

## THE LEGAL STATUS OF UNACCOMPANIED CHILDREN WITHIN INTERNATIONAL, EUROPEAN AND NATIONAL FRAMEWORKS

PROTECTIVE STANDARDS VS. RESTRICTIVE IMPLEMENTATION

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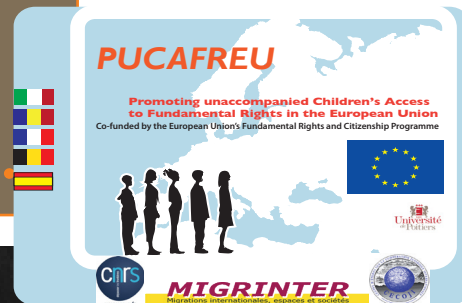
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**THE LEGAL STATUS OF UNACCOMPANIED CHILDREN  
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EDITED BY DANIEL SENOVILLA & PHILIPPE LAGRANGE





# FOREWORD

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### (INCLUDING SOME DEFINITIONS OF TERMINOLOGY AND CONTENTS)

The PUCAFREU project (Promoting unaccompanied children's access to their fundamental rights in the European Union), is co-funded by the European Union's Fundamental Rights and Citizenship programme. The project is coordinated by the French CNRS (National scientific research centre) through its research unit MIGRINTER and with the support of research unit CECOJI, both based at the University of Poitiers in France.

The main and most challenging working remit of the PUCAFREU project involves conducting research into the situation of unaccompanied children living in the European Union space and staying unprotected outside the care and the control of State authorities. We have initially named this target group as "unprotected unaccompanied children".

This document constitutes a first stage of the project research process and proposes a theoretical and legal analysis of the legal treatment and status of unaccompanied migrant and asylum seeking children in different contexts and at different levels. The United Nations Committee on the Rights of the Child has set up a double definition of this migration distinguishing between "unaccompanied children" those "*who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so*" and "separated children", those "*who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives*"<sup>1</sup>.

These two categories are of interest to the PUCAFREU project. However, considering that within the EU context the term predominantly used is "unaccompanied children" or "unaccompanied minors", we have decided to prioritise in this document the term of "unaccompanied children".

<sup>1</sup> Committee on the Rights of the Child (2005): General Comment n° 6 on the treatment of unaccompanied and separated children outside their country of origin, CRC/GC/2005/6 of the 1st September 2005, paragraphs 7 & 8.

Moreover, as the contents of this document apply to all unaccompanied children, we will not be referring specifically at this point to "unprotected unaccompanied children".

With regard to the contents, the first chapter of this document examines the contents of the United Nations Convention on the Rights of the Child and its interpretation of- and adequate implementation to- the situation of unaccompanied children. Daniel Senovilla has divided this chapter in four main sections. The first one includes an analysis of the four general principles of the United Nations Convention. In the second stage, we study those children's rights that are directly linked to the care and protection of unaccompanied children. The third section deals with durable solutions particularly focusing on those that are often implemented to unaccompanied children within the European context (return to the country of origin whether for family reunification purposes or integration into the host society). Finally, the fourth section is devoted to other rights or contents of the United Nations Convention that are relevant to the unaccompanied children's legal treatment and status. In all these parts, we have reviewed all of the most relevant sources (Committee on the Rights of the Child, UNICEF, United Nations High Commissioner for Refugees, Separated Children in Europe Programme) and we have included our own parallel analysis.

The European Union legislative framework concerning unaccompanied children has been examined in chapter two. Céline Lageot has firstly analysed the different EU Directives on Asylum and Immigration focusing on the contents that refer to unaccompanied children. As well as this, in the second section of this chapter Daniel Senovilla carries out a first assessment of the contents of the European Commission's Action Plan (2010-2014) on unaccompanied minors.

The third chapter explores the Council of Europe framework. In the first part, Juan Manuel Lopez Ulla provides an in-depth examination of the European Court of Human Rights' relevant jurisprudence concerning unaccompanied children, including a fresh analysis on the recent 2011 Court decision ruling against Greece for the detention and release of an Afghan teenager seeking asylum. The second part by Marie Françoise Vallaud is devoted to all other regulations and recommendations from the Council of Europe concerning unaccompanied children.

Finally, the fourth chapter presents an analysis of the legal national contexts and administrative practices of the destination countries of the PUCAFREU project (France, Spain, Belgium and Italy). Lélia Tawfik underlines the generalized lack of adequacy of national regulations with respect to the contents of the United Nations Convention on the Rights of the Child. Three different stages of the procedure are analysed: the arrival and reception of the unaccompanied child; the access into the care system and finally the identification of a durable solution.

Summing up, the contents of this document reflect an overview of the legal regulations concerning unaccompanied children at both international (United Nations, European Union and Council of Europe context) and national levels. These contents also identify some of the potential gaps and contradictions in legal regulations and constitute an ample basis from which to explore the probable root causes leading unaccompanied children living in the European Union space to refuse, abandon or be excluded from institutional care services and hence become unprotected.

## ABOUT THE AUTHORS

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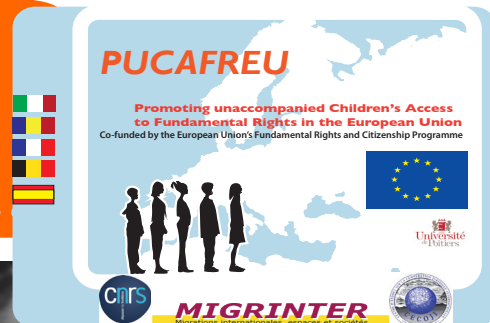
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# CHAPTER 1

## SOME KEY ASPECTS ON THE INTERPRETATION OF THE CRC CONTENTS AND ITS APPLICATION TO THE SITUATION OF UNACCOMPANIED CHILDREN OUTSIDE THEIR COUNTRY OF ORIGIN.

Daniel SENOVILLA HERNÁNDEZ

The United Nations Convention on the Rights of the Child<sup>1</sup> (hereafter, CRC or the Convention) constitutes the foremost international legal instrument to protect and support children's rights worldwide. By mid-2011, only two States -Somalia and the United States of America- had not yet ratified the Convention. The 27 European Union Member States and most of the States from where unaccompanied children come from have therefore committed themselves to respect and implement all principles and rights to all children under their national jurisdictions.

So far, most of the existing literature has focused on a general analysis on the interpretation of the CRC contents<sup>2</sup>. However, there are very few references devoted to the interpretation and implementation of the CRC principles, obligations and rights to aid the situation of children on the move. The core instrument that up until now has analysed in-depth the situation of unaccompanied children outside their country of origin is the General Comment n° 6 (2005) of the Committee on the Rights of the Child<sup>3</sup>. Besides this, other specialized publications from international United Nations agencies or private humanitarian institutions are also worth highlighting. Amongst these are the United Nations High Commissioner for Refugees (UNHCR) guidelines on the child's best interest determination process<sup>4</sup> and the publications from the Separated Children in Europe Programme, particularly its position papers and its widely known Statement of good practice<sup>5</sup>.

In this first chapter, we will analyse in depth the key contents of the CRC and its adequate interpretation and implementation to the situation of unaccompanied children who are living outside their country of origin and/or residence, particularly focusing on those who are unprotected. Firstly, we will notably address the interpretation of the CRC four general principles, with special attention to the best interest principle.

1. Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. Available on line at: <http://www2.ohchr.org/english/law/crc.htm> (access in July 2011)

2 A key contribution is the UNICEF's Implementation Handbook for the Convention. See HODGKIN, R. & NEWELL, P. (2007): *Implementation handbook for the Convention on the Rights of the Child (fully revised third edition)*. Geneva, UNICEF, 787 pages. See also, among others, BELLAMY, C., ZERMATTEN, J. & (eds.) (2007): *Realizing the rights of the child*, Ruffer & Rub, 301 pages; DETRICK, S. (1999): *A commentary on the United Nations Convention on the Rights of the Child*, The Hague, Boston, Martinus Nijhoff Publishers; CONNORS, J., ZERMATTEN, J. & PANAYOTIDIS, A., Eds. (2007): *18 candles: The Convention on the Rights of the Child reaches majority*, International Institute for the Rights of the Child & Office of the United Nations High Commissioner for Human Rights.

3 Committee on the Rights of the Child (2005): General Comment n° 6 on the treatment of unaccompanied and separated children outside their country of origin, CRC/GC/2005/6 of the 1st September 2005.

4 UNHCR- United Nations High Commissioner for Refugees (2008): "UNHCR Guidelines on determining the best interest of the child", 97 pages.

5 Separated Children in Europe Programme (2009): "Statement of good practice- 4th revised edition", edited by Terry Smith, Separated Children in Europe Programme- Save the Children & UNHCR, 84 pages.

Secondly, we will analyse those rights of the Convention who are directly linked to unaccompanied children's need of care. Thirdly, we will raise the question of which durable solutions can be implemented with regards to the situation of unaccompanied children, always bearing in mind the determination of their best interest. Finally, we will deal with other contents of the CRC of particular importance to the situation of unaccompanied children, as their access to employment and their deprivation of liberty.

## 1.1 - THE CRC FOUR GENERAL PRINCIPLES AND ITS APPLICATION TO THE SITUATION OF UNACCOMPANIED CHILDREN

The CRC is divided into a brief preamble and three parts. Parts 2 and 3 are respectively devoted to the mechanisms to monitor the implementation of the CRC by States parties and to the process of signature and ratification of the Convention. Our interest will be on the first part of the text. This first part is purely normative and includes general principles and obligations as well as a corps of social, economical, civil and cultural rights which are recognised to all human beings who are “below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”.<sup>6</sup> To be precise, there is a double level of rights recognition at the CRC: while some of the rights are directly recognised by the Convention for all children, others need previous recognition by the States and are in some cases subjected to the financial or logistical capability of each State.

The four general principles of the CRC which are reflected in articles 2, 3, 6 and 12 of the text, refer respectively to the principle of non discrimination (article 2); the principle of the best interests of the child (article 3); the right of the child to life, survival and development (article 6) and finally, the child's right to express his/her views freely.<sup>7</sup>

### 1.1.a- The principle of non-discrimination

Article 2 of the CRC sets up a non-discrimination obligation concerning the recognition and application of the rights of the Convention to every child within the jurisdiction of a State party. As a consequence, unaccompanied children are entitled to all rights foreseen at the CRC with no possible exclusion.<sup>8</sup>

To confirm this interpretation, the Committee on the Rights of the Child states that “the enjoyment of rights stipulated in the Convention is not limited to children who are citizens of a State party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children - including asylum-seeking, refugee and migrant children - irrespective of their nationality, immigration status or statelessness”<sup>9</sup>. This obligation could be negative and positive in nature: State parties should avoid any action susceptible to hinder unaccompanied children's entitlement to the rights of the Convention and promote measures to facilitate their enjoyment of these rights<sup>10</sup>.

Furthermore, still according to the interpretation of the Committee on the Rights of the Child, the implementation of the Convention should embrace all children within the territory of a State party including those attempting to enter that territory.<sup>11</sup> This interpretation is of particular importance and applies to all unaccompanied children who are deprived of liberty at points of entry and/or transit zones before authorising or refusing their access to the territory of the concerned

6. Article 1 of the CRC.

7. Committee on the Rights of the Child (2003): General Comment n° 5 on the general measures of implementation of the Convention on the Rights of the Child, CRC/GC/2003/5 of the 27<sup>th</sup> of November 2003, paragraph 12.

8. Article 2.1 of the CRC: “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status”

9. Committee on the Rights of the Child (2005): General Comment n° 6 on the treatment of unaccompanied and separated children outside their country of origin, *op.cit.*, paragraph 12.

10. Committee on the Rights of the Child (2005): General Comment n° 6 on the treatment of unaccompanied and separated children outside their country of origin, *op.cit.*, paragraph 13.

11. Committee on the Rights of the Child (2005): General Comment n° 6 on the treatment of unaccompanied and separated children outside their country of origin, *op.cit.*, paragraph 12.

State party<sup>12</sup>.

### 1.1.b- The best interests of the child principle

While implementation of the contents of the CRC to the situation of unaccompanied children has been theoretically confirmed in the previous section, article 3 of the CRC establishes the child's best interests principle. Following this principle, every State party institution has the obligation to give primary consideration to the best interest of the child in any actions concerning it<sup>13</sup>.

Nevertheless, the CRC provides this obligation without really defining the notion of "best interests of the child". Neither the Working Group drafting the Convention, nor the Committee on the Rights of the Child has yet established a precise definition or criteria determining its general meaning<sup>14</sup>. To a certain extent, and bearing in mind the impossibility to embrace all existing particularities and nuances of the children's reality, the CRC creates this undermined legal notion that has to be specified at every single case<sup>15</sup>. Moreover, the contents of the Convention have to be considered as a whole (The Committee on the Rights of the Child stresses the existence of an interrelationship between the four general principles of the Convention). As a consequence, the best interest of a child has to be determined in every case in connection with the principle of non-discrimination, the child's right to life, survival and development and the expression of his/her views<sup>16</sup>.

With regard to the specific situation of unaccompanied children, the General Comment n° 6 just provides in broad terms how to proceed to determine the best interests of an unaccompanied child.

Firstly, this document considers that a "best interest determination" requires a complete assessment on the child's identity (nationality, ethnic, social and cultural background) and his/her vulnerabilities and protection needs. Further, carrying out this assessment involves authorizing the child's access to the territory of the involved State<sup>17</sup>.

Secondly, the best interest of an unaccompanied child requires the prompt appointment of a guardian representing the child in all administrative and judicial proceedings where he/she could be involved (particularly if the child is referred to an asylum procedure). An independent legal representative should also support the unaccompanied child through all these administrative and judicial procedures.<sup>18</sup>

These above-mentioned actions are of course of advantage to the unaccompanied child's best interest. However, from our point of view, they just refer to the early stages of the unaccompanied child's reception protocol. To a certain extent, the General Comment neglects to set up a clear association between the child's best interest in the medium and long-term and the determination of a durable solution to respond to his/her situation, a durable solution that, as Elena Rozzi points out, should be narrowly linked to the child's best interest principle.<sup>19</sup> The process to determine a durable solution and its connexion with the best interest of the child are aspects that will be analyzed in-depth in section 1.3 of this chapter.

12. Within the scope of the PUCAFREU project, this situation is particularly alarming in France where a significant number of unaccompanied children are temporally deprived of liberty every year at the transit zones (*zones d'attente*) of its international airports and maritime ports (especially at Charles de Gaulle airport close to Paris). This situation has been denounced in a number of NGO reports and research papers, notably TROLLER, S. (2009): *"Lost in transit: Insufficient Protection for Unaccompanied Migrant Children at Roissy Charles de Gaulle Airport"*, Human Rights Watch- Children's Rights Division, 73 pages.

13. Article 3 of the CRC: *"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration"*.

14. See HODGKIN, R. & NEWELL, P. (2007), *op.cit.*, page 39.

15. See this argument at LAZARO (2002): *"Los menores en el derecho español"*, TECNOS Publishing, Madrid, pages 107-110.

16. See HODGKIN, R. & NEWELL, P. (2007), *op.cit.*, page 37.

17. Committee on the Rights of the Child (2005): General Comment n° 6 on the treatment of unaccompanied and separated children outside their country of origin, *op.cit.*, paragraph 20.

18. Committee on the Rights of the Child (2005): General Comment n° 6 on the treatment of unaccompanied and separated children outside their country of origin, *op.cit.*, paragraph 21.

19. See ROZZI, E. (2002): *"The evaluation of the best interests of the child in the choice between remaining in the host country and repatriation: a reflection based on the Convention on the Rights of the Child"*, Save the Children Italy Onlus.

### 1.1.c- The child's right to life, survival and development

This third general principle of the CRC is reflected at article 6<sup>20</sup>. Besides the implications concerning the recognition the child's right to life and survival, fundamental rights that had been previously recognised under other International and Human Rights Law instruments, the interpretation of the notion of development and its implementation to the situation of unaccompanied children is of particular importance within our analysis.

With regard to the contents of this principle, the General Comment n°6 is again rather vague and only establishes the States parties' obligation to ensure maximum protection from violence and exploitation. This, considering that unaccompanied children are especially vulnerable to situations of trafficking for sexual purposes or the child's exploitation in criminal activities<sup>21</sup>. The Committee invites States to take active measures to avoid or minimise the mentioned risks, such as prompt appointment of guardians, priority procedures for victims, provision of information and awareness of the potential risks, etc.<sup>22</sup>.

In addition to all risks mentioned by the General Comment, it is essential to take into account all risks linked to the child's migration route. Like many adult migrants, a significant number of unaccompanied migrant children are using illicit paths to access European Union territory. Clandestine migration often involves using extremely dangerous transport means that compromise migrant children's integrity and even their life. It is well known that young and underage harragas<sup>23</sup> living around the international Tangier commercial port in Morocco put their lives in danger in their attempt to reach the Spanish coast. A similar situation of danger is faced by those unaccompanied West African children trying to cross the ocean in small boats to the Canary Islands or those engaged in the long and dangerous inland route through the desert to the Libyan or Tunisian shores and then cross the Mediterranean to reach Italy. We cannot forget those children arriving from Albania and crossing the Adriatic Sea to enter Italy or the mountains further south to get into Greece. We should also mention those Pakistani and Afghan children who follow a dangerous route through Iran, Turkey and several EU countries before trying to reach the United Kingdom. Finally, this is also the case of other children entering the European Union through the new Eastern Member States after a dangerous transit through the Ukraine. The number of unaccompanied children failing in their attempt to realize their dream of getting into Europe is completely unknown. Besides, the eventual responsibilities under article 6 of the CRC incurred by countries of origin of migrant children as well as countries of transit and destination constitutes a delicate issue with no clear resolution so far.

