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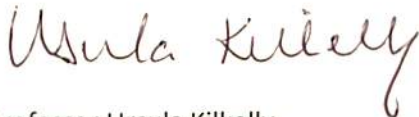
Dear Sir/Madam

Please find attached an Amicus Curiae brief submitted by the Child Law Clinic at University College Cork on the request to the Inter-American Court of Human Rights for an advisory opinion on migrant children.

We are grateful for the opportunity to contribute to this important process and thank you in advance for giving our Brief your attention. We would also like to wish you every success with the Advisory Opinion.

Should you require anything further please do not hesitate to contact me.

Yours faithfully



Professor Ursula Kilkelly
Director, Child Law Clinic

Professor Ursula Kilkelly
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AMICUS CURIAE

**REQUEST FOR ADVISORY OPINION ON MIGRANT CHILDREN BEFORE THE
INTER-AMERICAN COURT OF HUMAN RIGHTS**

Submitted by the Child Law Clinic, University College Cork, Ireland to the
Inter-American Court of Human Rights

10 February 2012

Signed as Director of the Child Law Clinic, Professor Ursula Kilkelly

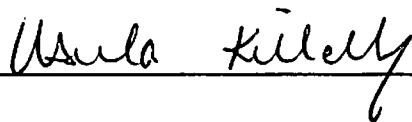


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INTRODUCTION

1. The Child Law Clinic of University College Cork, Ireland, respectfully submits this *amicus curiae* brief for the benefit of the consideration of the Inter-American Court of Human Rights of the issues contained in the Request for an Advisory Opinion on Migrant Children.

2. The Child Law Clinic at University College Cork is an independent research clinic which provides student-led research services to those litigating children's issues. The Clinic is directed by Professor Ursula Kilkelly, and is made up of staff and graduate students of University College Cork. Members of the Clinic are highly skilled legal researchers, with considerable knowledge of child law and children's rights. As an organisation which promotes the use of law to reform the treatment of children, with a particular influence on evidence-based law, the Clinic has a particular interest in the issues raised by the prospective Advisory Opinion. This Brief was prepared and written by Clinic members - graduate students Emily Bartholomew, Amy Coleman and Anna Marie Brennan - under the supervision of Professor Kilkelly.

3. The Request for an Advisory Opinion on Migrant Children was submitted to the Inter-American Court of Human Rights by the States of Argentina, Brazil, Uruguay and Paraguay on 7 July 2011. Such an Advisory Opinion is of great significance given that:

- i) Children generally are vulnerable and require proper and consistent vindication of their rights.
- ii) Children in the migration system are particularly vulnerable given the combination of their often-irregular immigration status, and their age.

The Child Law Clinic is particularly concerned with the rights of separated children who arrive in the recipient country without a parent or guardian who is legally or customarily responsible for them. There are numerous reasons why asylum-seeking children arrive unaccompanied to other states. Some children are sent by their families to pave the way for other members of the family to come to the host state; other children may be abducted in order to become child soldiers, while some families may have to split themselves up in order to survive in situations of armed conflict.¹ In addition, after arrival in the host state, some parents may abandon their children in the hope that if the child is deemed to have arrived unaccompanied, they will have a better chance of being granted asylum, and in turn of building a future in the new state.²

4. This brief will pay particular attention to the first and second questions posed by the Request for Advisory Opinion, namely

¹ L. Bonnerjea, "Disasters, Family Tracing and Children's Rights — Some Questions about the Best Interests of Separated Children" (1994) 18 *Disasters* 277.

² *Ibid.*

1. Which are, in light of Articles 1, 2, 5, 7, 8, 19, 22.7 and 25 of the American Convention and Articles 1, 25 and 27 of the American Declaration of the Rights and Duties of Man, the procedures that should be adopted in order to identify the different risks for the rights of migrant children; to determine the needs for international protection and to adopt, if applicable, the special protective measures required?

2. Which are, in light of Articles 1, 2, 7, 8, 19 and 25 of the American Convention and Article 25 of the American Declaration on the Rights and Duties of Man, the due process guarantees that should govern immigration proceedings in which migrant children are involved?

5. This *amicus curiae* brief of the Child Law Clinic, University College Cork, Ireland, will thus consider the rights of separated children with respect to:

- Seeking asylum through a specialised procedure which takes into account their particular vulnerabilities;
- The appointment of a guardian *ad litem*; and
- The appointment of legal representation.

6. A guardian *ad litem*, or guardian “for the purposes of legal action”, is an adult - usually professional qualified as a social worker or a psychologist - whose role it is to represent the interests of the child in legal proceedings. More generally, the guardian *ad litem* ensures that the child is protected, participates in decisions affecting her/him, and receives the medical, housing, educational and other services necessary to promote the child’s welfare. The role of the guardian *ad litem* is distinct from the role of the child’s lawyer: while the lawyer’s role is advise the child on her/his legal rights, assist the child in navigating the asylum application process, and represent the child in associated legal proceedings, it is the role of the guardian *ad litem* to secure the child’s welfare through access to appropriate services, much like a parent.

7. The brief will draw on national and international law, case law and best practice guidelines to explain the wide range of standards and principles that support the rights of the separated child in the immigration system. It is the view of the Child Law Clinic that these instruments are worthy of the Court’s consideration in an Advisory Opinion.

EXECUTIVE SUMMARY

8. This *amicus curiae* brief examines the rights of separated children who arrive in the recipient state without a parent or guardian. In particular, the objective of this brief is to analyse the rights of the separated child with regard to:

- Seeking asylum through a specialised procedure which takes into account such children's particular vulnerabilities;
- The appointment of a guardian *ad litem*; and
- The appointment of legal representation.

9. The brief considers that separated children should be appointed a guardian *ad litem* on their arrival in the recipient state. The UN Convention on the Rights of the Child supports this recommendation. The jurisprudence of both the Inter-American Court of Human Rights and the European Court of Human Rights also make the case that the vulnerability of the child warrants the appointment of a guardian *ad litem* to ensure that his/her rights are vindicated and that his/her views are heard in all matters that affect the child as part of the determination of his/her refugee status.

10. The brief examines whether separated children seeking asylum have the right to be appointed legal representation to vindicate their rights. The appointment of a lawyer to children in such cases would not only guarantee that all legal remedies are being pursued in the child's case, but it would also ensure that the child has information about the legal procedures that ultimately affect him/her. Furthermore, an independent legal representative would be able to advise the separated child on his/right to seek asylum and could guide the child through the application process. In numerous cases, the Inter-American Court of Human Rights has held that a child has a right to due process. The Committee on the Rights of the Child has also recognised this obligation and the Council of Europe Guidelines on Child-friendly Justice stress the importance of children enjoying the right to legal counsel to facilitate their direct access to justice. This brief will contend, therefore, that the appointment of a legal representative is necessary to ensure the child's autonomous rights are protected during the refugee status assessment procedure.

11. The third part of this brief analyses the right of the separated child to a specialised asylum procedure taking into account his/her particular vulnerabilities. It is clear from an analysis of psychological research that children need this special procedure because separation from family members can have a detrimental impact on how they cope with the psychological effects of trauma and distress. This brief concludes that children should have access to a refugee status assessment procedure that takes into consideration the trauma that they may have endured as a consequence of being separated from their families. Above all, Article 22(1) of the UN Convention on the Rights of the Child clearly states that proper measures should be implemented by states to take into account the particular vulnerabilities of the child. Therefore, if it is determined

during refugee status assessment proceedings that the child is unable to communicate with officials in a common language, an interpreter must be obtained to facilitate the proceedings between the parties in a common language. This conclusion is supported, also, by the Council of Europe Guidelines on Child-friendly Justice.

SUMMARY OF ISSUES

- I. The Particular Vulnerabilities of Separated Children Warrant Special Consideration by this Court to Ensure Protection of their Substantive and Procedural Rights.
 - a) *Explanation of the particular vulnerabilities of separated children*
 - b) *The substantive rights of separated children.*
 - c) *The need for dual representation and specialised asylum procedures.*
 - d) *Conclusion.*

- II. Separated Children should be Appointed a Guardian *ad Litem* Immediately Upon Arrival in the Destination Country.
 - a) *The appointment of a guardian ad litem is necessary to vindicate the rights of the separated children as guaranteed under the United Nations Convention on the Rights of the Child (UNCRC).³*
 - b) *European legal instruments provide for the prompt appointment of a guardian ad litem to separated children.*
 - c) *Case law of the European Court of Human Rights has recognised the need for a guardian ad litem to be appointed to separated children.*
 - d) *The Inter-American Court of Human Rights may take into account the decisions and opinions of the European Court of Human Rights.*
 - e) *A guardian ad litem should be appointed to the separated child even in a situation where he or she will soon attain majority, until such time as a durable solution is reached, in order to properly vindicate the development rights of the child.*
 - f) *Conclusion.*

- III. Separated Children should be Appointed an Independent Legal Representative in Addition to a guardian *ad litem*
 - a) *Appointment of an independent legal representative in addition to a guardian ad litem is necessary to vindicate the child's right to be heard as required by Article 12 of the UNCRC.⁴*
 - b) *Appointment of an independent legal representative is necessary to vindicate the child's right to due process as guaranteed by the Conventions and jurisprudence of the Inter-American system and Article 3 of the UNCRC.*
 - c) *Appointment of an independent legal representative is necessary to vindicate the child's substantive rights as guaranteed by the UNCRC and recognised by this Court.*

³ United Nations Convention on the Rights of the Child [hereinafter "UNCRC"], GA Res. 44/25. U.N. GAOR. 44th Sess. Supp. No. 49, at 167 U.N. Docs. A/44/49 (1989).

⁴ Article 12 provides that:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

- d) *European legal instruments and best practice guidelines provide for the prompt appointment of an independent legal representative for the child.*
- e) *Case law of the European Court of Human Rights has clearly recognised the need for an independent legal representative to be appointed to the child.*
- f) *Conclusion.*

IV. Separated Children Seeking Asylum Have a Right to a Specialised Asylum Procedure That Takes into Account their Particular Vulnerabilities.

- a) *The difficulties faced by separated children during the refugee assessment process render them entitled to specialised procedures*
- b) *The UNCRC provides for specialised procedures for the child during the assessment process.*
- c) *The UNCRC provides for specialised procedures for the child during the asylum process.*
- d) *Conclusion*

DISCUSSION

I. The Particular Vulnerabilities of Separated Children Warrant Special Consideration by this Court to Ensure Protection of their Substantive and Procedural Rights.

12. The Child Law Clinic respectfully submits that the plight of separated children warrants special attention. As persons without parental care in a foreign country, they are voiceless and without a responsible adult to help them access proper care, housing, medical treatment, education, and other services. Evidence-based research establishes that separated children are disproportionately vulnerable to exploitation, abuse, human trafficking, barriers to proper education, and racial discrimination.⁵ The purpose of this section is to elaborate on the particular vulnerabilities of separated children, delineate the substantive rights to which they are entitled, and introduce why a dual representation system is necessary to effectuate these rights.

a) Explanation of the particular vulnerabilities of separated children.

13. Separated children are at greater risk of sexual exploitation and abuse, child labour, and gender-based violence than their accompanied counterparts.⁶ Additionally, the psychological implications of being separated from their family members are critical. It is important to note that, “the reason and circumstances surrounding a given separation may be sometimes more relevant to the question of untoward effects on the child than the simple separation itself.”⁷ Therefore, the argument can be made that the separation of the child from his/her family in times of great danger, such as situations of armed conflict, may have a greater effect on the child than separation under other circumstances.⁸

14. The effects of traumatic events on minors who have been separated from their families are well documented.⁹ In particular, the child’s separation from parents, especially the mother, has time and again been recognised as having a detrimental impact upon the psychological well being of the child.¹⁰ The

⁵ See, e.g., Ombudsman for Children’s Office, “Separated Children Living in Ireland” (2009), available at http://www.oco.ie/assets/files/publications/separated_children/SeparatedChildrenProjectReport.pdf (Date accessed: 9 December 2011); Irish Refugee Council, “Closing a Protection Gap: National Report 2010-2011” (Dublin: IRC, 2011) available at <http://irc.fusio.net/wp-content/uploads/2011/09/Closing-a-Protection-Gap-National-Report.pdf> (Date accessed: 8 December 2011).

⁶ United Nations Committee on the Rights of the Child, *General Comment No. 6 (2005) Treatment of Unaccompanied and Separated Children Outside Their Country of Origin* UN Doc CRC/GC/2005/6 1 September 2005 at para. 7 (‘General Comment No. 6.’) at para. 3.

⁷ I. Derluyn and E. Broekaert, “Unaccompanied Refugee Children and Adolescents: The Glaring Contrast between a Legal and Psychological Perspective” (2008) 31 *International Journal of Law and Psychiatry* 319 at 323.

⁸ *Ibid.*

⁹ A. Freud and D. Burlingham, *Infants Without Families: The Case For and Against Residential Nurseries* (London: Medical War Books, 1943.)

