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Unaccompanied Minors' Rights within the European Union: Is the EU Asylum and Immigration Legislation in line With the Convention on the Rights of the Child?

Legal Paper presented under the supervision of
Philippe de Bruycker and Rebecca O'Donnell

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Any opinions expressed in this paper are those of the author and do not necessarily reflect the views of the Odysseus Network, Save the Children or any other organizations mentioned within

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“Irrespective of their legal status, unaccompanied minors should be entitled to the necessary protection and basic care […].[1]”

“States especially those of transit and destination should devote special attention to the protection of undocumented and unaccompanied children, as well as the protection of children seeking asylum and children victims of transnational organized crime, including trafficking in persons […].”[2]

“Non-rights-based arguments such as those relating to general migration control cannot override best interests’ consideration[3]”

“Rights believers have an obligation to raise and stimulate discussion of the difficult and contentious issues that arise in actualizing migrant children rights. They need to address the ambivalence that policymakers feel, torn between sympathy and hostility, between a concern to protect and a pressures to punish, rather than minimize or ignore it. Human Rights' instruments will never deliver on their aspiration without the political honesty and the mobilizing muscle that transform them into lives demand.”[4]

[1] Council Resolution of 26 June 1997 on unaccompanied minors who are nationals of third countries, *Official Journal C 221, 19/07/1997 P. 0023 – 0027*

[2] Statement by Professor Jorge Agustin Bustamante, Special Rapporteur on the Human Rights of Migrants, *Human Rights Council, 11th session, Geneva, 2 June 2009*

[3] General Comment No.6 (2005) – Treatment of Unaccompanied and Separated Children outside Their Country of Origin, *United Nations Committee on the Rights of the Child, CRC/GC/2005/6, 1 September 2005, paragraph 86, p.23*

[4] *Jacqueline Bhabha (2009),* Arendt’s Children: Do Today’s Migrant Children Have a Right to Have Rights?*, Human Rights Quarterly 31, 2009, p. 451*

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May this paper contribute to the ongoing lively discussions on unaccompanied minors.
But most of all may it contribute to the improvement of unaccompanied minors' treatment.

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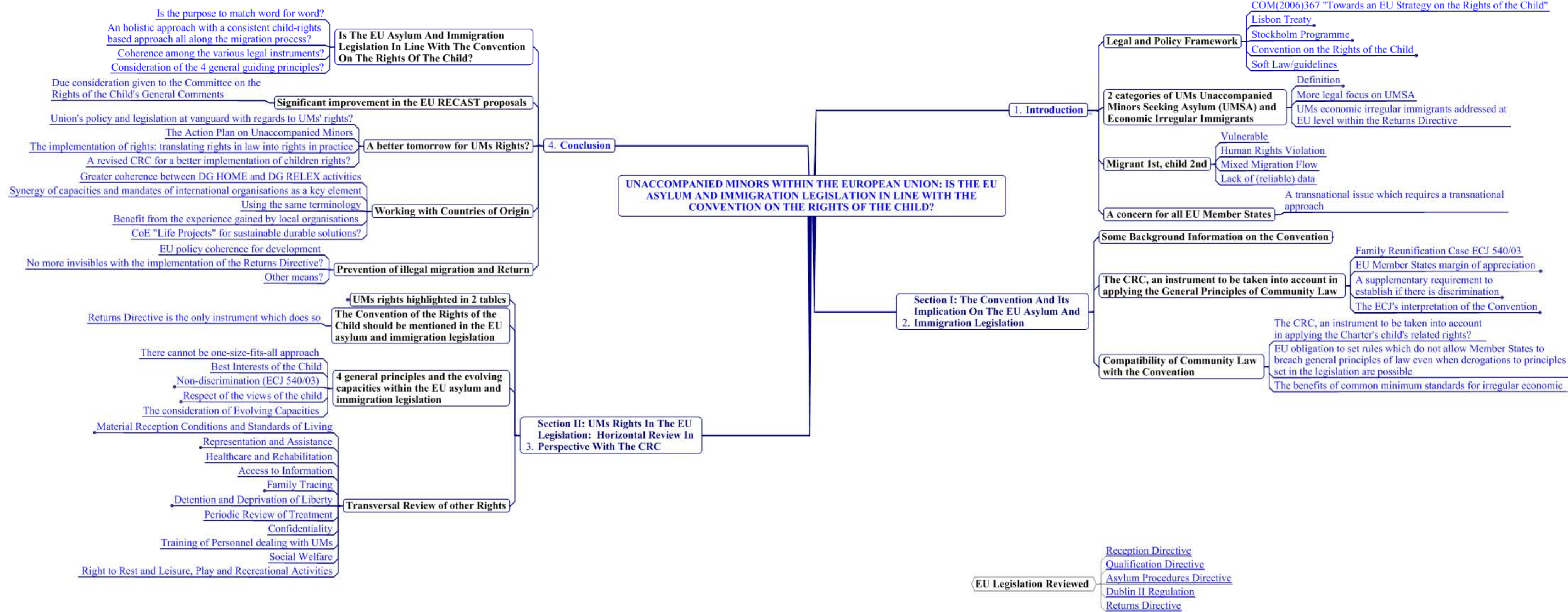

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INTRODUCTION

With the European Union economic integration being achieved, **Justice and Home Affairs are the areas which nowadays face the most challenges, placing human beings – be they nationals or third-country nationals – at the centre of the Europe Union** (EU) an entity *sui generis* "founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms"[5], and which "places the individual at the heart of its activities by [...] creating an area of freedom, security and justice."[6]

The **Lisbon Treaty[7]** which now includes the protection of children's rights[8] entered into force on December 1st 2009 and the **Stockholm programme[9]** adopted on December 2nd 2009 sets the development of "responsibility, solidarity and partnership in immigration and asylum matters" as one of the main objectives for the period 2010-2014.

It is in this framework that **this paper will address the specific rights of unaccompanied minors. The focus will be put on unaccompanied minors who arrive unaccompanied or who are left unaccompanied afterwards within the Union, be they asylum seekers or considered as irregular[10] economic migrants.**

As any other migrant, unaccompanied minors (UMs) have the right to leave their own country – in due line with Art.12 of the International Covenant on Civil and Political Rights (ICCPR)[11] which states that "everyone shall be free to leave any country, including his own" - but do not have a corresponding right to be received by another State, expect those who are seeking international protection.

As any other child, both unaccompanied minors seeking asylum and UMs who are considered irregular economic migrants should benefit from the protection of the Convention on the Rights of the Child (hereafter "the Convention" or "CRC") a *lex specialis* Human Rights Treaty of universal application adopted on November 20th 1989, which reflects a holistic

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[5] Preamble of the Treaty on European Union as amended by the Lisbon Treaty

[6] Preamble of the Charter of Fundamental Rights of the European Union

[7] The Lisbon treaty amends the Treaty on the European Union (TEU) and the Treaty establishing the Community (TEC); this latter has been renamed the Treaty on the Functioning of the European Union (TFEU). The Consolidated version is available at http://europa.eu/lisbon_treaty/index_en.htm

[8] Art.3(5) TEU

[9] The Stockholm Programme – An open and secure Europe serving the citizens, *Brussels, December 2nd 2009, 17024/09.* The Stockholm programme is the third multi-annual programme in the area of freedom security and justice. It was adopted by the European Council on December 2nd 2009 (17024/090)

[10] Although "illegal" is the terminology used within the EU legislation, "irregular" will be used in this paper to reflect the international legislation. Besides, the term "illegal" has a criminal connotation, when migrants should not be criminalized solely for their entry or presence in the territory, be it legal or illegal

[11] International Covenant on Civil and Political Rights (ICCPR), UNGA Resolution 2200A (XXI), of 16 December 1966 (entry into force on March 23, 1976). The "right to leave" is also mentioned in the following texts: Article 8 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICPMW); Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination; Article 10 of the Convention on the Rights of the Child; Article 13 of the Universal Declaration of Human Rights; Article 5 of the General Assembly's Declaration on the Human Rights of Individuals Who are Not Nationals of the Country in Which They Live

integrated approach towards the protection of children rights. Indeed, as specifically stated in Art.2.1 of the Convention *"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 race, colour, sex, language, religion, political or other protection, national, ethnic or social origin, property, disability, birth or other status."* Yet in practice, while asylum law is a specific branch of international public law with clear rights and safeguards for those who had to flee from their territory to escape persecution – first and foremost within the 1967 Refugee Convention and its 1967 Protocol[12], there is no analogous branch in the immigration area[13]; UMs who are seeking asylum are entitled to international protection while the others are not. Besides, the EU legislation mainly addresses unaccompanied minors seeking asylum (UMSA) and not the other UMs who are considered as irregular economic migrants[14], and whose treatment is thus surrounded by a legal void at EU level apart for UMs who have to be returned in the context of the Returns Directive[15]; and even in this framework, Member States have the possibility not to apply this Directive to third-country nationals who are apprehended or intercepted "in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State." (Art.2(2)(a)). **Attention has therefore been focused on a specific group of migrant children to the detriment of other categories**. UMs considered as irregular economic migrants are thus even more vulnerable than the asylum seekers and one might even wonder if they have a right to have rights.[16] Host States tend to see them as "non-citizens who are illegally in the country and should be removed at the earliest opportunity. They can be called outlaws in the original sense since they seem to live outside of the law."[17]

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[12] 1951 Convention relating to the Status of Refugee and 1967 Protocol relating to the Status of Refugee available at http://unhcr.org. It should be noted that the Refugee Convention is not child specific and does not contain any specific reference to child refugee

[13] The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, which applies to all migrant workers and their families, irregular or regular, could bring similar protection in terms of immigrants' human rights. To date it has only been ratified by 30 States, most of them being countries of origin of migrants. None of the EU Member States has ratified the Convention. The only regional human rights Treaty that is clearly applicable to all migrants, regular or otherwise on EU/EEA, is the European Convention on Human Rights

[14] The only legal instrument that addresses both asylum seekers and economic irregular migrants when referring to Unaccompanied Minors, and which thus gives an adequate definition according to its provisions,, is the Council Resolution of the European Union of 26 June 1997,[14] with Unaccompanied Minors being defined as *"third country nationals below the age of eighteen, who arrive on the territory of the Member States unaccompanied by an adult responsible for them whether by law or custom, and for as long as they are not effectively in the care of such person"*.

