

THE EUROPEAN SOCIAL CHARTER:
A COMMENTARY

**Volume 3 –
Articles 11 – 19**

Edited by

**Stefano Angeleri, Koldo Casla
& Sébastien Van Drooghenbroeck**

Manuscript submitted to BRILL PUBLISHERS

In

August 2023

Table of Contents

- Preliminary Remarks & Acknowledgments* 1**
- Preface* 2**
- List of Abbreviations* 3**
- Table of Cases*..... 4**
 - European Committee of Social Rights4
 - European Commission of Human Rights7
 - European Court of Human Rights7
 - Court of Justice of the European Union10
 - African Commission on Human and Peoples’ Rights11
 - Inter-American Court of Human Rights.....11
 - UN Committee on Economic, Social and Cultural Rights11
 - UN Human Rights Committee.....12
- Notes on contributors* 14**
- Article 11 - The Right to Protection of Health*..... 17**
 - INTRODUCTION.....17**
 - I. THE DRAFTING AND ADOPTION OF ARTICLE 11 19**
 - II. COMPARING OTHER INTERNATIONAL PROVISIONS ON THE RIGHT TO HEALTH WITH ARTICLE 11 OF THE ESC21**
 - III. CONTENT OF ARTICLE 11: THE RIGHT TO PROTECTION OF HEALTH24**
 - A. REMOVING “AS FAR AS POSSIBLE THE CAUSES OF ILL-HEALTH” (ARTICLE 11 PARAGRAPH 1) 24
 - B. PROVIDING “ADVISORY AND EDUCATIONAL FACILITIES FOR THE PROMOTION OF HEALTH AND THE ENCOURAGEMENT OF INDIVIDUAL RESPONSIBILITY IN MATTERS OF HEALTH” (ARTICLE 11 PARAGRAPH 2) 26
 - C. PREVENTING “AS FAR AS POSSIBLE EPIDEMIC, ENDEMIC AND OTHER DISEASES, AS WELL AS ACCIDENTS” (ARTICLE 11 PARAGRAPH 3)..... 26
 - IV. OBLIGATIONS OF THE STATES PARTIES27**
 - A. POSITIVE OBLIGATIONS 28
 - B. NEGATIVE OBLIGATIONS 28
 - V. LINKS BETWEEN THE RIGHT TO HEALTH PROTECTION AND OTHER HUMAN RIGHTS: INDIVISIBILITY OF HUMAN RIGHTS29**
- Article 12 – The right to social security*..... 23**
 - INTRODUCTION.....23**
 - I. GENERAL PRESENTATION24**
 - A. DRAFTING HISTORY 26
 - B. RELEVANT INTERNATIONAL STANDARDS 27
 - C. RELATIONSHIP WITH OTHER CHARTER’S PROVISIONS..... 29

II. INTERPRETATION BY THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS	30
A. ARTICLE 12 § 1	30
B. ARTICLE 12 § 2	31
C. ARTICLE 12 § 3	32
D. ARTICLE 12 § 4	33
CONCLUDING REMARKS	35
<i>Article 13 – The right to social and medical assistance</i>	<i>36</i>
INTRODUCTION	36
THE NORMATIVE CONTENT OF ARTICLE 13 ESC	38
A. ADEQUATE ASSISTANCE FOR PERSONS IN NEED	39
1. Eligibility criteria	39
2. Levels and types of benefits	39
3. Procedural and formal requirements	41
B. PROHIBITION OF THE DIMINUTION OF POLITICAL AND SOCIAL RIGHTS	42
C. EMPOWERING SOCIAL SERVICES	42
D. THE PERSONAL SCOPE OF ARTICLE 13	43
II. COMPARABLE PROTECTION IN OTHER INSTRUMENTS OF EUROPEAN AND INTERNATIONAL LAW	46
A. THE EUROPEAN CONVENTION ON HUMAN RIGHTS	46
B. EUROPEAN UNION LAW	49
C. INTERNATIONAL INSTRUMENTS	53
CONCLUDING REMARKS	55
<i>Article 14 – The right to benefit from social welfare services</i>	<i>59</i>
INTRODUCTION	59
II. GENERAL PRESENTATION	59
A. DRAFTING HISTORY	62
B. RELEVANT INTERNATIONAL STANDARDS	62
C. RELATIONSHIP WITH OTHER ESC PROVISIONS	63
II. INTERPRETATION BY THE ECSR	64
A. ARTICLE 14 § 1	66
B. ARTICLE 14 § 2	68
CONCLUDING REMARKS	69
<i>Article 15 – The right of persons with disabilities to independence, social integration and participation in the life of the community</i>	<i>73</i>
INTRODUCTION	73
I. THE PRIMARY RIGHTS GUARANTEED BY ARTICLE 15 OF THE REVISED EUROPEAN SOCIAL CHARTER	76
A. THE RIGHT TO GUIDANCE, EDUCATION AND TRAINING OF PERSONS WITH DISABILITIES	77
1. Education, vocational training and guidance	78
2. From integration to inclusion	79
3. Obligations of the State Parties under Article 15 § 1	80
4. Reasonable accommodation	82
B. THE RIGHT TO INDEPENDENT LIFE, FULL AND EQUAL SOCIAL PARTICIPATION THROUGH EMPLOYMENT	83
1. Work in the “ordinary working environment” vs sheltered employment	83

2. The employer’s obligation of reasonable accommodation.....	84
3. Obligations of the State Parties under Article 15 § 2	85
C. THE RIGHT TO FULL SOCIAL INTEGRATION AND PARTICIPATION IN THE LIFE OF THE COMMUNITY THROUGH ACCESSIBILITY	86
II. NON-DISCRIMINATION IN THE EXERCISE OF ARTICLE 15 OF THE REVISED EUROPEAN SOCIAL CHARTER.....	87
III. DISABILITY PROTECTION IN OTHER INSTRUMENTS OF EUROPEAN AND INTERNATIONAL LAW: CONVERGENCE OR DIVERGENCE WITH THE CHARTER?	88
CONCLUDING REMARKS.....	92
<i>Article 16 – The right of the family to social, legal and economic protection.....</i>	<i>94</i>
INTRODUCTION.....	94
I. LEGAL PROTECTION OF THE FAMILY	97
A. EQUALITY AMONG FAMILIES, SPOUSES AND PARENTS	97
B. FAMILY MEDIATION.....	98
C. DOMESTIC VIOLENCE.....	98
D. CHILD ISSUES.....	99
II. SOCIAL AND ECONOMIC PROTECTION OF FAMILY	100
A. SOCIAL POLICIES AND SOCIAL SECURITY ISSUES	100
1. Childcare facilities	100
2. Economic protection	101
a. Family benefits.....	101
b. Family benefits of a sufficient amount	101
3. Vulnerable families.....	102
4. Equal treatment	102
B. HOUSING	102
1. General Remarks	102
2. Housing in Respect of Family Protection.....	103
a. Personal Scope	103
b. Material scope	105
c. Procedural Safeguards.....	106
d. Interim measures	106
CONCLUDING REMARKS.....	107
<i>Article 17 – The right of children and young persons to social, legal and economic protection.....</i>	<i>108</i>
INTRODUCTION.....	108
I. DRAFTING HISTORY	108
II. OTHER INSTRUMENTS ESTABLISHING SIMILAR STANDARDS	109
III. ANALYSIS OF THE PROVISION	112
A. PERSONAL SCOPE.....	112
B. MATERIAL SCOPE	115
1. Legal status of the child.....	115
2. Rights of children in public care	117
3. Protection of children from violence, ill-treatment and abuse.....	118
4. Young offenders	120
5. Right to assistance and the situation of children in poverty.....	121
6. Right to education.....	122

CONCLUDING REMARKS.....	125
<i>Article 18. The right to engage in gainful occupation in the territory of other parties</i>	127
INTRODUCTION.....	127
I. DRAFTING HISTORY.....	127
II. ARTICLE 18 IN ITS INTERNATIONAL AND EUROPEAN NORMATIVE ENVIRONMENT	128
III. SCOPE OF APPLICATION.....	131
A. MEMBER STATES' RATIFICATION	131
B. PERSONAL SCOPE OF APPLICATION	132
IV. CONTENT	133
A. GENERAL CONSIDERATIONS	133
B. ARTICLE 18 § 1: APPLYING REGULATIONS IN A SPIRIT OF LIBERALITY.....	134
C. ARTICLE 18 § 2: SIMPLIFY EXISTING FORMALITIES AND REDUCE OR ABOLISH CHANCERY DUES AND CHARGES.....	135
D. ARTICLE 18 § 3: LIBERALIZE REGULATIONS GOVERNING THE EMPLOYMENT OF FOREIGN WORKERS	136
E. ARTICLE 18 § 4: RECOGNIZE THE RIGHT OF NATIONALS TO LEAVE THE COUNTRY TO ENGAGE IN A GAINFUL OCCUPATION IN OTHER PARTIES TO THE CHARTER	138
CONCLUDING REMARKS.....	139
<i>Article 19 – The right of migrant workers and their families to protection and assistance</i>	140
INTRODUCTION.....	140
I. SCOPE OF APPLICATION.....	141
A. CONTEXTUALIZATION OF SOURCES	141
B. PERSONAL SCOPE	142
II. ARTICLE 19 § 1: THE RIGHT TO ADEQUATE AND FREE SERVICES TO ASSIST MIGRANT WORKERS AND TO ACTION AGAINST MISLEADING PROPAGANDA RELATING TO EMIGRATION AND IMMIGRATION	144
III. ARTICLE 19 § 2: RIGHT TO HEALTH AND MEDICAL SERVICES IN TRANSIT AND RECEPTION FACILITIES FOR MIGRANT WORKERS	145
IV. ARTICLE 19 § 3: COOPERATION BETWEEN THE PUBLIC AND PRIVATE SOCIAL SERVICES OF EMIGRATION AND IMMIGRATION COUNTRIES	147
V. ARTICLE 19 § 4: RIGHT TO AN EQUAL TREATMENT ON REMUNERATION AND OTHER EMPLOYMENT AND WORKING CONDITIONS, MEMBERSHIP OF TRADE UNIONS AND ENJOYMENT OF THE BENEFITS OF COLLECTIVE BARGAINING, AND ACCOMMODATION.	148
VI. ARTICLE 19 § 5: RIGHT TO AN EQUAL TREATMENT WITH REGARD TO EMPLOYMENT TAXES, DUES OR CONTRIBUTIONS PAYABLE IN RESPECT OF EMPLOYED PERSONS	151
VII. ARTICLE 19 § 6: RIGHT OF REUNION OF THE FAMILIES OF MIGRANT WORKERS.....	151
VIII. ARTICLE 19 § 7: RIGHT OF ACCESS TO LEGAL PROCEEDINGS RELATING TO MATTERS REFERRED TO IN THIS ARTICLE.....	152
IX. ARTICLE 19 § 8: RIGHT OF NOT BEING EXPELLED UNLESS UNDER EXCEPTIONAL CIRCUMSTANCES.....	153
X. ARTICLE 19 § 9: RIGHT OF TRANSFER OF EARNINGS AND SAVINGS	154
XI. ARTICLE 19 § 10: EXTENSION TO SELF-EMPLOYED WORKERS	154

XII. ARTICLE 19 § 11: RIGHT TO THE TEACHING OF THE NATIONAL LANGUAGE(S) OF THE RECEIVING STATE	154
XIII. ARTICLE 19 § 12: CHILDREN'S RIGHT TO LEARN THE MIGRANT WORKER'S MOTHER TONGUE	156
CONCLUDING REMARKS.....	157
<i>Selected Bibliography</i>	<i>159</i>

Article 17 – The right of children and young persons to social, legal and economic protection

Cinzia Peraro

With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed:

1. *(a) to ensure that children and young persons, taking account of the rights and duties of their parents, have the care, the assistance, the education and the training they need, in particular by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose;*
(b) to protect children and young persons against negligence, violence or exploitation;
(c) to provide protection and special aid from the state for children and young persons temporarily or definitively deprived of their family's support;
2. *to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools.*

INTRODUCTION

Article 17 of Part I of the European Social Charter (ESC or the “Charter”), in its 1996 Revised version (RESC or Revised Charter), provides for the fundamental right of children and young persons to be appropriately protected at social, legal and economic levels. The content is further specified in Article 17 of Part II, which sets out the measures that the Parties shall undertake with a view to effectively guaranteeing their right to grow up in an environment where their full development and their personality as well as their physical and mental capacities are encouraged.

