constitutional Court, *Grootboom*, cit., para. 43.

¹⁸⁴ *Ibidem*, para. 95.

¹⁸⁵ *Ibidem*, para. 78.

¹⁸⁶ *Ibidem*, para. 78.

children have a progressive right to adequate housing that is subject to available resources (section 26), children must be provided with some form of shelter at all times (section 28(1)(c)) – obliging the state to provide them with such if their parents cannot.¹⁸⁷ The argument of the Constitutional Court that the “carefully constructed constitutional scheme for progressive realisation of socio-economic rights would make little sense if it could be trumped in every case by the rights of children to get shelter from the state on demand”¹⁸⁸ in fact negates children from the additional protection that section 28(1)(c) affords them and overlooks the fact that “shelter” may have a limited meaning in relation to “adequate housing” – as such limiting the feared surpassing of the “carefully constructed constitutional scheme”.¹⁸⁹

Khosa Case

The case of *Khosa and Others v. Minister of Social Development*¹⁹⁰ concerns an application for an order confirming the constitutional invalidity of certain provisions that disqualify persons who are not South African citizens from receiving certain welfare grants. The applicants are indigent Mozambican citizens living in South Africa as permanent residents.¹⁹¹ If they had been South African citizens, they would have qualified to receive the grants in question, and it is argued that the citizenship requirement infringed their Constitutional rights to equality, social security, and the rights of children. In High Court, the case was unopposed and the Court found in favour of the applicants, striking down the challenged provisions, which related to child-support grants, care-dependency grants and old-age grants and ordering payment of the relevant grants.

¹⁸⁷ Or, as this case goes, at least not actively rob them from shelter that their parents or families provided. The bulldozing and burning of possessions that occurred here during the eviction was clearly disproportionate and in violation of several of the people's human rights and most probably in violation of their Constitutional rights. The Court considered in this respect that “[t]he validity of the eviction order has never been challenged and must be accepted as correct” but that the eviction “was done prematurely and inhumanely: reminiscent of apartheid-style evictions.” (Ibidem, para. 10).

¹⁸⁸ Ibidem, para. 71.

¹⁸⁹ The Court considers in addition that “there is an obvious danger [in that] [c]hildren could become stepping stones to housing for their parents instead of being valued for who they are.” (Ibidem, para. 71). This argument seems a bit excessive, especially when the limited meaning of “shelter” in relation to “adequate housing” is taken into consideration.

¹⁹⁰ South Africa, Constitutional Court, *Khosa and Others v. Minister of Social Development*, 4 March, 2004, CCT 12/03.

¹⁹¹ The application is brought in their own names, on behalf of their minor children, other people who had joined the application but could not litigate personally, the class of permanent residents as a whole, and in the general public interest.

The Constitutional Court held that “[t]he Constitution vests the right to social security in ‘everyone’”¹⁹² and “the denial of access to social grants to permanent residents who, but for their citizenship, would qualify for such assistance does not constitute a reasonable legislative measure as contemplated by section 27(2) of the Constitution.”¹⁹³ The exclusion of permanent residents from the scheme is discriminatory and unfair and infringes the right to equality and therefore, in order to remedy the found violation, the Court reads in the words “or permanent resident” after the word “citizen” in each of the challenged sections.

Specifically in regard to children, the Court considered that while in the case of child-support grants and care-dependency grants, the relevant legal provisions require both the parent *and* the child to be South African citizens, in the case of foster-child grants no such citizenship requirement is imposed.¹⁹⁴ So the children referred to in the provisions regarding child-support and care-dependency grants may be born in South Africa and may be South African citizens, it matters not according to these provisions. What matters is whether their primary caregiver or parent is a South African citizen and these provisions therefore discriminate against children on the grounds of their parents' nationality.¹⁹⁵ In addition, because foster-child grants are not subject to any citizenship requirement, the Court asserted that “[i]t was therefore conceded that citizenship is an irrelevant consideration in assessing the needs of the children concerned”¹⁹⁶ and held that the denial of support to children in need trenches upon their rights under section 28 (1)(c) of the Constitution.

Important to note is the fact that though a dissenting minority considered that some of the considered limitations are reasonable and in accordance with the Constitution, they

¹⁹² South Africa, Constitutional Court, Khosa, cit, para. 85.

¹⁹³ Ibidem, para. 82.