¹⁰ I. Derluyn et al., “Post-Traumatic Stress in Former Ugandan Child Soldiers” (2004) 363 *Lancet* 1646; S. Elbedour *et al.*, “An Ecological Integrated Model of Children of War:

presence of family members during the migration process may reduce “the extent to which experiences are perceived as terrifying and traumatic.”¹¹ Therefore, the separation of the child from his/her family can have a detrimental impact on how children cope with the psychological effects of trauma and distress.¹²

15. One of the consequences of being separated from his/her family is that the child may “lose their entire social infrastructure: not only their parents, and relatives, but also the security of grandparents, neighbours, teachers... The world of significant adults is lost, and with it goes much of the security and stability, safety and roots of the child.”¹³ This in turn may leave the child at a higher risk of experiencing trauma during the refugee assessment process in the host state because their parents are not present to provide social and economic resources to the child.¹⁴

16. Separated children face particular challenges with respect to accessing necessary resources to address their vulnerabilities. The UN Committee on the Rights of the Child has identified that unaccompanied children “are often discriminated against and denied access to food, shelter, housing, health services and education.”¹⁵ In the Irish context, research undertaken by the Ombudsman for Children’s Office revealed that discrimination was a major point of concern amongst the children interviewed.¹⁶ Research from this office’s 2009 report also revealed that separated children “receive a lower standard of care than children in the mainstream care system.”¹⁷

17. In conclusion, separated children are exceptionally vulnerable because they face greater risks of abuse than accompanied migrant children, have often suffered psychological trauma following separation from their families, and face discrimination and other barriers to accessing the services they need upon arrival to their destination country.

Individual and Social Psychology” (1993) 17 *Child Abuse and Neglect* 805; N. Lavik *et al.*, “Mental Disorder Among Refugees and the Impact of Persecution and Exile: Some Findings from an Out-Patient Population” (1996) *British Journal of Psychiatry* 169 at 726–732.

¹¹ Derluyn and Broekhaert, *supra* n. 7 at 323. *See also* R. Hicks, “Psychosocial Considerations in the Mental Health of Immigrant and Refugee Children.” (1993) *Canadian Journal of Community* 71.

¹² A. Ager, “Risk and Protective Factors in Mozambican Refugee Children” (1992) 27 *International Journal of Psychology* 441.

¹³ Derluyn and Broekhaert, *supra* n. 7 at 323. *See also* Bonnerjea, *supra* n. 1.

¹⁴ P. Guarnaccia and S. Lopez, “The Mental Health and Adjustment of Immigrant and Refugee Children.” (1998) *Child and Adolescent Psychiatric Clinics of North America* 537.

¹⁵ *General Comment No. 6*, *supra* n. 6 at para. 3.

¹⁶ E. Logan, “Ombudsman for Children: Annual Report” (2009), <http://www.oco.ie/publications/annual-reportsfinancial-statements.html> (Date accessed: 3 November 2011) at pg. 61.

¹⁷ Ombudsman for Children’s Office, “Separated Children Living in Ireland” *supra* n. 5 at pg. 53.

b) The substantive rights of separated children

18. Separated children, like all children, are entitled to certain basic rights under the United Nations Convention on the Rights of the Child (UNCRC). The UNCRC is based upon four general principles, which are to be read in tandem with each other right conferred upon children therein.¹⁸ These principles are 1) non-discrimination,¹⁹ 2) the primacy of the best interests of the child in any action concerning the child,²⁰ 3) the child's right to life, survival and development,²¹ and 4) the child's right to have his/her views heard and taken into account, according to the age and maturity of the child.²² It is important, in order to effectuate the vindication of all other rights conferred on the child by the UNCRC, that these four fundamental principles are respected in conjunction with the child's substantive rights. In the context of separated children, the following substantive rights are especially relevant:

- The right to an identity – including name, nationality and family relations;²³
- The right to have their application for family reunification dealt with in a positive, humane and expeditious manner;²⁴
- The right of the child to receive information;²⁵
- The right of the child not to be subjected to arbitrary or unlawful interference with his/her privacy, home or correspondence, nor to unlawful attacks on his/her honour and reputation;²⁶
- The right of the child deprived of his/her family to have their ethnic, religious, cultural and linguistic background taken into account;²⁷
- The right of the child to the enjoyment of the highest attainable standard of health;²⁸
- The right of the child to an education;²⁹
- The right of the child of an ethnic minority to the enjoyment of his/her own culture;³⁰
- The right of the child not to be deprived of his/her liberty unlawfully or arbitrarily, and the right to due process of law.³¹

¹⁸ United Nations Committee on the Rights of the Child, *General Guidelines Regarding the Form and Content of Initial Reports to be Submitted by States Parties under Article 44*, Paragraph 1(a), of the Convention: UN Doc CRC/C/5. 30 October 1991. at para. 13 CRC/C/5.

¹⁹ Article 2, UNCRC.

²⁰ Article 3, UNCRC.

²¹ Article 6, UNCRC.

²² Article 12, UNCRC.

²³ Article 8, UNCRC.

²⁴ Article 10, UNCRC.

²⁵ Article 13, UNCRC.

²⁶ Article 16(1), UNCRC.

²⁷ Article 20(3), UNCRC.

²⁸ Article 24, UNCRC.

²⁹ Article 28, UNCRC.

³⁰ Article 30, UNCRC.

³¹ Article 37(b), UNCRC.

19. The rights that are especially relevant to separated children and their recognition by the Inter-American system include the right to non-discrimination, appropriate education, adequate health care, the right to family, and the right to apply for asylum. Each will be addressed in turn.

The Right to Non-Discrimination

20. The separated child is particularly vulnerable to discrimination as he/she is by definition a foreign national without a parent to advocate on his/her behalf. The principle of non-discrimination is one of the fundamental principles³² of the UNCRC and is enshrined in article 2.³³ Framed as the right to equality by the American Declaration on the Rights and Duties of Man, this instrument guarantees “[a]ll persons are equal before the law” and enjoy equal rights “without distinction as to race, sex, language, creed or any other factor.”³⁴ Likewise, the American Convention on Human Rights prohibits discrimination at Article 1.³⁵ Additionally, “this Court has stated that Article 1(1) of the American Convention places the States under the obligation to respect and guarantee full and free exercise of the rights and liberties recognized therein, with no discrimination.”³⁶ Accordingly, there is sufficient legal support for measures to be taken to protect separated children’s right to non-discrimination.

The Right to Education

21. The child’s right to education is set forth in Article 28 of the UNCRC.³⁷ The right to education is also recognized in the American Declaration on the Rights and Duties of Man at Article 12³⁸ and the American Convention on Human Rights at Article 26.³⁹ While the Inter-American Commission recognized in the *Yean and Bosico v. Dominican Republic* that the right to education is not explicitly guaranteed by the American Convention on Human Rights, it found that the petitioners did have the right to primary education through Article 19, which provides “[e]very minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state,” when read together with the UNCRC.⁴⁰ According to the Committee on the Rights of the Child, “[e]very unaccompanied and separated child, irrespective of

³² Committee on the Rights of the Child, *supra* n. 18 at para. 13.

³³ Article 2, UNCRC.

³⁴ American Declaration of the Rights and Duties of Man, May 2, 1948, 1 Annals of the O.A.S. 130 (1949), art. 2.

³⁵ American Convention on Human Rights, Jul. 18, 1978, 1144 U.N.T.S. 123, art. 1.

³⁶ *Juridical Condition and Human Rights of the Child (Advisory Opinion OC-17/02)*, (2002), I/A Court H.R., Series A No. 17, para. 43.

³⁷ Article 28, UNCRC.

³⁸ American Declaration of the Rights and Duties of Man, 2 May 1948, 1 Annals of the O.A.S. 130 (1949), art. 12.

³⁹ American Convention on Human Rights, 18 July 1978, 1144 U.N.T.S. 123, art. 26.

⁴⁰ *Case of the Girls Yean and Bosico vs. Dominican Republic* (2005) I/A Court H.R., Series C No. 130, para. 185. *See also Juridical Condition and Human Rights of the Child (Advisory Opinion OC-17/02)*, (2002), I/A Court H.R., Series A No. 17, para. 84.

status, shall have full access to education in the country that they have entered in line with Articles 28, 29 (1) (c), 30 and 32 of the Convention and the general principles developed by the Committee.”⁴¹ Evidence-based research of the experience of separated children in Ireland revealed that many experienced difficulties in accessing education, and young mothers lacked the childcare support necessary to continue in school and often left school as a result.⁴² This example illustrates why it is crucial to recognise and protect the unaccompanied child’s right to education.

The Right to Health Care

22. The child’s right to health care is codified in Article 24 of the UNCRC.⁴³ The American Declaration on the Rights and Duties of Man provides that “[e]very person has the right to the preservation of his health” at Article 11.⁴⁴ In the Irish context, 59% of the separated children interviewed in one study had been exposed to violence, while 39% were experiencing physical or mental health ailments.⁴⁵ Given that many separated children experience some trauma prior to their arrival to the destination country, this number comes as no surprise. These statistics highlight the heightened psychological health needs of separated children and the importance of effectuating their right to appropriate health care.

The Right to Family

23. The child’s right to preserve family relations and to be reunified with separated family members is laid out in Articles 8, 9, and 10 of the UNCRC.⁴⁶ In the case of refugee children, the obligation of state parties “to obtain information necessary for reunification with his or her family” is set forth in Article 22.⁴⁷ The Inter-American system has codified right to family at Article 6 of the American Declaration on the Rights and Duties of Man⁴⁸ and Article 17 of the American Convention on Human Rights.⁴⁹ The Inter-American Commission on Human Rights has recognized the child’s right to protection of family,⁵⁰ as has the Inter-

⁴¹ *General Comment No. 6, supra* n. 6 at para. 41.

⁴² Irish Refugee Council, “Closing a Protection Gap,” *supra* n. 5 at 32.

⁴³ Article 24, UNCRC.

⁴⁴ American Declaration of the Rights and Duties of Man, May 2, 1948, 1 *Annals of the O.A.S.* 130 (1949), art. 11.

⁴⁵ Irish Refugee Council, “Closing a Protection Gap,” *supra* n. 5 at pg. 35.

⁴⁶ Articles 8, 9 & 10, UNCRC.

⁴⁷ Article 22, UNCRC.

⁴⁸ American Declaration of the Rights and Duties of Man, May 2, 1948, 1 *Annals of the O.A.S.* 130 (1949), art. 6.

⁴⁹ American Convention on Human Rights, Jul. 18, 1978, 1144 U.N.T.S. 123, art. 17.

⁵⁰ *Case of the Girls Yean and Bosico vs. Dominican Republic* (2005) I/A Court H.R., Series C No. 130; *Ms. X v. Argentina*, (1997) IACHR Report N° 38/96, Case 10.506; *Petition 1070-04 Milagros and Leonardo Fornerón v. Argentina*, (2006) IACHR Report N° 117/06.

American Court.⁵¹ Regarding family reunification for separated children, the Committee on the Rights of the child has said the following:

In order to pay full respect to the obligation of States under Article 9 of the Convention to ensure that a child shall not be separated from his or her parents against their will, all efforts should be made to return an unaccompanied or separated child to his or her parents except where further separation is necessary for the best interests of the child, taking full account of the right of the child to express his or her views (Art. 12).⁵²

The Irish experience reveals that separated children are not always informed of their right to be reunified with their family members and, accordingly, are unable to access family tracing programs that could help them reunite.⁵³ This underscores the extraordinary need of separated children to have assistance in effectuating their right to family.

The Right to Seek Asylum

24. Children have a right to seek asylum under the UNCRC at Article 22.⁵⁴ This right is also acknowledged in the American Declaration on the Rights and Duties of Man⁵⁵ and the American Convention on Human Rights.⁵⁶ Effectuating the separated child's right to seek asylum, as subsequent sections will establish, necessarily comprises the appointment of a guardian *ad litem* and an independent legal representative, as well as the development of child-friendly refugee application procedures. For discussion of the importance of having an attorney to protect to right to seek asylum and the Irish experience, see discussion section III(a), *infra*. For discussion of the right to specialised, child-sensitive asylum procedures, see discussion section IV, *infra*.

c) The need for dual representation and specialised asylum procedures.

25. The Child Law Clinic respectfully submits that to secure the protection of the separated child's substantive rights, both a guardian *ad litem* and independent legal representative should be appointed to the child. The dual representation system, "a Rolls Royce model"⁵⁷ of best practice in terms of child representation, serves as a procedural safeguard to the child's right to participation in particular. As sections II and III will elucidate, *infra*, the guardian *ad litem* and the lawyer/attorney serve two very distinct but equally important functions. While both are crucial to promoting the best interests of

⁵¹ *Juridical Condition and Human Rights of the Child (Advisory Opinion OC-17/02)*, (2002), I/A Court H.R., Series A No. 17, para. 71.

⁵² *General Comment No. 6*, *supra* n. 6 at para. 81.

⁵³ Irish Refugee Council, "Closing a Protection Gap," *supra* n. 5 at pg. 38.

⁵⁴ Article 22, UNCRC.

⁵⁵ American Declaration of the Rights and Duties of Man, May 2, 1948, 1 Annals of the O.A.S. 130 (1949), art. 27.

⁵⁶ American Convention on Human Rights, Jul. 18, 1978, 1144 U.N.T.S. 123, art. 22(7).