[15] 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

[16] *Jacqueline Bhabha (2009),* Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights?*, Human Rights Quarterly 31, 2009, pp. 410-451*

[17] CommDH/Issue Paper(2007)1 CoE

Unaccompanied minors are extremely vulnerable, as children, as migrants, and because they are unaccompanied. They have undergone separation from family members and have also, to varying degrees experienced loss, trauma, disruption and violence.[18] Children who are unaccompanied face a greater risk of abuse, exploitation or neglect than those who are accompanied.[19] They are particularly vulnerable to human rights' violations and abuses at all stages of the migration process[20]; they might be treated like adults, are more susceptible to face discrimination, not to speak about the risks of not being given the opportunity to claim their rights (e.g. in the case of asylum seekers). They are also more psychologically vulnerable, as they are more likely to elaborate severe symptoms of anxiety, depression and post-traumatic stress.[21] However, it is a common problem that migrant children are not considered primarily as children but as migrants. **They are entitled to care measures and services as children but removed and rejected as illegal immigrants**[22], as least when they cannot benefit from international protection. Studies on the roots of migration, though scares, reveal that children migrate for diverse personal, economic or environmental reasons.[23] Among others, these may include: flying from persecution, political conflicts or loss of family security; seeking for a better living (education; work, etc.), escaping poverty; or surviving from natural disasters.[24]

Besides, reality shows that it seems more and more difficult to differentiate one category of UMs from the other – a phenomenon known as "**mixed migration**"[25] – with the result that a *prima facie* refugee might not be able to claim asylum and is thus at risk of *refoulement* without access to the protective measures to which he or she is entitled to.[26]

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[18] General Comment No.6 (2005) – Treatment of Unaccompanied and Separated Children outside Their Country of Origin, *United Nations Committee on the Rights of the Child, CRC/GC/2005/6*

[19] *Jacqueline Bhabha (2009),* Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights?*, Human Rights Quarterly 31, 2009, pp. 410-451*

[20] 2008 Januzs Korczak Lecture "the Child's best interest: a generally applicable principle", *Council of Europe, CommDH(2008)24, Stokholm, 9 September 2008*

[21] *Ilse Derluyn, Eric Boekart, (2008),* Unaccompanied refugee children and adolescents: The glaring contrast between a legal and psychological perspective, *International Journal of Law and Psychiatry 31, 2008, pp. 319-330*

[22] Introduction Note to the International Conference "the Migration of UMs in Europe: the contexts of origin, the migration routes, the reception systems", Poities, 10-11 Octobre 2007

[23] Careful consideration should be given to "Separated asylum seeking children in EU Member States – SEPAC" an initiative from the Fundamental Rights Agency (FRA) managed by the International Organization for Migration (IOM). The purpose of this project is to provide EU national policy makers with an insight on the situation of UMs, research results being based on interviews with separated asylum-seeking children.

[24] For more information on the roots of migration, see the very interesting study published by European Forum in 2009 *"Wandering Young People, the Conditions of Return – Feasibility Study on the Reintegration of isolated Minor Victims of Trafficking, Spain, France, Italy, Albania, Austria, Romania".* This study, which focused mainly on child victims of trafficking of human beings and was funded by the European Return Fund, classifies migrant children according to 7 profiles: the runaways; the mandated; the nomads; the adopted; the duped; the prepared; the exiles. For more information, please visit the following website http://www.fesu.org

[25] Mixed Migration Flows are defined as "complex population movements, including refugees, asylum-seekers, economic migrants and other migrants" in International Migration Law – Glossary on Migration, *International Organization for Migration, 2004.* EU Member States are faced with mixed migration flows especially at the southern border, with migrants arriving by boat from the Mediterranean or Aegean Seas, or the Atlantic Ocean

[26] 2008 Januzs Korczak Lecture "the Child's best interest: a generally applicable principle", *Council of Europe, CommDH(2008)24, Stokholm, 9 September 2008*

Despite a great deal of data being provided in the various reports related to UMs, Member States as well as all other actors involved with UMs complain about the **lack of reliable data and statistics**. Nigel Cantwell and Anna Holzscheiter note in their Commentary of Art.20 CRC that "even when data exist, the indicators used are only rarely comparable across different national contexts, thereby reducing significantly the possibility of making inferences about the broader, 'global' dimension of children living outside their family environment."[27] Hence, they are invisible (or is it that we do not want to see them?), left in limbo with regard to their residential status, and they face more risks of being trafficked since they might go underground to avoid being removed from the EU when they reach the age of 18. Their lack of visibility, combined with their junior status in society, contributes to the failure of States to address their needs, which in turn, deepens the material deprivation experienced by migrant children.[28]

There is no dispute that unaccompanied minors deserve special protection as minor children, and that ideally they should be considered as children before being considered as migrants. In its Resolution on the Stockholm programme[29], the European Parliament underlined the importance of treating migrant children as children first and foremost, and to ensure that they benefit from their rights as children without discrimination. **Unaccompanied minors** nonetheless **suffer from the tensions that exist between the preservation of children's rights and the migration pressure on EU Member States.**

Indeed, **Member States are all confronted with the situation of UMs**, as transit or destination countries, and are at the forefront when dealing with them. In this respect, the EU Committee of the Regions notes that "[i]n many cases it falls to local and regional authorities to receive and assist unaccompanied minors and that this includes the obligation to ensure housing, social and medical assistance and education. Where appropriate, Member States must integrate them into employment and carry out the major administrative task of documenting each individual case, shouldering the resulting financial burden."[30] The challenge Member States face, is to "strike a proper balance between protecting the rights of all those who are inside or at [their] borders, and maintaining control of borders."[31] At the occasion of the Justice and Home Affairs (JHA) Council Conclusion of September 2009

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[27] *Nigel Cantwell and Anna Holzscheiter, (2008),* Commentaries on the United Nations Convention on the Rights of the Child: Article 20 – Children Deprived of Their Family Environment, p.3

[28] *Jean Grugel and Nicola Piper, (2007),* Critical Perspectives on Global Governance, Rights and Regulation in Governing Regimes

[29] European Parliament Resolution of 25 November 2009 on the Communication from the Commission to the European Parliament and to the Council – An area of freedom, security, and justice serving the citizen – Stockholm programme." P7_TA-PROV(2009)0090

[30] Opinion of the Committee of the Regions on the situation of unaccompanied minors in the migration process – the role and suggestions of regional and local authorities, OJ C 51/07, 6 March 2007, p.37, *paragraph* 1.9

[31] CommDH/IssuePaper (2007), CoE

"Ministers confirmed that this subject represents an important challenge for member states and raises issues of common concern. […] [A]ll member states would benefit from the development of common approaches and increased cooperation with countries of origin, including cooperation to facilitate minors' return."[32] However, **both migration and the promotion of children's rights are areas where actions at EU level were only taken within the last decade**.

The Treaty of Amsterdam, which was ratified on May 1st 1999, represents the real inception of the asylum and immigration policy.[33] The Tampere European Council's milestones and The Hague programme (both predecessors of the Stockholm programme which has been adopted in December 2009 and will cover the 2010-2014 period) respectively adopted during the European Council held in Tampere in 1999 (for the period 1999–2004), and in The Hague in December 2004 (for the period 2005–2010) are also worth mentioning to demonstrate that most actions relating to freedom, security and justice have been taken in the asylum area, towards the establishment of a Common European Asylum System (CEAS). The legal instruments studied in this paper (the Reception, Qualification, Asylum Procedures and Returns Directives and Dublin II Regulation) have been adopted as a response to the objectives set during the Tampere Council, leading to the adoption of common minimum standards at EU level - with due respect to the principles of subsidiarity and proportionality[34] - that have to be implemented by Member States.

The same **definition of unaccompanied minors** is given in each piece of legislation analyzed in the framework of this paper, as "persons below the age of 18 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 care of such person: it shall include minors who are left unaccompanied after they have entered the territory of the Member State." However, "unaccompanied" does not always reflect the reality, since minors might sometimes be, or might have been accompanied for a short period, by adults responsible for them; they might also look for family reunification; and they might also suffer

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[32] Council of the European Union, 2962nd meeting, Justice and Home Affairs, Brussels, *21 September 2009, 13467/09 (Press 271),* p.8

[33] Issues relating to migration were initially addressed at intergovernmental level within the third pillar - "Justice and Home Affairs" - created within the Maastricht Treaty on European Union, which was ratified on 2 November 1992. The EU relied on 2 other pillars: the European Communities (1st pillar), and the Common Foreign and Security Policy (2nd pillar)

[34] As reminded in the preambles of the EU legislation on immigration and asylum "since the objectives of the proposal action, namely to establish minimum standards [...] cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale of effect of the proposed action, be better achieved by the Community, the Community may adopt measures in accordance with the principles of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, [these] Directive[s] [do] not go beyond what is necessary in order to achieve these objectives.

from trafficking.[35] The use of the terminology "separated" would seem to be more appropriate, "**separated children**" being defined in General Comment No 6 (GC6)[36] from the Committee on the Rights of the Child as minors who "have been separated from both parents, or from their previous legal or customary caregiver, but not necessarily from other relatives [and] may therefore include minors accompanied by other adults' family members". In this respect, it should also be noted that the EU legislation refers to "adults responsible for [UMs] whether by law or by custom" while the use of the terminology "adult who is their legal or customary primary caregiver"[37] seem to be more appropriate.

As for children in general, they were mentioned for the first time in the Amsterdam Treaty[38], the main focus being placed on the prevention of crimes, terrorism and trafficking of persons. **The real impulse** thus came with the **Commission Communication "Towards an EU Strategy on the Rights of the Child"** in 2006[39], which nevertheless did not address UMs either, but stated that one of the EU challenges was to ensure that "children as immigrants, asylum seekers and refugees are fully respected in the EU and its Member States' legislation and policies".

A new turn was taken with the entry into force of the Lisbon Treaty and the adoption of the Stockholm programme in December 2009.