¹⁹⁴ The conditions for a child-support grant, according to section 4 of the Social Assistance Act 1992 as amended by the Welfare Laws Amendment Act 1997, are that the person requesting the grant is (a) the primary care-giver of a child; and (b) he or she and that child are (i) resident in the Republic at the time of the application for the grant in question; (ii) South African citizens; and (iii) comply with the prescribed conditions.

For a care-dependency grant, following Section 4B of the Social Assistance Act 1992 as amended by the Welfare Laws Amendment Act 1997, the conditions are that the person requesting this grant is (a) the parent or foster parent of a care-dependent child; and (b) he or she and that child are (i) resident in the Republic at the time of the application for the grant in question; (ii) in the case of a parent and his or her child, are South African citizens; and (iii) comply with the prescribed conditions.

For a foster-child grant, Section 4A of the Social Assistance Act 1992 as amended by the Welfare Laws Amendment Act 1997 requires that the person requesting the grant is (a) the foster parent of a child and (b) he or she and that child are (i) resident in the Republic at the time of the application for the grant in question; and (ii) comply with the prescribed conditions.

¹⁹⁵ Actually, because in the case of foster-child grants neither the child nor the parent needs to be South African citizen, and neither need they be in the case of care-dependency grants for foster-children, children in the care of their parents or families are also discriminated on the basis of their own nationality.

¹⁹⁶ South Africa, Constitutional Court, Khosa, cit, para. 78.

did agree with the majority that the provisions relating to children are unconstitutional. A citizenship requirement for grants is therefore not in conformity with the Constitution.

3.3 Concluding Remarks

The Refugee Convention and the international refugee protection system, as well as the CRC, are fully applicable to children. Moreover, as the guiding principles regarding to children's rights, the CRC forms the background against which the Refugee Convention should be read. Accordingly, the CRC recognises refugee children as a vulnerable group with special needs – an acknowledgement that in turn justifies their preferential treatment in all refugee situations.

Exercising children's rights in refugee cases asks for protection measures that relate specifically to the refugee situation, but also for actions in reaction to general difficulties that all children may face. It is crucial that states acknowledge that refugee children are at least much, but generally more so, in need of an adequate standard of living that guarantees their positive development – a crucial element in a child's life and possibly the one that is most detrimentally influenced by non-compliance with their rights. Explicitly looking at the economic, social and cultural rights of children, it can be observed that such components relate specifically and in a sense, only, to the right to survival and development. At the same time, the above chapter illustrates this right as one of the main issues in the CRC, and it is a guiding principle that impacts all decisions relating to the implementation and fulfilment of children's rights.

Case law illustrates these assertions. The cases from Belgium and the Netherlands emphasise the fact that children are in practice unable to orchestrate their lives to reach a reasonable standard of living themselves. They are dependent on adults for their livelihood *now*, with little to no options to arrange such for themselves, and in their development to *become* adults that can take care of themselves. And, where the issue of social security to adults may entail such political considerations as withholding assistance to remove the incentive to come or stay illegitimately in a country, these considerations are in fact less relevant in regard to children since they, in practice, do not have the option to choose otherwise. The child's right to social assistance in the CRC therefore, is in fact not subject to political consideration as its equivalent obligation in the ICESCR, when applied with regard to adults. Furthermore, the

principal significance of the rights of children is stressed particularly in the case judged by the European Committee of Social Rights. Despite the fundamental importance because of its connection to the right to life and human dignity, the Committee did not rule the very limited form of assistance benefiting illegally residing foreign nationals a violation of the right to medical assistance and treatment. In contrast though, the exact same limitations do constitute a violation of the corresponding right of children to medical treatment and assistance – thereby affirming the distinct standards of protection and assistance for children and adults.

And, in the end, the non-discrimination principle continues to play a significant role. Being one of the main human rights principles and in all cases considered being of immediate and unconditional application, it directly impacts the economic, social and cultural rights of refugee children. Where social assistance and support is granted to children in the state of refuge, either in general or in special circumstances, it cannot be categorically refused to refugee children. Due to the aforementioned political considerations and greater protection afforded, the possibilities for states to limit this right for certain categories of children are in fact less than with regard to adults. The considered case law in addition shows the immediate relevance of principle of non-discrimination for refugee children, as the reasons for the strict exercise are demonstrated all the more relevant for them.

