

# TRAINING MANUAL

## UPRIGHTS

### MODULE 1

#### KEY CONCEPTS AND GUIDING PRINCIPLES ON UNACCOMPANIED ASYLUM-SEEKING CHILDREN



## Fostering Quality Legal Assistance in the Asylum Procedure



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# GENERAL INTRODUCTION

## TERMINOLOGY

For the purpose of these training modules, the terminology used in the relevant European Union (EU) instruments will be applied. International law, as well as national legislative instrument, might differ from EU terminology. In this case, an explanation will be provided in the relevant sections.

## BRIEF NOTE ON EU ASYLUM LAW

The EU has developed a set of norms applicable to those seeking international protection and those benefiting from it. This system, commonly known as the Common European Asylum System (CEAS) acknowledges that the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol are the cornerstone of the international protection. The CEAS is composed of the following legislative instruments:

- **Qualification Directive: Directive 2004/83/EC and its recast 2011/95/EU** on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted;
- **Asylum Procedures Directive: Directive 2005/85/EC and its recast 2013/32/EU** on common procedures for granting and withdrawing international protection;
- **Reception Conditions Directive: Directive 2003/9/EC and its recast 2013/33/EU** laying down standards for the reception of applicants for international protection;
- **Dublin II Regulation 343/2003 and its recast 604/2013 (Dublin III Regulation)** establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person. The
- **EURODAC Regulation 2725/2002 and its recast 603/2013** on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013

*EU Regulations* have direct effect and therefore have binding legal force on Member States as soon as they enter into force. The provisions of regulations have effect in the national legal systems of Member States without it being necessary for the national authorities to adopt measures of application.

*EU Directives* lay down certain end results that must be achieved by Member States leaving it to national authorities as to how to adapt their laws to meet these goals. In accordance with the jurisprudence of the Court of Justice of the European Union (**CJEU**) directives may only be transposed in national law by means of national provisions of a binding nature. National measures must guarantee the full application of the Directive in a sufficiently clear, transparent and precise manner so that, where

the Directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts. Directives provide for the transposition deadlines by which Member States are to adopt relevant domestic measures. These deadlines have already passed for all the above mentioned CEAS instruments.

**The EU Charter of Fundamental Rights (EU CFR)** is a primary EU law, binding on the Member States when implementing the Union law, to which the provisions of all CEAS instruments must conform. The Charter is a self-standing document. However, it should be read together with the Explanations to the Charter of Fundamental Rights and consonant with the case law of the Court of Justice of the European Union (CJEU). The EU CFR provides for the right to asylum with due respect for the 1951 Refugee Convention and contains numerous provisions which are applicable to persons seeking international protection and those benefitting from it, such as human dignity, the prohibition of inhumane treatment, the prohibition of *refoulement*, the right to family life, the right to an effective remedy, the principle of non-discrimination and the rights of the child.

#### Article 24 - The rights of the child

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

 *The Explanations to the EU Charter are available [here](#).*

 *Further on the CEAS, see: [European Commission, A Common European Asylum System and The Common European Asylum System](#).*

 On the specific rights of children in the asylum procedure, see:

- *EU Fundamental Rights Agency, [Separated, asylum-seeking children in European Union Member States](#)*
- *EU Fundamental Rights Agency, [Thematic Focus: Children](#)*
- *European Council on Refugees and Exiles (ECRE), [Right to Justice: Quality Legal Assistance for Unaccompanied Children - Comparative Report](#)*

## MODULE CONTENT

## LEARNING OBJECTIVES:

- To understand core definitions that will be used throughout the training modules;
- To gain a clear understanding of basic concepts related to international protection;
- To understand the importance of the principle of the best interests of the child, especially in relation to unaccompanied children seeking international protection;
- To become familiar with the main legislative instruments and standards at international and EU level applicable when ensuring the rights of unaccompanied children seeking international protection.

## 1. KEY DEFINITIONS

### 1.1 REFUGEE

The definition of 'refugee' is enshrined in the Convention relating to the Status of Refugees and the 1967 Protocol (often referred to as the 'Refugee Convention' or the '1951 Geneva Convention'), the main international instrument of refugee law.

#### Article 1(A)(2) - Refugee Convention - Definition of the term "refugee"

For the purposes of the present Convention, the term "refugee" shall apply to any person who: [...]

(2) [As a result of events occurring before 1 January 1951 and] 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. [...]

It is commonly said that refugee status is declaratory. A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee. (*UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, p. 28*).

#### Recital 21 recast - EU Qualification Directive

The recognition of refugee status is a declaratory act.



Further on the definition of refugee, see the [\*UNHCR Handbook and Guidelines on procedures and Criteria for Determining Refugee Status\*](#) and the [\*UNHCR Protection Training Manual for European Border and Entry Officials\*](#).

This definition of refugee is also provided by EU Asylum Law, namely in the EU Qualification Directive (2004/83/EC) and its recast (2011/95/EU) (rQD). EU Asylum law and policy draw directly from the Refugee Convention.

#### Article 78 - Treaty on the Functioning of the European Union

The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring

compliance with the principle of *non-refoulement*. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.

For this reason, the Qualification Directive acknowledges that the Refugee Convention is the ‘cornerstone of the international legal regime for the protection of refugees’ (Recital 4) and refers to the definition of refugee as enshrined in the Refugee Convention:

#### **Article 2(d) recast - EU Qualification Directive – Definitions**

‘refugee’ means a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it [...];

Thus, the definition provided by EU Law: i) specifies that, for the purpose of this legislative instrument, a refugee can only be a third-country national; and ii) expressly includes stateless persons.