⁵⁷ *Mabon v. Mabon* [2005] EWCA Civ 634 at para. 25.

the child⁵⁸ and the child's right to be heard,⁵⁹ the guardian *ad litem's* task is predominantly welfare-oriented, focusing primarily on liaising with stakeholders and providers to ensure that the child is receiving proper educational, medical, housing, and other necessary services. The role of the attorney, on the other hand, is to provide access to justice by assisting the child to navigate the legal system, most particularly the asylum process, and seeking legal recourse with respect to infringements upon the child's rights where necessary. To further distinguish these roles, it is helpful to turn to evidence-based research commissioned by the Council of Europe Commissioner for Human Rights and carried out by eight European Union countries.⁶⁰ This research concluded that the core standards for guardians *ad litem* are as follows:

- Advocating for all decisions to be taken in the best interests of the child, aimed at the protection and development of the child;
- Ensuring the child's participation in every decision which affects the child;
- Protecting the safety of the child;
- Advocating for the rights of the child;
- Serving as a bridge between and focal point for the child and other actors involved;
- Ensuring the timely identification and implementation of a durable solution;
- Treating the child with respect and dignity;
- Forming a relationship with the child built on mutual trust, openness and confidentiality;
- Being accessible to the child; and
- Being equipped with professional knowledge and competencies.⁶¹

d) Conclusion

26. In conclusion, the particular vulnerabilities of the unaccompanied child warrant special consideration by the Inter-American Court of Human Rights. Evidence-based research concerning the status of unaccompanied children in Ireland, as referenced in this section, illustrates the challenges in vindicating the rights of these children and ensuring their protection. In the sections that follow, this brief will explore the value of the appointment of a guardian *ad litem* and independent legal representative, together with the development of child-friendly asylum procedures, in protecting the rights to which separated children are entitled.

⁵⁸ See Article 3, UNCRC.

⁵⁹ See Article 12, UNCRC.

⁶⁰ These eight countries included Belgium, Denmark, Germany, Ireland, Italy, the Netherlands, Slovenia and Sweden. 127 separated and former separated children were interviewed for this report. Save the Children, *Core Standards for Guardians of Separated Children in Europe: Goals for Guardians and Authorities*, 2011, available at www.unhcr.org/refworld (Date accessed: 27 January 2012).

⁶¹ *Ibid.* at pp. 5-6.

II. Separated Children should be Appointed a Guardian *ad Litem* Immediately Upon Arrival in the Destination Country.

27. In this *Amicus Curiae* Brief, the UCC Child Law Clinic submits that in considering the Request for an Advisory Opinion on Migrant Children, the Inter-American Court of Human Rights should pay particular attention to the need of migrant children, in particular separated migrant children for the appointment of an independent guardian *ad litem* upon arrival in the destination country. Per the Request for Advisory Opinion, “it is essential for the Honourable Inter-American Court of Human Rights to clearly define precise standards, principles and obligations that States must comply with in relation the human rights of migrants, especially in relation the rights of migrant children.”⁶²

28. Separated children are deserving of a threefold protection⁶³ by the destination country, taking into account simultaneously their unique status as children, as children without legal parents, and as children within the immigration system. It is submitted that without consistent, proper and independent representation by a guardian *ad litem*, the rights of the separated child, as determined by the United Nations Convention on the Rights of the Child, the American Declaration of Human Rights, the European Convention on Human Rights, as well as other international instruments, will not be adequately vindicated. Additionally, the child will be unable to adequately navigate the immigration system of the relevant country.

a) The appointment of a guardian *ad litem* is necessary to vindicate the rights of the separated children as guaranteed under the United Nations Convention on the Rights of the Child (UNCRC).

29. The child, as a human being, is entitled to vindication of its human rights under international Human Rights Conventions, but is entitled to special recognition of the rights it incurs by virtue of its vulnerable nature, as most specifically outlined in the UNCRC. It should be noted that all of the MERCOSUR⁶⁴ countries are parties to the UNCRC.

30. Separated children are described by the United Nations Committee on the Rights of the Child (‘The Committee’) as, “children, as defined in Article 1 of the

⁶² Request for Advisory Opinion on Migrant Children before the Inter-American Court of Human Rights. Institute for Public Policy in Human Rights, CABA, 6 April 2011 at pg. 10.

⁶³ See Council of Europe: Parliamentary Assembly Recommendation 1703 (2005) – Recommendation on ‘Protection and Assistance for Separated Children Seeking Asylum.’ *infra* n. 85.

⁶⁴ MERCOSUR (Southern Common Market) is an economic and political agreement between Argentina, Brazil, Paraguay and Uruguay, which was established in 1991 by the Treaty of Asunción. Bolivia, Chile, Colombia, Ecuador and Peru currently have associate member status, however the Request for an Advisory Opinion was submitted by the four permanent MERCOSUR Member States.

Convention,⁶⁵ who have been separated from both parent, 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.”⁶⁶ Children may additionally become unaccompanied if they are left alone after entry to the third country. Separated children are extremely vulnerable; as noted above, they are deserving of a threefold protection. Often, separated children have undergone separation from family members, and, to varying degrees, have experienced loss, trauma, disruption and violence. Due to their vulnerable status, they face greater risks of, “sexual exploitation and abuse, military recruitment, child labour (including for their foster families) and detention.”⁶⁷ In some cases, separated children will arrive in countries where they do not speak the language, and are not aware of their legal rights to seek asylum or protection. Nevertheless, separated children must be entitled to protection and assistance to allow them to enjoy their rights outlined under the UNCRC. In particular, Article 20 of the UNCRC states that,

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

State Parties shall in accordance with their national laws ensure alternative care for such a child.

...When considering solutions, due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.⁶⁸

31. Additionally, Article 22 of the UNCRC makes specific reference to children seeking refugee status, stating that:

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.⁶⁹

⁶⁵ Article 1 of the UNCRC states that a child is, “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”

⁶⁶ *General Comment No. 6, supra* n. 6 at para. 8. See *infra* paras. 46-48, in the case of *Rahimi v. Greece*, for analysis on why children who are accompanied by an adult who is not a parent or customary caregiver may be vulnerable.

⁶⁷ *Ibid.* at para. 2.

⁶⁸ Article 20, UNCRC.

⁶⁹ Article 22, UNCRC.

32. The Committee on the Rights of the Child has noted that the guardian should:

“be consulted and informed regarding all actions taken in relation to the child. The guardian should have the authority to be present in all planning and decision-making processes including immigration and appeal hearings, care arrangements and all efforts to search for a durable solution. The guardian or adviser should have the necessary expertise in the field of childcare, so as to ensure that the interests of the child are safeguarded and that the child’s legal, social, health, psychological, material and educational needs are appropriately covered...”⁷⁰

In this way, the child’s rights outside of the immigration context will be adequately vindicated.⁷¹

33. The Separated Children in Europe Programme (‘SCEP’)⁷² in their Statement of Good Practice⁷³ (‘SCEP Statement of Good Practice,’) expanded on the responsibilities of a guardian *ad litem* with respect to children’s rights. SCEP included these responsibilities in its section on ‘Arrival, Reception and Interim Care,’ highlighting the importance of appointing a guardian *ad litem* for the child even before a decision is taken on their immigration status, to ensure the proper vindication of the child’s rights.

The guardian’s responsibilities should thus be to:

- Ensure that all decisions have the child’s best interests as a primary consideration;
- Ensure the child’s views and opinions are considered in all decisions that affect them;
- Ensure that the child has suitable care, accommodation, education, language support and health care provision, and that they are able to practice their religion;
- Explore, together with the child, the possibility of family tracing and reunification;
- Assist the child to keep in touch with his or her family.⁷⁴

34. The European Union Agency for Fundamental Rights (‘FRA’) produced a comparative report on ‘Separated, asylum-seeking children in European Union

⁷⁰ *General Comment No. 6, supra* n. 6 at para. 33.

⁷¹ *See supra* para. 18 for a list of the substantive rights of the child which the guardian would effectuate.

⁷² The Separated Children in Europe Programme started as a joint initiative of some members of the international Save the Children Alliance and the United Nations High Commissioner for Refugees (UNHCR.) SCEP is comprised of many non-governmental partners throughout Europe who work closely with UNHCR.

⁷³ Separated Children in Europe Programme, Statement of Good Practice, 4th Revised Edition, 2009. Available from www.separated-children-europe-programme.org. (Date accessed: 7 December, 2011) (hereinafter, SCEP Statement of Good Practice.)

⁷⁴ *Ibid.* at para D.3 - Appointment of a Guardian.

Member States' in 2010.⁷⁵ ('FRA Report.')

This report analysed the living conditions and legal experiences of 336 separated children, as well as 302 adults involved with them, in 12 European Union Member States. The report sought to elicit children's views relating to the respect shown to their rights in the receiving country.

35. With respect to the child's right to healthcare, as guaranteed by the UNCRC under Article 24, "in some countries...children complained that medical screening and health assessment upon arrival was not sufficient or was not carried out at all. This is notwithstanding the fact that such assessment is necessary to ensure timely and effective treatment, as well as the prevention of transmittable diseases."⁷⁶ The report noted that, "Children in large reception centres...complained about long waiting times to see a doctor and about the quality of their treatment, arguing that medical staff were often dismissive of their ailments."⁷⁷

36. It is vital to vindicate the healthcare rights of minors, and also vital to take into consideration the vulnerable position of separated children. Such individuals may often be suffering from depression or post-traumatic stress disorder due to their experiences, and may find it difficult to cope in a new country. A qualified guardian *ad litem* focused on the child's best interests would be crucial in securing adequate healthcare and psychological treatment for the child.

37. With respect to education, guaranteed under Article 28 of the UNCRC, "most children complained that they received limited information about educational possibilities and many did not know at what stage in their asylum application procedure they could actually start attending school."⁷⁸ Several needs with respect to education were highlighted in the report.

"First, the need to develop the necessary language skills as quickly as possible to enable integration into mainstream school... Secondly, the need to place children in schools as soon as possible, on the basis of an individual assessment of their educational needs: children's ability to follow the courses needs to be carefully assessed, to avoid placing them at a level that is either too low or too high for them; this needs to be reassessed periodically, as children may be making fast progress which needs to be reflected in their placement. Thirdly some of the children may be illiterate and require special tuition to address this. Fourthly, there is a need for educational and psycho-social counselling and support: many of these children may be traumatised as a result of their journey or exploitation from adults. They come from countries with a very different educational system, different teaching cultures and different relations between teachers and students and thus find it difficult to adjust; in

⁷⁵ European Union Agency for Fundamental Rights, *Separated, Asylum-Seeking Children in European Union Member States: Comparative Report*. (2010) Available at www.fra.europa.eu (Date accessed: 17 December, 2011) (hereinafter, FRA Report.)

⁷⁶ FRA Report at pg. 33.

⁷⁷ *Ibid.*

⁷⁸ *Ibid* at pg. 36.

addition they need help with homework that for other children is provided by parents or siblings.”⁷⁹

Some adult respondents to the report highlighted that, “a busy school schedule can allow the children to recover from traumatic experiences and think less of the asylum procedure which is often their main worry and concern.”⁸⁰

38. The appointment to the child of an independent, permanent guardian *ad litem* would help to ensure that the child was properly supervised within the educational system of the third country, and would ensure regular re-assessment of the development of the child.

39. Based on the above evidence, it is respectfully submitted that separated children are deserving of a protection which is threefold in nature. They are first of all minors, secondly minors without legal parents, and thirdly minors within the asylum system. Such minors should merit “not only that their interest (sic) be represented in connection with the asylum and other legal procedures,”⁸¹ but also that they receive, “the type of emotional support and guidance normally provided by parents.”⁸² It is submitted that the appointment of a permanent guardian *ad litem*, adhering to the standards outlined above,⁸³ would ensure the vindication of the rights of the child, as outlined by the United Nations Convention on the Rights of the Child.

b) European Legal Instruments Provide for the Prompt Appointment of a Guardian *ad Litem* to Separated Children.

40. The European Union, in *Case 540/03 European Parliament v. Council*, more commonly known as the “*Family Reunification Case*”⁸⁴ ruled in 2003 that the rights contained within the United Nations Convention on the Rights of the Child had to be taken into account when implementing Community Law. The European Union has taken steps to provide guidelines for its member states in terms of providing for migrants or asylum seekers. This section of the brief will examine relevant European legal instruments as they relate to the rights of the separated children to the appointment of a guardian. It should be noted that the European Directives refer to ‘unaccompanied minors’ rather than ‘separated children.’ Both definitions nevertheless refer to children separated from their parents and customary caregivers and are generally used interchangeably.

41. Representation for unaccompanied children is addressed in

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Ibid.* at pg. 53.

⁸² *Ibid.*

⁸³ Per SCEP Guidelines, *supra* n. 73.

⁸⁴ ECJ, Case-540/03, 27 June 2006, *Parliament v. Council*, OJ c 47, 21.02.2004.

- Council of Europe – Council Resolution of 26 June 1997 on Unaccompanied Minors who are Nationals of Third Countries.⁸⁵
- Council of Europe – Council Directive of 27 January 2003: Minimum Standards for the Reception of Asylum Seekers.⁸⁶
- Council of Europe – Council Directive of 1 December 2005: Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status.⁸⁷
- Council of Europe Parliamentary Assembly Recommendation 1596 – Situation of Young Migrants in Europe (2003).⁸⁸
- Council of Europe Parliamentary Assembly Recommendation 1703 – Recommendation on ‘Protection and Assistance for Separated Children Seeking Asylum.’ (2005).⁸⁹

The relevant text of these legal instruments may be found in Appendix 1.