The protection of the rights of the child has indeed been included in the Lisbon Treaty.[40] Art.2 TEU states that "[t]he Union's aim is to promote peace, its values and the well-being of its people" and states that the Union "shall combat social exclusion and discrimination, and

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[35] Article 1 of the Council Framework Decision of 19 July 2002 on Combating Trafficking in Human Beings (2002/629/JHA) defines the concept of trafficking in human beings for the purpose of labour or sexual exploitation. The Member States must punish any form of recruitment, transportation, transfer or harbouring of a person who has been deprived of his/her fundamental rights. Thus, all criminal conduct which abuses the physical or mental vulnerability of a person will be punishable. The victim's consent is irrelevant where the offender's conduct is of a nature which would constitute exploitation within the meaning of the proposal, that is, involving: the use of coercion, force or threats, including abduction; the use of deceit or fraud; the abuse of authority or influence or the exercise of pressure; the offer of payment. Instigating trafficking in human beings and being an accomplice or attempting to commit a crime will be punishable

[36] General Comment No.6 (2005) – Treatment of Unaccompanied and Separated Children outside Their Country of Origin, *United Nations Committee on the Rights of the Child, CRC/GC/2005/6, paragraph 8, p.6*

[37] This is the approach taken by Save the Children, notably in the "SC Europe Group Submissions, Revision of the EC Reception Directive" dated November 4th 2008

[38] Children are mentioned in Title VI TEU, related to provisions on police and judicial cooperation in criminal matters in Article 29 (ex Article K.1)

[39] COM(2006)367. This Communication was welcomed by the European Parliament in a Resolution of 16 January 2008 (2007/2093/(INI). In this Communication, the Commission proposed "to establish a comprehensive strategy to effectively promote and safeguard the rights of the child in the European Union's internal and external policies and to support Member States' efforts in this field". Children's rights were set as a priority within the EU Strategic Objectives 2005–2009. This Communication was a response to the European Council in March 2006, which requested "the Member States to take necessary measures to rapidly and significantly reduce child poverty, giving all children equal opportunities, regardless of their social background". It should be stressed that this document was not the strategy itself but a series of actions to be undertaken on the path towards drafting such a strategy, which in principle should be issued in 2010

[40] The protection of the rights of the child was mentioned in the Treaty establishing a Constitution of Europe signed in October 2004, but this was never ratified due to the French and Dutch rejection via referenda. The Treaty of Lisbon maintained the advances included in the Constitution

shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child." As far as the European Union's relations with the wider world are concerned, the EU shall contribute "to the protection of human rights, in particular the rights of the child, including respect for the principles of the United Nations Charter." (Art.3(5) TEU). The Council and the European Parliament are now empowered to adopt measures with regard to combating trafficking in persons, in particular women and children (Art.79(1)(c) TFEU) and may, by means of Directives adopted under the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature of such impact or such offences or from a special need to combat them on a common basis; trafficking in human beings and sexual exploitation of children being included in the areas of crime (Art.83(1) TFEU).

One of the other major changes is that the Treaty confers the Charter of Fundamental Rights[41] (hereafter "the Charter") **the same legal value as the Treaties (Art.6(2) TEU).** Art.24 of the Charter specifically addresses children's rights, the emphasis being put on the right of protection and care which is necessary for the children's well-being; on the fact that children should express their views freely and that such views should be taken into consideration on matters that concern them in accordance with their age and maturity. The best interests of the child must be a primary consideration in all actions relating to children taken by public or private authorities. Eventually, every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests. The following rights enshrined in the Charter are not specifically children's rights, but may nevertheless have special implications for children: Art.1 (Human dignity); Art.3 (Right to integrity of the person); Art.4 (Prohibition of torture and inhuman degrading treatment or punishment); Art. 5 (Prohibition on slavery and forced labour); Art.7 (Right to respect for private and family life); Art.11 (Freedom of expression and information); Art.14 (Right to education); Art.21 (Non-discrimination); Art.18 (Right to asylum); Art.32 (Prohibition of child labour and protection of young people at work); Art.33 (Respect for family and professional life); and Art.35 (Rights to healthcare).

[41] The Charter on Fundamental Rights of the European Union (2000/c 364/01) was signed during the European Council meeting in Nice in December 2000 but only got a binding force with the entry into force of the Lisbon Treaty in December 2009. It should be noted that the United Kingdom and Poland obtained the signature of a protocol which is not an opt-out from the Charter but a legally binding text that seeks to prevent the Charter from being interpreted in a way that it would create additional rights to those already provided for in British or Polish law. However, it has been acknowledged that the protocol's benefit is largely political in making crystal clear that the Charter will not impact on UK and Polish law expect when EU law is being implemented in the country, thus "to put beyond doubt what should have been obvious from the other provisions" (Justice Secretary Jack Straw, May 2008)

Member States also recognised in the **Stockholm programme** that the rights of the Child ensuing from the Convention must be systematically taken into account, with a view to ensuring an integrated approach and that measures to which the Union could bring added-value should be identified. Children in particularly vulnerable situations - and thus UMs - "represent a particularly vulnerable group which requires special attention and dedicated responses."[42] In this context, the European Council welcomed the **Commission's initiative to develop an action plan on UMs**, which should **combine measures directed at prevention, protection and assisted return**. Particular attention should be devoted to the exchange of information and best practice, minor's smuggling, cooperation with third-countries – including cooperation to facilitate the return of minors, as well as to prevent further departures, the question of age assessment, identification and family tracing, and the need to pay particular attention to unaccompanied minors in the context of the fight against human trafficking. "The action plan should also examine practical measures to facilitate the return of the high number of unaccompanied minors that do not require international protection, while recognising that the best interests for many may be their reunion with their families and development in their own social and cultural environment."[43] Particular attention is given to UMs in several other parts of the Stockholm programme. In this context, the Commission shall "identify measures to which the Union can bring added value, in order to protect and promote the rights of the child. Children in particularly vulnerable situations should receive special attention, notably children that are victims of sexual exploitation and abuse as well as children that are victims of trafficking and unaccompanied minors in the context of immigration policy."[44] While measures to counteract irregular immigration should be taken, "border controls should not prevent access to protection systems by those entitled to benefit from them and especially people and groups that are in vulnerable situations. In this regard, priority will be given to the needs of international protection and reception of unaccompanied minors."[45]

In its **Resolution on the Stockholm programme**[46], the European Parliament states that the action plan should address the special protection that UMs should benefit from whilst in the EU; it should also identify concrete and durable solutions for each child in the child's best interests; and establish a return and reintegration process in cooperation with third-countries when return is in the best interests of the child. The European Parliament calls for the EU to

[42] The Stockholm Programme – An open and secure Europe serving the citizens, *Brussels, December 2nd 2009, 17024/09,* paragraph 6.1.7 - "Unaccompanied minors", p. 68
[43] Ibid.
[44] Ibid.
[45] The Stockholm Programme – An open and secure Europe serving the citizens, *Brussels, December 2nd 2009, 17024/09,* paragraph 5.1 – Integrated management of the external borders", p.55
[46] European Parliament Resolution of 25 November 2009 on the Communication from the Commission to the European Parliament and to the Council – An area of freedom, security, and justice serving the citizen – Stockholm programme." P7_TA-PROV(2009)0090

cooperate with third-countries to prevent unsafe migration and to provide opportunities for children in the countries concerned. It further notes that "special attention should be paid to minors, whether accompanied or not, in order to ensure that they are not held in detention."[47]

One should note the particular emphasis put on return measures[48] in the multi-annual programme including towards UMs. In this respect, one might wonder if Member States are more concerned with ensuring that they respect human rights principles on paper – thus having special provisions related to the CRC included in legal instruments and thereby protecting themselves, rather than with protecting the rights of UMs. Is the main purpose of this sudden interest the protection of UMs' rights in the framework of EU migration policies or the "management" of EU migration flows in the European Union? Besides, while mention of the "integrated approach" is to be welcomed, it remains to be seen how the future legislation on asylum and immigration will be written from a child-rights perspective[49], especially since the wording in the Stockholm programme *("the rights of the child, i.e.")* seems to indicate that children rights are limited to the principle of the best interests of the child, the rights to survival and development, non-discrimination and participation.

Policy and Legal Issues at stake

Like any other children, and regardless of nationality and immigration status, unaccompanied minors' rights are protected by the provisions of the Convention on the Rights of the Child (hereafter "CRC" or "the Convention"). **Whilst EU Member States are parties to the Convention, the EU is not**. The EU should nevertheless take this legislation into account since the European Court of Justice (hereafter "ECJ" or "the Court") ruled in 2003 – in *Case 540/03 European Parliament v Council*, more commonly known as the "*Family Reunification case*"[50] - that **the Convention had to be taken into account as general principles of law when implementing Community law**. The implication of this affirmation on asylum and immigration cases should be questioned. Besides, does the entry into force of the Lisbon

[47] Ibid, paragraph 80

[48] The Stockholm Programme – An open and secure Europe serving the citizens, *Brussels, December 2nd 2009, 17024/09,* paragraph 6.1.6 – Effective policies to combat illegal immigration: "An effective and sustainable return policy is an essential element of a well-managed migration system within the Union." [...] "The "European Union and the Member States should intensify the efforts to return illegally residing third-country nationals."

[49] The Juvenile Justice Panel defines the child-rights based approach as follows: "A child-rights based approach is one which sees each child as a unique and equally valuable human being (Art.2 CRC), with the right not only to life and survival, but also to development in their fullest potential (Art.6 CRC). A child-rights based approach understands that children offer the best understanding than anyone of their own situation and that they have essential experience to offer (Art.12 CRC, and that they deserve to have their best interests met (Art.3 CRC) through adequate allocation of resources and implementation of all rights in the CRC (Art.4 CRC)

[50] ECJ, Case-540/03, 27 June 2006, Parliament v. Council, OJ C 47, 21.02.2004. The judgement is available at http://curia.europa.eu/

Treaty and the fact that it confers the Charter of Fundamental Rights[51] (hereafter "the Charter") the same legal value as the Treaties bring any new perspective? The role of the Court is also particularly important in this new context.