#### **CJEU - *Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal*, C-31/09, 17 June 2010**

“It is apparent from [...] the preamble to the Directive that the Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the Directive for determining who qualifies for refugee status and the content thereof were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria [...].

The provisions of the Directive must for that reason be interpreted in the light of its general scheme and purpose, while respecting the Geneva Convention and the other relevant treaties [...]. Those provisions must also, as is apparent from recital 10 in the preamble to the Directive, be interpreted in a manner which respects the fundamental rights and the principles recognised in particular by the Charter of Fundamental Rights of the European Union [...].”

## **1.2 THE PRINCIPLE OF NON-REFOULEMENT**

States have an obligation not to return refugees to countries where their life and freedom would be at risk (principle of *non-refoulement*). The protection against forcible return is one of the most essential guarantees that the Refugee Convention affords to refugees:

#### **Article 33 - Refugee Convention - Prohibition of expulsion or return (“refoulement”)**

1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

*Refoulement* is also prohibited by other international legal instruments – such as the United Nations (UN) Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). It is also prohibited by the EU law, in particular, the EU CFR.

### Article 3.1. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

### The EU Charter of Fundamental Rights - Article 19. Protection in the event of removal, expulsion or extradition

1. Collective expulsions are prohibited.
2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

There are differences in its scope under refugee law and international human rights law. The principle of *non-refoulement* under the Refugee Convention is not absolute, in accordance with Article 33.2, is not applicable to refugees '*whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country*'.

By contrast however, under international human rights law the principle of *non-refoulement* is absolute and no derogations are permitted either in law or in practice.

### Committee on the Rights of the Child; General Comment No. 6 (2005)

26. In affording proper treatment of unaccompanied or separated children, States must fully respect non-refoulement obligations deriving from international human rights, humanitarian and refugee law and, in particular, must respect obligations codified in article 33 of the 1951 Refugee Convention and in article 3 of CAT.

27. Furthermore, in fulfilling obligations under the Convention, States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37 of the Convention, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed. Such non-refoulement obligations apply irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-State actors or whether such violations are directly intended or are the indirect consequence of action or inaction. The assessment of the risk of such serious violations should be conducted in an age and gender-sensitive manner and should, for example, take into account the particularly serious consequences for children of the insufficient provision of food or health services.

However, under both the Refugee Convention and international human rights law, the principle also covers instances where there is a risk of *indirect refoulement*. States are prohibited to return a person to any third country where there is a risk that the person concerned may then be subsequently sent to an unsafe country. As a result, it doesn't need to be the country of origin or habitual residence.

 *Further on the principle of non-refoulement, see*

- [International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;](#)
- [ECtHR case law, inter alia, Soering v. United Kingdom, ECtHR, 1/1989/161/217, 7 July 1989 \(EDAL link\), Hirsi Jamaa and Others v. Italy, \[GC\], ECtHR, Application No. 27765/09 23](#)

[February 2012 \(EDAL link\); M.S.S. v. Belgium and Greece \[GC\], ECtHR, Application No. 30696/09, 21 January 2011](#)

- [Committee on the Rights of the Child; General Comment No. 6 \(2005\)](#)
- [Joint general comment No. 3 \(2017\)](#) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, 16 November 2017, paras. 45 – 47

### 1.3 INTERNATIONAL PROTECTION

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The right to seek and enjoy asylum is first and foremost recognised in Article 14(1) of the Universal Declaration of Human Rights, while at EU level the right to asylum is enshrined in the Charter of Fundamental Rights of the EU (EU CFR):

#### **Article 14(1) - Universal Declaration of Human Rights**

Everyone has the right to seek and to enjoy in other countries asylum from persecution.

#### **Article 18 EU Charter – Right to asylum**

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.

International protection under EU law includes protection afforded to refugees (see 1.1) and beneficiaries of subsidiary protection in light of the Member States obligations under international law. EU Member States have asylum systems in place to determine who is entitled to international protection and EU Asylum Law provides the overarching legislative framework.

The term ‘international protection’ encompasses both refugee and subsidiary protection status. Thus, an application for international protection means:

#### **Article 2(h) recast EU Qualification Directive – Definitions**

[...] a request made by a third-country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately;

### 1.4 A PERSON ELIGIBLE FOR SUBSIDIARY PROTECTION STATUS

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Individuals who do not qualify as refugees according to the Refugee Convention, but whose life and freedoms may still be at risk if returned to their countries of origin or former habitual residence may be eligible for subsidiary protection. The assessment of international protection starts with refugee status; in case she or he cannot qualify as such, it is assessed whether she or he can qualify for subsidiary protection. ‘Subsidiary protection’ is the form of international protection provided by EU Asylum Law. The QD and its recast define a ‘person eligible for subsidiary protection’ as:

#### **Article 2(f) recast - EU Qualification Directive – Definitions**

[...] a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm [...] and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;

Death penalty, torture, inhumane and degrading treatment or punishment, as well as a threat to the life of a civilian arising from situations of indiscriminate violence or during an international or internal armed conflict constitute serious harm according to Article 15 QD.

In a nutshell:

- Well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group, political opinion upon return → **Refugee Status**
- Substantial grounds for believing that the person would be exposed to a real risk of serious harm upon return → **Subsidiary Protection Status**

These training modules will refer to ‘applicants for international protection’ or ‘asylum applicants’ to generally indicate individuals seeking protection in Europe, unless when a distinction between refugee and subsidiary protection status will be needed. The expression of “Unaccompanied or separated asylum-seeking children” and its acronym “UASC” will be used throughout the modules for ease of reference and include both refugee status and subsidiary protection. Beneficiaries of international protection should be understood for the purpose of these modules as covering those enjoying international protection.