42. The legal instruments highlight the need for specific protection for unaccompanied children, noting that such children are particularly vulnerable as they are separated from parents and ordinary caregivers⁹⁰ and that they need to be provided and cared for regardless of their ambiguous legal status.⁹¹ The Council of Europe Resolution on Unaccompanied Minors who are Nationals of Third Countries notes that a guardian should be appointed who can ensure the vindication of the minor’s legal, social, medical and psychological needs.⁹² Provision is also made for regular assessment of the provision of guardianship for separated children,⁹³ suggesting that the duty of the State in respect of appointment of guardians is ongoing. The Council of Europe Directive relating to Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status outlines that a guardian should be appointed to an unaccompanied minor “as soon as possible”⁹⁴ and that this guardian should be

⁸⁵ Council of Europe – Council Resolution of 26 June 1997 on Unaccompanied Minors who are Nationals of Third Countries (97/C 221/03) (‘The Council Resolution on Unaccompanied Minors 1997.’)

⁸⁶ Council of Europe - Council Directive of 27 January 2003: Minimum Standards for the Reception of Asylum Seekers (2003/9/EC), (‘The Reception Directives.’)

⁸⁷ Council of Europe – Council Directive of 1 December 2005: Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (2005/85/EC), (‘The Procedures Directives.’)

⁸⁸ Council of Europe Parliamentary Assembly Recommendation 1596 – Situation of Young Migrants in Europe (Assembly Debate, 31 January, 2003.)

⁸⁹ Council of Europe: Parliamentary Assembly Recommendation 1703 – Recommendation on ‘Protection and Assistance for Separated Children Seeking Asylum.’ (Assembly Debate, 28 April 2005.)

⁹⁰ *Ibid* at Article 28, para. 5.

⁹¹ The Council Resolution on Unaccompanied Minors, *supra* n. 85 at Article 3(2).

⁹² Council Recommendation 1703, *supra* n. 89 at Article 3.5.

⁹³ The Reception Directives, *supra* n. 86 at Article 19.

⁹⁴ The Procedures Directives, *supra* n. 87 at Article 17. A further recommendation from the Council of Europe, (*supra* n. 88 at Article 27c) recommends that a guardian should be appointed to the child “within two weeks of the presence of the child on national territory coming to the knowledge of the authorities.”

fully involved in the preparation of the separated child for his/her asylum interview.

43. In terms of costs for the receiving State, Article 15 of the Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, provides generally that asylum applicants can consult a legal adviser or other counsellor at their own cost, but further provides at Article 15(3) that Member States may provide for free legal assistance, through domestic legislation, to those who lack sufficient resources. It is submitted that separated children would be deemed to lack sufficient resources, and should be appointed free assistance.

44. Furthermore, Council of Europe Recommendations 1596 – Situation of Young Migrants in Europe, and 1703 – Protection and Assistance for Separated Children Seeking Asylum, provide important guidelines for member states to facilitate the enhancement of their protective procedures for separated children.

c) Case law of the European Court of Human Rights has recognised the need for a guardian *ad litem* to be appointed to separated children.

45. It is respectfully submitted that in considering the rights of separated children to guardianship, the Inter-American Court of Human Rights should take into account the decisions of the European Court of Human Rights in the following cases

- *Rahimi v. Greece*⁹⁵
- *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*⁹⁶
- *Nsona v. Netherlands*⁹⁷

46. In *Rahimi v. Greece*, the applicant had fled Afghanistan and arrived in Greece at the age of 15. The Greek authorities had mistakenly presumed him to be accompanied by a cousin, although the applicant had claimed to not know this individual. The applicant was detained on the Greek island of Lesbos for two days, before being released and travelling to Athens. In Athens, the applicant was provided with accommodation by a Greek non-governmental organisation, Arsis. The applicant complained that the conditions of his detention did not take into account his vulnerable position as a separated child, in particular the fact that he had been detained amongst adults.⁹⁸ In addition, the applicant claimed

⁹⁵ *Rahimi v. Greece* Application no. 8687/08 ECHR 5 April 2011.

⁹⁶ *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* Application no. 13178.03 ECHR 12 October 2006.

⁹⁷ *Nsona v. Netherlands* Application no. 23366/94 ECHR 28 November 1996

⁹⁸ *Ibid.* at para. 79 of the judgment. Article 37(c) UNCRC states that, “Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.”

that he had not been appointed an interpreter, and had communicated with the authorities via a fellow detainee who spoke the applicant's language.⁹⁹ The applicant claimed that in presuming him to be an accompanied minor, the Greek authorities had denied him an opportunity to exercise his right to remedies available under domestic law.¹⁰⁰ In the case of accompanied minors, this right would be exercised by the minor's guardian, who did not exist in the present case, and thus the applicant had no means by which to complain of the conditions of his detention. The applicant's right to "prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of [his or her] liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action" had been denied.¹⁰¹

47. The European Court of Human Rights, in finding a breach of the applicant's rights under Articles 3 and 5 of the European Convention on Human Rights, criticised the Greek authorities' failure to properly evaluate the relationship between the applicant and the individual presumed to be his cousin. They also repeatedly noted with concern that the applicant had not been provided with a guardian,¹⁰² even after the public prosecutor responsible for minors had been informed of the applicant's situation.¹⁰³ The Court found, at paragraph 120 of the judgment, that, without representation, the applicant was not able to access any remedies in Greece, and accordingly declared that there had been a breach of the applicant's right under Articles 5(4) and 13 of the ECHR.¹⁰⁴

48. It is respectfully submitted that had the Greek authorities fully evaluated the alleged relationship between the applicant and the individual presumed by the authorities to be the applicant's cousin, and appointed the applicant an independent guardian, this would have supported the vindication of his rights, including, *inter alia*, his right to child-friendly justice procedures and special treatment by virtue of his vulnerable condition.

⁹⁹ *Supra* n. 97 at para. 8 of the judgment.

¹⁰⁰ *Ibid.* at para. 112 of the judgment.

¹⁰¹ As provided for under Article 37(d) UNCRC. This right is correlated in the ECHR at Article 5(4), which states that, "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

¹⁰² *Supra* n. 97 at paras. 16, 17, 66, 72 and 89 of the judgment.

¹⁰³ *Ibid.* at para. 89 of the judgment.

¹⁰⁴ Article 5(4) ECHR provides that, "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

Article 13 ECHR provides that, "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

49. *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*¹⁰⁵ concerned a nine-year-old citizen of the Democratic Republic of the Congo, whose mother had obtained refugee status in Canada and wished to remove her daughter from the Democratic Republic of the Congo. The mother, the first applicant, asked her brother, a Dutch national, to take the minor to Europe. On 18 August 2002, upon her arrival in Belgium, the minor, who was five years old at the time, was detained, as she did not have the documents necessary for entering the country. She was detained until she was deported to the Democratic Republic of the Congo on 17 October 2002.

50. In finding a breach of the applicant's rights under Article 3 of the ECHR, the court noted with concern that,

"...the second applicant, who was only five years old, was held in the same conditions as adults. She was detained in a centre that had initially been designed for adults, even though she was unaccompanied by her parents and no one had been assigned to look after her. No measures were taken to ensure that she received proper counselling and educational assistance from qualified personnel specially mandated for that purpose. That situation lasted for two months. It is further noted that the respondent State have acknowledged that the place of detention was not adapted to her needs and that there were no adequate structures in place at the time."¹⁰⁶

"A five-year-old child is quite clearly dependent on adults and has no ability to look after itself so that, when separated from its parents and left to its own devices, it will be totally disoriented."¹⁰⁷

"The second applicant'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. In view of the absolute nature of the protection afforded by Article 3 of the Convention, it is important to bear in mind that this is the decisive factor and it takes precedence over considerations relating to the second applicant's status as an illegal immigrant. She therefore indisputably came within the class of highly vulnerable members of society to whom the Belgian State owed a duty to take adequate measures to provide care and protection as part of its positive obligations under Article 3 of the Convention."¹⁰⁸

51. The Court reiterated the benefits of appointing a guardian to the child, as this would be in line with her best interests, as guaranteed under Article 3 of the Convention on the Rights of the Child.

"...in the absence of any risk of the second applicant's seeking to evade the supervision of the Belgian authorities, her detention in a closed centre for

¹⁰⁵ *Supra* n. 96.

¹⁰⁶ *Ibid.* at para. 50 of the judgment.

¹⁰⁷ *Ibid.* at para. 51 of the judgment.

¹⁰⁸ *Ibid.* at para. 55 of the judgment.

adults was unnecessary. Other measures could have been taken that would have been more conducive to the higher interest of the child guaranteed by Article 3 of the Convention on the Rights of the Child. These included her placement in a specialised centre or with foster parents. Indeed, these alternatives had in fact been proposed by the second applicant's counsel."¹⁰⁹

52. It is respectfully submitted by the Child Law Clinic that the appointment of a dedicated and permanent guardian to this child would have ensured the vindication of the minor applicant's rights under the UNCRC, in particular her right to have her best interests regarded as the primary consideration in her case¹¹⁰ and her rights with respect to deprivation of liberty under Article 37.¹¹¹

53. In *Nsona v. Netherlands*,¹¹² while the Court did not find a breach of the rights of the nine-year-old Zairean national under the ECHR, it nonetheless expressed that in deporting the child to Zaire unaccompanied,

¹⁰⁹ *Ibid.* at para. 83 of the judgment.

¹¹⁰ Article 3 UNCRC states that, "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.

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 with 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.

¹¹¹ Article 37 States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.

In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

¹¹² *Supra* n. 97

“...the Netherlands Government had failed to investigate Francine’s personal situation in Zaïre and had moreover failed to ensure her safety upon her return. Given the fact that Francine was a nine-year-old child allegedly without any living relatives in her country of origin, these were measures which the Government might have been expected to take before removing her.”¹¹³

The Court also criticised “the haste with which the Netherlands authorities gave effect to their decision to remove Francine from the Netherlands and their apparent willingness to hand over all responsibility for her welfare as soon as she had left Netherlands territory...”¹¹⁴

54. The Child Law Clinic considers that the appointment of a guardian to the applicant in this case would have helped to vindicate her rights to security and safety under Article 20 of the UNCRC as well as her rights under the ECHR.¹¹⁵

55. It is respectfully submitted, then, that the jurisprudence of the European Court of Human Rights clearly recognises the merits of providing separated children with guardianship. The Court has clearly drawn the connection between providing separated children with a guardian and the effective vindication of such a child’s rights under the ECHR.

56. As these cases illustrate, despite the absence of a formal link between the ECHR and the UNCRC, the UNCRC has been relied upon in cases relating to children before the European Court of Human Rights. The European Convention on Human Rights in itself makes little reference to children,¹¹⁶ yet in several cases,¹¹⁷ has referenced the United Nations Convention on the Rights of the Child, indicating a firm commitment to the protection of the rights of those under

¹¹³ *Ibid.* at para. 91 of the judgment.

¹¹⁴ *Ibid.* at para. 103 of the judgment. It should be noted that the SCEP Statement of Good Practice, *supra* n. 73, provides for cases of return of the child, but stress that even during the process of return, the child’s best interests should be a primary consideration. See SCEP Statement of Good Practice at para. D 15.5, stating that, “Where a best interests determination results in a decision to return, transfer or resettle a separated child they must be properly accompanied during their journey by a person with whom they have a trusting relationship, for example a guardian or social worker. Mechanisms must be established to effectively monitor the ongoing wellbeing of the child.”

¹¹⁵ See *supra* para. 30.

¹¹⁶ Kilkelly notes that, “Minors or juveniles (the text is inconsistent in its use of relevant terminology) appear only twice in the main body of the Convention, first in Article 5 concerning the right to liberty, and finally in Article 6 in relation to the right to a fair trial.” Kilkelly, U., *The Best of Both Worlds for Children’s Rights? Interpreting the European Convention on Human Rights in Light of the UN Convention on the Rights of the Child.* (2001) 23 Human Rights Quarterly 308 at pg. 311.

¹¹⁷ See *supra* n. 96 *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* Application no. 13178.03, ECHR 12 October 2006 at para. 83. See also *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) (1979), *Keegan v. Ireland*, 290 Eur. Ct. H.R. (ser. A) (1994), *A v. UK*, App. No. 25599.94 Comm. Rep., 18.9.97 *T. v. UK*, App. No. 24724/94 Comm. Rep., and *V. v. UK*, App. No. 24724/94 Comm. Rep., 4.12.98 (unreported.), *Z and Others v. UK*, App. No. 29392/95 Comm. Rep. 10.9.99.

18 years, which, it is respectfully submitted, should be taken into consideration in the prospective Advisory Opinion. This position is strengthened by the existence of the UNCRC as a widely accepted instrument of binding international law. The weight and relevance of the UNCRC has already been recognised by the Inter-American Court of Human Rights.¹¹⁸

d) The Inter-American Court of Human Rights May Take into Account the Decisions and Opinions of the European Court of Human Rights.