As already mentioned the treatment of UMs from their arrival in the European Union to their potential return to their countries of origin is a matter that all EU Member States have to deal with, as destination or transit countries. However**,** although **Member States have tried to harmonise their practices, there are still considerable divergences leading to non-coherence** with regard to the implementation of the EU migration legislation at Member States level.[52] **EU Member States have thus recognised that the treatment of unaccompanied minors is a transnational issue, which, in due respect of the principle of subsidiarity and proportionality, requires a common EU approach addressing the various aspects of this question.** There have consequently been many exchanges and meetings among the EU Member States through the whole of 2009, to address the treatment of UMs and identify themes that would require particular actions at European Union level. In this respect, it should be mentioned that the studies on the treatment of UMs[53] issued by 22 Member States in the framework of the European Migration Network (EMN)[54] were very helpful in identifying subjects which needed particular attention at EU level.

A transnational issue calls for a transnational approach. Since all UMs related provisions are not handled within one legal instrument, it is necessary to study how the rights which UMs are entitled to within the EU asylum and immigration legislation reflect the Convention's holistic approach.

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[51] The Charter on Fundamental Rights of the European Union (2000/c 364/01) was signed during the European Council meeting in Nice in December 2000 but only got a binding force with the entry into force of the Lisbon Treaty in December 2009. It should be noted that the United Kingdom and Poland obtained the signature of a protocol which is not an opt-out from the Charter but a legally binding text that seeks to prevent the Charter from being interpreted in a way that it would create additional rights to those already provided for in British or Polish law. However, it has been acknowledged that the protocol's benefit is largely political in making crystal clear that the Charter will not impact on UK and Polish law expect when EU law is being implemented in the country, thus "to put beyond doubt what should have been obvious from the other provisions" (Justice Secretary Jack Straw, May 2008)

[52] "General Recommendations for EU action in relation to Unaccompanied and Separated Children of Third Country Origin" made in the framework of the conference "addressing the protection gap for unaccompanied and separated children in the EU: role of the Stockholm programme" organized by Save the Children under the auspices of the Swedish Presidency, Brussels, September 15th, 2009

[53] The study *"Policies on Reception, Return and Integration Arrangements for, and Numbers of, Unaccompanied Minors – An EU Comparative Study" was issued by* Austria, Belgium, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy,Latvia, Lithuania, Netherlands, Malta, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden and the United Kingdom. The overall objective of this study was "to assist with developing policies for supporting safe reception arrangements for unaccompanied minors, in either host (EU Member State) countries or their countries of return". National reports from the EMN Member States as well as the Synthesis which has been released by the European Union are available at http://emn.sarenet.es/Downloads/prepareShowFiles.do;jsessionid=8FC0794F0D4EDEEA4FF14F7A022D1C92?directoryID=115

[54] The European Migration Network (EMN) was launched by the European Commission as a pilot project in 2003 and was given a legal basis by the Council in May 2008 (Council Decision 2008/381/EC). All EU Member States but Denmark, which has an observer's status) are represented by National Contact Points. EMN's goal is "[t]o meet the information needs of Community institutions and of Member States' authorities and institutions by providing up-to-date, objective, reliable and comparable information on migration and asylum, with a view to supporting policy-making in the European Union in these areas. The EMN also provides the wider public with such information.

Aim of this paper

Through a comparison of the EU legislation on immigration and asylum ensuing from the Tampere Council with the Convention on the Rights of the Child, this paper will attempt to answer the following question: **Is the current EU asylum and immigration legislation in line with provisions applicable to unaccompanied minors as enshrined in the Convention on the Rights of the Child?**

Children's rights and their implication on the EU asylum and immigration legislation will be addressed in **Section I**.

Following a horizontal review of unaccompanied minors' rights in the EU asylum and immigration legislation, these provisions will be put in perspective with the Convention on the Rights of the Child and analysed in **Section II**. A review of the situation of unaccompanied minors from the time of their access to the territory to their potential return to their countries of origin will involve an examination of the provisions contained in the Reception Directive, the Qualification Directive, the Asylum Procedures Directive, the Dublin II Regulation and the Returns Directive. Since this paper focuses on minors who are unaccompanied, but not separated, the provisions relating to unaccompanied minors within the Family Reunification Directive[55] will not be addressed; unaccompanied minors' rights within the framework of the Temporary Protection Directive[56] will not be discussed either. Consideration of views held from political and human rights NGOs, as relevant as they might be, and thus mentioned within this paper when appropriate, will not be taken into account, since this legal analysis focuses solely on comparing EU legislation with the Convention.

The **conclusion** will eventually allows us to provide an answer to the initial question "Is the current EU asylum and immigration legislation in line with provisions applicable to unaccompanied minors as enshrined in the Convention on the Rights of the Child?" The proposals for the recast of the Reception, the Qualification, the Asylum Procedures Directives and the Dublin II Regulation which are currently being discussed will also be addressed in this part of the report, giving some indications on the potential evolution of unaccompanied minors related provisions in the future EU asylum and immigration legislation**.**

This paper will end with some **recommendations and suggestions**.

[55] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification

[56] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof

SECTION I

CHILDREN RIGHTS AND THEIR IMPLICATION ON THE EU ASYLUM AND IMMIGRATION LEGISLATION

This Section will address children's rights ensuing from the Convention on the Rights of the Child and their implication on the EU asylum and immigration legislation. General Information on the Convention will be provided in **Sub-section I.1**, while **Sub-section I.2** will discuss the impact of the Convention on the asylum and immigration legislation, a Convention which is to be taken into account in applying the general principles of Community law as acknowledged by the ECJ in the "*Family Reunification case*".

I.1 - THE CONVENTION ON THE RIGHTS OF THE CHILD

It is believed that a sound understanding of the Convention is an essential prerequisite to an appropriate drafting of children's related provisions in any legislation. This might even be more important with regard to immigration and asylum matters, since as stated in Art.3 of the Convention, the best interests of the child is "a" (not the) primary consideration[57] to be put in balance with EU Member States' considerations as far as migration is concerned. Some general and historical background information on the CRC will thus be provided in Sub-section I.1.1, and more specific provisions related to UMs addressed in Sub-section I.1.2.

I.1.1 - Background Information on the Convention

The **United Nation Convention on the Rights of the Child** was approved by consensus[58] by the UN Member States on November 20th 1989. So far, 191 States have ratified it.[59] The Convention, a *lex specialis* Human Rights Treaty of universal application[60], is based on the content of the "United Declaration of the Rights of the Child" adopted in 1959 which was itself based on the "Geneva Declaration of the Rights of the Child" adopted by the 5th Assembly of the League of Nations in 1924, as a reaction to the millions of children left in deplorable circumstances after WW1, and which is regarded as the first international human rights instrument addressing the rights of the children (though there is no reference to "rights" as such in the instrument). The Declaration adopted in 1959, which contains 10 principles (thus expanding the 5 principles of the Geneva Declaration here above mentioned) is the first recognition of the child as a legal subject instead of a legal object. Poland had already called

[57] This issue will be further addressed in Section ii of this paper
[58] Some articles were drafted many times for the text to be adopted by Consensus
[59] Somalia and the United States of America are not States Parties to the Convention. Though strongly involved in the drafting of the Convention, the United States of America have not ratified the Convention, the official motivation for that being linked to potential conflicts with the US Constitution and because of opposition by some political and religious conservatisms. At the occasion of a Youth Debate at the Walden University, President Obama described the failure to ratify the Convention as "embarrassing" and promised to review this situation.
[60] The International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) and their Protocols are particularly relevant when comparing the CRC with other general human rights conventions of Universal application. Regionally, the ECHR and its Protocols should be mentioned, as well as the ESC, the ACPHR, the ACHR, and the Additional Protocol of the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador")

for the drafting of a text with binding effect in 1959 but was not supported by the other States Parties. In 1978, Poland was once again the initiator of the process which would lead to the adoption of the Convention in 1989. The initial aim was to adopt the Convention in 1979 which was the "year of the child" and also corresponded to the 20th anniversary of the 1959 Declaration; but Member States rapidly realized that it would not be possible to reach a consensus on a text, of which negotiation involved numerous various partners (NGOs, International Organizations, etc.) gathered in working groups, in such a short period. Following a 10-years negotiation within the auspices of the UN Commission on Human Rights[61], the Convention on the Rights of the Child was adopted in November 1989 and entered into force on September 2nd 1990.[62]

As in the Declaration of the Rights of the Child adopted in 1959, it is mentioned in the **Preamble of the Convention that "the child by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection […]". The fact that children live in exceptionally difficult conditions, and that such children need special attention is also mentioned.** The last Recital stresses the **importance of international cooperation** for improving the living conditions of children, in particular in developing countries. This last statement is particularly relevant as far as UMs are concerned since this issue calls for a particular cooperation between the countries of origin, the transit and the host countries.

The **four general principles** – non-discrimination, the principle of "the best interests of the child", child's rights to maximum survival and development and the respect of the views of the child, respectively Arts 2(1), 3(1), 6 and 12 of the Convention - are of paramount importance and the cornerstone of the Convention. **Each Article establishes a right in and of itself but should also be considered in the interpretation and implementation of all other rights enshrined in the Convention.** All together, they materialise the **"child rights-based approach"** concept.

The **"four principles category"** was invented by the members of the original Committee on the Rights of the Child when drafting the guidelines for State reports in 1991. While there are no records on the motivation for the creation of the "general principles" category, it is said that the Committee's purpose was to "simplify the CRC for didactic purposes" in order to make it more familiar to the government officials. Bruce Abramson in his Commentary on

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[61] According to Sharon Detrick, drafting the Convention under the auspices of the UN Convention on Human Rights means that "the Convention is an international human rights treaty and that children are therefore acknowledged as being fully-fledged of human rights." *Sharon Detrick (1992), The United Nations Convention on the Rights of the Child: A Guide to the Travaux Preparatoires*

[62] This background information has been drafted on the basis of various books and articles related to the Convention on the Rights of the Child, a list of which being provided in the bibliography of this paper.