Article 17 RESC covers issues similar to those protected by Article 7¹, in particular under its § 10², and by Article 16 RESC, which deals with the right of families to social, legal and economic protection. This latter provision also grants protection for mothers, which were previously contemplated jointly with children under former Article 17 of the 1961 Charter. Thus, Article 16 RESC covers children, but indirectly, insofar as they are considered as part of the family. Article 17 RESC, on the other hand, concerns the rights of the child as an individual³. Therefore, Article 17 does not apply to the matters covered by the other abovementioned Articles and specifically addresses the needs arising from the vulnerability of children, thus providing a protection “outside the context of work”⁴.

I. DRAFTING HISTORY

¹ On children’s protection in the Charter, see Katarzyna DUNAJ and Joanna RYSZKA, “The Protection of Vulnerable People in the Charter System”, in Stefano ANGELERI and Carole NIVARD (eds.), *The European Social Charter: A Commentary*, vol. I: *Cross-cutting Themes*, Leiden, Brill, 2022, pp. 319-348, spec. part III.A. See also: Giuseppe PALMISANO, *L’Europa dei diritti sociali. Significato, valore e prospettive della Carta sociale europea*, Bologna, Il Mulino, 2022, p. 93 ff.; CoE, *Digest of the Case Law of the European Committee of Social Rights*, June 2022, available online at <<https://rm.coe.int/digest-ecsr-prems-106522-web-en/1680a95dbd>>; Information Document prepared by the Secretariat of the ESC, *Children’s rights under the European Social Charter*, 2008, available online at <<https://rm.coe.int/1680474a4b>>.

² On their coordination and overlapping issues, see: ECSR, Conclusions XV-2 (2001), Statement of Interpretation on Article 17, 7 § 10, where the Committee affirmed that, with respect to the Contracting Parties having accepted both provisions, to deal with the following issues under Article 7 § 10: protection of children against moral dangers at work and outside work and involvement of children in the sex industry and in begging. Under Article 17, the following matters are covered: establishment of parentage and adoption; children and the law; children in public care; protection of children from ill-treatment and abuse. See also *supra* the comment under Article 7.

³ Holly CULLEN, “Is the European Social Charter a Charter for children?”, *Irish Jurist*, 2005, vol. 40, pp. 60-85, spec. p. 67.

⁴ Explanatory Report to the European Social Charter (Revised), Strasbourg, 3 May 1996, ETS No. 163, § 69.

The original version was drafted as an independent article in 1959⁵, although some paragraphs were included in other, different, articles. The version⁶ accepted in the 1961 Charter did not contain specific details regarding the right to protection. In the previous drafts, references to the protection from exploitation and negligence, or to providing children and young persons with a free primary and secondary education and welfare services had been proposed⁷. Additionally, the 1956 proposal⁸ to include homeless children, juvenile delinquents and children with disabilities as coming under the personal scope of the rights to be protected, within categories to be supported by special services, was not retained⁹. The revised provision does not include any specification on the target groups, which were identified through the interpretation of the European Committee of Social Rights (ECSR or the Committee)¹⁰.

Some amendments have been introduced into the RESC in comparison to the former Article 17 included in the 1961 Charter. The latter stated, in Part I, that “[m]others and children, irrespective of marital status and family relations, have the right to appropriate social and economic protection”; and, in Part II, that “[w]ith a view to ensuring the effective exercise of the right of mothers and children to social and economic protection, the Contracting Parties will take all appropriate and necessary measures to that end, including the establishment or maintenance of appropriate institutions or services”. In addition to the inclusion of specific clarifications on actions required to fulfil the objective of granting protection to children and young persons in different contexts, two fundamental changes can be underlined with a view to understanding the core provisions included under Article 17 RESC.

One amendment concerns the beneficiaries of the three-fold protection under the RESC, which now covers children and young persons, but without any reference to the mothers. As mentioned above, mothers do indeed fall within the scope of application of Article 16 on the right of the family to social, legal and economic protection¹¹. This demonstrates the intention to specifically address the rights of children, who are thus directly protected as individuals alone. Accordingly, this amendment facilitated the applicability of this provision to children in irregular situations, such as unaccompanied foreign minors¹².

Second, Article 17 of the RESC also provides for the legal protection of children and young persons. The 1961 Charter only refers to social and economic protection. The new reference to legal protection clearly fits into the evolving approach of considering children as individuals in need of protection in different contexts. As clarified in the Explanatory Report, “[t]his provision protects children, irrespective of such factors as their birth status and the marital status of their parents. In confirmation of the case law of the Committee of Independent Experts, according to which certain rights such as the right of children to inheritance are covered by Article 17 of the Charter, the word ‘legal’ has been added to its title”¹³. Therefore, this addition supports the broad interpretation of the provision, which is intended to grant protection in all situations.

II. OTHER INSTRUMENTS ESTABLISHING SIMILAR STANDARDS

Article 17 of the RESC encompasses many rights which are provided for at an international level in the principles of the UN Convention on the Rights of the Child (CRC) signed in New York on 20 November

⁵ Consultative Assembly of the Council of Europe, 12th January 1959, Doc. 927.

⁶ Consultative Assembly of the Council of Europe, 12th September 1959, Doc. 1035.

⁷ Lukas KARIN, *The Revised European Social Charter: An Article by Article Commentary*, Cheltenham, UK, Edward Elgar Publishing Limited, 2021, p. 225.

⁸ Consultative Assembly of the Council of Europe, 14th April 1956, Doc. 488.

⁹ Holly CULLEN, *cit.*, p. 65 ff.

¹⁰ See *infra*.

¹¹ Explanatory Report, *cit.*, § 66; Holly CULLEN, *cit.*, p. 65.

¹² See *infra*, for a comment, Stefano ANGELERI and Róisín DUNBAR, “The Reform of the European Social Charter”, in Stefano ANGELERI and Carole NIVARD (eds.), *The European Social Charter: A Commentary*, vol. I: *Cross-cutting Themes*, *cit.*, pp. 38-61, spec. p. 51.

¹³ Explanatory Report, *cit.*, § 70; see *infra*.

1989 and which, in fact, inspired its drafting¹⁴, as well as of the 1950 European Convention on Human Rights (ECHR).

The amendments to Article 17 were in fact intended to align it with the UN CRC, as reflected in the preamble, where it recognises with regard to children “the full development of their personality and of their (...) capacities” as the target of the protection. This reference recalls Article 27 of the CRC regarding the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development¹⁵. The principle of the best interests of the child, under Article 3 CRC, has been employed by the ECSR to develop its interpretation of the requirements of Article 17 RESC¹⁶. In its decisions, where relevant, the ECSR also made explicit reference to the CRC and the accompanying general comments of the UN Committee on the Rights of the Child.

The social rights enshrined in the European Social Charter stand alongside the European Convention of Human Rights, which encompasses civil and political rights, and thus have different structures and effects¹⁷. In some decisions, the ECSR makes references to the case law of the European Court of Human Rights (ECtHR) to support its interpretation and assessment of domestic legislation or practice¹⁸. In general, whenever comparable situations have been brought to their attention, their approach has been similar because it is aimed at granting the broadest protection possible¹⁹.

Other conventions have been adopted by the Council of Europe concerning issues related to specific children’s rights²⁰. Moreover, at the policy level, the 2006 programme “Building a Europe for and with children” represents a cross-disciplinary plan of action involving national governments, civil society, the EU, and other international organisations and stakeholders. Then, in 2020, the Steering Committee for the Rights of the Child was established as the successor to the Ad Hoc Committee for the Rights of the Child²¹. Various instruments offering practical guidance have been adopted by the Committee of Ministers that implement the strategies for the rights of the child²². On 23 February 2022, the Committee of Ministers adopted the new Strategy for the Rights of the Child (2022-2027) entitled “Children’s Rights in Action: from

¹⁴ On the influence of the UN Convention, see: Francesca IPPOLITO, “The Convention on the Rights of the Child in Litigation Before the European Social Charter Committee and the European Court of Human Rights: «Why Then, Can One Desire Too Much of a Good Thing?»”, *Diritti umani e diritto internazionale*, no. 1, 2020, pp. 93-119.

¹⁵ Stefano ANGELERI and Róisín DUNBAR, *cit.*, p. 51. For an assessment of the corresponding provisions among the two instruments, see: Holly CULLEN, *cit.*, p. 63 ff.

¹⁶ See *infra* and Lukas KARIN, *cit.*, p. 224. In *International Federation of Human Rights Leagues (FIDH) v. France*, complaint No. 14/2003, decision on the merits of 8 September 2004, the ECSR affirmed that “Article 17 of the Revised Charter is further directly inspired by the United Nations Convention on the Rights of the Child” (§ 36).

¹⁷ On the adoption of both instruments, see: Giuseppe PALMISANO, *L’Europa dei diritti sociali*, *cit.*, p. 19 ff. See also: Lorenza MOLA, *La Carta sociale europea e il controllo internazionale sulla sua applicazione*, Torino, Giappichelli, 2022, p. 1 ff.; Ann SKELTON, “International Children’s Rights Law: Complaints and Remedies”, in Ursula KILKELLY and Ton LIEFAARD (eds.), *International Human Rights of Children*, Singapore, Springer Nature, 2019, pp. 65-91, spec. p. 86.

¹⁸ See, for instance, *infra* regarding the issue of corporal punishment. For comments on the relationship between the Charter and the ECHR, see: Christina DELIYANNI-DIMITRAKOU, “The European Social Charter and the European Convention on Human Rights”, in Stefano ANGELERI and Carole NIVARD (eds.), *The European Social Charter: A Commentary*, vol. I: *Cross-cutting Themes*, *cit.*, pp. 351-374; Giorgio MALINVERNI, “The Court of European Human Rights, the protection of social rights, its relationship with the European Committee of Social Rights”, in Marilisa D’AMICO and Giovanni GUIGLIA (eds.), *European Social Charter and the challenges of the XXI century*, Napoli, Edizioni Scientifiche Italiane, 2014, pp. 97-112.

¹⁹ Findings of ECtHR jurisprudence are referenced in the footnotes of part III below.

²⁰ See: Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201), Lanzarote 25 October 2007; European Convention on the Exercise of Children’s Rights, CETS No. 160, Strasbourg 25 January 1996; European Convention on the Legal Status of Children Born out of Wedlock, CETS No. 85, 15 October 1975; Convention on the Adoption of Children (revised), CETS No. 202, 27 November 2008; Convention on Contact concerning Children, CETS No. 192, 15 May 2003; Convention on Preventing and Combating Violence against Women and Domestic Violence, CETS No. 210, 11 May 2011.

²¹ See applicable information at <<https://www.coe.int/en/web/children/cdenf>>.

²² See, for instance: Rec. CM/Rec(2009)10 on integrated national strategies for the protection of children from violence, 18 November 2009; Guidelines on child-friendly justice, 17 November 2010; Guidelines on child-friendly health care, 21 September 2011; Rec. CM/Rec(2011)12 on children’s rights and social services friendly to children and families, 16 November 2011; Rec. CM/Rec(2012)2 on the participation of children and young people under the age of 18, 28 March 2012; Recommendation CM/Rec(2018)5 concerning children with imprisoned parents, 4 April 2018; Rec. CM/Rec(2018)7 on guidelines to respect, protect and fulfil the rights of the child in the digital environment, 4 July 2018; Rec. CM/Rec(2019)11 on effective guardianship for unaccompanied and separated children in the context of migration, 11 December 2019; Action Plan on Protecting Vulnerable Persons in the Context of Migration and Asylum in Europe (2021-2025), August 2021.

continuous implementation to joint innovation”, which aims at advancing the protection and promotion of the rights of the child across Europe²³.