57. It should be noted that the Inter-American Court of Human Rights has on several occasions made reference to decisions and opinions of the European Court on Human Rights. In discussing the merits in the case of *Jessica Lenahan (Gonzales) v. US*,¹¹⁹ it was held that:

“As the Commission has previously held in cases involving the American Declaration, while the organs of the Inter-American System are not bound to follow the judgments of international supervisory bodies, their jurisprudence can provide constructive insights into the interpretation and application of rights that are common to regional and international human rights systems.”¹²⁰

58. In the case of *Andrea Mortlock*,¹²¹ the Court added that it was, “Wholly appropriate and established practice for the Commission to consider authorities originating from the European Court as well as other international courts, to the extent that the decisions are relevant to the obligations owed by the State to the alleged victim. Accordingly, in determining the present case, the Commission will, to the extent appropriate, interpret and apply the pertinent provisions of the American Declaration in light of current developments in the field of international human rights law, as evidence by treaties, custom and other relevant sources of international law.”¹²²

59. It is respectfully submitted that in the present case the Inter-American Court of Human Rights should take into account the decisions and opinions of the European Court of Human Rights as outlined above. Per the *Jessica Lenahan* case, the jurisprudence of international bodies “can provide constructive insights into the interpretation and application of rights that are common to regional and international human rights systems.”¹²³ All of the MERCOSUR countries and all European Union countries have signed and ratified the UNCRC, and thus the rights contained therein can constitute rights that “are common to regional and

¹¹⁸ See e.g. *Villagran Morales vs. Guatemala (The Street Children Case)* (1999) I/A Court H.R., Series C No. 63 at para. 195, where the Court referred specifically to relevant provisions of the UNCRC in interpreting Article 19 of the American Convention on Human Rights.

¹¹⁹ *Jessica Lenahan (Gonzales) et al. (United States)*, (2011) IACHR Report N° 80/11, Case 12.626.

¹²⁰ *Ibid.* at para. 135 of the judgment.

¹²¹ *Andrea Mortlock (United States)*, (2008) IACHR Report N° 63/08, Case 12.534.

¹²² *Ibid.* at para. 80 of the judgment.

¹²³ *Supra* n. 119 at para. 135 of the judgment.

international human rights systems,” and thus due consideration, while still respecting the independent authority of the Inter-American Court of Human Rights, may be given to the jurisprudence of the European Court of Human Rights.

e) A guardian *ad litem* should be appointed to the separated child even in a situation where he or she will soon attain majority, until such time as a durable solution is reached, in order to properly vindicate the development rights of the child.

60. The European Procedures Directives allow Member States to exercise discretion in the appointment of a minor who will likely reach the age of majority before a decision at first instance is taken on their immigration status. Additionally, the same directive allows Member States to exercise similar discretion in appointing a guardian to a minor who is over 16 years of age, unless circumstances exist that prevent that minor from pursuing an application without a representative.

61. It is submitted that, in this regard, the Inter-American Court of Human Rights should consider the importance of vindicating the child’s rights under the UNCRC. Not only does the UNCRC stipulate that childhood does not end until the age of 18, it also stresses at Article 6 that States are obliged to “ensure to the maximum extent possible the survival and development of the child.”¹²⁴ It is submitted that to fail to appoint a guardian to a child who is below 18 years of age could undermine the child’s rights as provided for in the UNCRC, in particular under Article 20, which entitles the child deprived of his or her family to “special protection and assistance provided by the State.”¹²⁵ Additionally, that the child may cease to be a minor soon after arrival in the recipient country does not negate his or her entitlement to health, education, proper development or special protection, nor does it in any way negate the vulnerable position of the separated child. It is thus respectfully submitted that a guardian should be appointed to the separated child who may soon turn 18, until such time as a durable solution is provided for that child, regardless of whether or not this occurs after the minor’s 18th birthday.¹²⁶

f) Conclusion

62. In summary, then, the Child Law Clinic respectfully submits that in order to afford due consideration to the full spectrum of rights of migrant children, and in particular separated children, the Inter-American Court of Human Rights should provide guidelines for States to effectuate the immediate appointment of

¹²⁴ Article 6, UNCRC.

¹²⁵ Article 20, UNCRC.

¹²⁶ See SCEP Statement of Good Practice, *supra* n. 73 at para. D3.2, which states that, “Guardians should be appointed until a durable solution has been identified and implemented. This may extend beyond the child’s 18th birthday. Where a durable solution is secured before the child turns 18 years old, consideration should be given to the continuation of the role up to the child’s 18th birthday if this is appropriate.”

a guardian *ad litem* to minors who arrive in their country. Care should be taken to ensure that such guardians are adequately trained, and that they may serve as guardian to the child until such time as an effective, durable solution is provided for that child.

III. Separated Children should be Appointed an Independent Legal Representative in Addition to a Guardian *ad Litem*

63. It is submitted that protection of separated children's rights requires that they be appointed an independent legal representative in addition to a guardian *ad litem*. The United Nations High Commissioner for Refugees [hereinafter "UNHCR"],¹²⁷ the Committee on the Rights of the Child,¹²⁸ the Council of Europe Parliamentary Assembly,¹²⁹ Separated Children in Europe Programme,¹³⁰ the Save the Children Europe Group,¹³¹ the European Council on Refugees and Exiles,¹³² the Irish Refugee Council,¹³³ and legal scholars¹³⁴ all share the view

¹²⁷ "Not being legally independent, an asylum-seeking child should be represented by an adult who is familiar with the child's background and who would prowl his/her interests. *Access should also be given to a qualified legal representative.*" UNHCR, *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum* (February 1997), available at <http://www.unhcr.org/3d4f91cf4.html> (Date accessed: 8 December 2011) at para. 8.3 [emphasis added].

¹²⁸ *General Comment No. 6*, *supra* n. 6 at para. 36.

¹²⁹ Council Recommendation 1703, *supra* n. 89 para. 9.

¹³⁰ The standard of practice according to the Separated Children in Europe Programme is to "[i]mmEDIATELY" appoint "an independent guardian" as well as a legal representative. With regards to the latter, "[i]n all legal proceedings, including any appeals or reviews, separated children must have legal assistance and a legal representative who will assist them to make their claim for protection and the implementation of any ensuing durable solutions. Legal representatives must be available at no cost to the child and, in addition to possessing expertise on areas of migration law, the asylum process, and instruments to protect victims of trafficking. They should be skilled in representing children, be gender-sensitive and be aware of child-specific forms of persecution and the exploitation of children in an international context." SCEP Statement of Good Practice, *supra* n. 73 at pp. 22 & 34.

¹³¹ Save the Children "emphasises the need to appoint both a guardian (with a properly identified role and qualifications) and (specially trained) legal representative for unaccompanied children." Save the Children Europe Group, *Initial Comments on the Revision of the 2002 EU Trafficking Framework Decision* (14 October 2008), available at www.savethechildren.net/alliance/europegroup/archives.html (Date accessed: 8 December 2011) at pg. 5.

¹³² More than a decade ago, ECRE recommended that "each unaccompanied child should be provided rapidly with a guardian who will work closely with the legal representative." European Council on Refugees and Exiles, "Opinion: Position on Refugee Children." (1997) 9 Int'l J. Refugee L. 74 at para. 18.

¹³³ Irish Refugee Council, "Closing a Protection Gap," *supra* n. 5 at pg. 52.

¹³⁴ As stated by one scholar: "The right to free legal assistance for alien children in removal proceedings is emerging as norm under international law, supported by other procedural norms in treaties and customary international law. Chiefly, the prohibition on *refoulement*, the norms contained in the CRC, and the customary international legal norms of due process and equal protection require that states meaningfully provide unaccompanied children asylum seekers with legal representation prior to removing them. In addition to attorneys, legal guardians can ensure the child's best interests are heard in order to prevent their wrongful removal." B. Rowe, "The Child's Right to Legal Assistance in Removal Proceedings under International Law." (2010) 10 Chi. J. Int'l L. 747, 768. See also L. Hill, "The Right to Be Heard: Voicing the Due Process Right to Counsel for Unaccompanied Alien Children." (2011) 31 B.C. Third World L.J. 41, 69 (arguing that unaccompanied children are entitled to counsel under the U.S. Constitution.)

that both a guardian *ad litem* and legal representative should be appointed to the separated child. As highlighted above, a lawyer, unlike a guardian *ad litem*, possesses the legal expertise necessary to advise the separated child on her/his right to seek asylum, as well as other substantive rights under national and international law, including the UNCRC. The experience of separated children in Ireland exemplifies the problems that arise when only a guardian *ad litem* is appointed, and the difficulties that separated children face in ensuring appropriate legal protection of their rights under the UNCRC without the benefit of legal counsel.¹³⁵

64. It has been highlighted above that the roles of the guardian *ad litem* and the lawyer or attorney are distinct, necessitating two individuals to fulfil these separate functions. As recognized in the Council of Europe’s Guidelines on Child-friendly Justice, “combining the functions of a lawyer and a guardian *ad litem* in one person should be avoided, because of the potential conflict of interests that may arise.”¹³⁶ Unlike a guardian *ad litem*, “[t]he lawyer does not have to bring forward what he or she considers to be in the best interests of the child...but should determine and defend the child’s views and opinions, as in the case of an adult client.”¹³⁷ Furthermore, child’s counsel require special training: “[l]awyers representing children should be trained in and knowledgeable on children’s rights and related issues,” as well as “receive ongoing and in-depth training and be capable of communicating with children at their level of understanding.”¹³⁸ The foregoing helps to explain why it is particularly important to appoint an independent legal representative *in addition* to a guardian *ad litem* in order to ensure that the child’s rights to due process, non-discrimination, education, health care, family reunification and asylum are secured.

a) Appointment of an independent legal representative in addition to a guardian *ad litem* is necessary to vindicate the child’s right to be heard as guaranteed under Article 12 of the UNCRC.

65. Appointment of an independent legal representative in addition to a guardian *ad litem* is especially important with respect to protecting the child’s right to be heard. The child’s right to be heard is enshrined by Article 12 of the UNCRC and is one of the fundamental principles of this instrument.¹³⁹ Article 12 requires state parties to ensure that “the child who is capable of forming his or her own views” be permitted to “express those views freely in all matters

¹³⁵ See *infra* sections III (a) – (c).

¹³⁶ Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on Child-friendly Justice* [hereinafter “Guidelines on Child-friendly Justice”] (17 November 2010), available at

<http://www.coe.int/t/dghl/standardsetting/childjustice/Guidelines%20on%20child-friendly%20justice%20and%20their%20explanatory%20memorandum%204.pdf>

(Date accessed: 9 December 2011) at para.105.

¹³⁷ *Ibid.* at para. 104.

¹³⁸ *Ibid.* at para. 39.

¹³⁹ Committee on the Rights of the Child, *General Comment No. 12: The Right of the Child to be Heard* (20 July 2009), CRC/C/GC/12, available at www.ohchr.org (Date accessed: 2 November 2011) (hereinafter, General Comment No. 12) at para. 2.

affecting the child,” including “any judicial and administrative proceedings affecting the child, either directly, or through a representative.”¹⁴⁰ In interpreting the meaning of “representative” the Committee on the Rights of the Child has indicated that the representative “can be the parent(s), a lawyer, or another person.”¹⁴¹

66. A legal representative is imperative to realising an unaccompanied child’s rights under Article 12. According to the Committee, it is critical that the child, “is informed about her or his right to express her or his opinion in all matters affecting the child and, in particular, in any judicial and administrative decision-making processes, and about the impact that his or her expressed views will have on the outcome.”¹⁴²

In the particular context of separated children, the Committee, “emphasizes that these children have to be provided with all relevant information, in their own language, on their entitlements, the services available, including means of communication, and the immigration and asylum process, in order to make their voice heard and to be given due weight in the proceedings.”¹⁴³

Unlike a guardian *ad litem*, who may be a social worker, a lawyer trained in the asylum process and other areas of law relevant to the child’s circumstances possesses the expertise necessary to inform the child about her or his legal options. The Committee has explicitly recognized that “in addition to the appointment of a guardian,” the asylum-seeking child “should...be provided with legal representation.”¹⁴⁴ The Committee is unequivocal in this regard that:

“[t]he unaccompanied or separated child should also, in all cases, be given access, free of charge, to a qualified legal representative, including where the application for refugee status is processed under the normal procedures for adults.”¹⁴⁵

67. Having an independent legal representative is particularly important in terms of advising the separated child on her or his right to seek asylum and following through with the application process. This has been borne out by the Irish experience. Separated children in Ireland are not automatically appointed legal counsel, but they are appointed a “guardian” who is a social worker with the Health Service Executive, the government’s social service agency.¹⁴⁶ It is the

¹⁴⁰ Article 12, UNCRC.

¹⁴¹ General Comment No. 12, *supra* n. 138 at para. 36. Moreover, recital 9 of the Preamble of the Convention on the Rights of the Child states that, “[b]earing in mind that, as indicated in the Declaration of 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.”

¹⁴² *General Comment No. 12, supra* n. 139 at para. 41.

¹⁴³ *Ibid.* at para. 124.

¹⁴⁴ *General Comment No. 6, supra* n. 6 at para. 36.

¹⁴⁵ *Ibid.* at para. 69.

¹⁴⁶ Irish Refugee Council, “Closing a Protection Gap,” *supra* n. 5 at pg. 9.

role of this “guardian” to act *in loco parentis* to guard the interests of the child.¹⁴⁷ The social worker “guardian” has the power to make a refugee or subsidiary protection application on behalf of the child, raising questions as to whether the social worker has sufficient legal expertise to advise the child on his or her options concerning asylum and the legal rights at stake.¹⁴⁸ Statistics establish that frequently, the social worker fails to make an asylum application on behalf of the child.¹⁴⁹ Mindful of this practice, the Irish Refugee Council following interviews with separated children in 2010 recommended “in line with international best practice, that a separated child is appointed an independent guardian *ad litem* in addition to their social worker and legal representative.”¹⁵⁰

b) Appointment of an independent legal representative is necessary to vindicate the child’s right to due process as guaranteed by the Conventions and jurisprudence of the Inter-American system and Article 3 of the UNCRC.