Regarding the interpretation of the notion of development and its recognition as a fundamental right and its adequate implementation to the situation of unaccompanied children, the General Comment n° 6 does not provide any ideas. However, the Committee on the Rights of the Child has reflected on several occasions its interpretation of child development as a holistic concept embracing the whole set of rights encompassed in the Convention. The child access to many of the rights of the Convention -right to health, right to education, right to an adequate standard of living, right to leisure and play- is especially relevant to ensure his/her maximum development<sup>24</sup>.

The unaccompanied child's opportunity to reach adequate and maximum development constitutes a key factor when deciding which durable solution should be taken to respond to his/her situation. On most occasions, the choice must be made between returning the child to his/her country of origin and integrating him/her in the host society where he/she is living. In this decision-making process, the assessment of the child's possibilities of development in both contexts (country of origin and country of destination) attains major importance. These aspects will be further analysed in section 1.3 below.

20. Article 6 of the CRC: 1. States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

21. Committee on the Rights of the Child (2005): General Comment n° 6 on the treatment of unaccompanied and separated children outside their country of origin, *op.cit.*, paragraph 23.

22. Committee on the Rights of the Child (2005): General Comment n° 6 on the treatment of unaccompanied and separated children outside their country of origin, *op.cit.*, paragraph 24.

23. In popular Moroccan jargon, irregular migrants are defined "*harraga*", term which could be translated as "those who are burning". See a detailed explanation at VACCHIANO, F. (2010): "*Bash n'ataq l-walidin*" ("to save my parents"): personal and social challenges of Moroccan unaccompanied children in Italy" in D. SENOVILLA HERNÁNDEZ, K. TOUZENIS and J. KANICS "Migrating alone: unaccompanied and separated children's migration to Europe", UNESCO Editions, Paris, pages 107-127, particularly page 118.

24. See HODGKIN, R. & NEWELL, P. (2007), *op.cit.*, page 93.

### 1.1.d- The child's right to express his/her views

Article 12 of the CRC includes the fourth general principle of the CRC referring to the child's right to express his/her views freely<sup>25</sup>. Once again, the General Comment n°6 does not provide much precise information on the interpretation of this principle at its implementation to the situation of unaccompanied children. This document states that "when determining the measures to be adopted with regard to unaccompanied or separated children, the child's views and wishes should be elicited and taken into account"<sup>26</sup>. For this purpose, the General Comment also determines that unaccompanied children should be adequately informed (in a friendly and adapted way considering his/her age and level of maturity) on their rights and entitlements, the services available, the asylum procedure, the family tracing process and the situation on their country of origin. Furthermore, the views of the child should be taken into account when appointing a guardian and/or a legal representative and when deciding arrangements on accommodation and care<sup>27</sup>.

Summing up, the General Comment insists on the unaccompanied child's right "to be informed", an entitlement which provides him/her the possibility to express his/her views. However, the text does not provide any information on how and to what extent the child's views have to be taken into consideration when making a decision or taking up a measure that concerns him or her.

Following UNICEF's Implementation handbook, two interrelated criteria -the child's age and his/her degree of maturity -should be taken into account when deciding how much weight to give to a child's view on any given subject. While the Convention rejects the setting up of a specific age barrier to provide weight to the child's views, the link between the degree of maturity and the capability to decide remains undefined<sup>28</sup>.

A 1994 United Nations High Commissioner for Refugees' document<sup>29</sup> sets up three different age ranges with different capacities to make a decision relating their future. According to this source, unaccompanied refugee children over the age of 16 are generally mature enough to make their own decisions. Those over the age of nine or ten (and younger than 16) might be able to make reasonable choices if they receive adequate information, always depending on their degree of maturity. Finally, and despite the fact that they should always have the opportunity to express their views, children below nine or ten years of age appear not be sufficiently mature to make independent decisions. In all cases, the UNHCR highlights the importance of taking into account the child's personal, social and cultural background before assessing his/her degree of maturity<sup>30</sup>. However, neither this categorization, nor a similar one has been taken up in further guideline documents from the same organisation.

The second section of article 12 of the CRC provides for the unaccompanied child's right to be heard, either directly or through an adequate representation, in all judicial and administrative proceedings concerning him/her<sup>31</sup>. The recognition and implementation of this right is especially relevant, particularly in those proceedings linked to the unaccompanied child's status as an alien and/or an asylum seeker. These proceedings are: identification, authorisation or refusal of entry, detention at transit zones or points of entry, age determination, granting of a durable resident status, return, etc. However, the implementation of this right is far from being effective in most cases within the European Union territory.

25. Article 12 section 1 of the CRC: "*States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child*".

26. Committee on the Rights of the Child (2005): General Comment n° 6 on the treatment of unaccompanied and separated children outside their country of origin, *op.cit.*, paragraph 25.

27. *Ibidem.*

28. See HODGKIN, R. & NEWELL, P. (2007), *op.cit.*, page 155.

29. UNHCR- United Nations High Commissioner for Refugees (1994): "*Refugee Children: guidelines on protection and care*", 183 pages.

30. *Ibidem.*, page 147.

31. Article 12.2 of the CRC: "*For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law*".



## 1.2- THE RIGHTS OF THE CRC LINKED TO UNACCOMPANIED CHILDREN'S RECEPTION AND CARE

Throughout this section we will analyse those rights which are directly linked to the reception process and care of unaccompanied children as well as all other rights which are linked to care provision and related services.

The child's right to the special protection and assistance of the State where they are living is of key importance to unaccompanied children. The CRC accredits this to all children who are temporarily or permanently deprived from their family environment<sup>32</sup>. The Committee on the Rights of the Child interprets that all unaccompanied children living outside their country of origin are entitled to this right<sup>33</sup>.

The recognition of this right should involve in practice all unaccompanied children located in the territory of a State party of the Convention. They should immediately and unconditionally benefit from all care provisions and services provided to children in a similar situation of abandonment. As section 2 of article 20 stipulates, accordingly to their national legislation, all States shall provide alternative care (different from family care) for all children living in that situation.

This alternative care involves, as a first necessary step, the placement of the unaccompanied child in adequate accommodation. Section 3 of article 20 refers to different options of placement such as "foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children". The General Comment assesses that in the choice between these different options, competent authorities should bear in mind the child's age and gender as well as his/her situation of vulnerability (such as being deprived of his/her family entourage and living in a different country from his/her country of origin)<sup>34</sup>. Furthermore, the General Comment sets up different criteria that should be considered as, among others, avoiding deprivation of liberty and unjustified changes in residence (unless these are in the child's best interest), keeping siblings together, allowing the child to stay with other relatives living in the host country (after assessment of their capability to take the children in), supervising periodically the placement conditions and ensuring the child's access to educational and vocational skills and opportunities<sup>35</sup>. Our previous research experience has shown that these parameters are rarely respected in the European member States' practice.

With regard to the child's legal representation and legal assistance as well as the appointment of a guardian, we have to refer to article 18 section 2 of the CRC which urges State parties to provide assistance to parents and legal guardians to perform their responsibilities in bringing up their children<sup>36</sup>. To sum up, States shall support parents in their duties and, if parents are no longer able to do it, the concerned State shall step in to secure the child's rights and needs<sup>37</sup>.

The Committee on the Rights of the Child's interpretation on the joint application of articles 18.2 and 20.1 of the CRC states that as soon as the child has been identified as unaccompanied, a guardian or legal adviser should be appointed until the child becomes of age or leaves the territory of the host State<sup>38</sup>. According to the same source, guardians should be authorised to attend all proceedings where decisions concerning the unaccompanied child are to be taken, particularly those linked to the determination of a durable solution. The General Comment also underlines that those guardians or advisers whose interest could be in conflict with the child's interest should not be eligible<sup>39</sup>.

32. Article 20.1 of the CRC: "A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State".

33. Committee on the Rights of the Child (2005): General Comment n° 6 on the treatment of unaccompanied and separated children outside their country of origin, *op.cit.*, paragraph 39: "Unaccompanied or separated children are children temporarily or permanently deprived of their family environment and, as such, are beneficiaries of States' obligations under article 20 of the Convention and shall be entitled to special protection and assistance provided by the relevant State".

34. Committee on the Rights of the Child (2005): General Comment n° 6 on the treatment of unaccompanied and separated children outside their country of origin, *op.cit.*, paragraph 40.

35. *Ibidem*.

36. Article 18.2 of the CRC: "For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children".

37. See HODGKIN, R. & NEWELL, P. (2007), *op.cit.*, page 261.

38. Committee on the Rights of the Child (2005): General Comment n° 6 on the treatment of unaccompanied and separated children outside their country of origin, *op.cit.*, paragraph 33.

39. *Ibidem*.

Further to this, review mechanisms should be implemented in order to monitor the quality of the guardianship and that the best interest of the child is respected in all decisions<sup>40</sup>.

Relating to this, the Separated Children in Europe Programme's statement of good practice insists on the need of appointing a guardian immediately after an unaccompanied child is identified (even when an age-determination procedure is in process). Moreover, appointed guardians shall assume a number of responsibilities such as, amongst others, to ensure that all decisions are taken in the best interest of the child, that the child's views are considered, that the child receives adequate care, accommodation, education, health care, language support and legal advice and support for immigration and asylum proceedings. Appointed guardians shall also take into account the child's views in order to identify a durable solution in the child's best interest<sup>41</sup>.

With reference to the child's right to education, the Convention devotes two large articles (28 & 29) urging States parties to promote global education systems that all children can access- on the basis of equal opportunity- to the different educational levels. Primary education shall be compulsory and available free to all children. Secondary school- in different forms as general or vocational- should also be available, accessible and, if possible, free to every child. Higher education should be made accessible to all on the basis of capacity<sup>42</sup>. The General Comment confirms that every unaccompanied child shall have full access to education, irrespective of his/her immigration status<sup>43</sup>.

In addition, the Convention has foreseen possible differences of development between States parties when recognising and ensuring the implementation of the right to education for all children. To this extent, article 4 of the Convention calls upon States parties to undertake necessary measures to ensure the implementation of this right, amongst others<sup>44</sup>, "to the maximum extent of their available resources and, where needed, within the framework of international cooperation". Furthermore, article 28 section 3 of the Convention encourages States parties to promote international cooperation in matters of education taking into account the needs of developing countries. Clearly, considering the economic and social differences between the countries of origin where unaccompanied children come from and the European countries of destination, the better or worse opportunities to access to a quality educational system shall be one of the significant factors to evaluate and bear in mind when deciding which durable solution should be taken in the child's best interest.

Similarly with the right to education, and considering the existing differences between developed and developing countries, the Convention urges States parties to make every effort to ensure that every child can exercise his/her right to the enjoyment of the highest attainable standard of health and to the access to health care services<sup>45</sup>. Once again, the text of the Convention encourages international cooperation between State parties in order to achieve progressively the full realization of the right to health care<sup>46</sup>.

Further to this the General Comment indicates that State parties are obliged to provide to unaccompanied children under its jurisdiction an equivalent access to health care as to national children<sup>47</sup>. Moreover, the General Comment underlines that unaccompanied children have undergone particularly difficult situations (separation from family, traumatic migration routes, violence, abuse, etc.) which "calls for special sensitivity and attention in their care and rehabilitation"<sup>48</sup>.

Finally, article 27 of the Convention requires State parties to recognise the right of all children to

40. Committee on the Rights of the Child (2005): General Comment n° 6 on the treatment of unaccompanied and separated children outside their country of origin, *op.cit.*, paragraph 40.

41. Separated Children in Europe Programme (2009): "Statement of good practice- 4th revised edition", *op.cit.*, pages 21-22.

42. Article 28.1 of the CRC, paragraphs (a), (b) and (c).

43. Committee on the Rights of the Child (2005): General Comment n° 6 on the treatment of unaccompanied and separated children outside their country of origin, *op.cit.*, paragraph 41.

44. Article 4 of the CRC refers to economic, social and cultural rights.

45. Article 24.1 of the CRC: "States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services".

46. See Article 24.4 of the CRC.

47. Committee on the Rights of the Child (2005): General Comment n° 6 on the treatment of unaccompanied and separated children outside their country of origin, *op.cit.*, paragraph 46.

48. Committee on the Rights of the Child (2005): General Comment n° 6 on the treatment of unaccompanied and separated children outside their country of origin, *op.cit.*, paragraph 47.

an adequate standard of living for their physical, mental, spiritual, moral and social development<sup>49</sup>. While this duty concerns mainly the child's parents- within their abilities and financial capabilities-, State parties shall support parents in assuming this responsibility<sup>50</sup>. Concerning unaccompanied children, the General Comment transfers the parents' obligation to the host States and highlights the importance of ensuring adequate nutrition, clothing and accommodation<sup>51</sup>.

In terms of analysis, the Convention links narrowly the right to an adequate standard of living to one of its general principles namely, the child's right to development in its different dimensions. To a certain extent the child's development depends on his/her living conditions and, apart from basic needs such as food, clothing and a place to live, it is generally admitted that children have also other needs<sup>52</sup>. This is the reason why the unaccompanied child's entourage and living conditions- both in the context of origin and in the destination country- are important factors to evaluate when determining a durable solution to respond to his/her situation.

### 1.3- DURABLE SOLUTIONS

Within the previous sections we have highlighted several times the key importance of the process to identify the best durable solution to respond to all specific needs of protection and to the situation of an unaccompanied child who is temporarily or permanently deprived of his/her family entourage. The Committee on the Rights of the Child considers the establishment and implementation of a durable solution that respects the child's best interest as the ultimate objective of all actions, measures and regulations concerning the members of this group<sup>53</sup>.

The process to determine a durable solution shall start as soon as the unaccompanied child has been identified. The General Comment n° 6 does not provide precise information on the common sequence to be followed before determining a durable solution. Yet this same source estimates that the first step to be undertaken should be to trace the unaccompanied child's family in order to assess the possibility to proceed towards family reunification<sup>54</sup>.

For its part, the United Nations High Commissioner for Refugees (UNHCR) has established a clear link between the identification of a durable solution and a previous formal process of determination of the child's best interest. The UNHCR defines a BID- best interest determination- as a "formal process with strict procedural safeguards designed to determine the child's best interests for particularly important decisions affecting the child. It should facilitate adequate child participation without discrimination, involve decision-makers with relevant areas of expertise, and balance all relevant factors in order to assess the best option"<sup>55</sup>.

A BID process involves clear stages and actions. The UNHCR considers that starting a BID requires the appointment of a supervisor and establishing a panel of experts composed of 3 to 5 persons with a previous background on child protection issues. Whenever possible, the establishment of the panel should be done in cooperation with the child welfare competent authorities as well as other international organisations or NGO's familiar with the unaccompanied children migration.

Once the supervisor and the panel of experts have been formed, the next stage requires collecting all relevant information linked to the situation of the concerned unaccompanied child. This includes verifying existing documents providing information on the child and interviews with the child and, if possible, observation. Interviews with persons from the child's entourage (caregivers, extended family, friends, neighbours, teachers, etc.) should be made and information collected on the

49. Article 27.1 of the CRC : "*States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development*".

50. See articles 27.2 & 27.3 of the CRC

51. Committee on the Rights of the Child (2005): General Comment n° 6 on the treatment of unaccompanied and separated children outside their country of origin, *op.cit.*, paragraph 44.

52. See HODGKIN, R. & NEWELL, P. (2007), *op.cit.*, page 394, to find a similar argument.

53. Committee on the Rights of the Child (2005): General Comment n° 6 on the treatment of unaccompanied and separated children outside their country of origin, *op.cit.*, paragraph 79: "*The ultimate aim in addressing the fate of unaccompanied or separated children is to identify a durable solution that addresses all their protection needs, takes into account the child's view and, wherever possible, leads to overcoming the situation of a child being unaccompanied or separated*".

54. Committee on the Rights of the Child (2005): General Comment n° 6 on the treatment of unaccompanied and separated children outside their country of origin, *op.cit.*, paragraph 80.

55. See UNHCR- United Nations High Commissioner for Refugees (2008), *op.cit.*, page 8.



living and social conditions in the geographical locations (mainly the context of origin from where the children come from and the context where the unaccompanied child lives in the destination country), etc. Finally, a decision on the BID should be taken bearing in mind and balancing the full range of the child's rights and establishing which solution respects to a wider extent these rights. Of particular importance are the views of the child; the views of his/her parents and other concerned family members; the existence or not of a safe environment at the different possible locations; the importance of family reunification if this is a possible option; the opportunities of the child to exercise his/her rights, especially his/her possibilities of adequate development (access to health care, education, adequate standard of living, etc.) in the different possible locations<sup>56</sup>.

The General Comment suggests five possible durable solutions to the situation of an unaccompanied child: (1) family reunification in the country of origin, in the country of destination or in a third country; (2) the return of the child to his/her country of origin; (3) the child's integration into the host society; (4) the child's resettlement in a third country; (5) Inter-country adoption<sup>57</sup>. Considering their major relevance regarding the situation of unaccompanied children in the European context, our analysis will focus on solutions (1), (2) and (3).

### Family reunification

Family reunification in the country of origin, in the country of destination or in a third country is considered by the General Comment as the durable solution to be prioritised whenever possible to implement and if it is assessed to be in the child's best interest<sup>58</sup>. The legal basis is to be found in articles 9 and 10 of the Convention. Article 9 establishes the States parties' obligation to ensure that a child is not separated from his/her parents against his/her will unless this separation is in the child's best interest<sup>59</sup>. Article 10 urges State parties to facilitate entering or leaving their territories for family reunification purposes when a child and his/her parents are living in different countries<sup>60</sup>.