## 1.5 CHILD

According to the Convention on the Rights of the Child (CRC), a child is a human being below the age of eighteen. This definition is also used in other international and regional instruments as well as at EU and national level.

### Article 1 - Convention on the Rights of the Child

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.

Everyone who is under the age of 18 should be treated as a child and should be entitled to special protection and care. All European Union (EU) Member States are parties to the CRC and are therefore bound to its provisions. Hence, States’ authorities shall ensure that children are provided with adequate care necessary for their well-being and development and shall take appropriate measures to this end.

### Article 3- Convention on the Rights of the Child

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform to the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Sometimes, the term ‘minor’ instead of ‘child’ is used to indicate persons below the age of 18.<sup>1</sup> For the purpose of these training modules, the term ‘child’ as defined in the CRC will be used, except when ‘minor’ is used in the source texts.

## 1.6 CHILDREN SEEKING INTERNATIONAL PROTECTION

International Law also refers to ‘refugee children’ or ‘asylum seeking children’. Although there is no official and universally accepted definition of these terms, they refer respectively to children who qualify as refugees or have applied for international protection (see 1.1 and 1.3).

### **Committee on the Rights of the Child - General Comment No. 6**

12. [...] the enjoyment of rights stipulated in the Convention is not limited to children who are citizens of a State party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children - including asylum-seeking, refugee and migrant children - irrespective of their nationality, immigration status or statelessness.

Under the CRC, States have an obligation to adequately protect children seeking asylum:

### **Article 22(1) - Convention on the Rights of the Child**

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.

Children can apply for international protection with their parents or relatives, but this is not always the case. In fact, if children are not cared for by an adult who would be responsible to do so, they are unaccompanied or separated. The Committee on the Rights of the Child in its ‘General Comment No. 6 (2005) Treatment of unaccompanied and separated children outside their country of origin’ provided a definition of unaccompanied children and separated children:

### **Committee on the Rights of the Child - General Comment No. 6**

7. “Unaccompanied children” (also called unaccompanied minors) are children [...] who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.

### **Committee on the Rights of the Child - General Comment No. 6**

8. “Separated children” are children [...] who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members.

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<sup>1</sup> For example in EU Asylum Law: see Article 2(i) EU QD, according to which ‘a third-country national or a stateless person below the age of 18 years’ is defined as ‘minor’.

Sometimes, the term ‘unaccompanied minors’ is used at EU Level (e.g. in the EU Qualification Directive) instead of unaccompanied child:

#### Article 2(l) recast - EU Qualification Directive – Definitions

‘unaccompanied minor’ means a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States;

#### Article 2(i) - Dublin III Regulation – Definitions

‘minor’ means a third-country national or a stateless person below the age of 18 years;

Given the scope of the training modules, the term ‘unaccompanied and separated asylum-seeking children’ and its acronym UASC will be used, to include unaccompanied and separated children seeking international protection.

UASC must not be discriminated because of their status and, as recommended by the Committee on the Rights of the Child in its General Comment No. 6, measures to address their stigmatization within the society should be taken by States. They should be treated first and foremost as children.

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## 2. THE GUIDING PRINCIPLES ON CHILDREN’S RIGHTS

The guiding principles on children’s rights are underlying requirements for the realization of all the rights of a child set out in the Convention of the Rights of the Child (CRC). All of them are particularly relevant for unaccompanied asylum seeking children. These guiding principles include:

1. Non-discrimination (Article 2);
2. The best interest of the child (Article 3);
3. The right to life, survival and development (Article 6); and
4. The right to participate and to be heard (Article 12).

#### Joint General Comment CMW/C/GC/3-CRC/C/GC/22 regarding the human rights of children in the context of international migration

19. States parties to the Convention on the Rights of the Child have a duty to ensure that the principles and provisions therein are fully reflected and given legal effect in relevant domestic legislation, policies and practices (art. 4). In all actions concerning children, States should be guided by the overarching principles of non-discrimination (art. 2); the best interests of the child (art. 3); the right to life, survival and development (art. 6); and the right of the child to express his or her views in all matters affecting him or her, and to have those views taken into account (art. 12) [...].

The present module will introduce the principle of the best interest of the child and the Module 2 - the right to be heard and participate. Please refer to the Module 0 (Guiding Principles and Definitions) produced within the framework of the EU-funded FAIR project for information regarding the right to be free from discrimination.

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### 3. THE PRINCIPLE OF THE BEST INTERESTS OF THE CHILD

The CRC states the primary importance of the principle of the 'best interests of the child' (BIC) in all actions concerning children.

#### **Article 3 - Convention on the Rights of the Child**

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

At EU level, this principle is enshrined in the EU Charter:

#### **Article 24 EU Charter – The rights of the child**

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

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

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

#### **CJEU, MA, BT, DA, C-648/2011, 6 June 2013**

"Those fundamental rights include, in particular, that set out in Article 24(2) of the Charter, whereby in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests are to be a primary consideration."

The primacy of the BIC principle is further supported by the European Court of Human Rights (ECtHR), whose jurisprudence has recognised the need to consider a child's best interests in all child-related actions, for example in cases related to expulsion of the child's parents or to the right to family life:

#### **Neulinger and Shuruk v. Switzerland, No. 41615/07, 6 October 2010**

"The Court notes that there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount [...]."

#### **Rahimi v. Greece, No. 8687/2008, 5 July 2011**

"108. La Cour note sur ce point que l'article 3 de la Convention relative aux droits de l'enfant du 20 novembre 1989 dispose que l'intérêt supérieur de l'enfant doit être une considération primordiale, entre autres, des autorités administratives dans toutes les décisions qui les concernent."