68. This Court and the Inter-American Commission on Human Rights have recognized that a child has a right to due process in a number of circumstances.¹⁵¹ The American Declaration on the Rights and Duties of Man and the American Convention on Human Rights codify the right to due process.¹⁵² This right to due process necessarily comprises the best interests guarantee of article 3 of the UNCRC.¹⁵³ As stated by the Committee on the Rights of the Child, “[t]he best interests of the child is similar to a procedural right that obliges States parties to introduce steps into the action process to ensure that the best interests of the child are taken into consideration.”¹⁵⁴ In the same vein, this Court has said “[t]hat in judicial or administrative procedures where decisions are adopted on the rights of children, the principles and rules of due

¹⁴⁷ *Ibid.* at pg. 16.

¹⁴⁸ *Ibid.* at pg. 45.

¹⁴⁹ “In 2005, there were 132 asylum applications from separated children, but 201 separated children in care whilst in 2003 there were 271 asylum applications and the same number in care.” *Ibid.* at pg. 30.

¹⁵⁰ *Ibid.* at pg. 52.

¹⁵¹ *Detained Minors v. Honduras*, (1999) IACHR Report N° 41/99 (Merits), Case 11.491; *Case of Bulacio vs. Argentina* (2003) I/A Court H.R., Series C No. 100; *Case of the Girls Yean and Bosico vs. Dominican Republic* (2005) I/A Court H.R., Series C No. 130; *Jailton Neri Da Fonseca v. Brazil*, (2004) IACHR Report N° 33/04, Case 11.364; *Petition 1070-04 Milagros and Leonardo Fornerón v. Argentina*, (2006) IACHR Report N° 117/06; *Villagran Morales vs. Guatemala (The Street Children Case)* (1999) I/A Court H.R., Series C No. 63; *Juvenile Reeducation Institute* (Merits, Reparations and Costs), (2004), I/A Court H.R., Series C No. 112; *Juridical Condition and Human Rights of the Child (Advisory Opinion OC-17/02)*, (2002), I/A Court H.R., Series A No. 17, para. 92.

¹⁵² American Declaration of the Rights and Duties of Man, May 2, 1948, 1 Annals of the O.A.S. 130 (1949), art. 26; American Convention on Human Rights, Jul. 18, 1978, 1144 U.N.T.S. 123, art. 8.

¹⁵³ Article 3, UNCRC. Indeed, the American Convention on Human Rights acknowledges the best interests principle. American Convention on Human Rights, Jul. 18, 1978, 1144 U.N.T.S. 123, art. 17(4).

¹⁵⁴ *General Comment No. 12, supra* n. 139 at para. 70.

legal process must be respected.”¹⁵⁵ The Committee on the Rights of the Child and the Council of Europe recognize that the obligation to respect the child’s right to due process and the best interests principle are interwoven.¹⁵⁶ This Court has described the bests interest of the child as a “regulating principle regarding children’s rights...based on the very dignity of the human being, on the characteristics of children themselves, and on the need to foster their development, making full use of their potential, as well as on the nature and scope of the Convention on the Rights of the Child.”¹⁵⁷

69. The best interests principle and the right to due process of law intersect with respect to the asylum-seeking child’s right to independent legal counsel. Respect for these two aims requires that the asylum-seeking child have a legal representative free from conflicts of interest. According to the Committee, a child’s “representative must be aware that she or he represents exclusively the interests of the child and not the interests of other persons (parent(s)), institutions or bodies...”¹⁵⁸ This is especially true in the context of accompanied children. These children have interests distinct from their parent, and their legal interests should have distinct protection via an independent attorney.¹⁵⁹ The Council of Europe has recognised the danger of conflicts of interest involving the parents and child’s counsel, and accordingly identifies the need to eliminate a parental consent requirement¹⁶⁰ and ensure that the parent(s) are not paying the legal fees for child’s counsel.¹⁶¹ To this end, the Council recognises in the Guidelines on Child-friendly Justice that “[c]hildren should be considered as fully-fledged clients with their own rights and lawyers representing children should bring forward the opinion of the child.”¹⁶² Especially for the child who is

¹⁵⁵ *Juridical Condition and Human Rights of the Child (Advisory Opinion OC-17/02)*, (2002), I/A Court H.R., Series A No. 17, at pg. 80.

¹⁵⁶ The Committee on the Rights of the Child has identified that with respect to the procedures of criminal hearings involving children, the best interest of the child should be of concern in establishing national standards of due process. “The court and other hearings of a child in conflict with the law should be conducted behind closed doors. Exceptions to this rule should be very limited, clearly outlined in national legislation *and guided by the best interests of the child.*” *General Comment No. 12, supra* n. 139 at para. 61 [emphasis added]. Similarly, the Council of Europe has recognised that the best interests standard and due process protections are not mutually exclusive. In defining Child-friendly Justice, the guidelines require “justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity.” *Child-friendly Justice Guidelines, supra* n. 136 at II(c).

¹⁵⁷ *Juridical Condition and Human Rights of the Child (Advisory Opinion OC-17/02)*, (2002), I/A Court H.R., Series A No. 17, para. 56.

¹⁵⁸ *General Comment No. 12, supra* n. 139 at para. 37.

¹⁵⁹ The Committee cautions against potential conflicts of interests between children and their parents. “However, it must be stressed that in many cases...there are risks of a conflict of interest between the child and their most obvious representative (parents(s)).” *Ibid.* at para. 36.

¹⁶⁰ *Child-friendly Justice Guidelines, supra* n. 136 at para. 98.

¹⁶¹ *Ibid.* at para. 103.

¹⁶² *Ibid.* at para. 40.

a victim of abuse – and the Committee has recognized that separated children are at greater risk of sexual exploitation and abuse, child labour, and gender-based violence¹⁶³ – having an independent advocate is a critical foundation to building the trusting relationship wherein the child can disclose abuse and obtain the necessary protection.¹⁶⁴

70. An independent attorney is thus needed to advise the child on his/her right to be heard. According to the Guidelines on Child-friendly Justice, “[c]hildren should be provided with all necessary information on how effectively to use their right to be heard and to have their views taken into consideration decision.”¹⁶⁵ Where the child elects to exercise the right to be heard, “[l]awyers should provide the child with all necessary information and explanations concerning the possible consequences of the child’s views and/or opinions.”¹⁶⁶ Without an independent representative to advise children on their Article 12 and other rights, there is no way to reliably ensure that unaccompanied children have a right to have their views considered (and, in the case of accompanied children, that they have a right to be heard vis-à-vis their parents); without this information, there is considerable risk that the child’s right to be heard, a fundamental principle, will go unfulfilled.

c) Appointment of an independent legal representative is necessary to vindicate the child’s substantive rights as guaranteed by the UNCRC and recognised by this Court.

71. Numerous legal issues arise for the separated child upon arrival to the destination country. As such, appointment of an independent legal representative is invaluable in terms of informing the child of her/his rights and advising her/him on any possible course of legal action. As identified by the Committee, “[s]tates are required to create the underlying legal framework and to take necessary measures to secure proper representation of an unaccompanied or separated child’s best interests.”¹⁶⁷ It is submitted that “proper representation” of the child’s best interests requires the prompt appointment of an independent legal representative who can assist in the protection of the unaccompanied child’s rights under the UNCRC and jurisprudence of this Court which include, but are not limited to: non-discrimination, education, health care, family reunification, and to seek asylum. For a thorough discussion of these rights, see *supra*, section I.

72. The Irish experience provides examples of why an independent legal representative is needed to protect the separated child’s right to family reunification in particular. While the Health Service Executive [hereinafter

¹⁶³ *General Comment No. 6, supra* n. 6 at para. 3.

¹⁶⁴ “It is thus, of paramount importance, that either the guardian *ad litem* or the independent advocate and the social worker build a relationship based on trust, communication and they should assume mutual-monitoring roles.” SCEP Statement of Good Practice, *supra* n. 73 at pg. 52.

¹⁶⁵ Child-friendly Justice Guidelines, *supra* n. 136 at para. 48.

¹⁶⁶ *Ibid.* at para. 41.

¹⁶⁷ *General Comment No. 6, supra* n. 6 at para. 33.

“HSE”] does have family tracing programmes in place, many unaccompanied children in Ireland have been unable to successfully avail of it. Unaccompanied children are overwhelmed with information upon arrival and are not always properly informed and reminded by HSE social workers of the family tracing programmes that are in place. According to one study:

“All social workers interviewed stated that they informed the children under their care about the option to look for their family or try to contact them. However, when separated children were asked, they did not know if they had initiated the process, or if they had been told about this option and some were interested in beginning to pursue a restoring family links application after the interview took place. Separated children may not remember if they had started the process or not due to the amount of information introduced in such a short period of time after arrival.¹⁶⁸

This illustrates why separated children need both a guardian *ad litem* and an independent legal representative. Unlike an HSE social worker “guardian,” a dedicated legal representative would be in a position to frequently inform unaccompanied children of their rights to family reunification and ensure that this message was conveyed. The decision to pursue family reunification in lieu of an asylum application would necessarily involve legal strategy, and a legal professional would be best suited to advise the separated child on the likelihood of success depending on the child’s wishes and the approach taken. Additionally, if family reunification were pursued, the attorney could follow up with the child’s guardian *ad litem* to ensure that family tracing services were accessed, in such a way that both the attorney and guardian *ad litem* would be jointly accountable in effectuating the child’s right to family.

d) European legal instruments and best practice guidelines provide for the appointment of an independent legal representative to the child.

73. According to the FRA Comparative Report on Separated Asylum-seeking Children in European Union Member States,¹⁶⁹ “some EU Member States do not assign a legal guardian to separated, asylum-seeking children, but a guardian who provides general social support, without being able to complement a child’s legal capacity. Other Member States just provide legal representation, advice or counselling to the child.”¹⁷⁰

74. Upon examination of the relevant legal and advisory instruments, there is no direct obligation on EU Member States to appoint a legal representative to a child, however there is consistent recognition of the need for asylum applicants

¹⁶⁸ Irish Refugee Council, “Closing a Protection Gap,” *supra* n. 5 at 38.

¹⁶⁹ FRA Report, *supra* n. 75.

¹⁷⁰ *Ibid.* at pg. 50. It is worth noting that the Report recommended at pg. 53 that “a legal guardian should be provided to every separated, asylum-seeking child as soon as possible,” but also that, “appropriate legal representation, advice and counselling, as well as free legal aid, as appropriate, should be provided to separated, asylum-seeking children and their legal guardians or other representatives, in the context of legal procedures, as soon as possible, to ensure fair access to justice.”

to have access to legal representation. The Preamble of the Council of Europe Procedures Directive provides that, “the procedure in which an application for asylum is examined should normally provide the applicant at least with...the opportunity to consult a legal adviser or other counsellor, and the right to be informed of his/her legal position at decisive moments in the course of the procedure, in a language he/she can reasonably be supposed to understand.”¹⁷¹ The Receptions Directive outlines that unaccompanied minors may have been exposed to abuse, neglect, exploitation, torture or cruel, inhuman and degrading treatment, and may need to be provided with counselling. As noted above, Article 15 of the Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status provide that Member States may require asylum applicants to bear financial responsibility for acquiring legal assistance, however free legal assistance may be provided to those who have insufficient resources to bear this cost. It is submitted that this would apply directly to separated minors who, due to the lack of economic support of a caregiver, would be unable to bear this cost personally.

75. The Child Law Clinic then notes that while the Directives do not specifically recognise the right of the migrant child to legal representation, they nonetheless provide explicit recognition of the vulnerability of unaccompanied minors, and additionally provide for legal representation for those without the necessary means, particularly during the asylum process. Additionally, the Child Law Clinic refers to the existence of other European best practice guidelines and recommendations.

76. The Council of Europe Parliamentary Assembly Recommendation 1703, on Protection and Assistance for Separated Children Seeking Asylum, stressed notably that the Committee of Ministers should, “remove any administrative obstacle so as to ensure that separated children can have a legal guardian and a legal representative appointed as a matter of urgency and not later than two weeks of their presence coming to the knowledge of the authorities.”¹⁷²

77. Additionally, in 2010, the European Commission released an Action Plan on Unaccompanied Minors,¹⁷³ which highlighted that legal representation for the unaccompanied minor was a crucial issue. The Action Plan highlighted a deficiency of existing EU directives, namely that they do not “provide for the appointment of a representative from the moment an unaccompanied minor is detected by the authorities... Representation is only explicitly stipulated for asylum applicants.”¹⁷⁴ The Action Plan stressed that the vulnerable status of unaccompanied minors merited the adoption by the EU of “higher standards of protection.”¹⁷⁵ The Commission stressed its intention to “...ensure that EU legislation is correctly implemented and...evaluate whether it is necessary to

¹⁷¹ The Procedures Directives, *supra* n. 87 at Preamble, Recital 13.

¹⁷² Council Recommendation 1703, *supra* n. 89 at para. 9. Emphasis added.