The Convention considers primarily that the child's best place to be is with his/her parents. Nevertheless it does not provide an absolute and unconditional identification between the notions of family life and the child's best interest. Moreover, article 9 of the Convention sets up a condition and an exception to the implementation of the principle of non-separation of the family.

The **condition** is the absence of will in the separation, which should have taken place against the child's and parents will. To a certain extent, the child's right to remain with his/her parents is subject to the parents' will to take in and care their child<sup>61</sup>.

The **exception** refers to those cases when the separation is implemented or maintained in the child's best interest. The text of the Convention refers to particular cases involving "abuse or neglect of the child by the parents".

When interpreting and applying these legal formulations to the situation of an unaccompanied child and more specifically when determining if a family reunification would be a durable solution in the child's best interest, (and apart from evaluating if the separation has taken place against the parents and the child's will) a primary and key factor to assess is the existence of consent in the family reunification. Considering that both the child's consent and the parents' consent are of great importance, we can invoke four different situations in this assessment:

56. All information in this paragraph about the BID procedure is fully detailed at UNHCR- United Nations High Commissioner for Refugees (2008), *op.cit.*, pages 47-76.

57. Committee on the Rights of the Child (2005): General Comment n° 6 on the treatment of unaccompanied and separated children outside their country of origin, *op.cit.*, paragraphs 79-94.

58. Committee on the Rights of the Child (2005): General Comment n° 6 on the treatment of unaccompanied and separated children outside their country of origin, *op.cit.*, paragraph 79.

59. Article 9.1 of the CRC: "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence".

60. Article 10.1 of the CRC.

61. This interpretation can be found at HODGKIN, R. & NEWELL, P. (2007), *op.cit.*, page 122: "The right of children to parental care is inevitably subject to the "will" of parents. Infants have no power or ability to choose their caregivers. They are dependent on their family, community and the State to make that choice for them. Moreover, even if young children were in a position to "choose" their parents, they could not force them to act as parents against their will. The State can seek to force parents to financially maintain their children, but it cannot compel parents to care for them appropriately".

When, regardless of the root causes of the migration, the child and his/her parents are willing to reunite again, we can consider that a decision on family reunification would always be in the child's best interest (except for those exceptional cases in which it may imply a serious risk to the child and/or his/her family).

When the child wishes to stay in the destination country but the family desires his return, it might initially appear that parents' parental authority should prevail. However, competent authorities must always verify that there is no risk of abuse, neglect or exploitation. Moreover, before taking a decision, these authorities should evaluate the balance between all educational and welfare facilities that the child can benefit from in the destination country with regard to those available at the country where the family reunification would take place.

When the child wishes to reunite, but his/her family refuses to take him/her in<sup>62</sup>, a decision on family reunification seems unlikely to be in the child's best interest. In spite of the weight to provide to the child's views considering his/her degree of maturity, we have to bear in mind that the parents' refusal to take in their child could be considered as a form of neglect and could potentially involve a risk of abuse. Once again, before taking a decision on family reunification, involved State parties should carefully evaluate all potential associated risks to the child as well as his/her development opportunities in both the host country and the country of origin.

Finally we can consider the case when both the child and his/her family are against family reunification. Our interpretation is that a decision on forced family reunification cannot be taken in the child's best interest nor invoke the Convention as article 9.1 authorises consented family separation.

Insisting on these arguments, the Separated Children in Europe Programme estimates that, prior to a decision on family reunification, an assessment has to be made on the ability and the willingness of the family to receive the children. Furthermore, when parents have invested in sending their child abroad, this may have a negative impact on how the child is perceived upon return<sup>63</sup>. In any case, according to this source, it should be an independent judicial authority which takes the final decision after due consideration of all relevant factors. From its side, the General Comment n° 6 establishes that only the best interest of the child can be an obstacle to implement family reunification. To be precise, the existence of a reasonable risk that family reunification would lead to violation of human rights of the child provokes that such solution would not be in the best interest of the child<sup>64</sup>.

### ***Return to the country of origin (without family reunification)***

According to the Committee on the Rights of the Child, when the return of an unaccompanied child to his/her country of origin does not imply family reunification purposes, it cannot be assessed to be an adequate durable solution unless it is in the child's best interest. The General Comment sets up a series of criteria to be considered before determining this option as the best possible durable solution. These include: the safety, social and economic conditions awaiting the child upon return; the existence of care arrangements available for the child; the views of the child; the child's degree of integration into the host country society; the child's right to preserve his/her identity (article 8 of the CRC); the convenience of providing continuity to the child's upbringing and integration into his/her previous cultural and ethnic background<sup>65</sup>. This type of durable solution should not be an option when a reasonable risk exists that would lead to a violation of the child's fundamental rights<sup>66</sup>. Nevertheless, The General Comment insists on the fact that a decision on return should never be taken based on arguments related to migration control<sup>67</sup>.

From our point of view, a return of an unaccompanied child where there are no family reunification

62. This situation can occur when families have spent their savings on a child's migration and, unaware of his uprooted situation in the destination country, they are reluctant to relinquish such an investment.

63. See (2004): «*Save the Children and The Separated Children in Europe Programme Position Paper on: Returns and Separated Children*», Separated Children in Europe Programme- Save the Children & UNHCR, page 6.

64. Committee on the Rights of the Child (2005): General Comment n° 6 on the treatment of unaccompanied and separated children outside their country of origin, *op.cit.*, paragraphs 81-82.

65. Committee on the Rights of the Child (2005): General Comment n° 6 on the treatment of unaccompanied and separated children outside their country of origin, *op.cit.*, paragraph 84.

66. *Ibidem*.

67. Committee on the Rights of the Child (2005): General Comment n° 6 on the treatment of unaccompanied and separated children outside their country of origin, *op.cit.*, paragraph 86.

purposes should involve the child's consent in all cases. In other words, it should be voluntary return and not forced. As the Separated Children in Europe Programme underlines, forced return is unlikely to lead to a durable solution as an unaccompanied child who does not want to return back home will seek to migrate again and will remain unaccompanied<sup>68</sup>.

Further to these considerations, from a legal analysis, the unique possible reason to justify the implementation of a forced return of an unaccompanied child is that the child's development opportunities in his/her context of origin are significantly better than those existing in the host society. In other words, once the return has been implemented and the child been placed at an adequate child welfare facility at the country of origin, he/she should have better opportunities to access to education, health care and an adequate standard of living compared to existing equivalent options in the country of destination. Only in this unlikely case (otherwise the reasons to migrate are hardly understandable), a decision on forced return could be considered to be in the child's best interest. This argument does not take into consideration the fact that the care that is proposed to the unaccompanied child in the country of destination is not adequate nor adapted to his/her specific needs leading him to abandon or refuse institutional protection and thence become uprooted. Thus, this situation itself shall never justify a decision on forced return.

### ***Integration into the host society***

The unaccompanied child's integration into the host country where he/she is living is considered to be a subsidiary solution by the Committee on the Rights of the Children. According to General Comment n° 6, as long as return to the country of origin is not possible for factual or legal reasons, integration into the host country becomes the preferred option<sup>69</sup>.

As it has been previously pointed out, following the UNHCR recommendations, the identification of a durable solution involves a formal determination of the child's best interest, evaluating all concurrent circumstances and balancing the child's access to fundamental rights both in the context of origin and the country of destination. We cannot consider as adequate the General Comment's approach in this point as it seems to establish a range of priorities in the different possible durable solutions which would be based on the possibility or not, to implement a return to the country of origin.

Our critical view is consolidated when the General Comment underlines that "once it has been determined that a separated or unaccompanied child will remain in the community, the relevant authorities should conduct an assessment of the child's situation and then, in consultation with the child and his or her guardian, determine the appropriate long-term arrangements within the local community and other necessary measures to facilitate such integration"<sup>70</sup>. We insist on, as the UNHCR also does, that identifying a durable solution involves a previous holistic assessment on the child's protection needs and situation. This assessment should not be done only when it has been decided that a return to the child's country of origin will no longer take place, as the General Comment advocates. Moreover, the Separated Children in Europe Programme considers that the unaccompanied child's degree of integration into the host society (considering the duration of his/her stay, his/her knowledge of the language, his/her scholar results, his/her personal ties) also constitutes a significant factor to bear in mind when determining a durable solution<sup>71</sup>.

Finally, the option of the unaccompanied child's integration into the host society shall involve his/her access to a durable immigration status that should be consolidated when the child becomes of age<sup>72</sup>. Up to this date, most European Union Member States do not follow this recommendation.

68. (2004): «*Save the Children and The Separated Children in Europe Programme Position Paper on: Returns and Separated Children*», *op.cit.*, page 8.

69. Committee on the Rights of the Child (2005): General Comment n° 6 on the treatment of unaccompanied and separated children outside their country of origin, *op.cit.*, paragraph 89.

70. Committee on the Rights of the Child (2005): General Comment n° 6 on the treatment of unaccompanied and separated children outside their country of origin, *op.cit.*, paragraph 90.

71. (2004): «*Save the Children and The Separated Children in Europe Programme Position Paper on: Returns and Separated Children*», *op.cit.*, pages 9-10.

72. Committee on the Rights of the Child (2005): General Comment n° 6 on the treatment of unaccompanied and separated children outside their country of origin, *op.cit.*, paragraph 89.

## 1.4- OTHER CRC RIGHTS AND CONTENTS RELEVANT TO THE SITUATION OF UNACCOMPANIED CHILDREN.

In this closing section of the chapter devoted to the rights of the child within the scope of the United Nations, we will briefly analyse other rights or contents of the Convention which are of significance in shaping the status and treatment of unaccompanied children living outside their country of origin. These are: the unaccompanied child's access to labour and the implementation of measures involving deprivation of children's liberty.

### *The unaccompanied child's access to employment*

Nowadays, access to regular labour constitutes a key factor of inclusion into modern societies, particularly in Western countries. Unaccompanied children living outside their country of origin are no exception. Regardless of the root causes of their migration, integration into the labour market in the middle or the long term constitutes a common objective to most children migrating on their own. What's more, making money constitutes a crucial and immediate objective of many unaccompanied children abandoning their country of origin for economical reasons and presenting motivations to migrate and expectations that do not essentially differ from other adult migrant workers. Despite this, general restrictions set up by International Law to prevent and protect children from certain forms of labour as well as certain States' regulations prioritising national workers make unaccompanied children's access to regular work difficult and provoke a number of them to search income through informal labour or other illegal activities.

The United Nations Convention does not recognise the child's right to employment but establishing rules to avoid or limit his/her economic exploitation and their implication in any work susceptible to be hazardous or harmful for the child's development. To this purpose, State parties are obliged to adopt legislative, administrative, social and educational measures in order to protect children from such exploitation. More specifically, the Convention urges States to establish a minimum age for admission to employment and appropriate regulation of children's working conditions as well as a system of sanctions to enforce these measures<sup>73</sup>.

These international rules to limit and regulate children access to employment are of course a very positive input. Nevertheless, as Touzenis and Farrugia point out, we should also consider that acceptance of migrant children working should not necessarily lead to their abuse or exploitation<sup>74</sup>. As mentioned above, many children migrating on their own to Europe seek to find employment as they had often assumed a previous active role in their country of origin and constituted an important source of income for their family. As a consequence, State parties shall promote and facilitate unaccompanied children's access to work respecting the conditions (minimum age, work conditions, etc.) set up by the Convention and by other relevant international legal instruments. This will help to avoid or at least limit- the increasing enrolment of unaccompanied children in informal work and/ or their involvement in criminal or marginal activities.

\* \* \*

### *Deprivation of liberty*

While the Convention does not formally prohibit deprivation of liberty of an under age person, it does set up a list of conditions and restrictions to be respected when such a measure is taken. Specifically, the text proscribes the child's subjection to torture or other inhuman or degrading treatment or punishment; to capital punishment or life imprisonment<sup>75</sup>.

When a State party decides to deprive a child of liberty- in other cases than those proscribed- it

<sup>73</sup> Article 32 of the CRC. The contents of this article are similar to those seen at the International Covenant on Economic, Social and Cultural Rights of 16 of December of 1966. We should also highlight here the importance of the International Labour Organization Conventions n° 138 concerning minimum age for admission to employment (1973) & n° 182 on worst forms of child labour (1990)

<sup>74</sup> TOUZENIS, K. and FARRUGIA, R. (2010): «The international protection of unaccompanied and separated migrant and asylum seeking children in Europe» in D. SENOVILLA HERNANDEZ, K. TOUZENIS and J. KANICS «Migrating alone: unaccompanied and separated children's migration to Europe», Éditions UNESCO, Paris, page 33.

<sup>75</sup> Article 37 (a) of the CRC.

is obliged to respect a list of additional obligations or conditions<sup>76</sup>:

- The impossibility of implementing other alternative measures to deprivation of liberty (as it is considered as a last resort measure).
- The application of deprivation of liberty for the shortest appropriate period of time.
- The obligation of treating the child with humanity and respect for his/her dignity.
- The obligation of treating the child taking into account his/her needs in relation to his/her age.
- The obligation to separate the child from adults (unless it is considered in his/her best interest not to do so).
- The recognition of the child's right to be in contact with his/her family whenever possible.
- The recognition of the child's right to legal and other appropriate assistance.
- The recognition of the child's right to appeal against the legality of his/her deprivation of liberty before a Court or other competent and independent authority as well as the obtention of a prompt resolution to this demand.

Most European Union Member States apply to unaccompanied children a double legal status considering them simultaneously as, on the one hand, children deprived from their family environment and, on the other hand, asylum seekers or even irregular migrants. Those States implementing their asylum or immigration legislations that do practice detention or administrative retention of unaccompanied children trying to enter their territory are clearly prioritising the child treatment as a migrant or a potential asylum seeker, instead of a children deprived of his/her family assistance. It seems clear to us that this practice of depriving migrant children of their liberty violates the above-mentioned Convention. Namely, requirement of implementing deprivation of liberty as a last resort measure and for the shortest period possible.

According to the Committee on the Rights of the Child, State parties to the Convention should not detain unaccompanied children for refoulement purposes solely on the basis of their status with regard to immigration and/or asylum regulations. In this sense, the General Comment underlines that when deprivation of liberty is justified for other reasons, "it shall be conducted in accordance with article 37 (b) of the CRC"<sup>77</sup>.

In summary, the analysis of the Convention on the Rights of the Child by different relevant international institutions (Committee on the Rights of the Child, UNHCR, UNICEF, etc.) and our own analysis show that, unless a detention is justified for reasons other than those linked with immigration and asylum regulations, unaccompanied children should never be detained when they are trying to access the territory of a European Member State. As a consequence, they should be immediately assisted and cared for as children deprived of their family entourage. All this, as a previous and necessary step to start a process to determine their best interest in order to identify which durable solution better responds to their needs for protection and to their development.

<sup>76</sup> Article 37 (b), (d), and (e) of the CRC.

<sup>77</sup> Committee on the Rights of the Child (2005): General Comment n° 6 on the treatment of unaccompanied and separated children outside their country of origin, *op.cit.*, paragraph 61.





# CHAPTER 2

## CHAPTER 2- 'UNACCOMPANIED MINORS' WITHIN THE EUROPEAN UNION LEGISLATIVE FRAMEWORK

CÉLINE LAGEOT & DANIEL SENOVILLA HERNÁNDEZ

European rules referring to unaccompanied minors are rare. Although some EU action has been taken in specific policy areas, such as child sexual exploitation, this is undermined by the fact that the legal bases in the EU treaties for action in relation to children are relatively limited. A specific reference is provided by the 1997 Amsterdam Treaty but this only covers offences against children<sup>1</sup>. The EU's approach is based on the 1997 Council Resolution on Unaccompanied Minors and on the EU Charter of Fundamental Rights (2000). Recent years have seen growing interest in the development of a clear legal basis for children's rights within the EU treaties. While article 24<sup>2</sup> of the EU Charter of Fundamental Rights represents a considerable step forward it is weaker in several respects than the text of the United Nations Convention on the Rights of the Child.

All these rules stand in the general frame of the EU competences based on asylum and immigration. Current EU legislation focuses less on prevention and exploitation and more on security and prevention of irregular migration. They do not bring enough guarantees to the minors, who are treated like foreigners whereas they should be treated, in the first instance, as children. They are also an inadequate reflection of the principles of the United Nations Convention on the Rights of the Child. For instance, EU legislation does not sufficiently incorporate the principle of the "best interests" of the child. On top of this, the dispersion of all of the European measures is an obstacle to good legibility and efficient application. Whenever there is a reference to the principle of the child's best interest, it often stands alone with no guidelines on how to implement it. It is too vague and left to the Member States' discretion as to how to apply it.

### 2.1- THE EU COUNCIL RESOLUTION 97/C OF 26 JUNE 1997 ON UNACCOMPANIED MINORS WHO ARE NATIONALS OF THIRD COUNTRIES

In relation to unaccompanied children in particular, there has only been one EU text that has wholly concentrated on issues concerning them: the EU Council Resolution 97/C 221/03. Although it has no legally binding force, the Resolution is seen as an influential reference point for the development of subsequent EU legislation as part of the Common European Asylum System. This Resolution defines the general frame concerning the treatment, which should be applied to unaccompanied minors, especially the reception, the stay and the return, as well as the asylum proceedings. This Resolution

1. Article 29 (former article K1) of the Treaty of Amsterdam amending the Treaty on European Union, The Treaties establishing the European Communities and certain related Acts.