Ensuring that the best interests of the child are adequately taken into account, properly evaluated, respected and upheld is a paramount requirement for the realisation of children's rights and, therefore, for the implementation of the obligations under international and EU law.

Despite the fact that the principle of the best interests of the child is regarded as a guiding principle to be respected in the implementation of all measures concerning children, there is no one-size-fits-all definition of what the term 'best interests' entails.

**IOM, Training Manual for Guardians and Social Workers dealing with unaccompanied minor asylum seekers**

“It is impossible to give a general definition of what is in the best interests of the child, since each case is different. Broadly speaking, the term “best interests” describes the well-being of a child and the full realisation of the child’s rights. This is in turn based on individual circumstances such as age, level of maturity, presence or absence of parents, the child’s environment and experiences.”

As affirmed by the Committee on the Rights of the Child in its ‘General Comment n. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration’, the best interests of the child must be determined on a case-by-case basis [para. 32]. The BIC principle must be applied in a dynamic fashion, account being taken of the context and the child’s individual circumstances.

#### **Committee on the Rights of the Child - General Comment No. 14**

[...] The concept of the child’s best interests is flexible and adaptable. It should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs.

The BIC principle requires a thorough consideration of the child’s individual circumstances, as well as an evaluation of the possible impact of the decision on the child’s life and well-being. There are several factors to be taken into account, such as the child’s view, safety, health, family ties and further on.

➔ See further on the factors to determine the best interests: UNHCR, Guidelines on Determining the Best Interests of the Child and IOM, Training Manual for Guardians and Social Workers dealing with unaccompanied minor asylum seekers, Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, 16 November 2017.

The full application of the BIC concept requires the development of a rights-based approach to situations concerning children, and all actors involved shall work to secure the child’s holistic well-being.

The Committee on the Rights of the Child has explained that the BIC is a threefold concept [para. 6], since it is:

(a) a **substantive right**:

#### **Committee on the Rights of the Child - General Comment No. 14**

**6.a.** The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general. Article 3, paragraph 1, creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court.

(b) a **fundamental, interpretative legal principle**:

#### **Committee on the Rights of the Child - General Comment No. 14**

**6.b.** If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child’s best interests should be chosen. The rights enshrined in the Convention and its Optional Protocols provide the framework for interpretation.

(c) a **rule of procedure**:

#### **Committee on the Rights of the Child - General Comment No. 14**

**6.c.** Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases.

Since they are first and foremost children, the BIC principle applies to refugee and unaccompanied asylum seeking children too:

**Committee on the Rights of the Child - General Comment No. 14**

17. Article 3, paragraph 1 seeks to ensure that the right is guaranteed in all decisions and actions concerning children. [...]The word "action" does not only include decisions, but also all **acts, conduct, proposals, services, procedures and other measures**.

18. Inaction or failure to take action and omissions are also "actions", for example, when social welfare authorities fail to take action to protect children from neglect or abuse.

19. The legal duty applies to all decisions and actions that directly or indirectly affect Children.

Unaccompanied asylum seeking children are first and foremost children and, therefore, the principle of the best interests of the child applies in their respect. In asylum context BIC is particularly relevant in all actions and decisions that may affect children and are related to, *inter alia*, the grant of international protection, the Dublin and family reunification procedures, return, access to rights.

**Joint General Comment CMW/C/GC/3-CRC/C/GC/22 regarding the human rights of children in the context of international migration**

29. States parties shall ensure that the best interests of the child are taken fully into consideration in immigration law, planning, implementation and assessment of migration policies and decision-making on individual cases, including in granting or refusing applications on entry to or residence in a country, decisions regarding migration enforcement and restrictions on access to social rights by children and/or their parents or legal guardians, and decisions regarding family unity and child custody, where the best interests of the child shall be a primary consideration and thus have high priority.

**Committee on the Rights of the Child - General Comment No. 6**

19. [...] In the case of a displaced child, the principle must be respected during all stages of the displacement cycle. At any of these stages, a best interest's determination must be documented in preparation of any decision fundamentally impacting on the unaccompanied or separated child's life.

For this principle to be fully respected, it is necessary to assess and determine what child's best interests are before taking any action or measure affecting children.

**Committee on the Rights of the Child - General Comment No. 14**

Assessment and determination of the child's best interests are two steps to be followed when required to make a decision.

While the best interests' assessment (BIA) is the process through which all necessary elements are evaluated and weighed, the best interests' determination (BID) is a formal process with precise safeguards, carried out bearing in mind the BIA. Any authority dealing with children shall carry out a BIA and a BID before taking any measure concerning a child. Public authorities and organizations making decisions that concern children must act in conformity with the obligation to assess and determine the child's best interests, while people who make decisions concerning children on a daily basis (e.g. parents, guardians, teachers, etc.) are not expected to follow strictly this two-step procedure, even though decisions made in everyday life must also respect and reflect the child's best interests.

- *See further on the elements to be taken into account when assessing the child's BIC: [General Comment No. 14](#), Committee on the Rights of the Child, paras. 52 - 79*
- *On the procedural safeguards [General Comment No. 14](#), Committee on the Rights of the Child, paras. 85 – 99*

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#### 4. BEST INTERESTS ASSESSMENT (BIA).

##### Committee on the Rights of the Child - [General Comment No. 14](#),

47. [...] The “best-interests assessment” consists in evaluating and balancing all the elements necessary to make a decision in a specific situation for a specific individual child or group of children. It is carried out by the decision-maker and his or her staff – if possible a multidisciplinary team –, and requires the participation of the child.