Art.2 of the Convention notes: "[t]he 'four general principles' were like the trainer-wheels on a child's bicycle. Unfortunately, leaving the trainers on for so long has led to two problems: first the understandings of the CRC rights have not matured (for instance, people remain confused about the difference between a rule and a principle, and the stress on 'general principles' is undermining the idea of children as rights-holders); and second 'four general principles' has become a vacuous cliché." Even more, speaking in terms of principles instead of rights is "an extremely weak way to talk about the legal obligations of States under the CRC." [63]

The following major features of the Convention should be pointed out:

- The CRC is a "comprehensive indivisible instrument", with no hierarchy established between the rights, which are indivisible and interdependent". It contains 54 Articles[64], and a Preamble with 13 paragraphs[65];
- Two optional protocols have been adopted by the UNGA in 2000, addressing respectively the "involvement of children in armed conflict[66]" and the "sale of children, child prostitution and child pornography";
- The rights enshrined in the human rights treaties apply to adults and children alike. Rights contained in the ICCPR and the ICESR[67] were incorporated in the Convention as it was argued that not doing so would be tantamount to putting into question their applicability to children [68];
- In the preamble, the emphasis is put on the protection, on a full and harmonious development of the child in a family environment, and in the spirit of peace, dignity, tolerance, freedom, equality and solidarity;

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[63] *Bruce Abramson, (2008),*Commentaries on the United Nations Convention on the Rights of the Child: Article 2 - The Right of Non-Discrimination, Chapter 8.4 – The CRC Committee's 'four general principles', p.64

[64] Part I (Articles 1 to 41) contains the substantive provisions of the CRC; Part II (Articles 42 to 45) contains its implementation provisions, and Part III (Articles 46 to 54) provides for a number of final clauses

[65] Sharon Detrick notes: "The preamble of the CRC states *inter alia,* that the States Parties to the CRC recall that, in the UDHR, the UN has proclaimed that childhood is entitled to special care and assistance; recognize that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding; consider that the child should be fully prepared to live an individual life in society and brought up in the spirit of the ideals proclaimed in the Charter of the Unites Nations; recognize that in all countries of the world there are children living in exceptionally difficult conditions, and that such children need special consideration; take due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child; and recognize the importance of international cooperation for improving the living conditions of children in every country, particularly in developing countries." *Sharon Detrick, (1999),* A Commentary on the United Nations Convention on the Rights of the Child

[66] Optional Protocol on the involvement of children in arm conflict , and the Optional Protocol on sale of children, child prostitution and child pornography; General Assembly Resolution A/RES/54/263 of 25 May 2000 (which respectively entered into force 12 February 2002 and 18 January 2002)

[67] ICESR stands for International Covenant on Economic, Social, and Cultural Rights on December 16, 1966, and in force from January 3, 1976

[68] *Sharon Detrick, (1999),* A Commentary on the United Nations Convention on the Rights of the Child, *op.cit.* p.2

- The Convention rights are usually subdivided into 4 parts, usually called the "4 P's": provision rights (rights providing access to certain goods and services, e.g. the right to education, right to enjoy social security, etc); protection rights (the right to be protected from certain activities (e.g. the right to be protected from all forms of exploitation); participation rights (the right to act in certain circumstances and the right to be involved in decision-making); and the prevention of harm to children.[69] It should nevertheless be reminded that all rights enshrined in the Convention are indivisible and inter-dependent;
- The principle of the best interests of the child, a primary consideration in all decisions concerning the child is stated in Art.3(1); this umbrella provision is one the four guiding general principles of the Convention which form the child-rights based approach together with Art.2 (non-discrimination); Art.6 (right to development etc.); and Art.12 (participation). All these Articles are interrelated;
- According to Art.2, "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction [...]". Still, the Convention assumes the family (and extended family including the legal guardian) to be the main providers of rights to children, the obligation of States being to support this primary obligation;
- The Convention is about a progressive realisation of rights. This is supported by Art.4 related to the general measures of implementation of the Convention according to which appropriate legislative, administrative and other measures for the implementation of rights recognized in the Convention shall be undertaken by Member States, to the maximum extent of their available resources [...]. According to the *travaux préparatoires* the qualifying phrase "to the maximum extent possible" was inserted to indicate that economic, social and cultural conditions were allowed to be taken into account by States Parties in the implementation of their positive obligation to ensure the right of the child to survival and development;
- Almost all CRC rights are context-dependent and are subject to qualifications. Context dependent rights always require trade-offs between competing interests; for some of these rights, the balancing enters by way of a limitations clause, as contained in Arts 10(2)[70], 13(2)[71], 14(3)[72] and 15(2)[73] of the CRC[74]; and for others it enters by

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[69] *G. Van Bueren, (1995),* The International Law on the Right of the Child, p.15

[70] The limitations clause in Art.10(2) CRC reads as follows: "The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention."

[71] The limitation clause in Art. 13(2) CRC reads as follows: "The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; or (b) For the protection of national security or of public order (ordre public), or of public health or morals"

qualifying words or phrases like “as in necessary” (e.g. in Art.3(2) which asserts that in acting “to ensure the child such protection and care as in necessary for his/her well-being” States Parties must take into account the rights and duties of the child’s parents, legal guardians or other individuals legally responsible for the child); or “where appropriate” (e.g. in Art.26 related to social security); or by placing certain limitation on the obligation of States (e.g. in Art.4 according to which States Parties shall undertake all “appropriate” measures “to the maximum extent of their available resources”); or by the frequent inclusion of the “national law” qualifications in the statement of various rights (e.g. in Art.12 where the child’s opportunity to be heard in proceeding affecting him shall be done “in a manner consistent with the procedural rules of national law”);

- A number of rights set forth in the CRC have “horizontal effects”, i.e. correspond to a positive obligation of States Parties to adopt positive measures concerning the acts or omissions of private parties[75];
- The Convention is “self-executing” in some countries, i.e. can be invoked directly before national courts. The CRC does not contain a provision expressly obligating its comprehensive incorporation or requiring it to be accorded any specific types of status in national law;
- In case of conflict between the national legislation and the Convention, predominance shall always be given to the latter, as per Art.27 of the Vienna Convention on the Law of Treaties[76];

Soft law has also provided a great added-value with regard to the possible interpretation and implementation of the Convention. Among the publications which should be mentioned:

- UNICEF has published an “Implementation Handbook for the Convention on the Rights of the Child”, a practical tool for implementation explaining and illustrating the implications of each Article of the CRC, and providing several checklists with specific

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[72] The limitation clause in Art.14(3) CRC reads as follows: “Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.”

[73] The limitation clause in Art. 15(2) CRC reads as follows: “No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.”

[74] In international human rights treaties, limitation clauses are used as regards certain rights to indicate that the exercise of the relevant right may be restricted by States Parties, but only in accordance with the conditions and pursuant to the grounds specified in the limitation clause. *Sharon Detrick, (1999),* A Commentary on the United Nations Convention on the Rights of the Child, p.33

[75] *G. Bueren* in *Sharon Detrick, (1999),* A Commentary on the United Nations Convention on the Rights of the Child, p.31

[76] Vienna Convention on the Law of Treaties was signed in Vienna on 23 May 1969 and entered into force on 27 January 1980, United Nations, *Treaty Series*, vol. 1155, p. 331. The text of the Convention is available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/

questions to help the various actors using the Convention (governments, international organizations, NGOs, etc) implementing it, or use these lists as a base to tailor more specific checklists;

- UNHCR has also published various guidelines related to UMSA, more particularly the "Guidelines on Policies and Procedures in Dealing with unaccompanied minors Seeking Asylum" issued in 1997 and the "Guidelines on Determining the Best Interests of the Child" published in 2008.[77] "These guidelines provide recommendations on policy from the principal UN body entrusted with the task of protecting and assisting refugees and as such they have greater persuasive value"[78];
- Save the Children Separated Children in Europe Programme (SCEP) published the 4th revised edition of the "Statement of Good Practices" in March 2010, the aim being "to provide a clear and simple overview of the principles, policies and practices required to implement measures that will ensure the promotion and protection of the rights of separated children in Europe"[79];

The various Commentaries on specific Articles of the Convention should also be mentioned since they provide experts' legal analysis of specific Articles of the Convention. So far, 15 Commentaries have been published.[80]

The Convention's ratification is an important achievement given the cultural diversity of the States representation at the UN General Assembly. It is described as a "critical milestone in legal protection"[81] of children as subjects of rights and creates obligations to all children within the jurisdiction of a given state. It is therefore important to use the CRC as a tool to interpret other treaties[82]. **Yet, there are many critics on the Convention**. For some, the CRC appears to be binding only on paper, for others "[the] Convention is honoured in its breach", its ratification is a "costless signal" with States knowing that "they will be obliged to make few, if any, real changes in policy."[83]

Although a **monitoring mechanism** has been set up (Arts 42 to 45 CRC), and a Committee on the Rights of the Child (also called "the Committee" hereafter) established in that framework, there is neither individual's opportunity to challenge state failure or interstate

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[77] Both documents are available at http://www.unhcr.org/refworld

[78] *G. Van Bueren, (1995),* The International Law on the Right of the Child, p. 364

[79] "Statement of Good Practice, 4th edition", Separated Children in Europe Programme. (2009). The publication can be downloaded at www.separated-europe-programme.org

[80] See the complete list of Commentaries used for this study in the Annex of this paper

[81] *Jane McAdam, (2006),* Seeking Asylum under the Convention on the Rights of the Child: A case for Complementary Protection, *The International Journal of Children's Rights, 14, 2006, pp 251-274*

[82] *Ursulla Kilkelly, (2000)* The Impact of the Convention on the Case-law of the European Court of Human Rights *in "Revisiting Children's Rights, 10 years of the UN Convention on the Rights of the Child", 2000, pp 87-100*

[83] *Jean Grugel and Nicola Piper, (2007),* Critical Perspectives on Global Governance, Rights and Regulation in Governing Regimes, p.117

right to complaint nor are there any provisions for taking disputes to the Committee or to an International Court of Justice. Lessons have indeed been drawn from the Committee's activities, especially on the basis of the its "concluding observations" established on the basis of the Member States' reports every 5 years.[84] Still, **sanctions merely take the form of negative publicity and multilateral policy pressure** to conform.[85] Michael Freeman in "the Future of Children's Rights" notes that "if international children's rights are to have a future, the Convention must be more intensively policed. If the fulcrum of enforcement is to be the Committee, it must have more powers. It ought to be a permanent Bureau. It ought to be pro-active, with the ability to conduct strategic investigations and garner evidence. It ought to have access to children and to young people" and even calls for a system which allows for "inter-state complaints and for complaints by individuals who consider themselves aggrieved by shortcomings in the laws and practices of their own country."[86] Against this background, the on-going activities of the working group which has been set up to explore the possibility **of elaborating an optional protocol to the Convention to provide a communications procedure complementary to the CRC's reporting procedure** should thus be followed carefully.[87]