2. Article 24 of the Charter of Fundamental Rights of the European Union: "The rights of the child: 1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration"

shows, generally speaking, preoccupations of control of migratory flux. It concentrates on measures set up to prevent irregular entry of unaccompanied minors or to organise their returns. However, it recognizes the extreme vulnerability of these children who should have access to protection and to basic care. Legal representation is recommended as well as the appointment of a guardian. Access to scholarship should be organised and minimum guarantees set up for asylum proceedings. States are invited to take any useful measure to prevent and purchase the trade and the exploitation of unaccompanied minors.

The Resolution also establishes that Member States may, in accordance with their national legislation and practice, refuse admission at their frontier to unaccompanied minors, in particular if they are without the required documentation and authorizations<sup>3</sup>. Member States should take appropriate measures, in accordance with their national legislation, to prevent the unauthorized entry of unaccompanied minors and should cooperate to prevent illegal entry to- and illegal residence of unaccompanied minors on their territory<sup>4</sup>. This demonstrates fairly clearly the focus of European migration legislation on illegal entrance and illegal residence. It is in conformity with the principle, already emphasized, that States have a right to determine who they want on their territory and who they do not want. It is contrary to the spirit of protection granted to all children in the United Nations Convention on the Rights of the Child, as it requires unaccompanied minors to be allowed into the territory and granted at least temporary protection until a permanent solution can be found, even if that may include return.

The Resolution establishes that children are entitled to the necessary protection and basic care, irrespective of their irregular or regular status<sup>5</sup>. Minimum guarantees are established for all unaccompanied minors (article 3) and Member States should provide as soon as possible the necessary representation of the minor by legal guardianship or representation by a (national) organization which is responsible for the care and well-being of the minor, or other appropriate representation<sup>6</sup>. This should be read as an opening up of the procedure to non-governmental representatives, which can be an external guarantee that minor's rights are effectively protected in the period pending a decision and that the child's best interests are at all times taken into consideration. "*Other appropriate representation*"<sup>7</sup> is an unfortunate phrase however, as only a legal guardian - or at least a legal adviser - can properly represent a minor. Where a guardian is appointed for an unaccompanied minor, the guardian should ensure, in accordance with national law, that the minor's needs are duly met<sup>8</sup>. Furthermore, unaccompanied minors should receive appropriate medical treatment to meet their immediate needs.

The standards set out in the Resolution are relatively weak overall. While the Resolution represents an important political commitment by Member States to recognizing the rights of unaccompanied minors, it has also to some extent undermined the practical implementation of high-quality standards. For instance, it indicates that states may refuse unaccompanied minors (also referred to as separated children) permission to enter EU territory without authorized documentation, whereas the 1997 United Nations High Commissioner for Refugees (UNHCR) Guidelines argue the contrary, recognizing that identity papers may have been lost, forged or destroyed, or may never have existed at all<sup>9</sup>.

Similarly, the UNHCR Guidelines state that it is particularly important that children seeking asylum (and especially separated children) are not kept in detention<sup>10</sup>, in accordance with article 37 of the Convention on the Rights of the Child. But the Resolution makes no such commitment and

3. Article 2.1 of the European Union Resolution of 26 June 1997 on unaccompanied minors who are nationals of third countries.

4. Article 2.2 of the European Union Resolution of 26 June 1997 on unaccompanied minors who are nationals of third countries.

5. Article 3.2 of the European Union Resolution of 26 June 1997 on unaccompanied minors who are nationals of third countries.

6. Article 3.4 of the European Union Resolution of 26 June 1997 on unaccompanied minors who are nationals of third countries.

7. Article 3.4 paragraph c) of the European Union Resolution of 26 June 1997 on unaccompanied minors who are nationals of third countries.

8. Article 3.5 of the Council of the European Union Resolution of 26 June 1997 on unaccompanied minors who are nationals of third countries.

9. UN High Commissioner for Refugees, Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, February 1997, paragraph 4.1.

10. UN High Commissioner for Refugees, Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, February 1997, paragraph 7.6.



whereas it correctly identifies the need for unaccompanied minors to be represented as soon as possible after arrival, the method and specific responsibilities is left to individual Member States.

## 2.2- EU DIRECTIVES ON ASYLUM AND IMMIGRATION

As all adults, unaccompanied minors are protected in the EU under the Geneva Convention on refugees 1951<sup>11</sup>. EU legislation has been adopted to adapt if not incorporate the universal principles in the different Directives: the Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the *reception* of asylum seekers (*the Reception Directive*); the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the *qualification* and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (*the Qualification Directive*); the Council Directive 2005/85/EC of 1 December 2005 on *minimum standards on procedures* in Member States for granting and withdrawing refugee status (*the Procedures Directive*). Finally, we will examine the contents of the controversial Council Directive 2008/115/EC of 26 December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals (*The Return Directive*).

### ***The Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (the Reception Directive)***

In 2003, the European Commission introduced a Directive laying down the minimum standards for the reception of asylum seekers in the EU. Unaccompanied minors are defined as “persons below the age of eighteen who arrive in the territory of the Member States unaccompanied by an adult responsible for them whether by law or by custom, and for as long as they are not effectively taken into the care of such a person; it shall include minors who are left unaccompanied after they have entered the territory of Member States”<sup>12</sup>.

The Directive includes provisions for children and unaccompanied minors where the best interests of the child are upheld and may be particularly relevant for young unaccompanied minor asylum seekers who have not had a decision while they are under 18. The Directive also sets out the specific measures necessary for housing, family tracing and representation of unaccompanied minors.

The Directive also sets out obligations for the schooling and education of minors<sup>13</sup>. Member States shall grant to minor children of asylum seekers and to asylum seekers who are minors, access to the education system under similar conditions as nationals of the host Member State.

Minors are specifically dealt with under article 18.1, which states that the best interests of the child “shall be a primary consideration for Member States when implementing the provisions of this Directive that involve minors”.

The Directive requires Member States “as soon as possible to take measures to ensure the necessary representation of unaccompanied minors by legal guardianship or, where necessary, representation of unaccompanied minors by an organisation which is responsible for the care and well-being of minors, or by any other appropriate representation (...)”<sup>14</sup>.

Member States may place unaccompanied minors aged 16 or over in accommodation centres for adult asylum seekers although, as far as possible, siblings shall be kept together, taking into account the best interests of the minor concerned and, in particular, his or her age and degree of maturity.

Those working with unaccompanied minors are expected to have had or receive appropriate training concerning their needs, and shall be bound by the confidentiality principle as defined in the national law, in relation to any information they obtain in the course of their work<sup>15</sup>.

### ***The Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the***

11. 1951 United Nations Convention relating to the Status of Refugees.

12. Article 2 (h) of the Council Directive 2003/9/EC of 27 January 2003.

13. Article 10 of the Council Directive 2003/9/EC of 27 January 2003.

14. Article 19.1 of the Council Directive 2003/9/EC of 27 January 2003.

15. Article 19.4 of the Council Directive 2003/9/EC of 27 January 2003.

### ***protection granted (the Qualification Directive)***

According to the Directive, “*The best interest of the child shall be a primary consideration for Member States when implementing the provisions of this Chapter that involves minors*”<sup>16</sup>.

In terms of education, the Directive ensures that Member States shall grant full access to the education system to all minors granted refugee or subsidiary protection status, under the same conditions as nationals<sup>17</sup>. This is in contradiction with international obligations under the Convention on the Rights of the Child as all minors ought to be given access to at least compulsory education<sup>18</sup>.

The Directive imposes a duty to ensure the representation of unaccompanied minors by legal guardianship or, where necessary, by an organization responsible for the care and well-being of minors, or by any other appropriate representation including that based on legislation or Court order<sup>19</sup>. This article repeats the same formulation that we have previously seen in article 19 of the Directive of 27 January 2003. However, the Qualification Directive decrees that the appointment of a guardian will only take place after the child has been granted refugee status or subsidiary protection. This provision contradicts the recommendation set up by the Committee on the Rights of the Child urging States to appoint a guardian as soon as an unaccompanied child has been identified<sup>20</sup>.

The Directive also requires that the Member State protects and acts in the best interests of the child, as far as possible keeping siblings together and tracing close relatives of a child as soon as possible. There is also a positive duty of Member States to ensure that unaccompanied minors are placed either with adult relatives, or with a foster family, or in centres specialised in accommodation for minors, or in other accommodation suitable for minors<sup>21</sup>.

### ***The Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (the Procedures Directive)***

It took more than five years to adopt this Directive and, finally, the guarantees granted with time to the asylum seekers were merely reduced. This Directive establishes minimal rules concerning the granting and the withdrawal of refugee status or subsidiary protection. A large discretionary power is left to Member States, which constitutes a limit to a good harmonisation of practices.

According to the Directive, Member States are expected to “lay down” specific procedural guarantees for unaccompanied minors on account of their vulnerability. In this context, the best interests of the child should be a primary consideration of Member States.

The Directive provides guarantees for unaccompanied minors, declaring that with respect to all procedures, Member States shall as soon as possible take measures to ensure that a representative is appointed to represent and/or assist the unaccompanied minor with respect to the examination of the application<sup>22</sup>. The State is also expected to ensure that the representative is given the opportunity to inform the unaccompanied minor about the meaning and possible consequences of the personal interview and, where appropriate, how to prepare for it. The representative shall be allowed to be present at that interview and to ask questions or make comments<sup>23</sup>.

### ***The Directive of the European Parliament and of the Council 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals (the Return Directive)***

This Directive, which has been largely criticised states that children and families must not be subject to coercive measures and can only be held in custody as a last resort. Unaccompanied minors may only be deported if they can be returned to their family or to “adequate reception facilities” in the State to which they are sent. According to the Directive, Member States shall take due account

16. Article 20.5 of the Council Directive 2004/83/EC of 29 April 2004.

17. Article 27.1 of the Council Directive 2004/83/EC of 29 April 2004.

18. See chapter 1 for further details.

19. Article 30 of the Council Directive 2004/83/EC of 29 April 2004.

20. Committee on the Rights of the Child (2005): General Comment n° 6 on the treatment of unaccompanied and separated children outside their country of origin, paragraph 33.

21. Article 30 of the Council Directive 2004/83/EC of 29 April 2004.

22. Article 15 of the Council Directive 2005/85/EC of 1 December 2005.

23. Article 17.1 of the Council Directive 2005/85/EC of 1 December 2005.

of : (a) the best interest of the child ; (b) family life ; (c) the state of health of the third country national concerned ; and shall also respect the principle of non-*refoulement*. The text also states that Member States “shall also take into account of the best interests of the child in accordance with the 1989 UN Convention on the Rights of the Child”<sup>24</sup>.

The Return Directive prohibits the removal of an unaccompanied minor as long as there is no assurance that he or she can be handed over at the point of departure or upon arrival to a family member, an equivalent representative, a guardian of the minor or a competent official of the country of return<sup>25</sup>. Nevertheless, this rule means that deportation of children is legalised even if implementation is subject to certain conditions.

The Directive also confirms that children are to be allocated suitable residential facilities and shall only be detained “as a measure of last resort and for the shortest appropriate period of time”<sup>26</sup>. A number of advocacy organisations have strongly criticised this measure as it is felt that families with children and unaccompanied children may be detained as a measure of last resort even if for the shortest possible period.

Finally, another great concern is that the Directive permits Member States to deny all these safeguards to unaccompanied children who have arrived in the EU via irregular routes and indeed have sometimes been trafficked into the EU without regular documents.

### 2.3- The European Commission Action Plan (2010-2014) on unaccompanied children

As a complement to the analysis by Céline Lageot on the European Union legislation concerning unaccompanied children, the European Commission has released in May 2010 an Action Plan (2010-2014) on unaccompanied minors. This document, a Communication from the European Commission (hereafter EC or the Commission) to the European Council and the European Parliament, constitutes a first attempt to set up a global strategy on the treatment of this particular category of migrants and /or asylum seekers. The Action Plan foresees implementing measures on prevention of unsafe migration of children simultaneously to others based on the reception and care of unaccompanied children in the countries of reception. In this section we will proceed to briefly analyse the contents of this communitarian text which is not legally binding.

Within an introduction section, the European Commission, amongst others, invokes the contents of the United Nations Convention on the Rights of the Child that should be placed “at the heart of any action concerning unaccompanied minors”<sup>27</sup>. Moreover, the Commission advocates for a common EU approach on this issue that should be based on the respect of the rights of the child, in particular the principle of best interest of the child, “which must be the primary consideration in all actions related to children taken by public authorities”<sup>28</sup>. That said, the Action Plan contains different sections and sets up three main axes of action: the prevention of this particular migration; regional protection programmes and the reception and identification of durable solutions. Our analysis will focus on preventive actions and the conditions of reception of unaccompanied children as well as the identification of a durable solution.

#### **Prevention**

The Action Plan estimates that “prevention of unsafe migration and trafficking of children is the first step for effectively tackling the issue of unaccompanied children”<sup>29</sup>. Four elements of action are suggested at this level: the first advocates on the necessity of linking migration of unaccompanied children with cooperation programmes. This will allow children “to grow up in their countries of origin with good prospects of personal development and decent standards of living”. However, this objective seems unrealistic to implement in practice: creating real prospects of development for

24. Article 5 of the Directive of the European Parliament and of the Council 2008/115/EC of 16 December 2008.

25. Article 10 of the Directive of the European Parliament and of the Council 2008/115/EC of 16 December 2008.

26. Article 17 of the Directive of the European Parliament and of the Council 2008/115/EC of 16 December 2008.

27. European Commission (2010): Action Plan (2010-2014) on unaccompanied minors of May 6th 2010, Communication from the Commission to the European Parliament and the Council, SEC(2010)534, page 2.

28. European Commission (2010): Action Plan (2010-2014) on unaccompanied minors of May 6th 2010, op.cit., page 3.

29. European Commission (2010): Action Plan (2010-2014) on unaccompanied minors of May 6th 2010, op.cit., page 6.

children in their contexts of origin would involve not only a review of current cooperation policies from European countries but also limiting actual unbalance between Northern and Southern countries with respect to all political and commercial exchanges. Within the current geopolitical context it seems unlikely that European Union and Member States would be ready to take this step.

The second and third elements are devoted to children and their entourage. The European Commission aims to develop awareness campaigns and training activities in the countries of origin in order to identify potential victims of trafficking and informing children and families of risks associated with irregular migration. Furthermore, the Action Plan seeks to promote the development of child protection services and specific actions related to unaccompanied children still in the countries of origin.

These kinds of prevention and awareness actions has previously been implemented in different countries of origin of unaccompanied migrant children, such as Morocco, whether being financed by the European Union institutions or not<sup>30</sup>. Yet, according to consulted experts, results of these actions and programmes are fairly limited. If a positive input could be observed in the reality of some of the targeted children, we would have to bear in mind that the foremost aim of these actions is preventing children's migration. Moreover, the will have to transfer European child protection models of action to a different context where children have different protection needs and where there is a general lack of trained professionals. These are factors likely to have limited effectiveness in the prevention actions aimed at the EC Action Plan.

### ***Reception conditions***

The fourth section of the EC's Action Plan is devoted to the reception conditions and the procedural guarantees to be applied to unaccompanied children who are located at an external border or inside the territory of a European Union Member State. At this point, the EC admits the existence of potential gaps in the applicable community legislation as well as the need to adopt a more protective legislation.

With regard to the appointment of a representative to assist unaccompanied children who are located by authorities of a Member State, the European Union legislation does not systematically provide this representation. If we examine the EU Directives on asylum, the Reception Directive of 27<sup>th</sup> of January 2003 urges Member States to ensure the necessary representation (through guardianship or other adequate forms) of those unaccompanied children who have asked for asylum<sup>31</sup>. Yet, the Qualification Directive of 29 of April 2004<sup>32</sup> seems to make the appointment of a guardian or a representative conditional to the fact that the children are granted refugee status or other kinds of protection. Moreover, as the Action Plan points out, EU legislation does not clearly define the tasks, the qualification and the role of representatives.

The Action Plan also makes a brief reference to the accommodation conditions of unaccompanied children, providing that they *"should always be placed in appropriate accommodation and treated in a manner that is fully compatible with their best interest"*<sup>33</sup>.

### ***Identification of a durable solution***

The last section of the Action Plan is devoted to the identification of durable solutions to respond to the situation of unaccompanied children living in a European Union Member State. The solution decision should be taken after an individual assessment of that which is in the child in question's best interest.

The Action Plan highlights three possible durable solutions: the return and reintegration to the

30. Two examples are the SALEM project « Solidarité avec les enfants du Maroc » implemented by the IOM and the project "Pourquoi je veux immigrer ?" implemented by the local association Tanmia. See [www.tanmia.ma/emigrer&www.un.org.ma/IMG/pdf/OIM\\_5\\_fr.pdf](http://www.tanmia.ma/emigrer&www.un.org.ma/IMG/pdf/OIM_5_fr.pdf)

31. Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, article 19.

32. Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country national or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, article 30.

33. European Commission (2010): Action Plan (2010-2014) on unaccompanied minors of May 6th 2010, *op.cit.*, page 9.

country of origin; the granting of an immigration or international protection status allowing the child to integrate in the Member State of residence; resettlement in a third country. Our analysis will focus on the two solutions concerning most of the unaccompanied children living in the European space (return to the country of origin and integration into the host country).