In order to implement the best interests principle in asylum context the best interests assessments should be undertaken **in each individual case** and **in the light of the specific circumstances of each child or group of children**, including age, sex, level of maturity, whether the child or children belong to a minority group and the social and cultural context in which the child or children find themselves.

In weighing the various elements, one needs to bear in mind that the purpose of assessing and determining the best interests of the child is to ensure the full and effective enjoyment of the rights recognized in the CRC, and the holistic development of the child [para. 82]. Moreover, in the best-interests assessment, one has to consider that the capacities of the child will evolve. Decision-makers should therefore consider measures that can be revised or adjusted accordingly, instead of making definitive and irreversible decisions. To do this, they should not only assess the physical, emotional, educational and other needs at the specific moment of the decision, but should also consider the possible scenarios of the child's development, and analyse them in the short and long term. In this context, decisions should assess **continuity and stability of the child's present and future situation**. [para. 84].

##### Committee on the Rights of the Child - [General Comment No. 14](#)

97. [...] any decision concerning the child or children **must be motivated, justified and explained**. The motivation should state explicitly all the factual circumstances regarding the child, what elements have been found relevant in the best-interests assessment, the content of the elements in the individual case, and how they have been weighted to determine the child's best interests. If the decision differs from the views of the child, the reason for that should be clearly stated. If, exceptionally, the solution chosen is not in the best interests of the child,

the grounds for this must be set out in order to show that the child's best interests were a primary consideration despite the result. It is not sufficient to state in general terms that other considerations override the best interests of the child; all considerations must be explicitly specified in relation to the case at hand, and the reason why they carry greater weight in the particular case must be explained. [...]

#### **UNHCR, Best Interests of the Child (2007)**

The best interests' assessment is a continuous process that starts from the moment of identification, and continues throughout the displacement cycle until a durable solution is reached.

#### **UNHCR, Guidelines on Determining the Best Interests of the Child (2008)**

A best interest's assessment [...] is essential before any action affecting an individual child [...] is taken [...]. It does not require any particular formality, and should be conducted systematically in many circumstances that occur between the moment a child is identified as unaccompanied or separated or otherwise at risk, until a durable solution is implemented. It should be carried out, for example, prior to initiating tracing or to providing temporary care. [...] The child should in all cases be given an opportunity to express his or her views.

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## 5. BEST INTERESTS DETERMINATION (BID)

#### **Committee on the Rights of the Child - General Comment No. 14**

47. [...] The "best-interests determination" describes the formal process with strict procedural safeguards designed to determine the child's best interests on the basis of the best-interests assessment.

#### **UNHCR, Best Interests of the Child (2007)**

The BID is a formal process with specific procedural safeguards and documentation requirements [...]. The decision-maker is required to weigh and balance all the relevant factors of a particular case, giving appropriate weight to the rights and obligations recognized in the CRC and other human rights instruments, so that a comprehensive decision can be made that best protects the rights of children.

#### **UNHCR, Best Interests of the Child (2007)**

There are a number of pre-conditions that are essential for an effective determination of the best interests of unaccompanied and separated children. These preconditions are: proper identification; an adequate registration process, including documentation; tracing; the appointment of a guardian; provision of temporary care arrangements and the monitoring thereof; and the opening of an individual case file.

#### **UNHCR, Guidelines on Determining the Best Interests of the Child (2008)**

A best interest's determination describes the formal process designed to determine the child's best interests for particularly important decisions affecting the child that require stricter procedural safeguards. Such process should ensure adequate child participation without discrimination. It should also allow the views of the child to be given due weight in accordance with age and maturity. It involves decision-makers with relevant areas of expertise, and balances all relevant factors in order to assess the best option.

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## 6. VULNERABILITY.

As mentioned above, the respect of the principle of the best interests of the child, and its proper assessment and determination, are paramount to properly address the special needs of children.

Children are regarded as in need of special safeguards and care due to their inherent vulnerability, as stated in the preamble of the CRC.

#### **Preamble - Convention on the Rights of the Child**

“the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth”

By virtue of their vulnerability, children are entitled to specific and tailored guarantees, which are aimed at protecting, respecting and fulfilling their rights, in order to promote their well-being and to tackle situations that could impair the full enjoyment of their rights. Children’s inherent vulnerability has been frequently recognised by the European Court of Human Rights (ECtHR) too, which has taken this element into account in reaching its decisions in cases concerning children.

Besides their particularly vulnerable nature, children can find themselves in situations which put them in a particularly disadvantaged and precarious condition. Disability, gender, young age, sexual abuse, absence of family ties are some of the factors that may exacerbate a child’s vulnerability, and hence specific considerations and adequate care are needed.

#### **Committee on the Rights of the Child - General Comment No. 14**

75. An important element to consider is the child’s situation of vulnerability, such as disability, belonging to a minority group, being a refugee or asylum seeker, victim of abuse, living in a street situation, etc.

When seeking asylum, children find themselves in a situation of compounded vulnerability due to their status as children as well as persons seeking international protection. For this reason, asylum seeking children present a double vulnerability, insofar as asylum seekers themselves form part of a vulnerable group, as the ECtHR has affirmed:

#### **M.S.S. v. Belgium and Greece - No. 30696/09, 21 January 2011**

“The Court attaches considerable importance to the applicant’s status as an asylum-seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection [...]. It notes the existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention, the remit and the activities of the UNHCR and the standards set out in the Reception Directive.”

With regard to asylum seeking children, protection concerns must take precedence over any consideration related to the irregular status of the child.