At the European Union level, the scope of some articles of the Charter of Fundamental Rights (CFR) echoes the content of Article 17 RESC²⁴. Article 24 CFR on the rights of the child is more extensive than Article 17 RESC²⁵. It states:

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

The Explanation to the EU CFR states that “Article 24 is based on the UN CRC, particularly Articles 3, 9, 12 and 13 thereof. Paragraph 3 takes account of the fact that, as part of the establishment of an area of freedom, security and justice, the legislation of the Union on civil matters having cross-border implications, for which Article 81 of the Treaty on the Functioning of the European Union confers power, may include notably visiting rights ensuring that children can maintain on a regular basis a personal and direct contact with both of their parents”²⁶.

Other EU Charter Articles may cover children’s rights to protection in various fields. These include Article 7 on the respect for private and family life, Article 14 on the right to education, Article 21 on non-discrimination, Article 33§1 on the right to legal, social and economic protection of the family, Article 34 § 3 on the right to social and housing assistance and Article 47 on fair trial guarantees. Though those instruments have different scopes of application and legal weight, similarities can be outlined in the interpretation of the corresponding provisions, as well as in the light of other relevant conventions²⁷.

At a policy level, the European Union is committed to the protection of children’s rights and promotes initiatives²⁸ such as the European Forum on the rights of the child, the EU Network for Children’s Rights and EU Child Participation Platform, as well as adopting such soft-law as the latest Strategy on the rights

²³ The 2022 Strategy identifies six strategic objectives: freedom from violence for all children, equal opportunities and social inclusion for all children, access to safe use of technologies for all children, child-friendly justice for all children, giving a voice to every child, children’s rights in crisis and emergency situations. The Strategy is available online at <<https://www.coe.int/en/web/children/strategy-for-the-rights-of-the-child>>.

²⁴ For an overview on the rights of the child in Europe, see: European Union Agency for Fundamental Rights, CoE and ECtHR, *Handbook on European law relating to the rights of the child*, 2022, available at <<https://fra.europa.eu/en/publication/2022/handbook-european-law-child-rights>>.

²⁵ *Charter of Fundamental Rights of the European Union*, OJ C 202, 7.6.2016, p. 389 ff.

²⁶ *Explanations relating to the Charter of Fundamental Rights* (OJ C 303, 14.12.2007, p. 17 ff.), available online at <[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32007X1214\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32007X1214(01))>. However, according to the preamble to the Explanations, “[a]lthough they do not as such have the status of law, they [the Explanations] are a valuable tool of interpretation intended to clarify the provisions of the Charter” (see also Article 52 § 7 CFR). Among the relevant EU legislation on the rights of the child in civil judicial cooperation, see Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) (OJ L 178, 2.7.2019, p. 1 ff.), that replaced Council Regulation (EC) No 2201/2003 of 27 November 2003; and the Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (COM(2022)695 final of 7 December 2022).

²⁷ On the relationship between the EU Charter and the European Social Charter, see: Marco ROCCA, “The European Social Charter and the European Union”, in Stefano ANGELERI and Carole NIVARD (eds.), *The European Social Charter: A Commentary*. vol. I: *Cross-cutting Themes*, cit., pp. 375-401; Olivier DE SCHUTTER, *The European Social Charter in the context of implementation of the EU Charter of Fundamental Rights*, Study for the European Parliament (PE 536.488), 2016, available online at <[https://www.europarl.europa.eu/RegData/etudes/STUD/2016/536488/IPOL_STU\(2016\)536488_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/536488/IPOL_STU(2016)536488_EN.pdf)>. For a comment, see also: Federica CRISTANI, “The European Court of Justice and the protection of social rights: Which role for the European Committee of Social Rights?”, in Marilisa D’AMICO and Giovanni GUIGLIA (eds.), *European Social Charter and the challenges of the XXI century*, cit., pp. 113-142.

²⁸ See applicable information at <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/rights-child_en>.

of the child (2021-2024)²⁹, and the European Child Guarantee³⁰.

III. ANALYSIS OF THE PROVISION

Part I of the RESC asserts the right of children and young persons to social, legal and economic protection, which is further implemented, under Part II, with recommended measures to be undertaken by States Parties to effectively grant such protection. The examination of the content of this provision addresses both the personal and material scopes, including references to the Committee's relevant decisions, which have contributed to the interpretation of the protection being guaranteed to the target groups³¹.

A. PERSONAL SCOPE

Article 17 of the RESC, as amended in relation to the original 1961 Charter, provides for the right to social, legal and economic protection in favour of children and young persons. The beneficiaries of the protections granted are children and young persons on an equal basis; the reference to these two groups is not intended to create any distinction. In fact, as explained in the Appendix to the RESC, the provision covers all persons under the age of 18 years³² unless age of majority is attained earlier, under the national law applicable to the child. This indication is, however, without prejudice to the other specific provisions of the Charter and in particular under to Article 7 which also, as specified in the Explanatory Report, covers the protection of children³³.

Pursuant to Article 17 § 1(a) related to the adoption of measures addressed to care, assistance and education, States shall take into account the rights and duties of the parents of the children or young persons involved. Parents, according to the Explanatory Report, must be considered all those persons who are in charge of the legal care or assistance of children or young persons, such as legal guardians or other individuals legally responsible³⁴. It thus requires States to consider and respect the responsibilities of those persons in charge of the child's care.

A relevant issue concerning the categorization of beneficiaries relates to the inclusion of foreign minors³⁵. Pursuant to paragraph 1 of the Appendix, the persons covered in Article 17 RESC are – *inter alia* – to “include foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned, subject to the understanding that these articles are to be interpreted in the light of the provisions of Articles 18 and 19”. Moreover, it specifies that “[t]his interpretation would not prejudice the extension of similar facilities to other persons by any of the Parties”³⁶ and that treatment as favourable as possible shall also be accorded to refugees³⁷ and stateless persons³⁸.

The Committee's 2021 decision in *International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece*³⁹ confirmed the applicability of both paragraphs of Article 17 RESC to foreign

²⁹ COM(2021)142 final of 24 March 2021.

³⁰ Council Recommendation (EU) 2021/1004 of 14 June 2021 establishing a European Child Guarantee (OJ L 223, 22.6.2021, p. 14 ff.), see its Recital 5 where it recalls the commitment included under Article 17 of the RESC.

³¹ For an overview on the practical application of the Charter, see: CoE, *Digest of the Case Law of the European Committee of Social Rights*, *cit.*; European Union Agency for Fundamental Rights, CoE and ECtHR, *Handbook on European law relating to the rights of the child*, *cit.*; Monika ŚMUSZ-KULESZA, Anahit MANASYAN and Alla FEDOROVA, *Training programme for judges. European Social Charter and case law of the European Committee of Social Rights*, February 2021, available online at <<https://rm.coe.int/15-judges-training-eng-soft/1680a39c11>>, spec. p. 141 ff. on Article 17.

³² Lukas KARIN, *cit.*, p. 351.

³³ Explanatory Report, *cit.*, § 71.

³⁴ *Ibid.*, § 72.

³⁵ On this issue, see also: Bige AÇIMUZ and Olgun AKBULUT, “The Values Underlying the European Social Charter”, in Stefano ANGELERI and Carole NIVARD (eds.), *The European Social Charter: A Commentary*, vol. I: *Cross-cutting Themes*, *cit.*, pp. 264-292, spec. part III.B; and, in general, GIUSEPPE PALMISANO, “Overcoming the limits of the European Social Charter in terms of persons protected: the case of third State nationals and irregular migrants”, in Marilisa D'AMICO and Giovanni GUIGLIA (eds.), *European Social Charter and the challenges of the XXI century*, *cit.*, pp. 171-192.

³⁶ Appendix, *cit.*, § 1.

³⁷ See also *infra* regarding ECSR, *International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece*, complaint No. 173/2018, decision on the merits of 26 January 2021.

³⁸ Appendix, *cit.*, § 1, second part, and § 2.

³⁹ ECSR, *International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece*, *cit.*, § 77.

children who are in an irregular migration situation on the territory of a State Party, as affirmed in earlier cases, which are analysed below under their respective subject matters.

The ECSR interpretation on the personal scope of this provision followed a teleological approach in order to ensure its conformity with other relevant international human rights instruments⁴⁰. The Committee itself stated that “it is necessary to seek the interpretation of the treaty that is most appropriate in order to realise the aim and achieve the object of this treaty, not that which would restrict the Parties’ obligations to the greatest possible degree”⁴¹. Thus, paragraph 1 of the Appendix must not be interpreted “in such a way as to deny foreign minors unlawfully present in a country (whether accompanied or unaccompanied) the guarantee of their fundamental rights, including the right to preservation of their human dignity”⁴².

In this regard, following the guidance of the UN Committee on the Rights of the Child, the ECSR considered that the personal scope of the Charter must be determined according to the principle of the child’s best interests. It recalled that, pursuant to CRC General Comment No. 5⁴³, “[e]very legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children’s rights and interests are or will be affected by their decisions and actions – by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children”⁴⁴.

On the interpretation of the personal scope, in *International Federation of Human Rights Leagues (FIDH) v. France* of 2004, the Committee stressed that the Charter was “envisaged as a human rights instrument to complement the European Convention on Human Rights” and that, pursuant to the Vienna Declaration of 1993, “the Charter must be interpreted so as to give life and meaning to fundamental social rights”⁴⁵. It follows *inter alia* that limitations on rights are to be read restrictively, i.e., understood in such a manner as to preserve intact the essence of the right and to achieve the overall purpose of the Charter”⁴⁶. In that case, the Committee recognised that Article 17 RESC “protects in a general manner the right of children and young persons, including unaccompanied minors, to care and assistance”. Thus, it found a violation of Article 17 because unaccompanied minors and children of illegal immigrants were only entitled to medical assistance in life-threatening situations and not in a prompt way⁴⁷.

As regards children unlawfully present in the territory of one State, in *Defence for Children International (DCI) v. the Netherlands* of 2009⁴⁸, the Committee clarified that children fall within the personal scope of application of Article 17 RESC regardless of their residence status, whether following a failed asylum procedure, a failed

⁴⁰ See: CoE, *Digest of the Case Law of the European Committee of Social Rights*, *cit.*, p. 213; Lukas KARIN, *cit.*, p. 364.

⁴¹ ECSR, *European Committee for Home-Based Priority Action for the Child and the Family (EUROCEF) v. France*, complaint No. 114/2015, decision on the merits of 24 January 2018, § 53.

⁴² ECSR, *Defence for Children International (DCI) v. Belgium*, complaint No. 69/2011, decision on the merits of 23 October 2012, § 30. “A strict interpretation of paragraph 1 of the Appendix, which would result in the non-recognition of the States Parties’ obligation to guarantee foreign minors unlawfully present in their territory the enjoyment of these fundamental rights, would be incompatible with international *ius cogens*” (*ibid.*, § 33). Moreover, according to the Committee, “a strict interpretation of the Appendix (...) would not be in harmony with the United Nations Convention on the Rights of the Child, which all member states of the Council of Europe have ratified. It is therefore justified for the Committee to have regard to this convention, adopting the interpretation given to it by the United Nations Committee on the Rights of the Child, when it rules on an alleged violation of any right conferred on children by the Charter” (ECSR, *European Committee for Home-Based Priority Action for the Child and the Family (EUROCEF) v. France*, *cit.*, § 53).

⁴³ UN, Doc. CRC/GC/2003/5, §§ 45-47.

⁴⁴ ECSR, *Defence for Children International (DCI) v. Belgium*, *cit.*, § 32. See: Lukas KARIN, *cit.*, p. 364.

⁴⁵ ECSR, *International Federation of Human Rights Leagues (FIDH) v. France*, complaint No. 14/2003, decision on the merits of 8 September 2004, §§ 27-29.