- Concerning return, the Action Plan seems to set up a preference for this solution considering that “*in many cases the best interest of the child is to be reunited with his/her family and to grow up in his/her own social and cultural environment*”<sup>34</sup>. The Action Plan also points out that return is one of the possible solutions and that the best interest of the child is the primary consideration when determining which solution is to be taken, preferably voluntary return. Further to this, the Action Plan makes reference to the Return Directive of 16 of December 2008<sup>35</sup>, most specifically to its article 10 concerning return and removal of unaccompanied children, and specifies that all measures in application of this Directive are susceptible to being financed under the framework of the European Return Fund.
- From our point of view, the European Commission’s tacit estimation on return of unaccompanied children as the preferred durable solution in the child’s best interest lacks consistency. The existing statistics and surveys show that return policies (particularly forced return policies) have been to date ineffective both from a quantitative perspective (the number of returned unaccompanied children is extremely weak if we compare it with the number of those received<sup>36</sup>) and from a qualitative one. In this last sense, regardless of the probable violation of the child’s rights that a majority of forced return procedures involve<sup>37</sup>, it is a fact that a significant percentage of returned children relapse after a while into a new migration process<sup>38</sup>.

Apart from asylum cases, the EC delegates on national legislation the granting of a durable legal status with regard to immigration regulations to those unaccompanied children “*who cannot be returned*”<sup>39</sup>. This provision reinforces our interpretation on a return to the country of origin as the Action Plan’s preferred solution. Besides, the text of the document does not include any provision on the key question of consolidating the granted legal status once an unaccompanied child becomes of age.

In conclusion, the European Commission’s Action Plan on unaccompanied minors constitutes a first attempt of European Union institutions to build up a global and comprehensive policy and legal treatment to deal with the migration of unaccompanied children. Previous EU legislation (asylum and immigration Directives) forgets key aspects on the unaccompanied children’s treatment such as the entry and first reception conditions, as well as establishing a formal process of best interest determination in order to identify the best durable solution responding to the specific needs of every unaccompanied child. We can highlight some positive inputs of the Action Plan such as recognising the gaps and limitations of previous legislation; recommending a harmonisation on data production and introducing for the first time the notion of durable solution linked to the child’s best interests.

However, any possible step forward is blocked and conditioned by the management and control of migratory flows that European Member States still consider the first priority. This is particularly clear when we examine the European Union Council Conclusions of 3<sup>rd</sup> of June 2010 that recall “*that the Stockholm Programme calls to practical measures to facilitate the return of the high number of unaccompanied minors who do not require international protection, while recognising that the best interest for many of them may be their reunion with their families and development in their own social and cultural environment*”<sup>40</sup>.

Summing up, the European Union still insists on return as the preferred solution to respond to the migration of unaccompanied children and justifies this choice on the identification of the right to family reunification and the child’s best interest. This identification omits an assessment of other rights that are susceptible to be jeopardized in the children’s contexts of origin (social rights, right to development, right to an adequate standard of living) and can lead unaccompanied migrant children refusing institutional care in the European context and therefore becoming unprotected.

34. European Commission (2010): Action Plan (2010-2014) on unaccompanied minors of May 6th 2010, *op.cit.*, page 12.

35. Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals

36. If we consider the existing statistics in Italy and Spain which are the two main European Member States that have implemented- so far- a policy of forced returns, we will find that during 2008 Spain implemented 10 returns of unaccompanied children (for more than 3.000 new receptions) and Italy only 2 (for around 8.000 registered unaccompanied children).

37. See chapter 1 for more details.

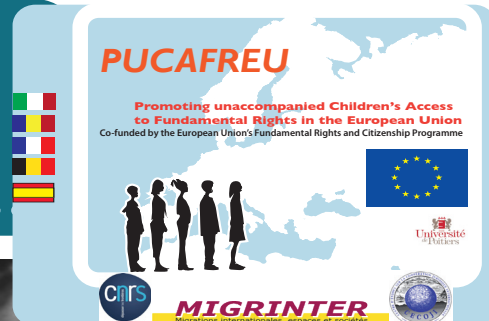
38. See (2001): “*I minori albanesi non accompagnati. Una ricerca coordinate fra Italia e Albania*”, Servizio Sociale Internazionale, sezione italiana e Istituto Psicoanalitico per la Ricerche Sociali. For similar findings see also BIGOT, R. & LEGAUX, J.P. (2009): “*Retours au pays de mineurs isolés roumains... avant un nouveau départ?*”, Hors la Rue, 32 pages.

39. European Commission (2010): Action Plan (2010-2014) on unaccompanied minors of May 6th 2010, *op.cit.*, page 14.

40. Council of the European Union: Council conclusions on unaccompanied minors, 3018th Justice and Home Affairs Council meeting, Luxembourg, 3 June 2010, paragraph o)







# CHAPTER 3

## THE COUNCIL OF EUROPE AND THE MIGRATION OF UNACCOMPANIED CHILDREN

Jurisprudence of the European Court of Human Rights and recommendations of the Committee of Ministers and the Parliamentary Assembly

JUAN MANUEL LÓPEZ ULLA & MARIE FRANÇOISE VALETTE

During the last decade, the institutions of the Council of Europe have assumed an increasing active role with regard to the situation of unaccompanied children on the move. On one hand, the European Court of Human Rights is progressively adopting a key protective position particularly when assessing through its rulings if detentions of unaccompanied children are to be considered as a violation of their fundamental rights. On the other hand, the recommendations adopted by the Committee of Ministers and the Parliamentary Assembly focus on the needs for protection of this group and insist on the importance of a child rights-based approach. This chapter proposes an overview of both of these outlooks.

### 3.1- THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS REGARDING UNACCOMPANIED CHILDREN

In *Rahimi v. Greece*, 5<sup>th</sup> April 2011, the European Court of Human Rights (hereafter the Court) has ruled an important judgment regarding the detention and the lack of care of an unaccompanied 15 year old Afghan minor. In particular, it is the first time that the Court has considered the fact that an unaccompanied minor being neglected by national authorities after being released without any kind of protection from a detention centre as a violation of article 3 of the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, ECHR)<sup>1</sup>.

Before this case, the Court had ruled another important judgment on a similar subject: the well known *Mubilanzila Mayeka and Kanili Mitunga v. Belgium*, 12<sup>th</sup> of October 2006, also known as Tabitha's case, where the Court underlined that a 5 year old child should not be detained unless there is no alternative and in the exceptional case where detention has to take place it should be implemented in appropriate centres and not in the same conditions as adults. As it has already been recognized<sup>2</sup>, Tabitha's case constitutes an important judgment regarding the detention conditions of migrant children. In the case of *Rahimi v. Greece*, the Court reaffirmed its jurisprudence and noted first that a minor can not be unprotected or without legal representation once they leave a detention centre. As no consideration to the age of the child was taken during or after the detention, the Court considered that the applicant had been subjected to inhuman treatment.

The European Court of Human Rights founded these judgments on the United Nations Convention on the Rights of the Child (hereinafter, CRC). The Court considered there was a breach of the CRC, especially of article 3 invoking "the best interest of the child principle"<sup>3</sup>. Moreover, a violation of article 37 of the same text took place as the detention or imprisonment of a child can only take place when there is no

1. Art. 3 of the ECHR: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

2. SENOVILLA HERNÁNDEZ, D. (2006): "Comentario sobre la sentencia del Tribunal Europeo de Derechos Humanos de Estrasburgo de 12 de octubre de 2009: caso *Mubilanzila Mayeka y Kanini Mitunga contra Bélgica*", *Revista de derecho migratorio y extranjería*, n. 13, pp. 187-198.

3. Art. 3.1 of the CRC: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

other possibility available<sup>4</sup>. Therefore, if national authorities do not carry out their international obligations relating to the detention of unaccompanied children, this could be considered as a violation of article 3 of ECHR<sup>5</sup>.

*Rahimi v. Greece*, 5<sup>th</sup> April 2011, is therefore the first judgment where the Court has condemned the fact that the child had been released from deprivation of liberty without any kind of protection. In this chapter, reference will be made to this case and to further jurisprudence of the European Court of Strasbourg on unaccompanied children's conditions of detention.

### 3.1.a- General considerations regarding the contents of the ECHR and its application to unaccompanied children

Article 1 of the ECHR recognizes to everyone the rights and freedoms defined in its Section I<sup>6</sup>. These rights and freedoms are not programmatic principles and shall be secured from the outset.

All human beings, minors or adults, under the jurisdiction of any of the State Parties to this Convention have legitimate right to access the European Court of Human Rights if a violation of any of the rights and freedoms recognized in the ECHR takes place. Therefore, under the Council of Europe's scope, everybody- children included- can appeal under the same conditions to the European Court.

Even though in theory anyone can appeal to the Court, in practice children face many legal, economic, social and cultural obstacles. The Court can only be accessed once all appeal procedures provided in domestic law have been followed and this requirement often constitutes an obstacle for children as in certain countries they are not able to assert their rights on their own.

In order to apply the ECHR effectively, the Court has pointed out in several rulings that *"the Convention is a living instrument which must be interpreted in the light of present-day conditions"*<sup>7</sup>. A general obligation to commit to a dynamic interpretation of the rights and freedoms of the Convention comes from this important recommendation. In applying this principle, the Court considers *"that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies"*<sup>8</sup>.

The Court often underlines that the contents of the ECHR should not be something theoretical, but concrete, real and effective. That is why the Court can audit how national laws are applied<sup>9</sup>. For example, in the case of *Assenov and others v. Bulgaria*, concerning a 14 year old boy, although the Court recognized the impossibility of proving that the injuries he suffered were the result of police action, the Court ended by recognizing a violation of article 3 of the Convention as the State had failed to properly investigate the child's claims. The Court highlighted that without a real and effective investigation, allegations of torture or ill treatment could hardly prosper, and the article 3 of ECHR would become ineffective law<sup>10</sup>. This consideration regarding the effectiveness of rights and

4. Art. 37 b) of the CRC: *"No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time"*.

5. See *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 12 October 2006, paragraph 81.

6. Article 1 of the ECHR: *"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention"*.

7. See the following judgments: *Tyrer v. the United Kingdom*, 25<sup>th</sup> April 1978, paragraph 31; *Soering v. the United Kingdom*, 7<sup>th</sup> July 1989, paragraph 102; *Loizidou v. Turkey*, 23<sup>rd</sup> March 1995, paragraph 71; *Selmouni v. France*, 28<sup>th</sup> July 1999, paragraph 101.

8. *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 12<sup>th</sup> October 2006, paragraph 48. See also *Selmouni v. France*, 28 July 1999, paragraph 101.

9. See, for example, *Mubilanzila Mayeka et Kaniki Mitunga v. Belgium*, 12<sup>th</sup> October 2006, paragraph 54; In *Okeali v. Turkey*, 18 October 2005, paragraph 54, the Court *"considers that the complaint, as presented by the applicant, concerns the positive obligation under Article 3 of the Convention to protect people's physical and psychological integrity through the law"* (see, *mutatis mutandis*, *Öneryıldız v. Turkey*, paragraph 95).

10. *Assenov and others v. Bulgaria*, 28<sup>th</sup> October 1998, paragraphs 95 and 100 to 106. Particularly, paragraph 102 says: *"The Court considers that, in these circumstances, where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention', requires by implication that there should be an effective official investigation. This investigation, as with that under Article 2, should be capable of leading to the identification and punishment of those responsible (see, in relation to Article 2 of the Convention, the McCann and Others v. the United Kingdom judgment of 27 September 1995, paragraph 161, the Kaya v. Turkey judgment of 19 February 1998, paragraph 86, and the Yaça v. Turkey judgment of 2 September 1998, paragraph 98). If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance (see paragraph 93 above), would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity"*. See also paragraph 106: *"Against this background, in view of the lack of a thorough and effective investigation into the applicant's arguable claim that he had been beaten by police officers, the Court finds that there has been a violation of Article 3 of the Convention"*.



freedoms enshrined in the Convention is of key importance.

With regard to the State's positive obligations under article 3 of the ECHR, the Court has always recalled that this article enshrines an "*absolute prohibition of torture and inhuman or degrading treatment or punishment*" with "*no provision for exception*"<sup>11</sup>. As a consequence, State authorities must take the necessary steps to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment<sup>12</sup>. This principle is recalled in all judgments invoking article 3 of the ECHR.

With reference to this positive obligation, in *A. v. United Kingdom*, 23<sup>rd</sup> of September 1998, where a child was abused by his stepfather, the Court reminded that article 1 taken together with article 3 "*requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals*"<sup>13</sup>.

In the case of *Okkani v. Turkey*, 17<sup>th</sup> October 2006, where a child was subjected to inhuman treatment by the police, the Court once again recalled that States should ensure that rights and freedoms recognized in the Convention are observed. Particularly in this case, the Court underlined that when an individual makes a credible assertion that they have suffered treatment infringing article 3 of the ECHR at the hands of agents of the State, "*it is the duty of national authorities to carry out 'an effective official investigation' capable of establishing the facts and identifying and punishing those responsible*". The Court added that this kind of control "*is essential for maintaining the public's confidence in, and support for, the rule of law and for preventing any appearance of the authorities' tolerance of- or collusion in- unlawful acts*"<sup>14</sup>.

In order to determine if article 3 of the ECHR has been violated, the Court often recalls that "*ill-treatment must attain a minimum level of severity*". But "*the assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim*"<sup>15</sup>.

Indeed, the Court has often pointed out that when the applicant is a child, considering their vulnerability, the obligation of effective protection ought to be stronger. In light of the Court's view, "*children are particularly vulnerable to various forms of violence*", so domestic provisions relating to the protection of children must be taken by Governments. Children are entitled, notes the Court, to State protection against serious breaches of personal integrity<sup>16</sup>.

### 3.1.b- The Court's jurisprudence on unaccompanied children

In this section we will examine the contents of the main European Court of Human Rights judgments relating to unaccompanied migrant or asylum-seeking children, specifically the Courts' regard for those States' actions or omissions leading to a violation of article 3 of the ECHR.

#### ***Rahimi vs. Greece, 5th April 2011***

The facts of *Rahimi v. Greece* were as follow: the applicant was a 15 year old Afghan national called Eivas Rahimi. After his parents died in the war in Afghanistan, he left his country and finally

11. In this sense, *Soering v. the United Kingdom*, 7 July 1989, paragraph 88; *Bati and others v. Turkey*, 3 June 2004, paragraph 120. In *Mubilanzila Mayeka et Kaniki Mitunga v. Belgium*, 12 October 2006, paragraph 55 the Court reminds "*the absolute nature of the protection afforded by Article 3 of the Convention*".

12. *Rahimi v. Greece*, 5<sup>th</sup> April 2011, paragraph 62 & *Mubilanzila Mayeka et Kaniki Mitunga v. Belgium*, paragraph 53. This resolution reminds: *Z and Others v. the United Kingdom*, 10<sup>th</sup> May 2001, paragraph 73, and *A. v. the United Kingdom*, 23<sup>rd</sup> September 1998, paragraph 22. This provision must be especially observed with regard to children and other vulnerable members of society to prevent any kind of ill-treatment concerning them (see *Osman v. the United Kingdom*, 28 October 1998, paragraph 116).

13. *A. v. United Kingdom*, 23<sup>rd</sup> September 1998, paragraph 22. This resolution also refers to *H.L.R. v. France*, 29<sup>th</sup> April 1997, paragraph 40.

14. *Okkani v. Turkey*, 17<sup>th</sup> October 2006, paragraph 65. See also *Slimani v. France*, 27<sup>th</sup> July 2004, paragraphs 30-31 and *Assenov and Others v. Bulgaria*, 28 October 1998, paragraph 102.

15. *Assenov and Others v. Bulgaria*, date, paragraph 94. See, amongst others, *Raninen v. Finland*, 16 December, 1997, paragraph 55; *Tekin v. Turkey*, 9 June 1998, paragraphs 52 and 53; *Bati and others v. Turkey*, 3 June 2004, paragraphs 113-120; *Mubilanzila Mayeka et Kaniki Mitunga v. Belgium*, 12 October 2006, paragraph 48.

16. *A. v. United Kingdom*, 19 February 2009, paragraph 22: "*children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity*". See also the *X and Y v. the Netherlands*, 26 March 1985, paragraphs 21-27; the *Stubblings and Others v. the United Kingdom*, 22 October 1996, paragraphs 62-64; and also the United Nations Convention on the Rights of the Child, articles 19 and 37. Also in this sense, *inter alia*, *A. v. the United Kingdom*, 23 September 1998, paragraph 22 & *Okkani v. Turkey*, 17<sup>th</sup> October 2006, paragraph 70.

arrived in the Island of Lesbos, in Greece. The same day he arrived, he was arrested and placed in Pagani detention centre. Once he was notified of a deportation order against him, he was released and instructed to leave Greece within 30 days. Without any kind of livelihood, the child remained unprotected for several days until he was taken in by a support association in Athens. He had applied for asylum but his application was still pending at the moment of this judgment.

The applicant alleged a lack of appropriate supervision considering his age. He also complained about the fact that he was not cared for during his arrest, during his deprivation of liberty and afterwards when he was released. He also contested about the conditions of his detention, alleging that he was placed in an adult detention centre. He complained as well that neither was he informed about the reasons for his detention, nor about the possibilities provided by Greek law to appeal such decision.

The Court observed that the complaint about the general conditions of Pagani detention centre, where the applicant was deprived of liberty for two days, are corroborated by several reports from national and international institutions, organizations and NGOs. For instance, the Court quotes a report released by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment highlighting the “*abominable conditions of detention*” at the Pagani centre. Furthermore, in a second report from the same institution published in 2010, it was shown that the centre was “*unhealthy beyond all description*”, and that illegal immigrants were detained in conditions “*that could be qualified as inhuman and degrading treatment*”. Considering these sources denouncing the deplorable living conditions at the Pagani detention centre, the Court considered that this place was dangerous for both detainees and staff<sup>17</sup>.