Furthermore, asylum seeking children who are unaccompanied are exposed to an additional layer of vulnerability. In its General Comment No. 6, the Committee on the Rights of the Child has affirmed that unaccompanied and separated children form a ‘particularly vulnerable group of children’. The absence of an adult carer who can take care of them imposes the adoption of particular safeguards to ensure that unaccompanied asylum seeking children are not subject to abuse and receive protection, in accordance with Article 22(1) CRC as well as Article 20(1) CRC:

#### **Committee on the Rights of the Child - General Comment No. 14**

A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

The extreme vulnerability of unaccompanied asylum seeking children is well established at international level:

#### **Committee on the Rights of the Child - General Comment No. 6**

47. In ensuring their access, States must assess and address the particular plight and vulnerabilities of such children. They should, in particular, take into account the fact that unaccompanied children have undergone separation from family members and have also, to varying degrees, experienced loss, trauma, disruption and violence. Many of such children, in particular, those who are refugees, have further experienced pervasive violence and the stress associated with a country afflicted by war. This may have created deep-rooted feelings of helplessness and undermined a child's trust in others. Moreover, girls are particularly susceptible to marginalization, poverty and suffering during armed conflict, and many may have experienced gender based violence in the context of armed conflict. The profound trauma experienced by many affected children calls for special sensitivity and attention in their care and rehabilitation.

Under EU Law, unaccompanied asylum seeking children are considered vulnerable persons whose specific situation deserves particular attention:

#### **Article 21 recast- EU Reception Conditions Directive**

Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation, in the national law implementing this Directive.

 *On the concept of vulnerability in European asylum procedures, see: [AIDA Comparative Report](#)*

Moreover, the vulnerability of asylum seeking children, especially when unaccompanied, has been frequently remarked by the ECtHR:

#### **Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, No. 13178/03, 12 October 2006**

“The [separated child]’s position was characterised by her very young age, the fact that she was an illegal immigrant in a foreign land and the fact that she was unaccompanied by her family from whom she had become separated so that she was effectively left to her own devices. She was thus in an extremely vulnerable situation.”

#### **Rahimi v. Greece, No. 8687/08, 5 April 2011**

“Comme il a déjà été relevé, la situation du requérant se caractérisait par son jeune âge, le fait qu'il était étranger en situation d'illégalité dans un pays inconnu, qu'il n'était pas accompagné et donc livré à lui-même. Eu égard à la protection absolue conférée par l'article 3 de la Convention, il convient, selon la Cour, de garder à l'esprit que ces éléments sont déterminants en l'espèce et prédominant sur la qualité d'étranger en séjour illégal du requérant.”

#### **Popov v. France, No. 39472/07 39474/07, 19 January 2012**

“[...] it is important to bear in mind that the child's extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant [...]. The European Union directive

concerning the reception of aliens thus treats minors, whether or not they are accompanied, as a category of vulnerable persons particularly requiring the authorities' attention [...]. To be sure, children have specific needs that are related in particular to their age and lack of independence, but also to their asylum-seeker status.

**Tarakhel v. Switzerland, No. 29217/12, 04 November 2014**

“With more specific reference to minors, the Court has established that it is important to bear in mind that the child’s extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant [...]. Children have specific needs that are related in particular to their age and lack of independence, but also to their asylum-seeker status.”

The obligations to uphold the best interests of the child and to protect children seeking international protection require States to put in place asylum systems and procedures that are able to address the particular needs of these children. The ECtHR has underlined such States’ obligation in its jurisprudence:

**Tarakhel v. Switzerland, No. 29217/12, 04 November 2014**

99. “The Court has also observed that the Convention on the Rights of the Child encourages States to take the appropriate measures to ensure that a child who is seeking to obtain refugee status enjoys protection and humanitarian assistance, whether the child is alone or accompanied by his or her parents.”

Bearing in mind that a child may present multiple vulnerabilities is essential to enable a proper assessment of her or his best interests. As explained above, the BIC is not a fixed concept, but it depends on the child’s individual circumstances. Therefore, an individualized assessment, in light of all facts and circumstances, is necessary for the assessment and/or determination of what is in the best interests of that particular child.

**Committee on the Rights of the Child - General Comment No. 6**

20. A determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child’s identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs.

**Committee on the Rights of the Child - General Comment No. 14**

48. Assessing the child’s best interests is a unique activity that should be undertaken in each individual case, in the light of the specific circumstances of each child or group of children or children in general. These circumstances relate to the individual characteristics of the child or children concerned, such as, inter alia, age, sex, level of maturity, experience, belonging to a minority group, having a physical, sensory or intellectual disability, as well as the social and cultural context in which the child or children find themselves, such as the presence or absence of parents, whether the child lives with them, quality of the relationships between the child and his or her family or caregivers, the environment in relation to safety, the existence of quality alternative means available to the family, extended family or caregivers, etc. [...]

49. Determining what is in the best interests of the child should start with an assessment of the specific circumstances that make the child unique.

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## 7. INDIVIDUALISED ASSESSMENT.

An individualised assessment allows tackling the manifold factors that may contribute to put a child in a situation of enhanced vulnerability, in order to properly address her or his situation and protect their human rights accordingly.

**Committee on the Rights of the Child - General Comment No. 14**

75. The purpose of determining the best interests of a child or children in a vulnerable situation should not only be in relation to the full enjoyment of all the rights provided for in the Convention, but also with regard to other human rights norms related to these specific situations, such as those covered in the [...] Convention relating to the Status of Refugees, among others.