Besides, "the role of the Committee is not only to evaluate the efforts made by States to fulfil their obligations under the Convention, but also to help them, when appropriate, to obtain assistance needed to overcome obstacles to full implementation."[88] In this respect, the specific role of the Committee's **General Comments**[89] should be highlighted. Though not legally binding[90], these General Comments (GCs) reflect the Committee's interpretation of some of the Convention's provisions. As stated in GC12, "**the purpose of a General Comment is to support States Parties in the effective implementation of specific Articles of the Convention"**. In doing so the Committee seek to strengthen the understanding of the meaning of an Article and its implication for governments, stakeholders, NGOs and society at large; to elaborate the scope of legislation, policy and practice necessary to achieve full

[84] The CRC general guidelines regarding the form and content of initial reports to be submitted by States Parties under Article 44(1)(a) present the Convention substantive provisions in "themes" rather than in chronological order; this is meant to facilitate the preparation of reports and to reflect the Convention's holistic approach on children's rights

[85] *Lars-Göran Sund, (2006),* The Rights of the Child as Legally Protected Interests, *The International Journal of Children's Rights, 14, 2006, pp. 327-337*

[86] *Michael Freeman*, The Future of Children's Rights in Children's rights, volume II, p.290

[87] Resolution from the Human Rights Council, 13th session, A/HRC/13/L.5, 18 March 2010

[88] *A. Glenn Mower, Jr., (1997),* The Convention on the Rights of the Child, International Law Support for Children, p.96

[89] The 12 General Comments are available at http://www2.ohchr.org/english/bodies/crc/comments.htm; GC1 (The aim of education); GC2 (The role of independent human rights institutions); GC3 (HIV/AIDS and the rights of the child); GC4 (Adolescent health); GC5 (General measures of implementation of the Convention on the Rights of the Child); GC7/Rev.1 (Implementing child rights in early childhood); GC8 (The right of the child to protection from corporal punishment or other cruel or degrading forms of punishment); GC9 (The rights of children with disabilities); GC10 (Children's rights in Juvenile Justice); GC11 (Indigenous children and their rights under the Convention); GC12 (The right of the child to be heard)

[90] A UN treaty body may adopt General Comments or Recommendations, which are official statements adopted by the Committee that elaborate on the meaning of treaty obligations. Some General Comments or Recommendations may be procedural in nature; others may address substantive provisions of the treaty and provide the Committee's interpretation of treaty rights.

implementation of an Article; to highlight the positive approaches in the implementation of an Article, benefiting from the monitoring experience of the Committee; and to propose basic requirements for appropriate ways to give due weight to children's views that affect them." [91] 12 GCs have been published so far, GC6 issued in 2005 addressing "the Treatment of Unaccompanied and Separated Children outside their Country of Origin;" and GC12 on "the right of the child to be heard"[92] released in 2009. Since these Comments "express the authoritative opinion of the body entrusted by States Parties with the task to monitor the implementation of the Convention, they are given high weight in the interpretation."[93]

Another critic is related to the wording of the Convention; **the drafting at EU level leaves a lot of leeway to Member States when implementing the asylum and immigration legislation at national level, but so does the Convention.** One could even say that as the EU asylum and immigration legislation, the CRC is about minimum standards. Some authors argue that some CRC's provisions might not be enough clearly stated so that there can be no doubt as to the nature and extent of the obligations assumed by the States Parties. Moreover, as Ambrason notes, the implementation of some rights suffer from the addition of balancing words like "appropriate" or "feasible"; the inclusion of tailor-made exceptions like "in accordance with their national laws", "due regard to the desirability of" or "save in exceptional circumstances"; the presence of limitations; and the presence of words of aspiration "rights being defined in terms of goals to strive towards, rather than here-and-now entitlements, as indicated by words like 'promote' and 'encourage'. One of the negative consequences being that "a State party desiring to justify performance that could be considered as falling short of the Convention's norms could turn vagueness to its advantage through a self-serving interpretation of particular provisions."[94]

I.1.2 - Unaccompanied Minors within the Convention

As already mentioned, **UMs should benefit from all the rights enshrined in the Convention**; as further detailed in Section II (Table 2) of this paper, the following provisions of the Convention relating to "separated children" might apply to them: the four general principles (Art.3 – Best interests of the child; Art.2 – Non-discrimination; Art.6 – Rights to maximum survival and development; Art.12 – Respect of the views of the child); Art.5 – Evolving capacities; Art.8 – Preservation of identity; Art.9 – Separation from parents;

[91] General Comment No.6 (2005) – Treatment of Unaccompanied and Separated Children outside Their Country of Origin, *United Nations Committee on the Rights of the Child, CRC/GC/2005/6;* and General Comment No.12 – The right of the child to be heard – CRC/C/GC/12, 20 July 2009, *paragraph* 8

[92] Ibid.

[93] *Nigel Cantwell and Anna Holzscheiter, (2008),* Commentaries on the United Nations Convention on the Rights of the Child: Article 27 – The Right to an Adequate Standard of Living, p.8

[94] *A. Glenn Mower, Jr., (1997),* The Convention on the Rights of the Child, International Law Support for Children, p.41

Art.10 – Entering or leaving countries for family reunification; Art.13 – Freedom of expression; Art.14 – Freedom of thought, conscience and religion; Art.16 – Child's right to privacy; Art.17 - Access to Appropriate Information; Art.19 – Protection from all forms of violence; Art.20 – Children deprived of their family environment; Art.22 – Refugee children; Art.23 – Disabled children; Art.24 – Right to health and health services; Art.25 – Review of treatment; Art.26 – Right to benefit from social security; Art.27 – Rights to an adequate standard of living; Art.28 – Right to education; Art.29 – The aims of education; Art.30 – Children of minorities or indigenous; Art.31 – Child's right to rest, leisure, play and recreational activities; Art.37 – Torture, degrading treatment and deprivation of liberty; Art.39 – Reintegration; Art.40 – Juvenile justice; and Art.41 – Respect for existing human rights standards.

While certain categories of children benefit from special treatment[95], **the Convention does not address the specific rights of "migrant children"**. The focus has been put on the rights of "children seeking asylum and those who have been recognized as refugees" be they unaccompanied or accompanied (Art.22) and of "children deprived of their family environment" (Art.20)[96]; "unaccompanied" is thus only mentioned once in the whole Convention, in Art.22.1 which states that children seeking asylum and those who have been recognized as refugees (thus not including irregular unaccompanied children) be they unaccompanied or accompanied, shall receive appropriate protection and humanitarian assistance in the enjoyment of rights set in the Convention and in other international human rights or humanitarian instruments to which the host State are Parties.[97]

An in-depth analysis of Art.20 CRC is given in the Commentary from Nigel Cantwell and Anna Holzscheiter. In a point related to "children outside their country of residence", they remind that "[n]otwithstanding its Art.22 and the general obligation under Art.39 regarding the recovery and social reintegration of child victims of neglect, exploitation or abuse, the CRC does not broach in any detail the issue of alternative care of refugees, asylum seekers,

[95] Commentaries on the United Nations Convention on the Rights of the Child: Article 2 - The Right of Non-Discrimination, *Bruce Abramson, 2008,* p.27

[96] "[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 (Art.20(1)). Pursuant to Art.20(2) States Parties are obliged to ensure, in accordance with their national laws, alternative care for such a child. In that respect, paragraph 3 lists the solutions which could be considered to provide such care and states that due consideration shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

[97] Art. 22(2) states that children seeking asylum or who has already been granted a refugee status shall be protected and assisted to trace their parents or other members of their family in order to obtain information necessary for reunification with their families. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason as set forth in the Convention.

migrants and victims of trafficking.[98] While States Parties have obligations towards any child within their jurisdiction, the exact nature of the obligations to provide special assistance remains unclear, however, with regard to children in certain situations. They further note that "**there are still numerous lacunae** in national, regional and, **particularly international legislation as concerns the effective safeguarding of the rights of children living outside their family environment**. Policies targeting the well-being of children without a family and aiming to secure these children's rights seem to be **characterized by frequent inconsistencies and 'grey zones'**, notably with regard to a) what counts as a family environment, and consequently, what counts as deprivation of a family environment and b) by what standards an alternative family environment should be measured. **Enhancing the homogeneity of legislations and policy approaches thus appear to be the first step** to guaranteeing that the children concerned experience minimal disruption in their lives and that they ultimately find themselves in a stable and harmonious environment that promotes their personal, emotional and physical development to the fullest extent possible."

I.2 – THE CONVENTION ON THE RIGHTS OF THE CHILD IN THE EU LEGAL ORDER AND ITS IMPACT ON ASYLUM AND IMMIGRATION LEGISLATION

The legal status of the CRC will now be addressed, examining the recognition by the recognized the European Court of Justice (hereafter "the Court" or "ECJ") that it had to "be taken into account in applying the general principles of EU law"[99], questioning the added-value of such affirmation by the ECJ with regard to the interpretation of unaccompanied minors' rights in asylum and immigration cases (Sub-section I.2.1). The compatibility of EU's legislation with the Convention will then be discussed (Sub-section I.2.2). The *Family Reunification case* will be referred to in both Sub-sections.

I.2.1 – The Convention, an Instrument which shall be taken into account in applying the General Principles of Law

It should be reminded that while the EU Member States are States Parties to the Convention, the Union is not. However, in 2006 **the Court recognized that the CRC was an instrument which should be taken into account "in applying the general principles of Community law",** in the *Family Reunification case*. The case concerns an action brought by the European Parliament to annul certain provisions of the Family Reunification Directive on the grounds

[98] *Nigel Cantwell and Anna Holzscheiter, (2008),* Commentaries on the United Nations Convention on the Rights of the Child: Article 27 – The Right to an Adequate Standard of Living, p. 46
[99] ECJ, Case-540/03, 27 June 2006, Parliament v. Council, OJ C 47, 21.02.2004, *paragraph* 37

that they breached fundamental rights, in particular those of minors.[100] It raises some questions on the approach taken by the ECJ, whose ruling was mainly argued on the basis of the case law ensuing from the application of ECHR rights and on the importance to preserve the margin of appreciation which EU Member States enjoy with regard to access to their territories. Although the Court recognised the existence of children's rights ensuing from the Convention, the contested provisions were not the subject of a final decision as to their compliance with these rights, therefore effectively leaving it to the Member States to apply these rights as they think fit.