In this judgment, the Court reminded that children must not be detained in centres under the same conditions as adults, and concluded that the detention conditions in the Pagani centre were severe enough to consider that they injured human dignity. Among the circumstances that should be evaluated to determine the severity of treatment, the Court has considered that children are highly vulnerable members of society, especially when they are illegal immigrants as well as when they are unaccompanied and left to their own devices<sup>18</sup>. In its argument, the Court considered that as the victim was an unaccompanied immigrant child, he was in a situation of extreme vulnerability. For this reason, the Court considered that article 3 of the ECHR was violated, without taking into consideration the length of detention (two days)<sup>19</sup>.

But besides the conditions of the child’s detention, what is ground breaking in the *Rahimi vs. Greece* judgment is that the Court considered that there had been an inhuman or degrading treatment as the child was not assisted either during his detention nor when he was released. The child should have been provided with a guardian from the moment he was arrested and also once he was released<sup>20</sup>.

### ***Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, 12th of October 2006***

This well-known judgment concerns the detention and posterior forced return by Belgian authorities of a 5 year old Congolese girl, named Tabitha, who was trying to reunite with her mother living in Canada. In this decision, the Court underlines that States have the duty to take adequate measures to provide care and protection as part of its positive obligations under article 3 of the ECHR. Furthermore, the same ruling states that children can neither be treated nor detained as if they were adults and that detention centres must be adapted to their needs. Moreover, appropriate measures should be taken by authorities to ensure that unaccompanied immigrant children receive proper counselling and educational assistance from qualified personnel, especially mandated for that

17. *Rahimi v. Greece*, 5<sup>th</sup> April 2011, paragraphs 30, 31, 37, 41 and 47.

18. *Rahimi v. Greece*, 5<sup>th</sup> April 2011, paragraph 87. In this sense, see also *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 12<sup>th</sup> of October 2006, paragraph 55.

19. *Rahimi v. Greece*, 5<sup>th</sup> April 2011, paragraph 86.

20. This attitude generated in the child a deep anguish and concern. The Court assumes the report of the NGO ARSIS saying that the child arrived to its hostel extremely thin and with other problems, such as distress and fear of darkness. See *Rahimi v. Greece*, 5<sup>th</sup> of April 2011, paragraphs 92, 94 and 95. The Court takes into consideration that Greek Ombudsman has reported that when children detained in Pagani centre are released, the authorities neither provide them with housing nor provide them any help. The Court also takes note of the report entitled “*Let them survive: the systematic failure of the protection of unaccompanied migrant children in Greece*” (Human Rights Watch, 2008). This report reflects the precarious situation in which these children are when they are released after a period of detention.

purpose<sup>21</sup>.

For these reasons, the Court concluded that the measures taken by Belgian authorities were far from being sufficient to fulfil the Belgian State's obligation to provide care to a 5 year old girl<sup>22</sup>. Consequently, as the child's detention "*demonstrated a lack of humanity to such a degree that it amounted to inhuman treatment*", with no doubt about the considerable distress that the girl had suffered because of such conditions, the Court considered that there had been a violation of article 3 of the ECHR<sup>23</sup>.

It should be noted that in *Mubilanzila Mayeka's* case the Court considered that article 3 of the ECHR was violated not only with regard to the child but also to her mother. To be precise, the Court states that not only a parent, but also a relative could qualify as a victim due to the ill-treatment of their child or another person of their family. This depends, the Court underlines, on several factors such as "*the proximity of the family tie - in that context, a certain weight will attach to the parent-child bond - the particular circumstances of the relationship and the way in which the authorities responded to the parent's enquiries*". In such cases "*the essence of such a violation lies in the authorities' reactions and attitudes to the situation when it is brought to their attention*"<sup>24</sup>.

Because of the distress and anxiety that the mother had suffered because the attitude of the Belgian authorities (apart from the separation due to detention- she was only provided with a telephone number to reach her daughter), the Court considered that such a level of severity constituted a violation of article 3 of the ECHR<sup>25</sup>.

*Muskhadzhiyeva and others v. Belgium*, 19<sup>th</sup> January 2010, presents a similar situation. In contrast to *Mubilanzila Mayeka*, in *Muskhadzhiyeva and others v. Belgium* the Court considered that article 3 of the ECHR had not been violated concerning the mother, taking into account that the family was not separated. The Court underlines that parents should not always be considered victims of the ill-treatment inflicted on their children, but only when special factors made the parents' suffering different in scale and nature from the emotional distress inevitable for close relatives of victims of serious human rights violations. In *Muskhadzhiyeva's* case the Court found that the distress and frustration caused by the children's detention in the transit centre did not reach the level of severity required in order to consider the mother as subjected to inhuman treatment<sup>26</sup>.

\* \* \*

In conclusion, up until now the Jurisprudence of the European Court of Human Rights concerning unaccompanied migrant or asylum seeking children has been sporadic. This failing is likely to have been motivated by the precarious situation of this particular kind of migrants as well as the existing procedural obstacles within domestic judicial systems, as has been previously referred to in this chapter. Nevertheless, in 2006 the Court condemned Belgian authorities for the detention and posterior return of an infant 5 year old unaccompanied girl trying to reunite with her mother. This judgment constituted an important step forward to defend the fundamental rights of unaccompanied children. However, many academics and advocates have speculated as to whether the Court's

21. *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 12<sup>th</sup> of October 2006, paragraph 50: "*The Court notes that the second applicant, who was only five years old, was held in the same conditions as adults. She was detained in a centre that had initially been designed for adults, even though she was unaccompanied by her parents and no one had been assigned to look after her. No measures were taken to ensure that she received proper counselling and educational assistance from qualified personnel especially mandated for that purpose. That situation lasted for two months. It is further noted that the respondent State have (sic) acknowledged that the place of detention was not adapted to her needs and that there were no adequate structures in place at the time*". See also *Muskhadzhiyeva and others v. Belgium*, 19 January 2010, paragraph 56.

22. *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 12<sup>th</sup> October 2006, paragraph 55: "*The second applicant's position was characterized by her very young age, the fact that she was an illegal immigrant in a foreign land and the fact that she was unaccompanied by her family from whom she had become separated so that she was effectively left to her own devices. She was thus in an extremely vulnerable situation. In view of the absolute nature of the protection afforded by Article 3 of the Convention, it is important to bear in mind that this is the decisive factor and it takes precedence over considerations relating to the second applicant's status as an illegal immigrant. She therefore indisputably came within the class of highly vulnerable members of society to whom the Belgian State owed a duty to take adequate measures to provide care and protection as part of its positive obligations under Article 3 of the Convention*".

23. *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 12<sup>th</sup> October 2006, paragraph 58: "*The measures taken by the Belgian authorities – informing the first applicant of the position, giving her a telephone number where she could reach her daughter, appointing a lawyer to assist the second applicant and liaising with the Canadian authorities and the Belgian embassy in Kinshasa – were far from sufficient to fulfill the Belgian State's obligation to provide care for the second applicant. The Court is in no doubt that the second applicant's detention in the conditions described above caused her considerable distress*".

24. The Court recalls at this point, *Çakıcı v. Turkey*, 8<sup>th</sup> July 1999, paragraph 98, and *Hamiyet Kaplan and Others v. Turkey*, 13 September 2005, paragraph 67.

25. *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 12 October 2006, paragraphs 61 and 62.

26. *Muskhadzhiyeva and others v. Belgium*, 19<sup>th</sup> January 2010, paragraph 66.

Jurisprudence would be the same if a similar situation occurred with teenage children. The recent condemnation of Greece in the *Rahimi* case shows that the European Court is determined to tackle State parties' abusive practices concerning migrant children's detention, taking into account their vulnerability, particularly when they are unaccompanied.

### 3.2- THE RECOMMENDATIONS OF THE COUNCIL OF EUROPE WITH REGARD TO UNACCOMPANIED CHILDREN

For several years two of the main bodies of the Council of Europe have been working on the subject of unaccompanied minors. These are the Committee of Ministers (composed of representatives of Member States) and the Parliamentary Assembly (composed of representatives of the National Parliaments of Member States). It should be noted that these bodies have only adopted recommendations and that they have never suggested nor envisaged the creation of a conventional norm regarding this issue.

This can easily be explained by the existence of satisfactory norms in International Law both at the United Nations (Convention on the Rights of the Child) and at the Council of Europe (Convention for the Protection of Human Rights and Fundamental Freedoms). In other words there is no major loophole at international level. There are undeniable difficulties but these are linked either to national or European Union sources or to the practices of the States, as can be seen in the studies presented in other chapters of this document.

The Committee of Ministers and the Parliamentary Assembly of the Council of Europe are therefore basically trying to devise concrete improvements that Member States should make at different stages of the process of dealing with unaccompanied minors. Given that they are not in the process of creating binding norms, the representatives of the States in the Committee of Ministers (and even more so the representatives of the National Parliaments at the Parliamentary Assembly) provide a clear illustration of one of the contradictions described by Daniel Senovilla Hernandez in his thesis<sup>27</sup>. They highlight the need to consider unaccompanied minors from the perspective of the protection of the rights of the child and if need be, from the protection of their human rights and not from that of migration policies.

They have therefore considered the topic of unaccompanied minors in wider contexts, both in considering them as children, for example in the transversal project by the Council of Europe *Building a Europe for and with children*<sup>28</sup>, and also as immigrants in the *Twenty principal guidelines on forced return*<sup>29</sup>. These minors have also been the subject of studies and specific recommendations. The following analysis is based uniquely on the results of these.

Even if we limit our research to the current decade, we can clearly see a rise in the number of documents in which unaccompanied minors are mentioned<sup>30</sup>. In spite of everything, certain continuity can be seen, in particular with regards to the importance accorded to the search for a durable solution, an essential condition in respecting the best interests of the child. The return to the country of origin and/or family reunification is just one option among others in the search for a durable solution.

With this in mind, the Recommendation Rec(2007)9 adopted by the Committee of Ministers on 12<sup>th</sup> July 2007 regarding the "*Life projects for unaccompanied migrant minors*" takes centre stage. The preamble of this Recommendation indicates a will to work out proposals based on reasoning shared both by United Nations' relevant authorities in the subject and by a number of NGOs<sup>31</sup>. By referring

27. SENOVILLA HERNANDEZ, D. (2010) : "*El tratamiento de los menores extranjeros no acompañados y separados en Europa. Un estudio comparado de seis países*", PhD. Thesis, Universidad Pontificia Comillas, Madrid, p.450.

28. Transversal project in progress since 2007.

29. Principles adopted 4th May 2005 by the Committee of Ministers of the Council of Europe.

30. For example in 2003 the Parliamentary Assembly adopted the Recommendation 1596(2003) on "*The situation of young migrants in Europe*"; in 2005 the Recommendation 1703(2005) on "Protection and assistance for separated children seeking asylum"; in 2007, the Committee of Ministers adopted a recommendation CM/Rec (2007) 9 on "Life projects for unaccompanied migrant minors"; and in 2011, the Parliamentary Assembly adopted recommendation 1969(2011) on "Unaccompanied minors in Europe : Issues of arrival, stay and return."

31. Concerning the NGOs quoted, the recommendation quotes the Inter-Agency Working Group developed by the International committee of the Red Cross (ICRC), International Rescue Committee (IRC), Save the Children UK (SCUK) and World Vision International (WVI) in collaboration with the United Nations High Commissioner for Refugees (UNHCR) and the United Nations Children's Fund (UNICEF) but also the Declaration of good practice from the Separated Children in Europe Programme 2004 adopted by Save the Children and the United Nations High Commissioner for Refugees in 2004.



on the one hand to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Social Charter and to the Convention of the Council of Europe against trafficking in human beings<sup>32</sup>, and on the other to the United Nations Convention on the Rights of the Child, the United Nations Convention relating to the Status of Refugees and to the United Nations Convention against Transnational Organised Crime, the Committee of Ministers highlights the consistencies between these different instruments. The concept of “life projects” came to the fore following the third session of the Political Platform on Migration of the Council of Europe in November 2004 and it was also central to the discussions at the Regional Conference “*Migration of Unaccompanied Minors: Acting in the best interests of the child*” held in Malaga in 2005<sup>33</sup>.

The Recommendation of 12<sup>th</sup> July 2007 basically highlights the need to protect minors and to seek to give them a stable future, but also to take into account each situation on an individual basis. In addition it outlines principles and measures destined to guide the Member States of the Council of Europe in dealing with unaccompanied minors.

The text explicitly takes both separated children and unaccompanied children under 18 into consideration under the category “unaccompanied migrant minors”. The “life projects” are based on a holistic approach (all of the needs of the child must be taken into account simultaneously), personalised (each situation is given appropriate consideration), and durable (note that the consequences of reaching adulthood are not dealt with explicitly). The aim of the Committee of Ministers is to provide Member States with practical advice in order to assure effective protection of these children. The concept has been developed based on experience gained from a number of Member States<sup>34</sup>.

One of the characteristics of the “life projects” is the element of reciprocity. The minor concerned must formally commit in writing to respect the regular assessments carried out by the relevant authorities. The latter should give him/her clear information, a personalised programme, a legal guardian and the basic necessities of life (accommodation, food, medical care and education).

It should be possible to establish these “life projects” either in the territory of the host country or in the territory of the country of origin or, alternatively, in both of these territories in turn. The last two proposals presuppose that cooperation exists between the different States involved. The Recommendation encourages the Member States to keep the country of origin and the transit countries informed of the principles upheld by the Committee of Ministers.

One of the results of this recommendation has been the creation of a Handbook for Front-line Professionals published in October 2010<sup>35</sup>. Another was the implementation in 2010 of an initial pilot phase of Life Projects in 8 member States of the Council of Europe (Belgium, Bosnia-Herzegovina, Bulgaria, Italy, Netherlands, Norway, Switzerland and the United Kingdom).

However, the lack of drive from the Member States of the Council of Europe to implement this Recommendation on “life projects” and the adoption by the European Union of the Stockholm Programme and an Action Plan for unaccompanied minors<sup>36</sup> have led the Parliamentary Assembly to readdress these questions. A 2011 report by the Committee on Migration, Refugees and Population of the Council of Europe<sup>37</sup> clearly lays out the ineffective nature of the rights applied to this particularly vulnerable population.

Three major obstacles are evident:

- National legislation not taking into account the specific nature of unaccompanied minors
- The heterogeneity of the practices of the States
- National authorities not applying legislation in an appropriate way.

32. Council of Europe Convention on Action against Trafficking in Human Beings of 16/05/2005, brought into force 01/02/2008. The European Union is not party to this convention.

33. Council of Europe, Regional Conference on “*Migration of unaccompanied minors: Acting in the best interests of the child*”, Torremolinos, Spain, 27<sup>th</sup>-28<sup>th</sup> October 2005. Conference proceedings, Council of Europe document MG-RCONF (2005) 27f.

34. See proceedings of two conferences for examples: In the French context, La Défenseure des enfants, conference “*Mineurs étrangers isolés: vers une harmonisation des pratiques dans l'intérêt de l'enfant*”, Paris 20th June 2008 ; in the Council of Europe context, Regional conference of 27-28<sup>th</sup> October 2005, see footnote 7.

35. Drammeh, L.(2010): “*Life projects for unaccompanied migrant minors: A handbook for front-line professionals*”, Council of Europe publishing.

36. Document 17024/09 and Action Plan for unaccompanied minors (2010-2014), Communication from the Commission to the European Parliament and the Council, SEC(2010)534. See Chapter 2.2 of this document.

37. Committee on Migration, Refugees and Population, Report of 21st March 2011 on “*Unaccompanied children in Europe: issues of arrival, stay and return*”, Doc 12539 by Ms. Mailis REPS, Estonia.

In its Resolution 1810(2011) of 15<sup>th</sup> April 2011, *Unaccompanied children in Europe: issues of arrival, stay and return*, the Parliamentary Assembly recalls the need to apply durable solutions to unaccompanied migrant minors and calls upon the European Union to “*consider proposing new legislative standards to close existing protection gaps in European Union law for all unaccompanied children, irrespective of whether they seek asylum*”<sup>38</sup>.

The relevant work carried out by either the Committee of Ministers and the Parliamentary Assembly leads us to two different conclusions :

- On the basis of the written reports both from International or European legal sources or on practical suggested solutions the outlook appears positive. The Convention on the Rights of the Child appears to be all encompassing and does not require any additional work on an international scale. The concept of “life project” is based on real experiences and has officially received nothing but praise.
- However, the praise seems a little suspect given that the Member States of the Council of Europe are not drawing the conclusions from the studies in which they have participated in this international arena. No progress seems to be being made in improving the efficacy of the rights of unaccompanied minors in Europe and although good intentions are repeated year after year they seem to be nothing more than words.

38. Article 6.2 of the Resolution 1810(2011) 15 April 2011.

# CHAPTER 4

## NATIONAL LAWS AND PRACTICES REGARDING UNACCOMPANIED CHILDREN AND THEIR ADEQUACY WITH REGARD TO INTERNATIONAL LAW

LÉLIA TAWFIK

The Convention on the Rights of the Child, adopted on 20th November 1989, underlines the obligations of the State parties, particularly in Articles 2, 3, 4, and 20<sup>1</sup>.

These articles stress the active role of State parties to the Convention that must take all the necessary measures to protect and promote the best interests and well-being of the child, without discrimination according to his/her nationality and legal status (see Chapter 1). It is therefore mandatory, as the Convention is legally binding, to ensure that unaccompanied children have access to their fundamental rights recognised in the Convention. All European States have ratified it. However the implementation of the Convention and the adaptation of national legal systems are fragmented: there exists a limited European Union framework which is “under construction”<sup>2</sup> (see Chapter 2), and European States deal with this issue to a variable extend within their national framework.