⁴⁶ ECSR, *International Federation of Human Rights Leagues (FIDH) v. France*, *cit.*

⁴⁷ *Ibid.*; see on this issue, Lukas KARIN, *cit.*, p. 363. Unaccompanied foreign minors do fall within the personal scope of the ECHR, that applies, within the jurisdiction of the Contracting Parties, to everyone whatever their country of origin. Their protection is granted, for instance, with regard to the prohibition of ill-treatment under Article 3 ECHR (ECtHR, 28 February 2019, *Khan v. France*, No. 12267/16, on the failure of the authorities to provide foreign minors with care before and after the dismantling of the makeshift camps set up in the “lande de Calais”; in the same sense, 28 February 2019, ECtHR, *H.A. and Others v. Greece*, No. 19951/16) as well as under Article 8 ECHR on the right to respect for private and family life (for instance, in case of shortcomings in procedural guarantees afforded to a minor migrant preventing him to file an asylum request: ECtHR, 21 July 2022, *Darboe and Camara v. Italy*, No. 5797/17).

⁴⁸ ECSR, *Defence for Children International (DCI) v. the Netherlands*, complaint No. 47/2008, decision on the merits of 20 October 2009, §§ 34-38 and 66.

regular immigration procedure and/or pending the results of a regular immigration procedure. This finding was then included in the Statement of Interpretation on Article 17 § 2⁴⁹.

The ECSR noted in the *Defence for Children International (DCI) v. Belgium* case of 2012 that the implication of paragraph 1 of the Appendix is that foreign minors (accompanied and unaccompanied) unlawfully present in a country – in the specific case, non asylum-seeking unaccompanied foreign minors and children in families illegally resident – “would not come within the personal scope of Article 17, as they are not nationals of other Parties ‘lawfully resident or working regularly’ within the territory of the Party concerned”⁵⁰. However, in the light of other relevant and applicable rules of international law⁵¹, the personal scope defined in “paragraph 1 of the Appendix should not be interpreted in such a way as to expose foreign minors unlawfully present in a country to serious impairments of their fundamental rights on account of a failure to give guarantee to the social rights enshrined in the revised Charter”⁵², such as the rights to life, to physical integrity or to human dignity⁵³.

The Committee pointed out that the application of the Charter’s provisions to foreign migrants in an irregular situation is “entirely exceptional and is not applicable to all the provisions of the Charter”. This is due to the fact that it is “justified solely in the event that excluding foreigners in an irregular migration situation from the protection afforded by the Charter would have seriously detrimental consequences for their fundamental rights” and would consequently place them “in an unacceptable situation, regarding the enjoyment of these rights, as compared with the situation of nationals and of lawfully resident foreigners”⁵⁴.

In the ECSR’s opinion, “the risk of impairing fundamental rights is all the more likely where children – *a fortiori* migrant children unlawfully present in a country – are at stake. This is due to their condition as ‘children’ and to their specific situation as ‘unlawful’⁵⁵ migrants, combining vulnerability and limited autonomy”⁵⁶. Indeed, children cannot be held genuinely responsible for their place of residence, because they are not able to decide for themselves whether to stay or to leave. So, in cases where they are unaccompanied, “their situation becomes even more vulnerable and the state should be managed entirely by the State, which has a duty to care for children living within its territory and not to deprive them of the most basic protection on account of their ‘unlawful’ migration status”⁵⁷.

In addition, since according to Article 17 § 1 RESC States Parties are required to fulfil positive obligations relating to the accommodation, basic care and protection of children and young persons, “[n]ot considering that States Parties are bound to comply with these obligations in the case of foreign minors who are in a country unlawfully would therefore mean not guaranteeing their fundamental rights and exposing the children and young persons in question to serious threats to their rights to life, health and psychological and physical integrity and to the preservation of their human dignity”⁵⁸. It means that State authorities cannot shirk their responsibility to protect the rights of unaccompanied children by alleging their unregulated legal situation⁵⁹.

In *International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece*, in 2021⁶⁰, the Committee reiterated its interpretation regarding the personal scope of Article 17 RESC, which therefore includes migrant children, whether accompanied or unaccompanied foreign children. This case concerned mostly children (accompanied and unaccompanied) who arrived in Greece and applied for asylum or international protection. As the ECSR noted, in the light of paragraph 2 of the Appendix, they therefore

⁴⁹ ECSR, Conclusions 2011, Statement of Interpretation on Article 17 § 2.

⁵⁰ ECSR, *Defence for Children International (DCI) v. Belgium*, *cit.*, § 28 ff.

⁵¹ *Ibid.*, § 29.

⁵² *Ibid.*, § 34. In this sense, see also: ECSR, *European Committee for Home-Based Priority Action for the Child and Family (EUROCEF) v. France*, *cit.*, § 55; *International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece*, *cit.*, § 75.

⁵³ ECSR, *Defence for Children International (DCI) v. Belgium*, *cit.*, § 29.

⁵⁴ *Ibid.*, § 35; and lately *International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece*, *cit.*, § 76.

⁵⁵ On the interpretation of the issue of unlawful stay, see Claudio PANZERA, “The personal scope of the European Social Charter: questioning equality”, *Revista Europea de Derechos Fundamentales*, n. 24, 2014, pp. 51-73, spec. p. 60 ff.

⁵⁶ ECSR, *Defence for Children International (DCI) v. Belgium*, *cit.*, § 37.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, § 38.

⁵⁹ See Bige AÇIMUZ and Olgun AKBULUT, *cit.*

⁶⁰ ECSR, *International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece*, *cit.*, § 75 ff.

fall within the definition of refugees under the 1951 Geneva Convention on the Status of Refugees⁶¹. The Committee recalled that “the protection of a refugee under the Charter does not depend on the administrative recognition of refugee status by a State, which is done by the granting of asylum”⁶². In this respect, it explicitly referred to its Statement of Interpretation on the rights of refugees under the Charter adopted in 2015⁶³. The Committee then considered that refugees must be guaranteed social rights that are directly related to the right to life and human dignity and form part of a “non-derogable core” of rights⁶⁴, among which Article 17 RESC is included⁶⁵. Consequently, the personal scope of the Charter also covers refugee and asylum-seeking children, as long as their asylum claim has not been rejected by a body of final instance⁶⁶.

B. MATERIAL SCOPE

According to Article 17 RESC, children and young persons have the right to social, legal and economic protection, which must be granted by the Parties by implementing all appropriate and necessary measures, such as those listed in Part II, under paragraphs 1 and 2, taking into consideration any different contexts. Such measures must be aimed at ensuring the effective exercise of the rights of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities.

A preliminary observation concerns the specification in Article 17 of Part I of the right to “appropriate” protection. It indeed stipulates that the States have a positive obligation to effectively undertake all necessary actions in favour of the vulnerable beneficiaries. In addition, the reference to the three levels of protection expresses the intention to comprehensively promote the rights of children and young persons in different situations which may, nonetheless, be mutually interconnected.

In general, under Article 17 RESC, States Parties are required to: ensure that children and young persons have the care, the assistance, the education and the training they need (§§ 1.a and 2); protect them against negligence, violence and exploitation (§ 1.b.) and; provide protection and aid for children and young persons deprived of their family’s support (§ 1.c.). According to the Committee’s decisions, the material scope of the provision in question covers the following issues: (1) the legal status of the child; (2) the rights of children in public care; (3) the protection of children from violence, ill-treatment and abuse; (4) young offenders; (5) the right to assistance and the situation of children in poverty; and (6) the right to education.

1. Legal status of the child

As to the legal protection, its introduction in the Revised Charter codifies the approach of the ECSR to legal issues concerning the status of children, as well as the need to protect their identity as such, which in fact covers various aspects of their personality and can also be relevant in order that they be able to benefit from the protection at social and economic levels.

As clarified in the Explanatory Report, the protection to children must be granted irrespective of legal factors, such as their birth status and the marital status of their parents⁶⁷. In particular, the Committee noted that Article 17 RESC permits no discrimination as between children born outside of marriage and children born within marriage, e.g., in respect of maintenance obligations and succession⁶⁸. In addition, concerning

⁶¹ *Ibid.*, § 80.

⁶² *Ibid.*, § 81.

⁶³ ECSR, Statement of Interpretation on the rights of refugees under the European Social Charter, elaborated during the 280th session, 7-11 September 2015, § 6. See also: ECSR, Conclusions 2015, § 21, p. 8, on the rights of refugees under the Charter.

⁶⁴ ECSR, Statement of Interpretation on the rights of refugees under the European Social Charter, *cit.*, § 11.

⁶⁵ ECSR, *International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece*, *cit.*, § 82.

⁶⁶ *Ibid.*, § 83.

⁶⁷ Explanatory Report, *cit.*, § 70.

⁶⁸ ECSR, Conclusions XVII-2, Malta; ECSR, Conclusions 2003, France; see also: CoE, *Digest of the Case Law of the European Committee of Social Rights*, *cit.*, p. 149. The ECSR interpretation is in line with the ECtHR, which grants protection to both natural and legal families especially concerning the status of the children by virtue of the principle of non-discrimination based on birth under Article 14 ECHR (see ECtHR, 13 June 1979, *Marckx v. Belgium*, No. 6833/74; ECtHR, 7 February 2013, *Fabris v. France*, No. 16574/08; ECtHR, 11 October 2011, *Genovese v. Malta*, No. 53124/09, where it reiterated that very weighty reasons would have had to be advanced to justify an arbitrary difference in treatment on the ground of birth), to *de facto* relations regardless of the gender of the

the legal status of children, a new issue that may be brought to the attention of the Committee involves the protection of the rights of children having same-sex parents, due to the increasing amount of case law before national courts and uncertainties in domestic – as well as in international and EU – legislation, especially concerning surrogacy and stepchild adoption⁶⁹.

According to Article 17 RESC a child has, in principle, the right to know his or her origins. The ECSR has examined the procedures available for the establishment of maternity and paternity and, in particular, those situations where such assessment is not possible and where the right of a child to know his or her origins is restricted⁷⁰. From a general perspective, legitimate and justified grounds should be submitted whenever the right to know the origins is limited so as to grant protection of the rights of the child against the rights of the other persons involved. For instance, it found that the right of the child to know his or her origins was not adequately protected under French legislation, where the mother of a child has requested that her identity should be kept secret during the birth and declaration of the birth, and where parents who place their child in care request that their identity remain secret⁷¹. As regards Ukraine, the ECSR noted that a child is entitled to information about his or her “absent parents”, if such information is not harmful to the child’s mental or physical health. In this respect, it requested further information on the grounds of considering the harmful effect on the child. Moreover, discrimination would occur in a case where adopted children have no right to information about their birth parents⁷².

As regards the minimum age for marriage, questions have been raised where there is a difference in the minimum age for marriage for males and females, on the grounds that this may be discriminatory, and that where the age is low for females, this may not adequately protect them⁷³. The ECSR found that French legislation was not in conformity with the Charter to the extent that it provided the minimum age of marriage for females of 15 years but 18 years for males⁷⁴.

Another aspect examined under Article 17 § 1 RESC concerning the legal status of the child is the issue of statelessness⁷⁵. In this regard, it can be noted that, in its Conclusions of 2019, the Committee asked the

parties (see ECtHR, 26 May 1994, *Keegan v. Ireland*, No. 16969/90; regarding same-sex partners, see: ECtHR, 24 June 2010, *Schalk and Kopf v. Austria*, No. 30141/04; ECtHR, 23 February 2016, *Pajic v. Croatia*, No. 68453/13; ECtHR, 30 June 2016, *Taddeucci and McCall v. Italy*, No. 51362/09); as well as in relation to inheritance rights, also in conjunction with Article 14 ECHR (see ECtHR, 3 October 2000, *Camp and Bourimi v. the Netherlands*, No. 28369/95; ECtHR, 13 July 2004, *Pla and Puncernau v. Andorra*, No. 69498/01; ECtHR, 28 May 2009, *Brauer v. Germany*, No. 3545/04; 9 February 2017, *Mitzinger v. Germany*, No. 29762/10).