Indeed, **although the Convention is mentioned at several occasions in the judgement, the ECJ does not provide any interpretation of CRC rights**. With regard to the best interests principle, the Court states that it has to be considered by the Member States when they verify whether a 12 years old child who arrives independently from his or her family meets the condition for integration, but without providing further explanation on the way this principle should be considered; in this respect the Court notes that the Community legislature paid sufficient attention to children's interests and that "the content of Art.4(1)[101] of the [Family Reunification] Directive attests that the child's best interests were a consideration of prime importance when that provision was being adopted; and it [did] not appear that its final subparagraph [failed] to have sufficient regard to those interests or authorise Member States which choose to take account of a condition for integration not to have regard to them. On the contrary [...] Art.5(5) of the [Family Reunification] Directive requires the Member States to have due regard to the best interests of the minor children." **By not providing any further content on the application of CRC rights (in the present case, the best interests of the child), the ECJ seems to suggest that it is enough that such rights are mentioned in the EU legislation without examining further whether such rights are effectively applied at the Member States level**. As will be further demonstrated in Section II of this paper, ensuring compliance with the CRC is far from being that simple, especially when the best interests principle should be considered as "a" primary consideration. **Merely making mention of a right does not mean that everybody understands what it means or how to implement it.** The Court also reminds us that the best interests is mentioned in Art.24(2) of the Charter but "never asks itself the question whether the disputed provisions ensure that the

[100] For a detailed analysis of the case, please refer to the Article written by Eleanor Drywood "Giving with one hand, taking with the other: fundamental rights, children and the family reunification decision" *European Law review Vol 32 issue 3, 2007, pp. 396-407*

[101] Art.4(1) of the Family Reunification Directive provides that, in principle, Member States are to authorise the entry and residence of the sponsor' spouse and children. However "by way of derogation, where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member State may, before authorising entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its legislation on the date of implementation of the Directive".

child's best interests are a primary consideration."[102] The Advocate General, in her *Opinion*[103], does not provide any interpretation on the basis of the Convention either.

Moreover, not only does the Court fail to give proper consideration to the Convention, but **it also bases most of its arguments on the basis of ECHR case-law**, a human rights instrument which according to Eleanor Drywood has never been viewed as an especially child-friendly document and tends to protect the right to respect for family life from the perspective of parents, rather than children's rights.[104]

Finally, the **ECJ emphasized the importance of preserving the margin of appreciation of Member States**. Whilst it acknowledges the importance of family life to a child - a right protected by several human rights instruments, the Court stresses that this does not create "for the members of a family an individual right to enter the territory of a State and cannot be interpreted as denying States a certain margin of appreciation when they examine applications for family reunification."[105] Consequently, the derogation given to Member States to verify whether a 12 years old child who arrives independently from the rest of the family meets the integration conditions before it authorises entry on the territory is a means to preserving albeit partially the margin of appreciation of the Member States.[106] The margin of appreciation appears to be the criterion which can be used to derogate from fundamental rights enshrined in the Community law itself. **Where the respect of the best interests of the child lies in this respect remains unclear**.

The above statements might also raise some concerns about the **capacity of the Court to use the Convention as a human right source for general principles of Community law**. As will be further discussed in Sub-section I.1.2.2 related to "non-discrimination", the Court states that age should not be the sole criterion to be considered when Member States derogate from the principles set in the Family Reunification Directive, but that a supplementary requirement should be taken into consideration (the specific "integration condition" for children aged over 12; and the best interests of minor children with a view to promoting family life as far as children aged over 15 are concerned). However, one might wonder how the Convention as "an instrument which shall be taken into account in applying the general principles of law" was indeed taken into account when the ECJ concludes that the age of 12

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[102] *Eleanor Drywood* "Giving with one hand, taking with the other: fundamental rights, children and the family reunification decision" *European Law review Vol 32 issue 3, 2007,* p.405

[103] Opinion of Advocate General Kokott delivered on 8 September 2005, Case C-540/03 European Parliament v Council of the European Union supported by Federal Republic of Germany and Commission of the European Commission. The Opinion is available at http://curia.europa.eu/

[104] *Eleanor Drywood* "Giving with one hand, taking with the other: fundamental rights, children and the family reunification decision", *op.cit.*, p.404

[105] ECJ, Case-540/03, 27 June 2006, Parliament v. Council, OJ C 47, 21.02.2004, *paragraph* 59

[106] ECJ, Case-540/03, 27 June 2006, Parliament v. Council, OJ C 47, 21.02.2004, *paragraph* 61

or 15 years old "corresponds to a stage in life of a minor when the latter has already lived for a relatively long period in a third-country without the members of his or her family, so that the integration in another environment is liable to give rise to certain difficulties"[107]; and that while the objective of marriage is a long-lasting married life, "children over 12 years of age will not necessarily remain for a long time with their parents. "[108] These are very broad statements, which do not seem to ensue from a correct legal interpretation of the Convention and which do not reflect a case-by-case consideration of each child's situation as specifically called for, in the application of the best interests principle.

Another important development is that **the Court has acquired general jurisdiction to give preliminary rulings also in the areas of justice and home affairs with the entry into force of the Lisbon Treaty** (Art.19(3)(b) TEU); this means that the national courts will be able to request preliminary rulings on EU measures in these areas, including on the interpretation of children's rights within an asylum and immigration context. Moreover, the Court will also have jurisdiction to rule on measures of public policy on cross-border controls. These are very important responsibilities, considering the growing number of immigration and asylum issues covered by EU law. It is therefore critical that anyone involved in disputes with proceedings which fall within the scope of EU immigration and asylum legislation is sufficiently familiar with "the sources of the basic rights that can be protected within the system, the circumstances in which those rights can be invoked (the scope of the EC rules) and the remedies which invoking those rights could entail (the legal effect of the EC rules)."[109]

The Committee stated in GC5 that for rights to have a meaning, effective remedies must be available to redress violations.[110] As already mentioned, **the possibility of elaborating an optional protocol to the CRC to provide a communications procedure complementary to the Convention's procedure** is currently being discussed in the framework of the UN Human Rights Council. Future developments in this respect should be carefully followed. Should this mechanism be put in place, "the Committee would be in a unique position to provide expert clarification on complex issues regarding the implementation of the Convention; the jurisprudence that would develop would greatly contribute to the interpretation of the Convention."[111] **The ECJ as any other court would also greatly benefit from such interpretative guidance.**

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[107] Ibid, *paragraph* 74
[108] Ibid, *paragraph* 75
[109] *Steve Peers,* "Human Rights in the EU Legal Order: Practice Relevance for EC Immigration and Asylum Law" p.137 in *Steve Peers and Nicola Rogers, (2006),* EU Immigration and Asylum Law, Texts and Commentary
[110] General Comment No.5 (2003) – General Measures of implementation of the Convention on the Rights of the Child (Arts. 4, 42, and 44 *paragraph* 6), *United Nations Committee on the Rights of the Child, GRC/GC/2003/5, 27 November 2003, paragraph* 24
[111] Human Rights Council, 13th session, report on the open-ended working group to explore the possibility of elaborating an optional protocol to the Convention on the Rights of the Child to provide a communications procedure. A/HRC/13/43, 21 January 2010, p.10.

I.2.2 – The compatibility of Community Law with the Convention

What does the recognition by the Court that Convention had to be taken into account in applying the general principles of law entail? This question will be answered addressing the legality of Community law and related compliance by the Member States.

It should first of all be noted that **the Court did not state that the Convention formed part of the general principles of EU law[112] but that it had to be "taken into account in applying the general principles of law".** ECJ's specific wording, which might be considered as a nuance, is actually very important: taking the Convention into account means that it has a role to play in the interpretation of general principles of law; whereas a Convention which would form part of the general principles of EU law could create a direct rule of law. It cannot be assumed that the Court would follow the latter line of interpretation since the European Union is not a party to the Convention. Considering the Lisbon Treaty which states in Art.3(5) that the Union shall protect the rights of the child and since the Charter has acquired the same value as Treaties, it could be argued that cases could now potentially be brought before the ECJ under the relevant provisions of the Charter relating to the rights of the child, the Convention then serving as the basis upon which the Charter's rights may be given further meaning.

Second of all, the consideration which is to be given to the CRC is also particularly relevant for UMs who are considered as irregular economic migrants, since their situation is only addressed within Member States' legislation, the only instrument addressing them at EU level being the Returns Directive. A legal void at EU level thus currently afflicts this vulnerable group. What about the implication of the CRC in this context? Since UMs are protected by the Convention as any other child, could the European Union be in breach of the Convention when it does not address UMs irregular economic migrants within its asylum and immigration legislation or can the situation remain as it is, with Member States' actions with regard to UMs who are considered as irregular economic migrants invalidated or interpreted in light of the CRC, when applied in the context of Member States' actions?

It should be recalled that in the hierarchy of Community acts, general principles of law come before acts of secondary law. Directives should therefore comply with general principles of law. The fact that the Union should consider these principles when drafting the legislation implies that a provision of a Community Act should therefore comply with these general principles; indeed, the EU should only set rules that does not allow Member States to breach general principles of law, including when it allows them to derogate from principles set in the

[112] For an exhaustive list of legal instruments which form part or the general principles of EU law, see http://curia.europa.eu/common/recdoc/repertoire_jurisp/bull_ordrejur/tab_A-01_02.htm

legislation. Second of all, the Court stated in the *Family Reunification Case* that the Convention which it takes into account in applying the general principles of Community law binds each of the Member States.[113] Besides, the Advocate General observes that Member States when implementing a Directive, shall do it in conformity with these fundamental rights, and "must make sure that they do not rely on an interpretation of it which would be in conflict with [...] general principles of Community law."[114]

It could therefore be argued that the European Union does not have any legal obligation to address the rights UMs who are considered as irregular economic migrants within the EU asylum and immigration legislation, but that there is a clear obligation on EU Member States to do so in their national legislation, as a matter of EU law.