¹⁷³ Communication from the Commission to the European Parliament and the Council – Action Plan on Unaccompanied Minors (2010-2014) SEC (2010) 534. Available at www.eur-lex.europa.eu. (Date accessed: 17 December 2011.)

¹⁷⁴ *Ibid.* at pg. 9.

¹⁷⁵ *Ibid.* at pg. 10.

introduce targeted amendments or a specific instrument setting down common standards on reception and assistance for all unaccompanied minors regarding guardianship, legal representation, access to accommodation and care, initial interviews, education services and appropriate healthcare etc.”¹⁷⁶ This proposal clearly recognises the need for dual representation for the child.

78. The European Council on Exiles and Refugees (ECRE) in its Position of Refugee Children¹⁷⁷ stated that,

“ECRE maintains that each refugee child who is seeking international protection in own right should

- a. Be provided promptly with legal advice and representation throughout the determination procedure, including any appeals,
- b. Be provided, if necessary, with the means to obtain this legal representation,
- c. If unaccompanied, automatically receive such representation at no cost to the child or those caring for the child,
- d. Be provided with interpreters trained in both refugee and child issues,
- e. Have the right to appeal against a negative decision to an independent judicial authority.”¹⁷⁸

Additionally, the SCEP Statement of Good Practice advised that the guardian should, *inter alia*, “ensure the child has suitable legal representation to assist in procedures that will address protection claims and durable solutions.”¹⁷⁹ This would also seem to envisage a clear preference for dual representation.

e) Case law of the European Court of Human Rights has clearly recognised the need for an independent legal representative to be appointed to the child.

79. The brief in this section will refer again to the cases discussed in section I.¹⁸⁰ in *Rahimi v. Greece*,¹⁸¹ the Court, in examining the applicant’s claim that his rights under Article 3 of the ECHR had been violated, noted that, as well as not being provided with information on his rights in a comprehensible language, the applicant had also not been able to engage the services of a lawyer.¹⁸² As such, as the applicant had also not been appointed a guardian, he was not able to complain to a designated individual about the conditions of his detention, nor seek vindication of his rights. Accordingly, the Court found a breach of the applicant’s rights under Article 3 of the ECHR.¹⁸³

¹⁷⁶ *Ibid.* at pg. 10.

¹⁷⁷ *Supra* n. 132.

¹⁷⁸ *Ibid* at para. 24.

¹⁷⁹ SCEP Statement of Good Practice, *supra* n. 73 at para. D3.

¹⁸⁰ *See supra* paras. 45 – 54.

¹⁸¹ *Supra* n. 95.

¹⁸² *Ibid.* at para. 120.

¹⁸³ *See supra* paras. 31 – 38.

80. In *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*,¹⁸⁴ the Court noted at para. 13 that on 18th August 2002, one day after the applicant's arrival into Belgium, and upon her having been refused leave to remain in Belgium, the Belgian authorities appointed a lawyer to assist the applicant, and he immediately applied for refugee status on her behalf. At para. 37, the court noted that the applicant's lawyer had paid her a number of visits and had brought her telephone cards, confectionery and money.¹⁸⁵ At para. 58, the Court considered that, "the measures taken by the Belgian authorities – informing the first applicant of the position, giving her a telephone number where she could reach her daughter, appointing a lawyer to assist the second applicant and liaising with the Canadian authorities and the Belgian embassy in Kinshasa – were far from sufficient to fulfil the Belgian State's obligation to provide care for the second applicant." It is therefore submitted by the Child Law Clinic that while the Belgian authorities had acted towards the child's best interests by appointing her a lawyer, in order to fully vindicate her interests a guardian *ad litem* should also have been appointed to vindicate her other rights.¹⁸⁶

f) Conclusion

81. The Child Law Clinic therefore respectfully urges the Inter-American Court of Human Rights to take into account the need for legal representation to be appointed to the child. A qualified lawyer, specially trained in asylum procedures and in other areas of law relevant to the child's situation, would ensure that the child's right to be heard is properly vindicated, and would also ensure not only that legal remedies were pursued and explored, but that the child would be aware of the procedures and consequences of each legal situation. As evidenced by the case-law as described above, a dedicated lawyer for the asylum-seeking child would also be on hand to ensure the child's rights outside the legal process, for example, the child's rights to health and education, are being adequately vindicated while the child is undergoing the asylum process.

¹⁸⁴ *Supra* n. 96.

¹⁸⁵ In this case, the applicant minor had not been appointed a guardian.

¹⁸⁶ The Court found a violation of the applicant's rights under Article 3 with respect to the conditions of her detention.

IV. Separated Children Seeking Asylum Have a Right to a Specialised Asylum Procedure That Takes into Account their Particular Vulnerabilities.

82. The objective of this section is first, to examine the right of separated children seeking asylum to a specialised asylum procedure that takes into account their particular vulnerabilities and second, to examine the right of the separated child to express his or her views during the refugee assessment procedure. In particular, this section will examine what obligation states have under the UNCRC to establish such a specialised procedure. For a detailed analysis of the particular psychological vulnerabilities of separated children, see *supra* section I(a).

a) The difficulties faced by separated children during the refugee assessment process render them entitled to specialised procedures.

83. One of the misleading beliefs concerning asylum seekers is that individuals seeking asylum are typically adults.¹⁸⁷ This idea significantly disadvantages children seeking asylum in numerous ways. First of all, separated children may have limited language skills and therefore find it difficult to explain their experience as persecution.¹⁸⁸ Therefore, children frequently find it more difficult to prove that they were persecuted in another state for the simple reason that they do not understand the intent of the persecutor and may also lack understanding of the situation in and of itself.¹⁸⁹

84. In some jurisdictions, children are not considered mature enough to have political and religious beliefs for which they can be persecuted.¹⁹⁰ Similarly, children who are political activists in their own right or members of families that are politically active find that the judicial mechanisms for reviewing their asylum status in their state do not take such persecution seriously.¹⁹¹ Where the child is able to establish that he/she is being persecuted on the grounds of his political or religious beliefs, the child applicant must still demonstrate that the government of the state in which he/she was being persecuted was unable or unwilling to defend him/her from the alleged persecutor.¹⁹² This prerequisite,

¹⁸⁷ J. Bhabha, "Seeking Asylum Alone: Treatment of Refugee and Trafficked Children in Need of Refugee Protection" (2001) 42 Int'l Migration 141 at 143.

¹⁸⁸ R. Hek, *The Experiences and Needs of Refugee and Asylum-Seeking Children in the UK: A Literature Review* (University of Birmingham: National Evaluation of the Children's Fund, 2005) at 34. See also: C. Nugent, "Protecting Unaccompanied Immigrant and Refugee Children in the United States" (2005) 32 Human Rights Magazine 9 at 9.

¹⁸⁹ Memorandum from Jeff Weiss, Acting Director of International Affairs, to Asylum Officers, Immigration Officers, and Headquarters Coordinators, INS Guidelines for Children's Asylum Claims (1998) at 21, available at <http://uscis.gov/files/pressrelease/ChildrensGuidelines121098> [hereinafter INS Guidelines.]

¹⁹⁰ See Bhabha, *supra* n. 187 at 143.

¹⁹¹ *Ibid.*

¹⁹² See Matter of Villalta, 20 I&N Dec. 142, 147 (United States Board of Immigration Appeals 1990.)

however, presumes that the child had the ability to request protection from government authorities.¹⁹³

85. In order to demonstrate that his/her fear of persecution is well-grounded, a child asylum seeker must demonstrate that his/her fear of persecution is subjectively or objectively reasonable.¹⁹⁴ It is observed that these elements are different for adults than for children; what may be regarded as persecution when directed to children may only be regarded as discrimination or harassment when applied to adults.¹⁹⁵ Therefore, during the judicial process, the adjudicator must first determine the subjective effect of the disturbing event on the child and secondly, determine what decision is objectively reasonable based on the child asylum seeker's age, maturity, cultural background and experience.¹⁹⁶

86. In addition, regard should be had for the fact that a child may be more afraid of unfamiliar surroundings and situations than adults and therefore, are more likely to perceive an implausible threat.¹⁹⁷ Therefore, seeing the serious harm or death of a family relative may constitute the persecution of a child because it affects the child emotionally and psychologically.¹⁹⁸ It is argued that this inconsistency in a child's experience as opposed to that of an adult is as a result of the child's amplified sensitivity and dependency on family members.¹⁹⁹ In addition, the death or serious bodily injury of a family member, especially a parent, may seriously affect separated children for the simple reason that unaccompanied children cannot turn to those they ordinarily rely on for support and as a result they can experience increased emotional and psychological trauma.²⁰⁰

b) The UNCRC provides for specialised procedures for the child during the assessment process.

87. Pursuant to Article 2 of the UNCRC, states are obliged to respect and ensure the rights of each child within their jurisdiction.²⁰¹ The UN Committee on the Rights of the Child has noted that these obligations "cannot be arbitrarily and unilaterally curtailed either by excluding zones or areas from a State's

¹⁹³ D. Villareal, "To Protect the Defenseless: The Need for Child-Specific Substantive Standards for Unaccompanied Minor Asylum Seekers." (2004) 26 *Houston Journal of International Law* 743 at 766.

¹⁹⁴ INS Guidelines, *supra* n. 189 at 19.

¹⁹⁵ J. Koo-Dalrymple, "Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied Minors." (2006) 26 *Boston College Third World Law Journal* 131 at 140.

¹⁹⁶ *Ibid.*

¹⁹⁷ J. Bhabha and W. Young, "Through a Child's Eyes: Protecting the Most Vulnerable Asylum Seekers." (1998) 75 *Interpreter Releases* 757 at 762.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

²⁰⁰ K. Nogosek, "It Takes a World to Raise a Child: A Legal and Public Policy Analysis of American Asylum Legal Standards and Their Impact on Unaccompanied Minor Asylees." (2000) 24 *Hamline Law Review* 1 at 11.

²⁰¹ Article 2, UNCRC.

territory or by defining particular zones or areas as not or only partly under the jurisdiction of the State.”²⁰²

88. Article 3(1) provides 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.”²⁰³ In respect of an accompanied child that is seeking asylum it is argued that the best interests principle must be followed at all stages during the asylum judicial process. The same can be argued in respect of separated children.

89. According to the UN Committee on the Rights of the Child, a judgment of what is in the best interests of a child necessitates an unambiguous and inclusive examination of the child’s identity, “including his or her nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs.”²⁰⁴ Therefore, it would seem that permitting the child access to the state is a precondition in this preliminary evaluation process. In turn, the evaluation process should be completed by qualified persons in a child friendly atmosphere who are proficient in age and gender-sensitive interviewing techniques.²⁰⁵

c) The UNCRC provides for specialised procedures for the child during the asylum process.

90. Article 22 of the UNCRC provides that children seeking asylum in a host state, including those that are separated, have a right to access asylum procedures, regardless of their age.²⁰⁶

91. If it emerges during the identification and registration process that,

“the child may have well-founded fear or, even if unable to explicitly articulate a concrete fear, the child may objectively be at risk of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, or otherwise be in need of international protection, such a child should be referred to the asylum procedure and/or, where relevant, to mechanisms providing complementary protection under international and domestic law.”²⁰⁷

92. It is submitted that Article 22(1) of the UCRC requires that proper measures should be implemented by states to take into account the particular vulnerabilities of the separated child. In particular, the Committee has stated that in implementing such measures, the following considerations should be made:

²⁰² *General Comment No. 6, supra* n.6 at para. 12.

²⁰³ Article 3(1) UNCRC.

²⁰⁴ *General Comment No. 6, supra* n. 6 at para. 20.

²⁰⁵ *Ibid.*

²⁰⁶ *See supra*, para. 31.

²⁰⁷ *General Comment No. 6, supra* n. 6 at para. 66.

1. The child must be represented by an adult who understands the background of the child and has the competency to represent the best interests of the unaccompanied child.²⁰⁸
2. The child must also have access to a legal professional free of charge.²⁰⁹
3. Applications of unaccompanied children seeking asylum must take precedence over the applications of adult asylum-seekers and a decision on the child asylum seeker's application must be made without undue delay.²¹⁰
4. Minimal procedural guarantees "should include that the application will be determined by a competent authority fully qualified in asylum and refugee matters."²¹¹
5. The child should also be afforded the opportunity to have a personal interview with a qualified competent person before the final decision on the child's application, if the age and maturity of the child at the time of application of the child permits.²¹² If the child has the opportunity to participate in a personal interview, the following procedures should be adopted:
 - a) If the child is not able to communicate with the interviewer in a common language, an interpreter should be sought to facilitate the interview between the parties in a common language.²¹³
 - b) The child should be given "the benefit of the doubt" where it is uncertain whether the child's story is accurate and true.²¹⁴
 - c) The child must have access to an appeal mechanism to review the decision on the child's asylum application.²¹⁵

93. The interviewers must take the fact that the child is unaccompanied as well as the culture and background of the child into account in completing the refugee status assessment.²¹⁶

- a) The refugee status assessment should also comprise a "case-by-case examination of the unique combination of factors presented by each child, including the child's personal, family and cultural background."²¹⁷

²⁰⁸ *Ibid.* at para. 69.

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.* at para. 70.

²¹¹ *Ibid.* at para. 71.