⁶⁹ Benedetta LIBERALI, “L’importanza delle parole e della tecnica decisoria in due recenti pronunce della Corte costituzionale in materia di omogenitorialità”, *Studium Iuris*, no. 1, 2021, pp. 1190-1201, spec. 1201. As regards surrogacy and Article 8 ECHR on the right to respect for private and family life, according to the ECtHR the recognition of the legal parent-child relationship is due only where a biological link exists, whereas the relationship with the intended parent remains within the States’ margin of appreciation (on this issue, see: Maria Caterina BARUFFI, “Surrogacy in the recent ‘multilevel’ case law”, in Cécile CORSO and Patrick WAUTELET (eds.), *L’accès aux droits de la personne et de la famille en Europe*, Bruxelles, Bruylant, 2022, pp. 85-111, especially concerning ECtHR, 26 June 2014, *Mennesson v. France*, No. 65192/11, and ECtHR, *Labassee v. France*, No. 65941/11; ECtHR, 24 January 2017, *Paradiso and Campanelli v. Italy*, No. 25358/12; and advisory opinion P16-2018-001, 10 April 2019). On the intra-EU recognition of parenthood established in a Member State, see the 2022 Commission Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood, *cit.* (for a comment, see: Lenka VÁLKOVÁ, “The Commission Proposal for a Regulation on the Recognition of Parenthood and Other Legislative Trends Affecting Legal Parenthood”, *Rivista di diritto internazionale privato e processuale*, no. 4, 2022, pp. 854-899).

⁷⁰ See ECSR, Conclusions 2011, Ukraine. The protection recognised by the Committee is similar to that of the ECtHR, which protects the right to know the origins pursuant to Article 8 ECHR (see, *inter alia*, ECtHR, 7 July 1989, *Gaskin v. the United Kingdom*, No. 10454/83; ECtHR, 13 July 2006, *Jaggi v. Switzerland*, No. 58757/00; ECtHR, 14 February 2012, *A. M. M. v. Romania*, No. 2151/10; ECtHR, 25 September 2012, *Godelli v. Italy*, No. 33783/09; ECtHR, 6 December 2022, *Scalzo v. Italy*, No. 8790/21).

⁷¹ ECSR, Conclusions 2003, France.

⁷² ECSR, Conclusions 2011, Ukraine.

⁷³ ECSR, Conclusions 2003, France; ECSR, Conclusions 2011, Ukraine. In this regard, the ECSR approach appears more protective than the ECHR to the extent that it requires to avoid any discrimination based on gender whenever children are concerned. Though, the requirements for contracting marriage fall within national sovereignty, as emerges from the ECtHR case law. Article 12 ECHR indeed provides for the right to marry for those of “marriageable age” according to national laws (ECmHR, 7 July 1986, *Khan v. the United Kingdom*, No. 11579/85 on an Islamic marriage; ECtHR, 8 December 2015, *Z.H. and R.H. v. Switzerland*, No. 60119/12, where it considered that neither Articles 8 nor 12 ECHR could be interpreted as imposing on any State party to the Convention an obligation to recognise a marriage, religious or otherwise, contracted by a 14-year-old child).

⁷⁴ ECSR, Conclusions 2003, France.

⁷⁵ See Appendix, *cit.*, § 3.

Parties what actions had been taken to reduce statelessness. This included such measures as ensuring that every stateless migrant child is identified, simplifying procedures for obtaining nationality, taking measures to identify children unregistered at birth as well as to facilitate birth registration⁷⁶. Indeed, pursuant to its 2013 Statement of Interpretation on the rights of stateless persons under the Charter, “stateless persons must be guaranteed the protection of the Charter on an equal footing with nationals of other States Parties to the Charter”⁷⁷.

2. Rights of children in public care

According to the Committee’s interpretation of the rights of children in public care under Article 17 RESC⁷⁸, the main criterion is that “placement must be an exceptional measure, and is only justified when it is based on the needs of the child, namely if remaining in the family represents a danger for the child”⁷⁹. For this purpose, “[t]he financial conditions or material circumstances of the family should not be the sole reason for placement”⁸⁰. In any case, the Committee affirmed that “appropriate alternatives to placement should be explored first, taking into account the views and wishes expressed by the child, his or her parents and other members of the family”⁸¹.

Indeed, any restrictions to the custodial rights of parents should be based upon adequate and reasonable criteria laid down in legislation and should not go beyond what is necessary for the protection and best interests of the child and the rehabilitation of the family⁸², because “the family is the natural environment for the growth and well-being of the child” and “parents have the primary responsibility for the upbringing and development of the child”⁸³.

In its 2011 Statement⁸⁴, the ECSR specified that the placement, when necessary, should be considered as a temporary solution, during which continuity of the relationship with the family should be maintained. Indeed, “[t]he child’s re-integration within the family should be aimed at, and contacts with the family during the placement should be provided for, unless contrary to the best interest of the child”. Placement of children outside their home, in a foster family or in a family-type environment, should have preference over placement in an institution. In any case, fundamental rights and freedoms such as the right to integrity, privacy, property and to connect with persons close to the child, must be adequately guaranteed for children living in institutions⁸⁵.

⁷⁶ ECSR, Conclusions XXI-4 (2019), General Introduction, March 2020, spec. General question on Article 17.

⁷⁷ ECSR, Conclusions 2013, Statement of Interpretation on the rights of stateless persons under Charter; Effrosyni BAKIRTZI, “The European Social Charter and the International Covenant on Economic, Social and Cultural Rights”, in Stefano ANGELERI and Carole NIVARD (eds.), *The European Social Charter: A Commentary*, vol. I: *Cross-cutting Themes*, cit., pp. 425-464, spec. p. 439; Lukas KARIN, cit., p. 361 ff.

⁷⁸ CoE, *Digest of the Case Law of the European Committee of Social Rights*, cit., p. 149 ff.

⁷⁹ ECSR, Conclusions 2011, Statement of Interpretation on Article 16 and 17 § 1. The ECSR approach is similar to the ECtHR case law, where the latter considered that pursuant to Article 8 ECHR the best interests of the children must be taken into consideration by the authorities when placing them in institutions (see: ECtHR, 7 June 2022, *I.G.D. v. Bulgaria*, No. 70139/14).

⁸⁰ ECSR, Conclusions 2011, Statement of Interpretation on Article 16 and 17 § 1. Similarly, according to the ECtHR, the mere existence of economic difficulties does not justify the children’s placement in institution (ECtHR, 13 October 2015, *S.H. v. Italy*, No. 52557/14), while the risk for the minors to be illtreated or abandoned imposes the authorities to place children in institution (ECtHR, 10 May 2001, *Z. and Others v. the United Kingdom*, No. 29392/95, according to which the failure by UK authorities to provide children with appropriate protection against serious, long-term neglect and abuse amounted to inhuman and degrading treatment in breach of Article 3 ECHR).

⁸¹ ECSR, Conclusions 2011, Statement of Interpretation on Article 16 and 17 § 1. See also: ESCR, *European Roma Rights Centre (ERRC) and Mental Disability Advocacy Centre (MDAC) v. Czech Republic*, complaint No. 157/2017, decision on the merits of 17 June 2020, § 140 ff.

⁸² ECSR, Conclusions XV-2 (2001), Statement of Interpretation on Article 17 § 1.

⁸³ ECSR, *European Roma Rights Centre (ERRC) and Mental Disability Advocacy Centre (MDAC) v. Czech Republic*, cit., § 135; ECSR, Conclusions 2011, Statement of Interpretation on Article 16 and 17§1, ECSR, Conclusions XV-2, Statement of Interpretation on Article 17 § 1.

⁸⁴ ECSR, Conclusions 2011, Statement of Interpretation on Articles 16 and 17 § 1.

⁸⁵ See: Information Document prepared by the Secretariat of the ESC, *Children’s rights under the European Social Charter*, cit., p. 8. Also according to the ECtHR, placement should be temporary and aimed at facilitating the family reunification in the light of Article 8 ECHR (ECtHR, 13 July 2000, *Scozzari and Giunta v. Italy*, No. 39221/98 and No. 41963/98, concerning the placement of children in community where certain personnel had convictions for paedophilia).

In the 2020 decision in the *European Roma Rights Centre (ERRC) and Mental Disability Advocacy Centre (MDAC) v. Czech Republic* case, the Committee addressed the practice of placing young children under the age of three in child centres, and the alleged failure to put in place non-institutional and family-like alternative forms of care. It evaluated this under Article 17 of the 1961 Charter, which refers to “the establishment or maintenance of appropriate [in the RESC, ‘sufficient and adequate’] institutions or services”⁸⁶. According to the Committee, the Czech Republic’s legislation on institutional care for children under the age of three years neither offered guarantees that the placement in institutions of children below the age of three was based on the needs of the child and served his or her best interests, nor ensured that appropriate available alternatives to placement were given prior consideration and applied accordingly. Thus, such legislation could not *per se* be regarded as being in conformity with the obligation to ensure the effective exercise of the right to protection of young children⁸⁷.

Stemming from the Conclusions of 2005 regarding Moldova, children placed in institutions should be entitled to the highest degree of satisfaction of their emotional needs and physical well-being, as well as to special protection and assistance⁸⁸. Such institutions must provide conditions promoting all aspects of children’s development. The Committee concluded that “a unit in a child welfare institution shall resemble the home environment and shall not accommodate more than 10 children”⁸⁹.

It is therefore necessary that domestic law provide for the possibility to lodge an appeal against a decision to restrict parental rights, to take a child into public care, or to limit the right of access to the child’s closest family⁹⁰. Remedies for children living in institutions, or for their guardians, to complain about the conditions in the institution should be provided⁹¹. Finally, States Parties must ensure adequate supervision of the child welfare system and in particular of the institutions involved⁹².

3. Protection of children from violence, ill-treatment and abuse

According to the Committee’s interpretation, Article 17 § 1 RESC entails the prohibition and penalisation of all forms of violence against children, including all forms of corporal punishment⁹³, both in the home and in all educational settings, public and private, and in alternative care. These forms consist of acts or behaviours likely to affect the physical integrity, dignity, development or psychological well-being of children. The relevant legislation must be sufficiently clear, binding and precise, so as to preclude the courts from refusing to apply it to violence against children. Moreover, States must act with due diligence to ensure that such violence is eliminated in practice⁹⁴.

In its decisions on the complaints submitted by the *World Organisation against Torture (OMCT)* against *Italy, Portugal, Ireland, Greece and Belgium*⁹⁵, the ECSR clarified the scope of application of Article 17 by taking into consideration the nature of the Charter as a living instrument to be interpreted in light of the developments in the national law and the relevant international conventions⁹⁶. According to the Committee’s case-law,

⁸⁶ ECSR, *European Roma Rights Centre (ERRC) and Mental Disability Advocacy Centre (MDAC) v. Czech Republic*, complaint No. 157/2017, decision on the merits of 17 June 2020, § 131 ff.

⁸⁷ *Ibid.*, §§ 148-156.

⁸⁸ See also: ECSR, Conclusions XV-2 (2001), Statement of Interpretation on Article 17 § 1. Similarly, on the consideration of children’s needs when placed in institutions, see: ECtHR, 18 July 2019, *R.V. and Others v. Italy*, No. 37748/13, where the Court found that the various delays in the decision-making process, which resulted in the children’s uninterrupted placement in care for over ten years, were incompatible with the requirements of Article 8 ECHR.

⁸⁹ ECSR, Conclusions 2005, Republic of Moldova.

⁹⁰ ECSR, Conclusions XV-2 (2001), Statement of Interpretation on Article 17 § 1.

⁹¹ *Ibid.*

⁹² *Ibid.* See also: ECSR, Conclusions 2005, Lithuania.

⁹³ ECSR, Conclusions 2011 (XIX-4), Statement of Interpretation on Articles 16 and 17.

⁹⁴ ECSR, *World Organisation against Torture (OMCT) v. Portugal*, complaint No. 34/2006, decision on the merits of 6 December 2006, §§ 19-21.

⁹⁵ ECSR, *World Organisation against Torture (OMCT) v. Greece* (complaint No. 17/2003), *Italy* (complaint No. 19/2003), *Ireland* (complaint No. 18/2003), *Portugal* (complaint No. 20/2003) and *Belgium* (complaint No. 21/2003), decisions on the merits of 7 December 2004.