In conclusion, when it comes to unaccompanied and separated children seeking international protection, due account should be taken of their vulnerabilities as 1) children; 2) asylum applicants; and 3) lacking care of parents/other family member as well as the other factors that may increase their vulnerability and require special attention. In addition, any other element that can exacerbate their vulnerability – e.g. suffering from any form of disability, or being victim of sexual abuse – should be duly considered and evaluated for the purpose of the BIA and the BID.

**Committee on the Rights of the Child - General Comment No. 14**

76. The best interests of a child in a specific situation of vulnerability will not be the same as those of all the children in the same vulnerable situation. Authorities and decision makers need to take into account the different kinds and degrees of vulnerability of each child, as each child is unique and each situation must be assessed according to the child's uniqueness. An individualized assessment of each child's history from birth should be carried out, with regular reviews by a multidisciplinary team and recommended reasonable accommodation throughout the child's development process.

Many instruments in EU law afford specific guarantees to children. For example, the Reception Conditions Directive 2003/9/EC and its recast 2013/33/EU recognise that children are entitled to special care in the context of reception:

**Reception Conditions Directive 2003/9/EC - recast 2013/33/EU**

Among vulnerable persons identified by the rRCD, children, in particular unaccompanied, are explicitly recognised. Due to their special needs, distinct from other categories of vulnerable persons, the rRCD affords them enhanced forms of protection under Articles 23 and 24.

The ultimate aim of the Directive in respect of children is to guarantee that Member States ensure a standard of living adequate for a child's physical, mental, spiritual and social development. To this end, the "best interests of the child shall be a primary consideration for Member States when implementing the provisions of the Directive that involve children.

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## 8. AGE ASSESSMENT

Given the definition of a child and the entitlement of children to special care and protection, it is important to ensure that individuals who are under 18 are treated as children. In cases of doubt the individual should be treated as a child (unless and until otherwise proven).

**Third Party Intervention in the case of Darboe and Camara v Italy (Appl.no.5797/17) - The AIRE Centre, Dutch Council for Refugees and ECRE**

Age assessment should never be undertaken as a routine practice and may only be resorted to where there are serious doubts about the claim of minor age and only after the principle of the benefit of the doubt has been applied.

In order to determine the age of a child in case of doubt, age assessment may be carried out.

### **Position Paper on Age Assessment in the Context of Separated Children in Europe, 2012 - Separated Children in Europe Programme (SCEP)**

Age assessment refers to the procedures through which authorities seek to establish the chronological age of an individual.

The correct identification of an individual as a child has considerable implications in the context of international protection, given the safeguards attached asylum claims lodged by children.

### **AIDA, Comparative Report on Vulnerability**

A prime example of the importance of and sensitivities in the identification of vulnerabilities is the age assessment of unaccompanied children. Being misidentified as an adult rather than a child when seeking international protection can have considerable implications on the level of rights and protections afforded to them by a receiving state. This ranges from being unable to access welfare services and support, to being detained as an adult, to not receiving publicly funded legal representation during the asylum process.

Currently, there is no method of age assessment that can determine a person's chronological age with certainty. In particular, medical examinations (such as hand-wrist bone X-rays) have been heavily criticised for being unreliable, not scientific and unethical; therefore, they are unsuitable to assess a child's age.

 *For an annex on medical literature and report advocating against the use of medical examination for age assessment purposes, see [‘Compilation of Expert Medical Opinions on the Use of Medical Examinations for Age Assessment of Non-National Children’](#), Annex No. 11 to the AIRE Centre, DCR and ECRE’s Third Party Intervention in the case ‘Darboe and Camara’ before the ECtHR. The case is currently pending before the Court.*

### **Position Paper on Age Assessment in the Context of Separated Children in Europe, 2012 - Separated Children in Europe Programme (SCEP)**

Most experts agree that age assessment is not a determination of chronological age but an educated guess. All medical and other exams currently used – in Europe and beyond - to assess the age of an individual can never lead to precise results and will always bring a considerable risk to the safety, well-being and protection of the individual whose age is disputed.

### **Position Paper on Age Assessment in the Context of Separated Children in Europe, 2012 - Separated Children in Europe Programme (SCEP)**

Age assessment must be carried out in full respect of key principles and standards enshrined at international and European level. Notably, age assessment shall be guided by the principle of best interests of the child throughout the procedure.

Age assessment procedures should be undertaken taking the best interests of the child as a primary consideration.

As the BIC must be a primary concern in all actions regarding children, it must guide age assessment procedures too. Upholding the child's BIC in the context of age assessment has several corollaries:

- **Age assessment should be undertaken only in case of doubt and never as a routine practice.**

Age assessment must be carried out only when a serious doubt remains regarding a child's age. The benefit of doubt should be thus applied, so to avoid recourse to unnecessary procedures which may have a detrimental effect on the child's well-being.

#### **UNHCR, Guidelines No. 8 on Child Asylum Claim**

Age assessments are conducted in cases when a child's age is in doubt and need to be part of a comprehensive assessment [...]

#### **Position Paper on Age Assessment in the Context of Separated Children in Europe, 2012 - Separated Children in Europe Programme (SCEP)**

It should not be allowed to initiate age assessment when there are no reasonable grounds for doubting the age declared by an individual. Professionals mandated to initiate age assessment should be required to clearly and formally justify the reasons why they doubt an individual's declared age. Such reasons should be motivated on an individual, case-by-case basis.

- **Age assessment may only be carried following the child's informed consent.**

Before resorting to age assessment, authorities should ensure that the child has been duly informed on the purposes and the procedure. Such information must be conveyed in a language and in a manner the child understands. The appointment of a guardian and/or a legal advisor is therefore crucial to make sure that children are provided with adequate information on the age assessment process.