It appears that the treatment and protection of unaccompanied migrant children, from their arrival to the country of transit or destination until they attain adult status, reflects more a compromise between immigration law and child protection than a real consideration of their best interests. Indeed unaccompanied migrant children are too often considered as illegal immigrants with a strategy to benefit from the European reception system more than children in danger.<sup>3</sup> Therefore

1. Article 2: 1. State Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind [...]

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

Article 3: 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

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

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

Article 4: State Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention. With regard to economic, social and cultural rights, State Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 20: 1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

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

2. See D. Senovilla Hernandez quoted in “Approche des politiques des Etats à l'égard des mineurs isolés étrangers” in Migrations Société, Synthèse du colloque : “Mineur étranger isolé : une nouvelle figure de l'altérité ?”, MAZIZ L., Vol. 23, n°136, Juillet-août 2011, page 37.

3. See Carlo Giordano: “Les Etats mettent en place une sorte de système mixte entre les politiques de contrôle et de limitation de l'immigration d'un côté et la protection de l'enfance en danger de l'autre. Ils essaient donc de trouver une sorte de compromis entre les principes de la Convention internationale des droits de l'enfant et l'idée que ce phénomène migratoire ne soit autre qu'une stratégie élaborée avec ou sans l'aide des parents ou de personnes de référence, en raison des avantages en matière d'accueil réservé aux mineurs” quoted in “Approche des politiques des Etats à l'égard des mineurs isolés étrangers” in Migrations Société, Synthèse du colloque : “Mineur étranger isolé : une nouvelle figure de l'altérité ?”, MAZIZ L., Vol. 23, n°136, Juillet-août 2011, pages 32-33.

the same procedure as for adults applies, or with minor changes, instead of an adapted system taking into account all the specificities of this group. Their treatment is subsequently a complex mix between immigration control and child protection.

In this chapter we will identify some inadequacies in the national legal systems concerning unaccompanied children at different stages of the procedure with regard to the Convention on the Rights of the Child. Our focus will be on the States within the scope of implementation of the PUCAFREU project, which are considered to be destination countries for this kind of migration: France, Italy, Belgium and Spain. They all ratified the Convention during the first years after it came into force (France: 1990; Italy and Spain: 1991, Belgium: 1992). The stages of the procedure analysed in this chapter will be the arrival at the territory or apprehension of the child within the territory; the protection and assistance provided; and the conception of a durable solution.

## 4.1- FRANCE: A HYBRID SYSTEM BETWEEN IMMIGRATION CONTROL AND CHILD PROTECTION

According to the stage of the procedure, French authorities emphasize one of two aspects in their treatment of unaccompanied migrant children: either they apply immigration law with the objective of sending the child back to his/her country of origin or transit as adult illegal migrants, or they treat him/her considering his/her age and situation of vulnerability and danger as they do for other children who are in a situation of need.

### 4.1.a- First contact between French authorities and the child: a distinction between the “migrant” at the border and the “child” in the territory

French Law grants a different status to children identified at the border from those who are already within the territory:

On the one hand, a child who is intercepted at the French border, either because he/she does not fulfil the conditions of access to the territory or because identity documents are lacking or false, is detained in transit zones (mostly in Roissy Charles de Gaulle). These zones are considered by the French authorities as “extraterritorial”. Children, as well as adult migrants, can be kept for up to twenty days, for the necessary duration of their expulsion to their country of origin or last country of transit<sup>4</sup>. Thus immigration law applies to them, with the only difference being that a legal guardian (called an “ad hoc administrator”), representing the child’s rights, is appointed as soon as the child is identified. However, in addition to numerous criticisms of their role (lack of skills related to immigration law, lack of independence, late appointment, mean to legally justify expulsion of children, etc.<sup>5</sup>), they are not able to determine and defend the best interests of the child in such a short period. French authorities’ tendency to refuse entry and send back migrant children without considering their age and specific vulnerability is in violation of the Convention on the Rights of the Child<sup>6</sup>.

Indeed, this automatic deprivation of liberty does not comply with article 37 of the Convention which states that it “*shall be used as a measure of last resort and for the shortest appropriate period of time*”. The decision of the European Court of Human Rights in the case of *Mubilanzila Mayeka and Kanini Mitunga vs Belgium* (2006)<sup>7</sup> defines the minimum standards to respect but did not result in changing the condition of detention of children in the French transit zones<sup>8</sup>. Moreover this delay does not enable either the French authorities or legal guardians to make sure that the child will be properly received by his/her family or an adequate institution and that the return is in his/her best interest. This clearly violates article 3 of the Convention.

On the other hand, a child who is identified when he/she is already in the territory is granted a different status, as he/she cannot be deported while he/she is underage and is not obliged to

4. Articles L.221-1 to L.224-4 *Code de l'Entrée et du Séjour des Étrangers et du Droit d'Asile* (CESEDA), <http://www.legifrance.gouv.fr>

5. See (2009) “*Lost in Transit*”, Human Rights Watch (HRW), 68 pages.

6. See Committee on the Rights of the Child (2005): General Comment n° 6 on the treatment of unaccompanied and separated children outside their country of origin, CRC/GC/2005/6 of the 1st September 2005, paragraph 20: “*A determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child's identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs. Consequently, allowing the child access to the territory is a prerequisite to this initial assessment process*”.

7. See chapter 3 for further information on this judgment.

8. See MASSON B., “Mineurs isolés étrangers : le sens d’une appellation”, in “*Mineur isolé étranger: une nouvelle figure de l’altérité?*”, Migrations Société CIEMI vol 22 n°129-130, mai-août 2010, pages 115-128.



possess a residence card<sup>9</sup>. He/she is therefore not considered as an illegal migrant but as a child. Moreover, the situation of isolation is assimilated to a situation of need, therefore unaccompanied migrant children are considered as “children in danger” as defined by article 375 of the French Civil Code<sup>10</sup>. As a consequence they can benefit from care provisions (called “*assistance éducative*”: the right to State protection and assistance, the right to education, the right to health, etc.), which are granted to all children present in France without distinction of nationality. They are then under the jurisdiction of the Children’s Judge (*Juge des enfants*) to make provisions of care and under the jurisdiction of the Guardianship’s Judge (*Juge des tutelles*) to appoint a legal guardian. However, as we will explain in the next paragraph, the role of these judges and concerned institutions is not clearly defined and can lead to gaps between the different measures taken.

#### 4.1.b- Insufficient protection and assistance within the territory

As previously mentioned, unaccompanied migrant children are under the Children’s Judge’s jurisdiction to receive care provision. Another judge (“*Juge des tutelles*”) is in charge of appointing a legal guardian. However their role is not clearly defined and neither of these judges is automatically informed of the presence of unaccompanied migrant children. This leads to a lack of legal representation and a gap between different measures of protection, despite the fact that these roles are complementary and should be articulated in a more effective way to provide the necessary protection needed.

Additionally, the reception and treatment of these children varies depending on the department<sup>11</sup>, as the legal guardianship, if not given to a physical person, is of the department’s jurisdiction<sup>12</sup>. However departments may be reluctant and consider this to be a national issue that the State should deal with and finance (the French State only supports emergency systems around Paris<sup>13</sup>). The protection and services granted should in any case not suffer from political and economical considerations and unaccompanied migrant children should benefit from the highest standards of protection to exercise their rights as promoted by the Convention on the Rights of the Child.

As a consequence of the lack of protection, children tend to progressively abandon the system of care and find other means to survive, with a risk of falling into illegal practices.

#### 4.1.c- The absence of conception of durable solutions

According to the Convention on the Rights of the Child, and as explained in Chapter 1, a long-term project should be established by a competent institution, in a reasonable time, based on the best interests of the child and with due consideration given to the views of the child. The three usual possible durable solutions are: family reunification in the country of destination or in a third country; return to the country of origin; integration and regularization in the country of reception<sup>14</sup>.

However, if child’s residence in the territory is considered legal in France (whether they are accompanied or not), foreign children are rarely entitled to obtain a residence permit. Consequently, in most cases they become “illegal migrants” after they reach 18 and are susceptible to be deported. A 2006 amendment on immigration regulations has defined the criteria to obtain a residence permit: the child must have been under the official care system’s responsibility before he/she was 16; he/she should prove any studies or training to be “real and serious” and the nature of his/her familial links with the country of origin must be defined. Additionally, the care institution must give its opinion

9. Article 20-4 *Ordonnance n°45-174 du 2 février 1945 relative à l'enfance délinquante* and articles L511-4-1°, L521-4 and Art L 311-1 CESEDA.

10. Article 375 of French Civil Code: “*Si la santé, la sécurité ou la moralité d'un mineur non émancipé sont en danger, ou si les conditions de son éducation ou de son développement physique, affectif, intellectuel et social sont gravement compromises, des mesures d'assistance éducative peuvent être ordonnées par justice à la requête des père et mère conjointement, ou de l'un d'eux, de la personne ou du service à qui l'enfant a été confié ou du tuteur, du mineur lui-même ou du ministère public*” [...]

11. French territorial division (101 in France, including five overseas departments).

12. Law 2007-293, 5 March 2007 (*Code de l'action sociale et des familles*) article L221-1.

13. A centre for children who arrive in Roissy Airport (Centre de Taverny) run by the French Red Cross and a shelter for asylum seekers (CAOMIDA) managed by the organization France Terre d'Asile. Additionally, the development of the “*Dispositif Versini*” in 2003 aims to locate and provide a shelter for street children, run by three organizations: French Red Cross, France Terre d'Asile and Hors-la-rue.

14. See SENOVILLA HERNANDEZ D. (2010), “*El Tratamiento de los menores extranjeros no acompañados y separados en Europa. Un estudio comparado de seis países*”, PhD thesis, Universidad Pontificia Comillas de Madrid, 504 pages.

regarding the integration into French society<sup>15</sup>, with the risk of going beyond its initial remit.

These conditions lack relevance. Apart from the objective condition of the age of reception into the care system (which is very restricted as many children arrive after they reach 16), the other criteria depend on the authorities' discretionary appreciation of the seriousness of the child's studies and his/her integration into French society. This assessment does not take into account the fact that the child may face difficulties due to many reasons<sup>16</sup>. Above all, this discretionary appreciation does not acknowledge the best interests of the child.

## 4.2- SPAIN: A RECEPTION SYSTEM DEPENDING ON THE POSSIBILITY OF RETURN TO THE COUNTRY OF ORIGIN

The 1996 Law on the legal protection of children states in its article 3 that the Rights promoted by the Convention apply to all children on the territory without distinction of nationality<sup>17</sup>. However the consideration of the best interest remains limited, as the return to the country of origin is seen as the priority solution.

### 4.2.a- The principle of non-detention

In Spain, unaccompanied migrant children are not detained upon their arrival to the territory, except if there exists doubt about their status as a child<sup>18</sup>. They can be in this case detained for the necessary duration to confirm their age. However the duration of the procedure is not determined, neither is its maximum length nor the control upon it. This possible deprivation of liberty and above all the lack of clarity of its limits do not comply with article 37 of the Convention that states that detention "shall be used as a measure of last resort and for the shortest appropriate period of time".

In these circumstances the child can enter the territory once his/her age has been confirmed.

It should be noted that the specific location of Spain makes its maritime borders natural points of entry to Europe, notably for African and North-African migrants. Migrants, and consequently migrant children, arrive most notably in the Canary Islands, Ceuta and Melilla or in Andalucía and therefore enter the territory irregularly without being filtered through transit zones such as at the French airport Roissy Charles de Gaulle<sup>19</sup>.

### 4.2.b- An unequal protection depending on children's location in the territory

Once their status as a child is confirmed, unaccompanied migrant children are automatically under the responsibility of regional public institutions that provide child protection services. After they confirm the "situation of abandonment"<sup>20</sup>, the child is appointed a public guardian.

The practices vary considerably from one Autonomous Community (called *Comunidad autónoma*) to another. Indeed, Autonomous Communities are in charge of children's protection while the State is in charge of immigration and asylum. The reception and protection depends therefore on the location of the child within the territory. For instance, the child can be placed in care in ad hoc centres reserved for unaccompanied children upon their arrival, during the reception phase and then for longer periods, or be first placed in specialised centres and then integrated into the common law system, or vice versa. However, many problems occur: late declaration of "abandonment" leading to a delayed legal representation and guardianship; lack of best interest determination; isolation in specific systems that were originally created for emergency situations (such as in Catalonia); no educational plan; threat of forced return, etc. These bad practices lead children to abandon care

15. Article L313-11, 2° bis CESEDA (Law 24 July 2006, reaffirmed in Law 16 July 2011).

16. See BOIDE M., CIAIS M., CORBEL F-X., LE CLEVE A., MALHOU A., MARTINI J-F. (2010), "Pour une application du droit commun dans la prise en charge des mineurs isolés étrangers en quête d'asile et de protection", in "Mineur isolé étranger : une nouvelle figure de l'altérité ?", Migrations Société, page 257-274.

17. Article 3, *Ley Orgánica 1/1996, de 15 de enero, de Protección Jurídica del Menor, de modificación parcial del Código Civil y de la Ley de Enjuiciamiento Civil*.

18. Article 35, *Ley Orgánica 2/2009, de 11 de diciembre, de reforma de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social*.

19. See LAZARO GONZALEZ I. & MOROY ARAMBARRI B. (2010): "La situación actual de los menores extranjeros no acompañados en España" in « *Los menores extranjeros no acompañados* » coordinated by LAZARO GONZALEZ I. & MOROY ARAMBARRI B., Edition Catedra Santander de Derecho y Menores, Universidad Pontificia de Comillas, Madrid, pages 17-32

20. Called "situación de desamparo", defined in article 172 of the Spanish Civil Code.

systems and be outside of any protection<sup>21</sup>.

#### 4.2.c- The return as the preferred durable solution

As previously mentioned, the child enters the territory but with the authorities' implicit objective of returning him/her to his/her country of origin in order to carry out family reunification, or to give responsibility to the care systems of the country of origin. Therefore, when the family or the guardianship system is identified, the child can be returned to his/her country of origin. Indeed, the return to the country of origin is considered to be the priority, ostensibly to promote family reunification in the best interest of the unaccompanied migrant child, even if all the alternatives have not been assessed. Previously, a limit to repatriation applied if danger existed for the child or his/her family in the case of return, but a recent amendment on regulation has abolished this limit<sup>22</sup>. However forced returns are rare in practice and seem to be used more as a threat to prevent unaccompanied children's migration to Spain<sup>23</sup>.

Nevertheless, it should be mentioned that bilateral agreements have been signed with Romania, Senegal and Morocco to promote this return, in after the family context has theoretically been checked. However the conditions of reception in the country of origin are rarely assessed and the child and his/her family's opinion will rarely be asked for. The return is therefore "forced" and not voluntary. The Children's Rights Committee of the United Nations denounced in 2002 those returns without assessment of the conditions of reception in the country of origin and the Human Rights Commission confirmed in 2004 that those repatriations could be seen as expulsions.<sup>24</sup> In 2008, the Spanish Constitutional Court recognised the necessity to consider the child and his/her family's will and the capacity of every child to legally refuse his/her repatriation<sup>25</sup>. Even if this opposition does not guarantee that the judge will cancel the repatriation, numbers have dropped since 2008<sup>26</sup> (6 repatriations occurred in 2010)<sup>27</sup>.

However, if returns are currently rare in practice, no alternative is really considered. Indeed, unaccompanied migrant children can apply to obtain a residence permit within nine months, since a declaration of a "situation of abandonment" by the regional protection institution has been released, but delays of the formalities usually take much longer. Moreover, this regularization depends on the proof that the return to the country of origin is impossible<sup>28</sup>. The integration in the Spanish context is then a "secondary solution"<sup>29</sup> instead of a real alternative, even when it is in the best interests of the child. When unaccompanied migrant children reach adult status, they can ask for a residence and work permit, if they have previously obtained a residence permit as a child. Otherwise (in the majority of the cases they did not possess this), a residence permit for exceptional circumstances can be granted if subjective conditions are met. This mainly applies to educational

21. SENOVILLA HERNANDEZ, D & KANICS, J. (2010): «Protected or merely tolerated? Models of reception and regularisation of unaccompanied and separated children in Europe» in *"Migrating alone: unaccompanied and separated children's migration to Europe"*, edited by SENOVILLA HERNANDEZ, D., TOUZENIS, K. and KANICS, J., Editions UNESCO, Paris, pages 37-61.

22. Articles 189-198 *Real Decreto 557/2011, de 20 de abril, por el que se aprueba el Reglamento de la Ley Organica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social, tras su reforma por Ley Organica 2/2009*. This norm replaces the *Real Decreto 2393/2004, de 30 de diciembre, por el que se aprueba el Reglamento de la Ley Organica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social*.

23. SENOVILLA HERNANDEZ D. (2010), "El Tratamiento de los menores extranjeros no acompañados y separados en Europa. Un estudio comparado de seis países", Universidad Pontificia Comillas de Madrid, 504 pages.

24. UN Commission on Human Rights, Migrant workers: Addendum Visit to Spain, 14 January 2004, E/CN.4/2004/76/Add.2 §55 and Committee on the Rights of the Child: Spain, "Consideration of reports submitted by State parties under article 44 of the Convention", CRC/C/15/Add.185, 13 June 2002 § 45, quoted page 167 in SENOVILLA HERNANDEZ, D. (2009) "Mineurs isolés étrangers en Espagne, Une réponse juridique et institutionnelle conforme à la Convention internationale des droits de l'enfant" in *"Les nouvelles figures de migrants en Espagne"*, Migrations Société, Vol 21, n°125, September-October 2009, pages 161-173

25. *Tribunal Constitucional*, Decision 183/2008, 22 December 2008.