⁹⁶ See, for all, *World Organisation against Torture (OMCT) v. Italy*, *cit.*, §§ 40-41. The Committee referred to the following sources: Article 19 of the UNCRC as interpreted by the Committee on the Rights of the Child; Article 3 of the ECHR as interpreted by the European Court of Human Rights (inter alia ECtHR, 25 April 1978, *Tyrer v. the United Kingdom*, No. 5856/72, as regards judicial birching of children; ECtHR, 25 February 1982, *Campbell and Cosans v. the United Kingdom*, Nos. 7511/76 and 7743/76, as regards corporal

“the prohibition of all forms of violence must have a legislative basis”⁹⁷. This “must cover all forms of violence regardless of where it occurs or to the identity of the alleged perpetrator”, and “the sanctions available must be adequate, dissuasive and proportionate”⁹⁸.

In this same case concerning Italy, the applicant complained about the possibility, under national legislation and practice, that parents or other persons with children under their charge may be authorised to use “correctional measures” involving a certain degree of violence. However, the Committee did not find any violation of Article 17 RESC since, based on the submitted domestic case law regarding the relevant rules, no ambiguity emerged about the lawfulness of the use of any degree of violence against children by any person, even in circumstances traditionally regarded as justifying such conduct⁹⁹. On the contrary, in another case regarding Ireland, the Committee noted that the corporal punishment of children within the home was permitted by virtue of the existence of the common law defence of reasonable chastisement. Although the domestic criminal law protects children from very serious violence within the home, the Committee held that certain forms of violence are in fact permitted and that the situation was in violation of Article 17¹⁰⁰.

In the 2006 decision involving Portugal¹⁰¹, the Committee upheld the OMCT arguments affirming that under national legislation and case law no explicit or effective prohibition of all corporal punishment of children, either by their parents or by others, is provided. Therefore, the absence of an explicit statutory ban in the legislation entailed a violation of Article 17¹⁰². Similarly, in the cases introduced by *Association for the Protection of All Children (APPROACH)* against *France, Ireland, Italy, Slovenia, Belgium* and *Czech Republic*¹⁰³, the complainant organisation alleged that they were in breach of Article 17 § 1 RESC because of the lack of explicit and effective prohibition of all corporal punishment of children within the family, schools and other settings, and because the States in question had failed to act with due diligence to eliminate such punishment in practice. The Committee confirmed that they violated the provision on the grounds that the respective State legislation did not set out an “express and comprehensive prohibition on all forms of corporal punishment of children”¹⁰⁴ and there was no case law by superior courts showing that the respective legislation had been interpreted as prohibiting all forms of violence against children¹⁰⁵.

punishment inflicted at school and ECtHR, 23 September 1998, *A v. the United Kingdom*, No. 25599/94, as regards parental corporal punishment); Rec. No. R (93) 2 on the medico-social aspects of child abuse adopted by the Committee of Ministers on 22 March 1993; Rec. R(90) 2 on social measures concerning violence within the family adopted by the Committee of Ministers on 15 January 1990; Rec. No. R(85)4 on violence within the Family adopted by the Committee of Ministers on 26 March 1985; Rec. 1666 (2004) “Europe-wide ban on corporal punishment of children” adopted by the Parliamentary Assembly on 24 June 2004.

⁹⁷ ECSR, *World Organisation against Torture (OMCT) v. Italy*, cit., § 42.

⁹⁸ *Ibid.* The lack of clear legislation and positive actions undertaken by the authorities to prevent domestic violence and abuse, as well as the failure to protect children, may amount to a violation of Article 3 ECHR on the prohibition of torture, inhuman or degrading treatment or punishment, occasionally in conjunction with Article 8 ECHR on the right to private and family life (see: ECtHR, 10 May 2001, *Z. and Others v. the United Kingdom*, No. 29392/95; ECtHR, 15 September 2009, *E.S. and Others v. Slovakia*, No. 8227/04; ECtHR, 3 September 2015, *M. and M. v. Croatia*, No. 10161/13; ECtHR, 3 October 2017, *D.M.D. v. Romania*, No. 23022/13).

⁹⁹ ECSR, *World Organisation against Torture (OMCT) v. Italy*, cit., § 46.

¹⁰⁰ ECSR, *World Organisation against Torture (OMCT) v. Ireland*, cit., § 57.

¹⁰¹ ECSR, *World Organisation against Torture (OMCT) v. Portugal*, cit.

¹⁰² *Ibid.*, § 22.

¹⁰³ ECSR, *Association for the Protection of All Children (APPROACH) Ltd. v. France*, complaint No. 92/2013, decision on the merits of 12 September 2014; *Ireland*, complaint No. 93/2013, decision on the merits of 2 December 2014; *Italy*, complaint No. 94/2013, decision on the merits of 5 December 2014; *Slovenia*, complaint No. 95/2013, decision on the merits of 5 December 2014; *Belgium*, complaint No. 98/2013, decision on the merits of 20 January 2015; *Czech Republic*, complaint No. 96/2013, decision on the merits of 20 January 2015. The findings of the ECSR are in line with the protection afforded within the ECHR context. According to the ECtHR, as regards France, the malfunctioning of its justice system amounted to a breach of Article 3 ECHR since it failed to protect the child from the severe abuse by her parents which had led to her death (ECtHR, 4 June 2020, *Association Innocence en Danger v. France* and *Association Enfance et Partage v. France*, No. 15343/15 and No. 16806/15; ECtHR, 3 November 2022, *Loste v. France*, No. 59227/12 regarding the failure to protect the child from ill-treatment while in the foster care). The ECtHR found a violation of Article 3, as well as of Article 13 on the right to an effective remedy, in a case concerning the Irish State’s failure to protect the applicant from sexual abuse and her inability to obtain recognition at national level of that failure (ECtHR, 28 January 2014, *O’Keeffe v. Ireland*, No. 35810/09). Furthermore, the ECtHR stated that the deficient investigation due to the authorities’ failure to effectively apply the criminal-law system for punishing all forms of rape and sexual abuse was in breach of Articles 3 and 8 ECHR (ECtHR, 24 May 2016, *I.C. v. Romania*, No. 36934/08; similarly, ECtHR, 22 June 2021, *R.B. v. Estonia*, No. 22597/16).

¹⁰⁴ See ECSR, *Association for the Protection of All Children (APPROACH) Ltd. v. Belgium*, cit., § 51.

¹⁰⁵ *Ibid.*, §§ 54-55.

It must be recalled that Article 17 RESC is closely linked with Article 7 § 10¹⁰⁶. The States Parties having accepted both provisions must respect, under Article 7 § 10, the following issues: the protection of children against moral dangers at work and outside work and the involvement of children in the sex industry and in begging. On the other hand, the issues dealt with under Article 17 are, in particular, the protection of children from ill-treatment, including corporal punishment. As regards the coordination of the above noted articles, in the *APPROACH v. Cyprus*¹⁰⁷ complaint the Committee recalled that the Charter was conceived as a whole and in some cases its provisions complement each other, as well as overlap in part, and this is the case of the protection of children from ill-treatment and abuse¹⁰⁸. The ECSR pointed out that “the fact that the right of children and young persons to social, legal and economic protection is guaranteed under Article 17 of the Charter does not exclude the examination of certain relevant issues relating to the protection of children under Article 7 § 10”¹⁰⁹. Thus, a State that has not accepted Article 17 may be examined under Article 7 § 10 whenever the subject matter deals with ill-treatment and abuse¹¹⁰.

4. Young offenders

Regarding young offenders, or children in conflict with the law, the ECSR stated that the age of criminal responsibility must not be excessively low even for very serious crimes¹¹¹. The criminal procedure relating to children and young persons must be adapted to their age and they must be afforded the same procedural guarantees as adults, although proceedings involving minors should be conducted rapidly, as set out in the 2001 Statement of Interpretation on Article 17 RESC¹¹². Moreover, minors should not normally be held in custody on remand, and if so, only for serious offences and for a short duration¹¹³. In such cases, minors should be separated from adults. In this last regard, in *EUROCEF v. France* the Committee declared that the detention of a minor in waiting areas, together with adults, and/or accommodated in hotels, deprived of the assistance of a guardian, cannot be in the best interests of the child and was in violation of Article 17 § 1 RESC¹¹⁴.

Moreover, prison sentences should only exceptionally be administered to young offenders and various alternative measures, such as those mentioned in Recommendation No. R(87)20¹¹⁵, should be considered¹¹⁶. Prison sentences for young offenders should in any case only be for a short duration¹¹⁷ and the length of the sentence must be laid down by a court. As noted in its Conclusions of 2011 regarding Belgium, the Committee required that young offenders should not serve their sentence together with adult prisoners, and

¹⁰⁶ See also the comment of Article 7 in this volume.

¹⁰⁷ ECSR, *Association for the protection of All Children (APPROACH) Ltd. v. Cyprus*, complaint No. 97/2013, decision on admissibility of 2 July 2013.

¹⁰⁸ See ECSR, Conclusions XV-2, vol. 1, Statement of Interpretation on Article 7 § 10.

¹⁰⁹ ECSR, *Association for the protection of All Children (APPROACH) Ltd. v. Cyprus*, *cit.*, §10.

¹¹⁰ ECSR, Conclusions XV-2 (2001), Statement of Interpretation on Article 17, 7 § 10; CoE, *Digest of the Case Law of the European Committee of Social Rights*, *cit.*, p. 99.

¹¹¹ ECSR, Conclusions 2011, Ireland; ECSR, Conclusions XIX-4 (2011), United Kingdom, where the Committee held that the age of criminal responsibility at 10 years remains manifestly too low and therefore it is not in conformity with the Charter; see also ECSR, *International Commission of Jurists (ICJ) v. Czech Republic*, Complaint No. 148/2017, decision on the merits of 20 October 2020.

¹¹² ECSR, Conclusions XV-2 (2001), Statement of Interpretation on Article 17. Also the ECtHR found a violation of Article 6 ECHR on the right to fair trial when no procedural guarantees are afforded to minors (ECtHR, 2 March 2010, *Adamkiewicz v. Poland*, No. 54729/00) or due to the failure to provide legal assistance (ECtHR, 27 November 2008, *Salduz v. Turkey*, No. 36391/02).

¹¹³ ECSR, Conclusions 2005, France; ECSR, Conclusions XIX-4 (2011), Denmark, where the Committee found that 8 months, extendable, of pre-trial detention is excessive and therefore not in conformity with the Charter.

¹¹⁴ ECSR, *European Committee for Home Based Priority Action for the Child and the Family (EUROCEF) v. France*, *cit.*, §§ 99-101. In general on migration and detention procedures concerning children. See also: CoE, *A handbook for frontline professionals, How to convey child-friendly information to children in migration*, 2019, available online at <<https://edoc.coe.int/en/migration/7998-how-to-convey-child-friendly-information-to-children-in-migration-a-handbook-for-frontline-professionals.html>>; CoE, *A study of immigration detention practices and the use of alternatives to immigration detention of children*, 2017, available online at <<https://edoc.coe.int/en/migration/7533-a-study-of-immigration-detention-practices-and-the-use-of-alternatives-to-immigration-detention-of-children.html>>; CoE, *Visiting places where children are deprived of their liberty as a result of immigration procedures*, Guide for Parliamentarians, 2017, available online at <<https://edoc.coe.int/en/migration/7526-visiting-places-where-children-are-deprived-of-their-liberty-as-a-result-of-immigration-procedures-guide-for-parliamentarians.html>>.

¹¹⁵ Rec. No. R(87)20 on social reactions to juvenile delinquency adopted by the Committee of Ministers on 17 September 1987.

¹¹⁶ ECSR, Conclusions XV-2 (2001), Statement of Interpretation on Article 17.

¹¹⁷ ECSR, Conclusions 2011, Norway, where the Committee considered that the maximum penalty of imprisonment for a term of 21 years for minors is excessive and therefore not in conformity with the Charter.

thus observed that the possibility of relinquishment of a youth jurisdiction which would allow for minors to be treated as adults and serve their sentence with adults is contrary to the Charter¹¹⁸.

Finally, in its 2001 Statement, the ECSR underlined “the importance of enabling young offenders to maintain contact with their family, *inter alia* by placing them as close to the family as possible and by allowing them to receive correspondence and visits”¹¹⁹. It follows that young persons in conflict with the law should also be provided with specific protective measures that are aimed at ensuring their full development, physically and mentally, as well as at ultimately safeguarding their best interests.