²¹² *Ibid.*

²¹³ *Ibid.* at para. 71.

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*

²¹⁶ *Ibid.* at para. 72.

²¹⁷ *Ibid.*

- b) The legal representative of the child as well as the child's guardian should be in attendance at each interview conducted by the refugee assessment body with the child.

94. In considering the right of the separated child to a refugee status assessment that takes into account their particular vulnerabilities, Article 12 of the UNCRC provides that the child has the right to have his views and wishes taken into account during all proceedings affecting him/her. In order to enable the child to exercise this particular right, "all relevant information concerning, for example, their entitlements, services available including means of communication, the asylum process, family tracing and the situation in their country of origin..." should be gathered.²¹⁸ The child's views should also be taken into account with regard to the child's guardianship and accommodation arrangements. In addition, this information should be communicated to the child in such a way that they will understand it and that it is appropriate to their level of maturity. As already noted above, the child's right to express their views and wishes during the refugee status assessment is dependent on the child being able to communicate such views in a common language to their legal representative and official, therefore, the child should have access to an interpreter during all stages of the procedure.

d) Conclusion

95. A separated child seeking asylum in another state has clearly defined rights to specialised procedures, taking into account his/her particular vulnerabilities. Separated children need this specialised procedure due to the fact that separation from family can have a detrimental impact upon how children cope with the psychological effects of trauma and distress. Therefore, the refugee status assessment procedure needs to take into account the fact that the child is particularly vulnerable. It is argued that the adoption of the mechanism outlined above would ensure that the vulnerabilities of the child are properly observed during refugee status assessment procedures.

²¹⁸ *Ibid.* at para. 25.

CONCLUSION

96. It is therefore respectfully submitted by this *Amicus Curiae* Brief that the child should be appointed dual representation: a guardian *ad litem*, to ensure vindication of all the child's rights, as guaranteed under the UNCRC, and a legal representative to support the child through the legal aspects of the asylum process. Moreover, it is submitted that appointment of an independent attorney or lawyer is necessary to properly apprise the unaccompanied child of his/her right to be heard, to non-discrimination, to education, health care, and family reunification, and pursue legal remedies accordingly.

97. The Child Law Clinic also respectfully submits that the separated child is entitled to specialised asylum procedures, taking into account his or her vulnerable position as firstly, a minor, and secondly, an unaccompanied minor, in the host state.

98. The Child Law Clinic concludes that the implementation of a specialised procedure taking into account the vulnerabilities of a separated child seeking asylum would ensure that their best interests are properly observed during the refugee status assessment procedure. Therefore, the fact that the child is unaccompanied, as well as the culture and background of the child, should be taken into account during the refugee status assessment procedure. A specialised procedure would in turn ensure that the due process rights of the child as laid down in the sources outlined throughout the brief are observed and that the unaccompanied child's views are taken into account during proceedings.

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APPENDIX 1 – EUROPEAN INSTRUMENTS

Council of Europe – Council Resolution of 26 June 1997 on Unaccompanied Minors who are Nationals of Third Countries (97/C 221/03)

Article 3(2)

Irrespective of their legal status, unaccompanied minors should be entitled to the necessary protection and basic care in accordance with the provisions of national law.

Article 3(4)

For the purposes of applying this Resolution, Member States should provide as soon as possible for the necessary representation of the minor by:

- (a) legal guardianship
- (b) representation by a (national) organization which is responsible for the care and well-being of the minor, or
- (c) other appropriate representation.

Article 3(5)

Where a guardian is appointed for an unaccompanied minor, the guardian should ensure, in accordance with national law, that the minor's needs (for example, legal, social, medical or psychological) are duly met.

Council of Europe - Council Directive of 27 January 2003: Minimum Standards for the Reception of Asylum Seekers (2003/9/EC)

Article 18 – Minors

1. The best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Directive that involve minors.
2. Member States shall ensure access to rehabilitation services for minors who have been victims of any form of abuse, neglect, exploitation, torture or cruel, inhuman and degrading treatment, or who have suffered from armed conflicts, and ensure that appropriate mental health care is developed and qualified counselling is provided when needed.

Article 19 – Unaccompanied Minors

1. Member States shall as soon as possible take measures to ensure the necessary representation of unaccompanied minors by legal guardianship or, where necessary, representation by an organisation which is responsible for the care and well-being of minors, or by any other appropriate representation. Regular assessments shall be made by the appropriate authorities.

Council of Europe – Council Directive of 1 December 2005: Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status

Preamble (Recital 13)

In the interests of a correct recognition of those persons in need of protection as refugees within the meaning of Article 1 of the Geneva Convention, every applicant should, subject to certain exceptions, have an effective access to procedures, the opportunity to cooperate and properly communicate with the competent authorities so as to present the relevant facts of his/her case and sufficient procedural guarantees to pursue his/her case throughout all stages of the procedure. Moreover, the procedure in which an application for asylum is examined should normally provide an applicant at least with the right to stay pending a decision by the determining authority, access to the services of an interpreter for submitting his/her case if interviewed by the authorities, the opportunity to communicate with a representative of the United Nations High Commissioner for Refugees (UNHCR) or with any organisation working on its behalf, the right to appropriate notification of a decision, a motivation of that decision in fact and in law, the opportunity to consult a legal adviser or other counsellor, and the right to be informed of his/her legal position at decisive moments in the course of the procedure, in a language he/she can reasonably be supposed to understand.

Article 15 – Right to legal assistance and representation

Article 15 (1)

Member States shall allow applicants for asylum the opportunity, at their own cost, to consult in an effective manner a legal adviser or other counsellor, admitted or permitted as such under national law, on matters relating to their asylum applicants.

Article 15(2)

In the event of a negative decision by a determining authority, Member States shall ensure that free legal assistance and/or representation be granted on request, subject to the provisions of paragraph 3.

Article 15 (3)

Member States may provide in their national legislation that free legal assistance and/or representation is granted:

(a) only for procedures before a court or tribunal in accordance with Chapter V and not for any onward appeals or reviews provided for under national law, including a rehearing of an appeal following an onward appeal or review; and/or

(b) only to those who lack sufficient resources; and/or

(c) only to legal advisers or other counsellors specifically designated by national law to assist and/or represent applicants for asylum; and/or

(d) only if the appeal or review is likely to succeed.

Member States shall ensure that legal assistance and/or representation granted under point (d) is not arbitrarily restricted.

Article 15(4)

Rules concerning the modalities for filing and processing requests for legal assistance and/or representation may be provided by Member States.

Article 15(5)

Member States may also

- (a) impose monetary and/or time-limits on the provision of free legal assistance and/or representation, provided that such limits do not arbitrarily restrict access to legal assistance and/or representation;
- (b) provide that, as regards fees and other costs, the treatment of applicants shall not be more favourable than the treatment generally accorded to their nationals in matters pertaining to legal assistance.

Article 15(6)

Member States may demand to be reimbursed wholly or partially for any expenses granted if and when the applicant's financial situation has improved considerably or if the decision to grant such benefits was taken on the basis of false information supplied by the applicant.

Article 17 – Guarantees for Unaccompanied Minors

Article 17(1)

With respect to all procedures provided for in this Directive and without prejudice to the provisions of Articles 12 and 14,²¹⁹ Member States shall:

- (a) as soon as possible take measures to ensure that a representative represents and/or assists the unaccompanied minor with respect to the examination of the application...²²⁰
- (b) ensure that the representative is given the opportunity to inform the unaccompanied minor about the meaning and possible consequences of the personal interview and, where appropriate, how to prepare himself/herself for the personal interview. Member States shall allow the representative to be present at that interview and to ask questions or make comments, within the framework set by the person who conducts the interview.

Article 17(2)

²¹⁹ Article 12.1 provides, *inter alia*, that 'Member States may determine in national legislation the cases in which a minor shall be given the opportunity of a personal interview.'

²²⁰ Article 1(a) here states that, "This representative can also be the representative referred to in Article 19 of Directive 2003/9/EC of 27 January 2003, laying down minimum standards for the reception of asylum seekers."

Member States may refrain from appointing a representative where the unaccompanied minor:

- (a) will in all likelihood reach the age of maturity before a decision at first instance is taken; or
- (b) can avail himself, free of charge of a legal adviser or other counsellor, admitted as such under national law to fulfil the tasks assigned above the representative; or
- (c) is married or has been married.

Article 17(3)

Member States may, in accordance with the laws and regulations in force on 1 December 2005, also refrain from appointing a representative where the unaccompanied minor is 16 years old or older, unless he/she is unable to pursue his/her application without a representative.

Article 35 (in relation to border procedures)

Member States must ensure that the persons concerned, Have a representative appointed, in the case of unaccompanied minors, as described in Article 17(1), unless Article 17(2) or (3) applies.

**Council of Europe Parliamentary Assembly Recommendation 1596 –
'Situation of Young Migrants in Europe.'
(Assembly Debate, 31 January, 2003.)**

Article 27

The Parliamentary Assembly outlined best practice guidelines for member states to consider in the creation of a legal framework for the appointment of guardians for unaccompanied minors.

- a.* all Council of Europe member states should adopt a legal framework for the appointment of a legal guardian for separated children who are under their jurisdiction, irrespective of whether they apply for asylum or not;
- b.* the legal guardian should look after the child individually, and be chosen among people or institutions of proven reliability, and have an understanding of the special and cultural needs of separated children as well as of the institutions of the host country;
- c.* the appointment of the legal guardian should take place as a matter of urgency, and in any case within two weeks of the presence of the child on national territory coming to the knowledge of the authorities;
- d.* the legal guardian should ensure that all decisions affecting the child are taken in his or her best interests, that the child has suitable legal representation to deal with his or her legal status and that she or he receives suitable care, accommodation, education, language support and health care;
- e.* the legal guardian should also act as a link between the child and various service providers and advocate on behalf of the child where necessary.

**Council of Europe: Parliamentary Assembly Recommendation 1703 –
Recommendation on 'Protection and Assistance for Separated Children**

Seeking Asylum.'
(Assembly Debate, 28 April 2005.)

Article 28.

Para. 5:

As they are without parents or legal or customary primary care-givers, separated children seeking asylum should benefit from the prompt appointment of a legal guardian to defend their interests and ensure their well-being, and they should also be placed in care and reception structures in keeping with their age and majority.

Para 9:

The Assembly therefore recommends that the Committee of Ministers:

- i. instruct one or more of the specialised committees to conduct in-depth studies on access to the territory and to the asylum procedure for separated children seeking asylum in Council of Europe member states, as well as on the availability of a system of legal guardianship;
- ii. instruct one or more of the specialised committees to conduct a study to review the practice of member states as regards child-specific forms of persecution;
- iii. draw up, in co-operation and co-ordination with the UNHCR, the Save the Children Alliance and the Separated Children in Europe Programme, a recommendation urging member states to:
 - a. recognise the primacy of the principle of the best interests of the child in all asylum or immigration decisions, procedures, practices or legislative measures affecting minors;
 - b. recognise and fully implement in practice the principle of non-discrimination, ensuring that all rights apply to all children on their territory or within their jurisdiction without exception;
 - c. refrain from refusing entry to their territories to separated children, on any grounds;
 - d. amend their legislation and remove any administrative obstacle so as to ensure that separated children can have a legal guardian and a legal representative appointed as a matter of urgency and not later than two weeks of their presence coming to the knowledge of the authorities;
 - e. ensure that separated children are heard in the context of the asylum procedure, either directly or through their legal guardian, and that they are questioned in a manner in keeping with their age, maturity and psychological situation;
 - f. amend their legislation so as to exempt separated children from accelerated or admissibility asylum procedures;

- g. recognise child-specific forms of persecution as persecution within the meaning of the 1951 Geneva Convention relating to the Status of Refugees;
 - h. grant special or humanitarian residence permits to children who have been subjected to child-specific forms of persecution and who are not recognised as refugees;
 - i. facilitate family reunification on behalf of separated children, as indicated in Assembly [Recommendation 1596 \(2003\)](#) on the situation of young migrants in Europe;
 - j. allow the detention of separated children only as a last resort and for the shortest possible time, as indicated in Recommendation [Rec\(2003\)5](#) of the Committee of Ministers to member states on measures of detention of asylum seekers
 - k. ensure that the return of separated children to their country of origin is implemented only if this is in the best interest of the child and in compliance with the safeguards set out in Assembly [Recommendations 1547 \(2002\)](#) on expulsion procedures in conformity with human rights and enforced with respect for safety and dignity and [Recommendation 1596 \(2003\)](#) as mentioned above.
- iv. encourage the organisation and provision of specific training for lawyers as well as officials and other professionals dealing with separated children during the asylum procedure and in the context of anti-trafficking policy and law;
 - v. urge member states to comply with the guidelines adopted by the UNHCR, the Save the Children Alliance and the Separated Children in Europe Programme, in particular the revised Statement of Good Practice on Separated Children Seeking Asylum;
 - vi. call on member states to continue their co-operation with the UNHCR and the Separated Children in Europe Programme in order to:
 - a. introduce a uniform format for registering information on separated children as regards age, gender and country of origin, with a view to facilitating identification, family tracing and the comparability of information collected;
 - b. introduce common standards for assessing the age of separated children;
 - c. harmonise the collection of statistical data relating to separated children seeking asylum as regards gender, age, country of origin and decisions on asylum and communicate such information to the UNHCR and other relevant organisations.