26. France Terre d'Asile, Consiglio Italiano per i Rifugiati, Institute for Rights, Equality and Diversity (2010) "L'accueil et la prise en charge des mineurs non accompagnés dans huit pays de l'Union européenne". See [www.infomie.net](http://www.infomie.net)

27. Memoria de la Fiscalía General del Estado 2011, page 987.

28. SENOVILLA HERNANDEZ, D & KANICS, J. (2010): «Protected or merely tolerated? Models of reception and regularisation of unaccompanied and separated children in Europe» in *"Migrating alone: unaccompanied and separated children's migration to Europe"*, edited by SENOVILLA HERNANDEZ, D., TOUZENIS, K. and KANICS, J., Editions UNESCO, Paris, pages 37-61.

29. ROBIN N. & SENOVILLA HERNANDEZ, D. (2010): «The migration of unaccompanied and separated Senegalese children to Spain» in *"Migrating alone: unaccompanied and separated children's migration to Europe"*, edited by SENOVILLA HERNANDEZ, D., TOUZENIS, K. and KANICS, J., Editions UNESCO, Paris, pages 143-154.

measures and activities toward integration<sup>30</sup>. The discretionary character of this decision prevents the consideration of regularization and integration as durable solutions taken into account, for the child's best interest determination.

### 4.3- BELGIUM: A SPECIFIC SYSTEM BUT LIMITED IN BOTH LAW AND PRACTICE FOR UNACCOMPANIED MIGRANT CHILDREN<sup>31</sup>

Belgium has adopted an ad hoc system for unaccompanied migrant children, which is specific at each stage of the procedure: from the reception and identification phases to protection to the implementation of a durable solution. However this system, despite its protective elements, has still to improve to meet the standards of the Convention on the Rights of the Child, especially concerning children who are not seeking asylum.

#### 4.3.a- The principle of non-detention

Unaccompanied migrant children cannot in principle be detained upon their arrival, since the 2007 reform<sup>32</sup>. Previously, the same procedure as for adults applied and children could be detained for up to five months. This system, in contradiction with article 37 of the Convention on the Rights of the Child, was condemned by the European Court of Human Rights in the famous "Tabitha" decision<sup>33</sup>. Currently, children are transferred to an "Orientation and Observation Centre" (called COO, "*Centre d'Orientation et d'Observation*"). However, in case of doubts about his/her age, a child can be detained in a "closed centre" at the border until the confirmation of the age examination, for three working days, renewable, before joining the COO. During an initial period of fifteen days (possibly extended by five days), the refusal of entry and consequent return to the country of origin is possible until their status as minor is confirmed. Indeed, the migrant is considered not to have entered the territory and the COO has an "extraterritorial" status, so that if the age assessment indicates that he/she is an adult, the person can be directly returned. Those recognised as children cannot be forcibly returned. Unaccompanied migrant children who are found on the territory also stay in this centre.

The 2002 Guardianship Law, implemented in 2004, created a specialized guardianship mechanism for unaccompanied children<sup>34</sup>. The Guardianship Service ("*Service des Tutelles*"), under the supervision of the Ministry of Justice has to be informed as soon as an unaccompanied migrant child is identified at the border or within the territory and should appoint a guardian within 24h after the status of minor is confirmed. A temporary guardian can be appointed during the identification process in "extremely urgent" situations. However the criterion of "urgency" varies and many potential children remain without a guardian. Additionally, children coming from the European Economic Area are excluded from the right to a guardian, likely to be in contradiction with article 2 of the Convention (non-discrimination principle).

#### 4.3.b- An unequal protective approach: illegal distinction between asylum seekers and others

As already mentioned the Guardianship Service appoints a guardian, either a physical person or an association and also exercises supervision. The legal guardian has a broad remit: legal representation of the child in all procedures (immigration, asylum, administrative), tracing the family in the country of origin, assistance to access education, health and reception systems. They also assess the child's situation in his/her country of origin and in Belgium and suggest a durable solution. However, in practice, the time limit of 24 hours for appointment is largely exceeded, especially when the age examination results are pending, and can even reach a month. Finally, guardians, whose role is

30. SENOVILLA HERNANDEZ, D. (2007): «*Situación y tratamiento de los menores no acompañados en Europa. Un estudio comparado de 6 países- Resumen de resultados*», Observatorio Internacional de la Justicia Juvenil, 64 pages.

31. This part has been reviewed by Julien Blanc and Katja Fournier, Service Droit des Jeunes – Belgium, in October 2011.

32. Articles 40 and 41, *Loi sur l'accueil des demandeurs d'asile et de certaines autres catégories d'étrangers*, 12 January 2007, published in the *Moniteur belge* (7 May 2007).

33. Belgium was condemned for detaining during two months a five years old Congolese girl and for returning her alone to Congo, when she was trying to join her mother in Canada. See *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 12 October 2006, European Court of Human Rights. This ECHR judgment has been examined within chapter 3 of this document.

34. *Loi-programme* 24 December 2002, published in the *Moniteur belge* (31 December 2002).



qualified as a “good practice example”<sup>35</sup> (considering the broad scope of their mission and their duties), are underpaid and overworked. This weakens the efficiency and quality of their role of representation and protection of unaccompanied migrant children.

During the evaluation stay in the COO (lasting 15 days and renewable), adequate reception and protection has to be determined according to the needs of the child<sup>36</sup>. The two existing COO are run by the Federal Agency for the reception of asylum seekers (Fedasil). However, in practice and since October 2009, due to the lack of reception centres, Fedasil excludes non- asylum seekers (except those who are considered as “vulnerable”: under 13 years old, pregnant girls, a child who has a child, and generally girls). Consequently, unaccompanied migrant children often stay in hotels with no social support or even live in the streets. This practice is illegal under Belgian law and could also be considered as contrary to article 2 of the Convention (non-discrimination principle).

After an initial observation period, unaccompanied migrant children are sent to a Federal centre, a Red Cross centre, a centre for victims of traffic, an independent flat or can stay with extended family (second phase of reception). Theoretically, the child who is not seeking asylum should join centres under the linguistic Communities’ (French and Flemish) responsibility which are competent for child protection (for children who are considered in “danger<sup>37</sup>” or “being in a problematic educational situation<sup>38</sup>”). However, reception centres lack capacity. At the same time linguistic Communities refuse to consider any unaccompanied migrant child as vulnerable and therefore to take him/her under their care.

This specific system is unique in Europe and aims at providing an adequate protection to the special needs of unaccompanied migrant children, based on their best interest. However it faces difficulties in handling the number of unaccompanied migrant children (around 2800 per year<sup>39</sup>). As a consequence, children stay a few months in the Observation and Orientation Centres instead of one month, before entering into the second phase of the reception, leading to the overloading of the system. According to their level of vulnerability and due to the limits of the current reception systems, numerous unaccompanied migrant children do not benefit from the protective system.

#### 4.3.c- An arbitrary consideration of all durable solutions

The Immigration authorities, after receiving the legal guardian’s proposal, determine an appropriate durable solution (family reunification in Belgium or in a third country, return to the country of origin, or unlimited stay in Belgium). The durable solution is based on the child’s best interest. However the Foreign Office often considers that a return to (any) family member is the best interest of the child, even if Jurisprudence shows in some cases the family could not guarantee the safety or the proper development of the child. The guardian can appeal the decision.

In the meantime, as long as a durable solution is not chosen, the child who is not seeking asylum or does not ask to be recognised as a victim of trafficking (in this case special procedures apply) can be granted a temporary residence authorization of three months, renewable. After six months, he/she can be granted a temporary residence status (“CIRE”: *Certificat d’Inscription au Registre des Étrangers*), if he/she has identity documents. This status is then renewable if the child knows one of the national languages, if he/she studies and also depending on his/her family situation and to any other relevant information<sup>40</sup>. If no durable solution has been found after three years since the first application to a residence permit (it also means that the child must have arrived and above all been identified before he/she was 15), the child can ask for a permanent residence permit if some conditions are fulfilled: presentation of identity documents, studies, etc. Otherwise, the child’s stay becomes illegal (but the child cannot be forcibly deported until he/she reaches 18). He/she can also ask to be regularized under exceptional circumstances that also apply for adult migrants (humanitarian reasons, good integration, absence of family links in the country of origin, medical condition)<sup>41</sup>.

35. BRUUN L. & KANICS J. (2009), “Ensuring that every separated child is heard and protected: the role of an independent, professional guardian”, in *“Migrating alone: unaccompanied and separated children’s migration to Europe”*, edited by SENOVILLA HERNÁNDEZ, D., TOUZENIS, K. and KANICS, J., Editions UNESCO, Paris, pages 58-67.

36. Article 2 of the *Arrêté royal du 9 avril 2007 déterminant le régime et les règles de fonctionnement applicables aux centres d’observation et d’orientation pour les mineurs étrangers non accompagnés*, 9 April 2007.

37. Criteria set by the French Community.

38. Criteria set by the Flemish Community.

39. Statistics of the Guardianship Service in 2010. Estimates indicate that 3.100 unaccompanied migrant children would arrive in Belgium in 2011.

40. *Circulaire du Service public fédéral d’intérieur relative au séjour des mineurs étrangers non accompagnés*, 15 September 2005.

41. Articles 9 bis and 9 ter *Loi sur l’accès au territoire, le séjour, l’établissement et l’éloignement des étrangers*, 15 December 1980.

The legality of the child's stay is therefore based on subjective and unclear criteria and decided by the Immigration authorities, on an arbitrary basis and with delay that sometimes prevents the child from asking for renewal or new documents<sup>42</sup>. In conclusion, the "protective" Belgium system applies more to asylum-seekers and children with additional vulnerabilities than to all unaccompanied migrant children.

#### 4.4- ITALY: A WEAK PROTECTION SYSTEM<sup>43</sup>

The Italian system does not promote a strong protection system for unaccompanied migrant children. On the contrary, it tends to restrict possibilities of integration and regularization.

##### 4.4.a- Distinction between unaccompanied migrant children at the border or within the territory

Upon their arrival, unaccompanied migrant children can be denied access to Italian territory, deported to their country of origin or transit, or detained at the border, as the same procedure for adults applies<sup>44</sup>. However deportations of children are very rare in practice.

Once in the territory, they are considered as being "in need" and have immediate access to protection. They cannot be deported nor detained pending deportation. Indeed, their residence is not illegal as long as they have the status of a minor. They are entitled to a residence permit specific to minors until they become of age, once they are integrated in the care system and are represented by a legal guardian. They cannot be deported, except for national security reasons<sup>45</sup>. However a few receive legal documentation, which is anyway, temporary.

The recent arrival of more than 50,000 migrants (including more than 2,500 unaccompanied children<sup>46</sup>) from Tunisia, Libya and the Sub-Saharan States to Lampedusa, Linosa and Lampione Islands has underlined failures in the procedure and violations of the Convention on the Rights of the Child. Indeed, despite the Humanitarian Emergency Plan established by the Italian authorities to deal with these arrivals, unaccompanied migrant children were detained in centres without a judicial control and sometimes with adults, or even having to sleep outside, before being sent on the mainland. Numerous factors were denounced by associations: detention in centres for immigrants; delays of these detentions and late transfers to children's homes; living conditions in the centres; arbitrary age assessment; no determination of best interests and durable solutions, etc. This crisis, if nothing else, has revealed weaknesses in the Italian reception system<sup>47</sup>.

##### 4.4.b- An insufficient protection

As mentioned above, the access to a protective system is automatic after the child has been identified as unaccompanied. Their protection (reception, shelter) is the same that applies to vulnerable children in the territory who are in a situation of risk or abandonment, whether migrants or not (common structures of child welfare)<sup>48</sup>. However, care systems differ from a region to another. Children are assisted, placed and legally represented by a private or public guardian (in the second case the institution is under the municipality's responsibility), however, depending on the city, the appointment may be delayed and take several months. This consequently prevents the child applying for a residence permit. Guardians may also face conflict of interest as they may be representing the municipality and advocate for measures that are not in the best interest of the child but of the municipality (such as the return to the country of origin, when reception centres lack availability).

42. SENOVILLA HERNANDEZ D. (2010), *op.cit.*, pages 208-211.

43. This part has been reviewed by Elena Rozzi, ASGI – Italy, in October 2011.

44. Article 10, 14 & 19 paragraph 1 of *Decreto Legislativo n.286, Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero*, 25 July 1998. See also ROZZI E. (2008), "The situation of EU and non-EU separated children in Italy", in "La migration des mineurs non accompagnés en Europe", under SENOVILLA HERNANDEZ D.'s direction, E-Migrinter n°2, [http://www.mshs.univ-poitiers.fr/migrinter/e-migrinter/200802/emigrinter2008\\_02\\_013.pdf](http://www.mshs.univ-poitiers.fr/migrinter/e-migrinter/200802/emigrinter2008_02_013.pdf)

45. *Decreto Legislativo n.286, Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero*, 25 July 1998

46. According to Save the Children Italy.

47. See Gruppo CRC (2011), « Update on the situation of migrant children in Lampedusa » (not public)

48. Civil Code, article 403; Law n. 184/83, article 2 and following.



They are also often overwhelmed by the numbers of cases as well as undertrained<sup>49</sup>.

The reception system is notably problematic during periods of massive arrivals to Italy. Children are in theory entitled to all public services (health, education, social services); however they lack access to them if they do not have a valid residence status.

#### 4.4.c- The return as the prioritized durable solution

Durable solutions are not equally considered according to the best interests of the child, as the return to the country of origin has to be assessed first. The durable solution “integration” is consequently side-lined as the prioritised solution is the return to the country of origin to reunify the family. Indeed, the interdiction to deport children does not exclude returns<sup>50</sup>. The law allows “assisted returns” after the family has been traced or if there exist a care institution in the country of origin willing to take care of the child<sup>51</sup>. The decision is taken by the Committee for Foreign Minors (“*Comitato Minori Stranieri*”, under the Ministry of Welfare), which receives notification of the arrival/presence of unaccompanied migrant children and have the task of tracing the family<sup>52</sup>. In practice, however, only few decisions of return are taken, except concerning Romanian children, to whom the return is facilitated by agreements with Romania and not decided by the Committee for Foreign Minors.

Unaccompanied migrant children may reach adult status without possessing residence permits, or when they do, they may face difficulties to consolidate their legal situation. However the conditions to obtain a legal residence status when they reach 18 have recently become less restrictive.

Before a 2011 decree, the conditions to renew the residence permit when they reach 18 were the following: there was no pending return; the child had entered Italy before he/she was 15 years old; he/she followed for at least two years an integration project managed by a public or private organism recognised by the State; he/she studied or worked and had a place to live<sup>53</sup>. Previously a distinction existed with children under foster family’s care: they could be regularized even if they had arrived after they were 15 years old. The Courts then had homogenized these two statuses (under public guardianship or a family’s charge) and allowed the renewal of the residence title even if the child had not been in the territory for three years. This renewal was also irrespective of participation in an integration project and of the Committee for Foreign Minors’ decision on return<sup>54</sup>. However the 2009 Security Law confirmed the above-mentioned conditions and extends them to children benefiting from the reception family’s care system. These restrictive conditions<sup>55</sup>, which tended to exclude unaccompanied migrant children from protection and integration systems (with the consequence of becoming illegal migrants and being subjected to deportation from Italy) were modified in August 2011.

Current practice now requires that one of these conditions has to be fulfilled to get a legal residence status: either the child is under guardianship and has received a positive opinion of the Committee for Foreign Minors, or he/she has arrived in Italy before he/she was 15 years old and has participated in an integration project for at least two years<sup>56</sup>. The consequences for unaccompanied

49. ROZZI E. (2008), *op.cit.*, page 16.

50. *Decreto Legislativo n.286, Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero*, 25 July 1998, D.P.C.M 9 December 1999, n°535.

51. *Decreto Legislativo n.286, Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero*, 25 July 1998, D.P.C.M 9 December 1999, n°535.

52. **Article 33** *Decreto Legislativo n.286, Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero*, 25 July 1998; DPCM 535/99; Ministry of Interior’s memorandum 9.4.2001.

53. **Legge 30 luglio 2002, n.189** “*Modifica alla normativa in materia di immigrazione e di asilo*” and Legge 15 luglio 2009, n.94, “*Disposizioni in materia di sicurezza pubblica*”

54. **Constitutional Court (Corte Costituzionale)** judgments n. 198/2003 and n. 234/2004 and State Council (Consiglio di Stato) judgments n.1681/2005 and n.564/07.

55. See GIORDANO C. (2010), “L'accueil des mineurs isolés étrangers en Italie: entre régularisation et « clandestinisation », l'exemple de la ville de Parme”, in “*Mineur isolé étranger: une nouvelle figure de l'altérité?*”, Migrations Société CIEMI vol 22 n°129-130, mai-août 2010, pages 147-160.

56. **Article 32** *Decreto Legislativo n.286, Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero*, 25 July 1998, modified by Decreto Legge 89/11.

migrant children's access to legal status are yet to be measured.

In conclusion, the lack of adequacy between national laws and the International Convention on the Rights of the Child occurs through several factors (both causes and consequences): either there exists no specific regulations addressing the special needs of unaccompanied migrant children, or gaps occur between stages of the procedure. Indeed, in most of the countries studied, immigration law applies partly (and to different extents) to unaccompanied migrant children instead of child protection laws. This implies that the child is discriminated against (there exists discrimination between national children and migrant children, and additionally between EU children and non-EU children). In any event, limited protection and generalized lack of integration and opportunities to get legal status lead children not to enter care systems or to abandon them during their stay in European States. They consequently often stay outside the official systems of protection, are marginalized and susceptible to exploitation, and cannot enjoy the rights recognised by the Convention.

To conclude, good practices and systems have to be developed, promoted and implemented to harmonize European systems and reach the standards of the Convention on the Rights of the Child.

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