5. Right to assistance and the situation of children in poverty

According to the Committee’s interpretation, Article 17 § 1 RESC guarantees the right of children and young persons – including minors in an irregular situation and unaccompanied, as observed above – to care and assistance, which also covers medical assistance¹²⁰, social assistance and appropriate accommodation.

Under this provision, States are obliged to take the necessary measures to provide the required protection and special aid to children temporarily or definitively deprived of their family’s support. It follows that, as the ECSR found in *Defence for Children International (DCI) v. the Netherlands*¹²¹, when children are unlawfully present in the territory and when, according to the relevant national legislation, they may not claim entitlement to the benefits or facilities which would *inter alia* secure them shelter, they are deprived of their family’s support¹²². Such a situation is not in conformity with Article 17 § 1 RESC. In that decision, the Committee also affirmed that “the obligations related to the provision of shelter under Article 17 § 1 (c) are identical in substance to those related to the provision of shelter under Article 31 § 2” RESC on the right to housing, and may thus be violated on that same ground¹²³.

The obligation of States Parties to provide assistance also implies the protection of children and young persons from negligence, violence or exploitation. In *Defence for Children International (DCI) v. Belgium*, the Committee referred to the content of Article 17 concerning the aid to be provided by the State where the minor is unaccompanied or if the parents are unable to provide such aid. It recalled the importance of Article 17 § 1(b) RESC, “because failure to apply it would obviously expose a number of children and young persons to serious risks to their lives or physical integrity”¹²⁴ as well as to a threat “to respect for human dignity”¹²⁵. In this respect, a violation of Article 17 § 1 may occur when medical age assessments are based on the use of bone testing because this can have serious consequences for the unaccompanied foreign minors and “is inappropriate and unreliable”, as acknowledged by the ECSR in the complaint *EUROCEF v. France*¹²⁶. Regarding age assessment in the context of migration, the Committee of Ministers has recently adopted a new Recommendation to member States establishing human rights principles and guidelines based on the principle of the “presumption of minority” for persons undergoing age assessment, and requiring states to implement multidisciplinary and evidence-based procedures¹²⁷.

¹¹⁸ ECSR, Conclusions 2011, Belgium.

¹¹⁹ ECSR, Conclusions XV-2 (2001), Statement of Interpretation on Article 17.

¹²⁰ In *International Federation of Human Rights Leagues (FIDH) v. France*, complaint No. 14/2003, decision on the merits of 8 September 2004, § 36, the ECSR noted that medical assistance to unaccompanied minors in France was limited to situations that involve an immediate threat to life, and that children of illegal immigrants were only admitted to the medical assistance scheme after a certain time; and thus such situation was not in conformity with Article 17.

¹²¹ ECSR, *Defence for Children International (DCI) v. The Netherlands*, *cit.*, §§ 70-71.

¹²² *Ibid.*

¹²³ *Ibid.*, § 71. In this sense, see: ECSR, *European Federation of National Organisations working with the Homeless (FEANSA) v. the Netherlands*, complaint No. 86/2012, decision on the merits of 2 July 2014, § 50. See also *Digest of the Case Law of the European Committee of Social Rights*, *cit.*, p. 153 and the comment under Article 31 in this volume.

¹²⁴ ECSR, *Defence for Children International (DCI) v. Belgium*, *cit.*, § 73.

¹²⁵ *Ibid.*, § 82.

¹²⁶ ECSR, *European Committee for Home Based Priority Action for the Child and the Family (EUROCEF) v. France*, *cit.*, §§ 106 and 113. In this regard, see: CoE, *We are children, hear us out! - Children speak out about age assessment*, Report on consultations with unaccompanied children on the topic of age assessment, 2019, available online at <<https://edoc.coe.int/en/migration/7996-we-are-children-hear-us-out-children-speak-out-about-age-assessment.html>>; CoE, *Age assessment for children in migration - A human rights-based approach*, A guide for policy makers, 2019, available online at <<https://rm.coe.int/ageassessmentchildrenmigration/168099529f>>.

¹²⁷ Rec. CM/Rec(2022)22 on human rights principles and guidelines on age assessment in the context of migration and its Explanatory Memorandum, adopted by the Committee of Ministers on 14 December 2022 at the 1452nd meeting of the Ministers’

The ECSR also assesses the situation of foreign migrant children in poverty and their need of care and assistance. It conducts its evaluation on the basis of the UN Guiding Principles on extreme poverty and human rights¹²⁸. According to these Guiding Principles, “[e]ven short periods of deprivation and exclusion can dramatically and irreversibly harm a child’s right to survival and development. To eradicate poverty, States Parties must take immediate action”¹²⁹ and “promote the rights of children living in poverty, including by strengthening and allocating the necessary resources to child protection strategies and programmes, with a particular focus on marginalized children”¹³⁰. Thus, since “unaccompanied foreign minors must be placed as quickly as possible in an appropriate reception structure and their needs must be meticulously assessed in order to keep any changes to a minimum”, compliance with Article 17 RESC requires that States ensure immediate assistance, in light of the fact that such prompt support allows meeting the material needs of young people and the demand for medical or psychological care in order to set up a child support plan¹³¹.

Yet, the Committee has not formally dealt with child poverty in the context of Article 17 RESC. Rather, it addressed the issue under Article 30 which deals with the right to protection against poverty and social exclusion¹³². However, the obligations upon member States to ensure that children have the assistance they need may also include measures directed towards the amelioration and eradication of child poverty and social exclusion, since Article 17 RESC clearly refers to economic protection¹³³. In its Conclusions of 2019, the ECSR submitted a general question on Article 17 regarding the right to assistance¹³⁴ and underlined that the obligation upon States Parties to take all measures to ensure care and assistance are provided to children and young persons “is strongly linked to measures directed towards the amelioration and eradication of child poverty and social exclusion”. Therefore, child poverty levels will be taken into account when considering the State’s obligations in terms of Article 17 RESC. Measures that States may adopt to reduce child poverty include non-monetary measures, such as ensuring access to quality and affordable services in the cases of health, education, housing etc. This may also include measures focused on combatting discrimination against, and promoting equal opportunities for, children, particularly from vulnerable groups such as ethnic minorities, Roma children, children with disabilities, and children in care; as well as the extent to which child participation is ensured in work directed towards combatting child poverty and social inclusion¹³⁵.

6. Right to education

Both paragraphs 1(a) and 2 of Article 17 RESC guarantee the right of children and young persons to education¹³⁶. According to the Committee’s interpretation, this provision as a whole places positive

Deputies). This Recommendation refers also to the ECtHR case law, according to which failure to take into consideration the vulnerability of children in this context may amount to a violation of Articles 3, 8 and 13 ECHR. See: ECtHR, 21 July 2022, *Darboe and Camara v. Italy*, No. 5797/17, where it recalled the existing domestic and EU law on guarantees for unaccompanied minor asylum-seekers, as well as the Resolution of the Council of the European Union of 26 June 1997 and the Council of Europe’s Parliamentary Assembly Resolution 1810 (2011) on the primary importance of the best interests of the child and of the principle of presumption of minority in respect of unaccompanied migrant children, who require special protection and should be assigned a guardian and be assisted during the asylum proceedings.

¹²⁸ Magdalena SEPÚLVEDA CARMONA, *Guiding principles on extreme poverty and human rights*, adopted by the United Nations Human Rights Council on 27 September 2012, A/HRC/21/39. See also: ECSR, *Defence for Children International (DCI) v. Belgium*, cit., § 81.

¹²⁹ *UN Guiding principles*, cit., § 32.

¹³⁰ *Ibid.*, § 34.

¹³¹ ECSR, *Defence for Children International (DCI) v. Belgium*, cit., § 81.

¹³² In this regard, see Aoife NOLAN, *Protecting the Child from Poverty: The Role of Rights in the Council of Europe*, 2019, p. 10, where the Author observes that “[w]hile the ECSR has made extensive reference to provisions that have implications for child poverty, it has made relatively little reference to child poverty specifically in its Article 30 conclusions work. This omission is striking and regrettable given the ongoing problem of child poverty in the CoE. It is also surprising given the heavy focus on children within the Charter itself – particularly in Article 17”, available online at <<https://rm.coe.int/protecting-the-child-from-poverty-the-role-of-rights-in-the-council-of/168098c54c>>.

¹³³ Aoife NOLAN, cit., p. 46. See also: ECSR, Conclusions 2013, Statement of Interpretation on Article 30; and the comments under Articles 30 and 31 in this volume.

¹³⁴ ECSR, Conclusions 2019, General introduction, General Question on Article 17§1, March 2020.

¹³⁵ *Ibid.*

¹³⁶ It must be noted that the ESC of 1961 does not contain a provision on the right to education. The right to education is also protected indirectly pursuant to Article 7 RESC, imposing restrictions on children’s employment rights with a view to enabling them to obtain the full benefits of compulsory education (see *Handbook on European law relating to the rights of the child*, cit., p. 172 ff., spec. p. 180). On this right, see: *Digest of the Case Law of the European Committee of Social Rights*, cit., p. 155 ff.; CoE, Information

obligations upon States to establish and maintain an education system that is both accessible and effective. For a system of education to be accessible and effective, “there must be *inter alia* a functioning system of primary and secondary education; which includes an adequate number of schools fairly distributed over the geographical area (in particular between rural and urban areas); the number of children enrolled in school should reach 100% of those of the relevant age; class sizes and the teacher pupil ratio must be reasonable; there must be a mechanism to control the quality of teaching and the methods used; education must be compulsory until the minimum age for admission to employment”¹³⁷.

In assessing whether the system is effective, the Committee will examine if, considering that equal access to education should be guaranteed for all children, “particular attention is paid to vulnerable groups such as children from minorities, children seeking asylum, refugee children, children in hospital, children in care, pregnant teenagers, teenage mothers, children deprived of their liberty etc. and whether necessary special measures have been taken to ensure equal access to education for these children”¹³⁸.

In general, the ECSR observed that all education provided by States must fulfil the criteria of availability, accessibility, acceptability and adaptability¹³⁹. It also specified that the criteria of accessibility and adaptability relate to educational institutions and curricula that have to be accessible to everyone, without discrimination, and that teaching must be designed to respond to children with special needs¹⁴⁰.

In the Committee’s decisions in the complaints *Mental Disability Advocacy Centre (MDAC) v. Bulgaria*¹⁴¹ and *International Association Autism-Europe v. France*¹⁴², it stated that, while a distinction between children with and without disabilities in the application of Article 17 § 2 RESC is acceptable, “the integration of children with disabilities into mainstream schools in which arrangements are made to cater [to] their special needs should be the norm and teaching in specialised schools must be the exception”¹⁴³. Any special education should provide the children concerned with sufficient instruction and training and complete their schooling in equivalent proportions to those of children in mainstream schools¹⁴⁴. However, the Committee pointed out that the right to education of children with disabilities is also guaranteed by Articles 15 § 1 and 10 of the RESC, and that Article 15 applies as *lex specialis*¹⁴⁵.

In the Conclusions of 2011 regarding Slovakia, the ECSR observed that special measures for Roma children should not involve the establishment of separate schools or classes only for this group, which may otherwise lead to segregation. The fact that Roma children are disproportionately represented in special classes was not in conformity with Article 17 § 2 RESC¹⁴⁶. In *European Roma and Travellers Forum (ERTF) v. France*¹⁴⁷, the Committee observed that “educational policies for Roma children may be accompanied by flexible

Document prepared by the Secretariat of the ESC, *The right to education under the European Social Charter*, 2006, available online at <https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/ESC_The_Right_to_Education_under_the_European_Social_Charter_2006_en.pdf>.

¹³⁷ ECSR, Conclusions 2003, Statement of Interpretation on Article 17.

¹³⁸ ECSR, *Mental Disability Advocacy Centre (MDAC) v. Bulgaria*, complaint No. 41/2007, decision on the merits of 3 June 2008, § 34; ECSR, Conclusions 2003, Bulgaria, Article 17 § 2; Conclusions 2005, Bulgaria, Article 17 § 2.