#### **Position Paper on Age Assessment in the Context of Separated Children in Europe, 2012 - Separated Children in Europe Programme (SCEP)**

If an age assessment is thought to be necessary, informed consent must be gained from the individual. [...] Cultural-linguistic mediators or – if not possible – interpreters specifically trained to facilitate exchange between professionals and the child in the process of age assessment, should be involved in the procedure from the start.

#### **UNHCR, Guidelines No. 8 on Child Asylum Claims**

Children need to be given clear information about the purpose and process of the age-assessment procedure in a language they understand. Before an age assessment procedure is carried out, it is important that a qualified independent guardian is appointed to advise the child.

- **Methods of age assessment must respect the child's moral and physical integrity.**

Age assessment must be conducted in a safe and fair manner, always respecting human dignity and children's specific needs in light of the States obligations under international and EU primary law. Intrusive methods for assessing a child's age are at odds with legal standards protecting the rights of the child. This is particularly relevant in respect of medical examinations, as referred above.

#### **Committee on the Rights of the Child - General Comment No. 6**

[...] the assessment must be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity.

#### **Position Paper on Age Assessment in the Context of Separated Children in Europe, 2012 - Separated Children in Europe Programme (SCEP)**

[...] age assessment is not an exact science and a considerable margin of uncertainty will always remain inherent in any procedure.

- **The child shall be given the benefit of doubt.**

Since age assessment procedures are not able to state with certainty a person's age, the respect of the BIC principle imposes that, in case of doubt following an age assessment, the person is given the benefit of doubt. This means that, should a serious doubt remain, the person must be treated as a child. In addition, the benefit of doubt must also be granted during the age assessment procedure:

**Committee on the Rights of the Child - General Comment No. 6**

[...] in the event of remaining uncertainty, should accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, s/he should be treated as such.

**Position Paper on Age Assessment in the Context of Separated Children in Europe, 2012 - Separated Children in Europe Programme (SCEP)**

When making an age assessment, individuals whose age is being assessed should be given the benefit of doubt. Margins of error adequate to each exam (based on updated references) should always be indicated clearly. If the age range resulting from the assessment includes the minor age, the individual shall be considered and treated as a child.

[...] In cases of doubt, before and/or pending age assessment procedures, the person claiming to be under eighteen years should be treated as a child. [...] The principle of the benefit of doubt shall be always applied in favor of the presumed child. Pending the results of age assessment an individual who may be a child should be considered and treated as such, including access to fundamental rights and safeguards that all children are entitled to according to the international legal framework.

**UNHCR, Guidelines No. 8 on Child Asylum Claims**

The margin of appreciation inherent to all age-assessment methods needs to be applied in such a manner that, in case of uncertainty, the individual will be considered a child.

- **The child should be given an effective opportunity to challenge the age assessment result.**

In order to provide the child with an effective opportunity to challenge the age assessment decision, it is necessary that she or he is assisted by a competent guardian and a specifically trained legal representative.

**ICJ, FAIR Project, Module 0**

There must be an effective opportunity to challenge an age assessment decision through judicial review. Children should be provided with legal and procedural information, including on how a decision can be challenged.

EU Asylum Law (Procedure Directive 2008/115/EC and its recast (2013/32/EU) foresees the possibility for EU Member States to resort to medical examinations to assess the age of unaccompanied asylum seeking children, only when a doubt on the child's age arises. In this context, Article 25 Procedure Directive establishes a series of safeguards that need to be respected in the context of age assessment. Particularly, the child's human dignity must be respected and she or he must be adequately informed

on the procedure and consent must be obtained prior to any examination. The Directive also states the principle of the benefit of doubt that the person undergoing age assessment should benefit from. Notwithstanding the safeguards in EU Law relating to age assessment procedures, it is important to stress that medical examinations are to be considered unsuitable to assess a child's age, since they are unreliable and inaccurate and, therefore, harmful for children's rights.

➔ *For an annex on medical literature and report advocating against the use of medical examination for age assessment purposes, see 'Compilation of Expert Medical Opinions on the Use of Medical Examinations for Age Assessment of Non-National Children', Annex No. 11 to the AIRE Centre, DCR and ECRE's Third Party Intervention in the case 'Darboe and Camara' before the ECTHR. The case is currently pending before the Court.*

#### **Article 25 recast EU Reception Conditions Directive**

5. Member States may use medical examinations to determine the age of unaccompanied minors within the framework of the examination of an application for international protection where, following general statements or other relevant indications, Member States have doubts concerning the applicant's age. If, thereafter, Member States are still in doubt concerning the applicant's age, they shall assume that the applicant is a minor.

Any medical examination shall be performed with full respect for the individual's dignity, shall be the least invasive examination and shall be carried out by qualified medical professionals allowing, to the extent possible, for a reliable result.

Where medical examinations are used, Member States shall ensure that:

(a) unaccompanied minors are informed prior to the examination of their application for international protection, and in a language that they understand or are reasonably supposed to understand, of the possibility that their age may be determined by medical examination. This shall include information on the method of examination and the possible consequences of the result of the medical examination for the examination of the application for international protection, as well as the consequences of refusal on the part of the unaccompanied minor to undergo the medical examination;

(b) unaccompanied minors and/or their representatives consent to a medical examination being carried out to determine the age of the minors concerned; and

(c) the decision to reject an application for international protection by an unaccompanied minor who refused to undergo a medical examination shall not be based solely on that refusal.

The fact that an unaccompanied minor has refused to undergo a medical examination shall not prevent the determining authority from taking a decision on the application for international protection.