Altogether, the cases seem to imply less political leeway for governments due to the fact that children cannot be targeted by such but are still entitled to their rights. While the South African *Grootboom* case appears to merit a different conclusion, the judgement does not alter the fact that the Constitution does afford children a stronger degree of protection. The Court does point out that the parents' primary responsibility for securing the child's rights does not do away with the fact that states have certain responsibilities to assist and facilitate parents, to enable them to fulfil their duties. While the South African cases are remarkable in showing that economic, social and cultural rights can in fact be upheld in court, their acknowledgement of children's *particular* protection remains to be desired – which is an assertion that unfortunately shows remarkable similarities with the practical reality of refugee children's rights.

Chapter 4

CONCLUSION

This thesis set off with the words *mankind owes the child the best it has to give*. To add another generality to this statement; it is often considered in political statements and declarations, both nationally and internationally, that “every child matters” and that it is important to “include each child”. But is that really the case? While we can already question this position on a national level, it can most certainly be doubted in the case of foreign children – children for whom states feel little to no responsibility, even despite their upstanding words on an international level.

Yet, not all is lost. Positive developments have taken place and it can no longer be maintained that states have no responsibilities with respect to children. An international human rights convention has since 1989 taken the place of informal declarations and has lead to the recognition and acceptance that children have rights in their own account. Rights that must be upheld – moreover, that must be given high priority.

The question that has been posed seeks to find out what protection is afforded under the international refugee system and the international human rights system. Consequential to the position that was generally afforded to children, they were for long seen as mere dependants to their parents and the assistance afforded to them, though considered important, was perceived essentially as following from compassion and goodwill rather than flowing from legal obligations. Still, in many cases governments seek to downplay their obligations in relation to children, negating their international commitments.

The Convention on the Rights of the Child and the Refugee Convention both afford protection to refugee children. Because of the near-universal ratification of the CRC and the limited awareness of children's particular needs in the Refugee Convention, the implementation of the latter is guided by the former. And, in addition, where the protection of the Refugee Convention may not or no longer apply, refugee children are all the same protected by the CRC. This includes those children that are granted assistance under subsidiary protection regimes rather than under the Refugee

Convention, those that for some reason are withheld from filing their request for asylum and those that reside in the host state illegally.

The special character of the CRC is based on the holistic and comprehensive approach of its provisions, which combine the special protection that children need with the fundamental rights and freedoms they are afforded like every human being. It is this combination that guarantees the child's harmonious development and constructive part of society. But, the inclusive application of the Convention's rights is not absolute, for the economic, social and cultural rights may be limited to the maximum extent of available resources – where the state party itself has the final word in what is “available”. This brings up the question how this limitation, which applies only to a specific category of rights and thus only to certain provisions, relates to the provisions that are not subjected to it and to the Convention as a whole. The interdependence of all rights is particularly present with regard to the rights of children, since one of the core issues and guiding principles is the safeguarding of the child's survival and development – the right to which all rights that may be bound by the aforementioned limitation contribute. Limited fulfilment of these rights therefore impacts the child's survival and development, and in addition the other rights that do not contain an economic, social or cultural component.

In essence, this is the whole problem with the indivisibility of human rights and a problem that exists with regard to adult's human rights as well. But, the limitation afforded to states under the CRC does differ from that which has been included in the general treaty on economic, social and cultural rights, the ICESCR. Noticeable is firstly the fact that the rights may only be limited to a maximum in resources (namely the “available” ones), but not in time. The obligation with regard to children under the CRC is immediate – as opposed to the general obligation relating to adults under the ICESCR, which may be “progressively” fulfilled. Also, the perceived difficulties in the justiciability of the rights are much less prominent with respect to children's rights than to those of adults: because the political considerations are far less relevant with regard to children than with regard to adults, children's rights have less to suffer of the political elements of economic, social and cultural rights. Moreover, children's rights are in fact an explication of the general rights and the holistic character of the CRC clarifies much of the uncertainties that may obscure the obligations of states under the general human rights treaties. The particular importance of the holistic character itself also carries

weight. Children cannot be expected to deal with the impediments that adults may face. They are less capable of dealing with and overcoming such obstructions and the implications of the struggle to do so are usually more detrimental and may last for a lifetime.