¹³⁹ ECSR, *Mental Disability Advocacy Centre (MDAC) v. Bulgaria*, *cit.*, § 37, where the Committee referred to the General Comment No. 13 of the Committee on Economic, Social and Cultural Rights of the United Nations International Covenant on Economic, Social and Cultural Rights on the right to education (document E/C.12/1999/10 of 8 December 1999, §6).

¹⁴⁰ ECSR, *Mental Disability Advocacy Centre (MDAC) v. Bulgaria*, *cit.*, § 37.

¹⁴¹ *Ibid.*

¹⁴² ECSR, *International Association Autism-Europe v. France*, complaint No. 13/2002, decision on the merits of 4 November 2003.

¹⁴³ ECSR, *Mental Disability Advocacy Centre (MDAC) v. Bulgaria*, *cit.*, § 35; *International Association Autism-Europe v. France*, *cit.*, § 49.

¹⁴⁴ ECSR, *Mental Disability Advocacy Centre (MDAC) v. Bulgaria*, *cit.*, § 36. Also within the ECHR context, the need to educate disabled children, whenever possible, with other children of their own age has been stressed (ECtHR, 4 July 1995, *Klerks v. the Netherlands*, No. 25212/94; ECtHR, 21 October 1998, *McIntyre v. United Kingdom*, No. 29046/95).

¹⁴⁵ ECSR, *European Action of the Disabled (AEH) v. France*, complaint No. 81/2012, decision on the merits of 11 September 2013, §§ 24-30; ECSR, Conclusions 2003, Bulgaria; CoE, *Digest of the Case Law of the European Committee of Social Rights*, *cit.*, p. 156. For a comment, see: Shivaun QUINLIVAN, “Emerging Jurisprudence on Inclusive Education under the European Social Charter (Revised)”, in Gauthier DE BECO, Shivaun QUINLIVAN and Janet E. LORD (eds.), *The Right to Inclusive Education in International Human Rights Law*, Cambridge University Press, 2019, pp. 447-472.

¹⁴⁶ ECSR, Conclusions 2011, Slovakia, Article 17 § 2.

¹⁴⁷ ECSR, *European Roma and Travellers Forum (ERTF) v. France*, complaint No. 119/2015, decision on the merits of 5 December 2017.

structures to meet the diversity of the group and may take into account the fact that some groups lead an itinerant or semi-itinerant lifestyle”¹⁴⁸.

As stems from the Statement of Interpretation on Article 17 § 2¹⁴⁹, access to education is crucial for the life and development of every child and its denial would thus exacerbate the vulnerability of a child irregularly present in the territory of one State Party. It implies that children, whatever their residence status, who fall within the personal scope of the Charter – in the light of the Committee’s case law¹⁵⁰ – and thus of Article 17 § 2, must be granted as effective access to education as any other child, even for those over the age of compulsory education¹⁵¹.

Under paragraph 2, the Parties undertake to adopt all appropriate and necessary measures designed to provide children and young persons with a free primary and secondary education as well as to encourage their regular attendance at school. As observed above, the right of all children to education is also guaranteed by Article 17 § 1 RESC where, however, there is no question of free education¹⁵². Primary and secondary education, which covers the basic education system, must be free of charge¹⁵³. In addition, hidden costs such as books or uniforms must be reasonable and assistance must be available to limit their impact on the most disadvantaged groups in order not to impinge upon the goal being pursued¹⁵⁴. As stated in the Appendix, this paragraph does not imply an obligation to provide compulsory education up to the age of majority¹⁵⁵. The Explanatory Report specifies that the reason for this approach is that in some States only primary education is compulsory, whereas in others secondary education is also compulsory¹⁵⁶.

The Explanatory Report then clarified that this paragraph does not imply that children and young persons have a right to exercise this right in a private school¹⁵⁷. However, in its Conclusions of 2019, the ECSR adopted a “Statement of Interpretation on Article 17 § 2 - Private sector involvement in education”¹⁵⁸, where it reiterated that the Charter provides that the obligations under this provision may be met directly or through the involvement of private actors, and observed that, in fact, in many States private education is also available¹⁵⁹.

¹⁴⁸ *Ibid.*, § 69. In this regard, the ECSR findings are in line with the right to education granted by Article 2 of Protocol No. 1 to the ECHR, that states: “No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions”. According to the ECtHR, the disproportionately prejudicial effect on Roma children by national law is in breach of such Article 2 taken in conjunction with Article 14 ECHR on the prohibition of discrimination (ECtHR, 13 November 2007, *D.H. and Others v. the Czech Republic*, No. 57325/00; ECtHR, 16 March 2010, *Oršuš and Others v. Croatia*, No. 15766/03; ECtHR, 13 December 2022, *Elmazova and Others v. North Macedonia*, Nos. 11811/20 and 13550/20). As to the specification regarding the respect for parents’ convictions, the ECtHR stated that “the setting and planning of the curriculum fall in principle within the competence” of the State (ECtHR, 29 June 2007, *Folgero and Others v. Norway*, No. 15472/02). In any case, for the purpose of safeguarding pluralism and differences in teaching, a particular religion or philosophy must be balanced by offering parents the possibility of either partially or fully exempting their children from such teaching – such as the possibility not to attend certain classes or the religious course as a whole (*ibid.*).

¹⁴⁹ ECSR, Statement of Interpretation on Article 17 § 2, 2011.

¹⁵⁰ See *supra*.

¹⁵¹ ECSR, Conclusions 2015, Slovenia; ECSR, Conclusions 2015, ECSR, Netherlands; *Médecins du Monde - International v. France*, complaint No. 67/2011, decision on the merits of 11 September 2012, § 128.

¹⁵² Katarzyna DUNAJ and Joanna RYSZKA, *cit.*, p. 331.

¹⁵³ This provision differs from Article 2 of Protocol No. 1 to the ECHR on the right to education. According to the ECtHR, this Article does not oblige States to make education available; it provides “a right of access to educational institutions existing at a given time” (ECtHR, 23 July 1968, “*Relating to certain aspects of the laws on the use of languages in education in Belgium*” v. *Belgium*, Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, section “The law”, part B, § 4). This is not however an absolute right; limitations must be foreseeable for those concerned, must pursue a legitimate aim and may not result in a denial of the right to education (ECtHR, 6 September 2016, *C.P. v. United Kingdom*, No. 300/11).

¹⁵⁴ ECSR, Conclusions 2003, Bulgaria; ECSR, *European Committee for Home-Based Priority Action for the Child and the Family (EUROCEF) v. France*, *cit.*, § 31.

¹⁵⁵ Appendix, *cit.*, on Article 17.

¹⁵⁶ Explanatory Report, *cit.*, § 74.

¹⁵⁷ *Ibid.*, § 73.

¹⁵⁸ ECSR, Conclusions 2019, General introduction, Statement of Interpretation on Article 17 § 2 - Private sector involvement in education.

¹⁵⁹ In this regard, the ECSR also considered the “Abidjan Guiding Principles on the human rights obligations of States to provide public education and to regulate private involvement in education”.

Although States respect the freedom of parents to choose an educational institution other than a public institution, the State must provide free quality public education¹⁶⁰. The Committee then added that even the offer of educational alternatives by private actors must not be detrimental to the allocation of resources towards, or otherwise undermine the accessibility and quality of, public education. Moreover, States are required to strictly regulate and supervise private sector involvement in education, making sure that the right to education is not undermined. Thus, appropriate measures should ensure that State allocation of resources to private education does not negatively impact upon the right of all children to access free, quality public education¹⁶¹.

According to a number of CoE documents on the increasing importance of the digital environment, States are invited to ensure that children have access to the digital environment and which must be inclusive and take into account children's developing capacities and the particular circumstances of children in vulnerable situations¹⁶².

As concerns school attendance, measures must be taken to encourage children's attendance at school as well as to actively reduce the number of children dropping out or not completing compulsory education as well as the rate of absenteeism¹⁶³. States Parties have a margin of discretion in developing and implementing concrete measures to combat absenteeism, depending upon the causes and their national situations¹⁶⁴.

In the assessment of national actions regarding educational systems, as set out in the Conclusions of 2019, States are also expected to adopt actions to introduce anti-bullying policies in schools, i.e. measures relating to awareness raising, prevention and intervention¹⁶⁵, as well as measures to facilitate child participation across a broad range of decision-making and activities related to education (including within the context of children's specific learning environments)¹⁶⁶.

CONCLUDING REMARKS

Article 17 RESC represents a fundamental provision aimed at promoting respect for the rights of children, that contributes to the concrete and effective pursuit of the general principle of the protection of the best interests of the child being embraced at international and European level under different perspectives. This Charter provision requires States Parties to provide practical actions and measures fit-for-purpose. It can also be regarded as a minimum standard with which national legislation and practice must comply. Children's rights are increasingly demanding attention in relation to the various situations analysed above, and indeed in relation to contemporary child protection issues, such as trafficking, migration, poverty, exploitation in work, gender identity challenges, and child pornography, as well as the legacy of the COVID-19 pandemic and the conflict in Ukraine.

As underlined by the Committee in its Statement on COVID-19 and social rights¹⁶⁷, the necessity to ensure guarantees for the protection of social rights is overwhelming, especially towards most socially vulnerable groups. The COVID-19 pandemic led to the closures of schools and other educational institutions which "exacerbated pre-existing inequalities in education", and that the necessary recourse to remote learning during lockdown periods has highlighted the issue of digital exclusion. It also recognised that, under Article 17 § 2, equal access to education should have been ensured for all children during the COVID-19 crisis. Other observations concerned child poverty and social exclusion, also exacerbated by the public health

¹⁶⁰ See ECSR, Conclusions 2019, General introduction, Statement of Interpretation on Article 17 § 2 - Private sector involvement in education.

¹⁶¹ *Ibid.*

¹⁶² Rec. CM/Rec(2018)7 on guidelines to respect, protect and fulfil the rights of the child in the digital environment, 4 July 2018; Rec. CM/Rec(2019)10 on developing and promoting digital citizenship education, 21 November 2019; Rec. CM/Rec(2016)2 on the Internet of citizens, 10 February 2016. See also: *Handbook for policy makers on the rights of the child in the digital environment*, 2020, available online at <<https://rm.coe.int/publication-it-handbook-for-policy-makers-final-eng/1680a069f8>>.

¹⁶³ ECSR, Conclusions 2011, Republic of Moldova; Conclusions 2003, Bulgaria.

¹⁶⁴ CoE, *Digest of the Case Law of the European Committee of Social Rights*, *cit.*, p. 156.

¹⁶⁵ ECSR, Conclusions 2019, General question on Article 17 § 2, on "Measures to combat bullying in the context of education".

¹⁶⁶ *Ibid.*, on "Voice of the child in education".

¹⁶⁷ ECSR, Statement on COVID-19 and social rights, adopted on 24 March 2021.

crisis, as well as the increased physical, psychological and sexual violence against children during the lockdown.

In its Statement on the crisis caused by the Russian Federation's military aggression against Ukraine¹⁶⁸, adopted on 24 March 2022, the ECSR stressed, in general, that the conflict should not prejudice the protection of the rights recognised by the Charter, both within Ukraine and beyond its borders, and that the States Parties to the Charter have obligations to effectively guarantee them at all times. This is particularly relevant in the context of the millions of children seeking international protection across Europe.

States Parties are invited to report on the rights of children, families and migrants by 31 December 2022¹⁶⁹. Among the requested information, which essentially refer to the Conclusions of 2019, States are also to report on measures taken to protect and assist children in crisis situations and emergencies, including arrangements regarding their education.

¹⁶⁸ ESCR, Statement on the crisis caused by the Russian Federation's military aggression against Ukraine, adopted on 24 March 2022.

¹⁶⁹ The ESCR transmitted on 8 July 2022 the Questions on Group 4 provisions (Conclusions 2023), Children families and migrants. States' reports will be examined in 2023. Consequently, trade unions, employers' organisations, non-governmental organisations, national human rights institutions and national equality bodies are invited to submit their comments on national reports by 30 June 2023.