The central position that has been given to the survival and development of children actually seems to be so general and meaningful that limiting the economic, social and cultural rights of children in the same manner as those of adults may in fact entail a violation of their rights under the CRC. This allows for the conclusion that therefore their economic, social and cultural rights – meaning their rights in their own account, even though this at times means support and assistance to the parents as the child's legal representatives and caregivers – must be met to a higher standard than those of adults.

This conclusion is no different for refugee children, including those that have not yet received official refugee status or those that are covered by an alternative regime, or even those that are not covered by any regime but in fact reside in the country illegally. In all cases, the principle of non-discrimination accords them the same rights and protection as national children. Moreover, economic, social and cultural rights are specifically relevant for refugee children (the term here and on used in the broad sense, covering all categories of children just mentioned). Their development has already been impeded and the assistance their parents can offer them to remedy is limited, not only for the fact that the situation itself is extraordinary and under any circumstance would be difficult, but even more so since they too face serious difficulties. They are not always allowed to provide for themselves, leaving aside the complications if they would be, and they too are cut from their community and normal lives.

At times, when they are included in the more substantial benefits their children are entitled to, this conclusion may result in the consequence that refugee parents appear to benefit from the fact that they have children. The opposing argument that is often given, that children will now become a source of income and a vehicle for immigration cannot convince otherwise. Apart from the fact that this argument is highly overrated, for having children still creates more insecurity than that it resolves, especially for refugee and illegal parents, this consequence is not as invasive as it is brought to be. Other ways must and can be found to discourage people from illegal immigration or choosing

illegality after they are denied refugee status. The cases discussed in this thesis illustrate this.

States have acknowledged that all children require special protection, and moreover – that they are legally entitled to such protection. While the general refugee policy of most countries may already be subjected to critical review, it is unacceptable that the standards that apply to refugee children, which afford them the crucial protection that has been proclaimed by nearly all states, are grossly neglected. Mankind most certainly owes the child the best it has to give – but let us hope that mankind does not overlook the refugee child.

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L I S T O F A B B R E V I A T I O N S

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of all forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
CtRC	Committee on the Rights of the Child
ESC	European Social Charter
ExCom	Executive Committee of the High Commissioner's Programme
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
Refugee Convention	United Nations Convention Relating to the Status of Refugees, as updated by the Protocol Relating to the Status of Refugees
UDHR	Universal Declaration on Human Rights
UNHCR	United Nations High Commissioner for Refugees

A D D E N D U M

Unfortunately, due to a programme error, some footnotes have been lost in the final version of my thesis. This addendum lists the footnotes that have been lost and the respective pages where they should have been. Please add this addendum to the thesis “Real People, Real Problems: Children left without human rights?” by Nelleke Groen Esmeijer.

Page 35:

¹⁰¹ Rachel Hodgkin, Implementation Handbook..., cit., p. 40.

¹⁰² Together with article 2(1), discussed earlier, and article 4, which will be considered below, this provision sets out the overall obligations of the states parties.

Page 37:

¹⁰⁹ As noted by Sharon Detrick, the general principle of the CRC is “that the two sets of human rights are indivisible and interdependent” meaning, inter alia, “that efforts to promote one set of rights should also take full account of the other.” Therefore, “the very nature of children's rights – as opposed to “adults' human rights” – may well establish State obligations of a stronger variety.” (Sharon Detrick, A Commentary..., cit., pp. 103-104).

¹¹⁰ Article 4 reads in full:

“States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.”

Page 47:

¹³⁸ It must be noted though, that family tracing must be continued regardless of the legal status the child receives.

¹³⁹ UNHCR, Refugee Children..., cit., p. 62.

¹⁴⁰ See also United Nations Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health, 11 August 2000, E/C.12/2000/4.

¹⁴¹ Article 27 reads:

“1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.
4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.”

Page 54:

¹⁶¹ Ibidem, p. 392.

¹⁶² CRC articles 28 and 29.

Page 57:

¹⁷¹ Ibidem, para. 36.

¹⁷² Ibidem, para. 36.

¹⁷³ Belgium, Arbitragehof (Court of Arbitration), 22 July 2003, nr. 106/2003.

¹⁷⁴ Article 2 CRC contains the non-discrimination principle, article 3 concerns the best interests of the child. Article 24 regards the right to health, 26 the right to social security and 27 the right to an adequate standard of living.

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