Should the EU nevertheless do so, in order to set common minimum standards with regard to the treatment of these minors? Could this be done on the basis of Art.352.TFEU?[115] First of all, not addressing this issue at EU level would not necessarily prevent legal cases from being brought before the ECJ on the basis of a breach of EU law, such as breach of the Charter. Second of all, it is acknowledged that the lack of specific procedures for the treatment of these minors often leads to a misuse of asylum law, because UMs sometimes claim asylum (at times following the advice of their legal guardians or representatives) although a careful consideration of their cases reveals they are not entitled to any protection in this respect. The adoption of common minimum standards within the EU legislation would probably help change this trend and would lead to more coherence with regard to EU Member States' practices.

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[113] ECJ, Case-540/03, 27 June 2006, Parliament v. Council, OJ C 47, 21.02.2004

[114] Opinion of Advocate General Kokott delivered on 8 September 2005, Case C-540/03, *paragraph* 81

[115] According to Art.352 TFEU "1. If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament. 2. Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments' attention to proposals based on this Article. 3. Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation. 4. This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second paragraph, of the Treaty on European Union.

The *Family Reunification case* could have been the occasion to shed some light on the enforcement of children's rights from the perspective of the European Union. It seems that the Court did not follow this line of approach at the time, and chose instead to work within the limits of the jurisprudence of the ECHR instead of taking the initiative to open a new era for the interpretation of children's rights within the European Union. **This was a clear demonstration of law enforcement carried by adults displaying a lack of child-centered focus.**[116] It is therefore interesting to monitor the evolution of the jurisprudence in the area of asylum and immigration now that the protection of children's rights is mentioned in the Lisbon Treaty and that, as already mentioned here above, cases might be brought before the Court, CRC being taken into account to give further meaning to the Charter's children's related rights.

While the ECJ had already acknowledged that the Charter should also be considered when implementing the general principle of law, it should be noted that this instrument has acquired the same value as Treaties with the entry into force of the Lisbon Treaty. Two particular matters are interesting in this respect: 1) the potential direct effect of the Charter and thus of Art.24 related to children's rights and the various Articles which might have implications on provisions related to UMs[117] in the legal instruments related to asylum and immigration; 2) the creation of new categories of rights such as "the right to dignity" and the "right to asylum". Another important issue with regard to the protection of human rights within the EU and its effect on asylum and immigration law is related to the "three-part system for the protection of human rights"[118] in Art.6 of Lisbon Treaty, i.e. the human rights protection by means of a combination of the Charter, ECHR[119] accession by the EU and the general principles of EU law. The entry into force of the Treaty is too recent to provide clear answers on these questions but any future development in this framework should be closely monitored, as this might also have a crucial impact on the drafting of the EU asylum and immigration legislation, and thus on the treatment of UMs. Opportunities for the Court's intervention in this respect are also eagerly awaited.

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[116] *Jacqueline Bhabha (2009),* Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights?*, Human Rights Quarterly 31, 2009, p. 446*

[117] The following rights are not specifically children's rights, but may have special implications for children: Art.1 (Human dignity), Art.3 (Right to integrity of the person), Art.4 (prohibition of torture and inhuman degrading treatment or punishment), Art.5 (Prohibition on slavery and forced labour), Art.7 (Right to respect for private and family life), Art.11 (Freedom of expression and information), Art.14 (Right to education), Art.21 (Non-discrimination), Art.18 (Right to asylum) Art.32 (prohibition of child labour and protection of young people at work), Art.33 (Family and professional life) and Art.35 (healthcare).

[118] *Steve Peers,* "Human Rights in the EU Legal Order: Practice Relevance for EC Immigration and Asylum Law" p.137 in *Steve Peers and Nicola Rogers, (2006),* EU Immigration and Asylum Law, Texts and Commentary, p.132

[119] ECHR stands for European Convention for the Protection of Human Rights of Fundamental Freedoms. It entered into force on September 3rd 1953

SECTION II

UNACCOMPANIED MINORS' RIGHTS IN EU LEGISLATION: HORIZONTAL REVIEW IN PERSPECTIVE WITH THE CONVENTION ON THE RIGHTS OF THE CHILD

This section will focus on a legal analysis of provisions related to UMs in EU legislation.

Sub-section II.1 will feature two tables containing provisions related to UMs in the Reception Directive, Qualification Directive, Asylum Procedures Directive, Dublin II Regulation and Returns Directive: the first one focusing on Articles which specifically target UMs and minors in each legislation; the second one reflecting a more in-depth analysis of the instruments, containing extracts of all the provisions applicable that are applicable to UMs.

Each instrument addressed in the framework of this paper could be the subject of an individual legal analysis. However, in order to reflect the Convention's holistic integrated approach, it has been decided to do a horizontal analysis; specific rights as addressed in the various instruments then being cross-checked with relevant CRC Articles in **Sub-section II.2**.Though not legally binding, reference will be made to the Committee General Comments when relevant, since their purpose is to express the opinion of the Committee with regard to the interpretation[120] of the Convention and because they should carefully be considered when drafting asylum and immigration legislation.

II.1 – PROVISIONS APPLICABLE TO UNACCOMPANIED MINORS IN THE EU LEGISLATION

It should be reminded that the following instruments have been used in the framework of this paper: the Reception, Qualification, and Asylum Procedures Directives, the Dublin II Regulation and the Returns Directive

Two tables are therefore presented here below:

- Articles which specifically target UMs and minors under each legislative instrument are included in **Table 1**, highlighting the rights which are addressed in each Article;

- **Table 2** reflects a more in-depth analysis of the legal instruments, containing extracts of all provisions that are applicable to UMs, i.e. Articles with specific provisions on UMs and minors already mentioned in Table 1; Articles related to applicants for international protection in general, which sometimes mention the particular approach

[120] As stated in GC12, the purpose of a General Comment is to support States Parties in the effective implementation of specific Articles of the Convention. In doing so the Committee on the Rights of the Child seek to strengthen the understanding of the meaning of an Article and its implication for governments, stakeholders, NGOs and society at large; to elaborate the scope of legislation, policy and practice necessary to achieve full implementation of an article; to highlight the positive approaches in the implementation of an Article, benefiting from the monitoring experience of the Committee; and to propose basic requirements for appropriate ways to give due weight to children's views affecting that affect them.

to be taken for minors and/or UMs; and eventually, other provisions of each legislation which are not adapted to the special rights of this vulnerable population according to the Convention but which might be applicable in the case of UMs as well as for other applicants for international protection.

Table 1 – Articles with specific provisions towards UMs and minors

Legislation	Specific Article for UMs	Specific Article for Minors (including UMs)	Rights addressed in each Article		Other Articles with specific mention of UMs and/or Minors
Reception Directive	**Art. 19** ***(UMs)***	**Art. 18** ***(Minors)***	**Art.19** Legal guardianship Regular assessment related to the necessary representation Family unity[121] Accommodation Best Interests of the Child Age and maturity Family tracing Training Safety Confidentiality	**Art.18** Best Interest of the Child Rehabilitation services for minors who have been victims of any form of abuse, neglect, exploitation, torture or cruel, inhuman and degrading treatment, or who have suffered from armed conflicts Appropriate healthcare Qualified Counselling	**Art.2(2)(h)** ***(Definition of UM)*** **Art.10** ***(Schooling and Education)*** **Art.13.2** ***(Standard of living)*** **Art. 17** ***(provisions for persons with special needs)***

[121] As indicated earlier, family unity will not be addressed in this paper.

Qualification Directive	**Art.30** ***(UMs)***		**Art.30** Best Interests of the Child Legal guardianship Minor needs Regular assessment Family unity Accommodation Best Interests of the Child Views of child; Age and maturity Family tracing Training Confidentiality	**Preamble, Rec. 12** **Art.2(i)** ***(Definition of UM)*** **Art.9** ***(Acts or persecution)*** **Art.20** ***(General rules – Content of International Protection)*** **Art. 27** ***(Access to education)*** **Art.29** ***(Healthcare)*** **Art.30** ***(Confidentiality)***
Asylum Procedures Directive	**Art.17 (Guarantees for UMs)**		**Art.17** Representation Personal Interview Information Special needs Medical examination Language Consent Best Interests of the Child	**Preamble, Rec. 14** **Art.2(h)** ***(Definition of UM)*** **Art.4 (a)(b)** ***(Access to the procedure)*** **Art.12** ***(Personal interview)*** **Art.35(3)(f)** ***(Border procedures)***

DUBLIN II	**Art.6**		Member States responsible for examining the application shall be where a member of his or her family is legally present, provided that this is in the best interest[122] of the minor. **In the absence of a family member, the Member State responsible for examining the application shall be that where the minor has lodged his or her application for asylum.**		**Art. 2(h)** ***(Definition of UM)*** **Art.15(3)** ***(Humanitarian Clause)***
Returns Directive	**Art.10** ***(Return and removal)***	**Art.17** ***(detention of minors and families)***	**Art.10** Assistance Return to family, nominated guardian, or adequate reception facilities	**Art.17** Detention Leisure activities Access to education Accommodation Best Interest of the Child	**Art.5** ***(Non-Refoulement, best interests of the child, family life and state of health)*** **Art.7.2** ***(Voluntary Return)***

[122] Interest without a "s" is probably a typographical error

Table 2 – General overview of the whole legislation, highlighting provisions which are applicable to UMs

Rights as in the Convention	CRC	Reception Directive	Qualification Directive	Asylum Procedures Directive	Dublin II	Returns Directive
Mention of the Convention		X	X	X	X	Preamble, rec.22
Specific Article for Unaccompanied Minors/ Specific provisions for UMs in other Articles	Art.22	Art. 19[123]/17	Art.30[124]/20(3)	Art.17[125]/Arts 6(4)(b) and 35(3)f	Art.6/15(3)	Art.10/17(1) and (4)
Specific Article for Minors/ Specific provisions for UMs in other Articles		Art.18[126]	/Preamble, rec.20, Arts 9(2)(f) and 29(3)[127]	/Arts 6(3)(a), 6(4)(c) and 23(4)(o)[128]	X	Art.17
Definition of Minors	Art.1[129]	X	X	X	X	X
Definition of Unaccompanied Minor	X	Art.2(2)(h)	Art.2(i)	Art.2(h)	Art.2(h)	X
Vulnerable persons/Vulnerable persons with special needs/special needs/minor's needs	Preamble, rec. 9; Arts 23(3), 27 and 37[130]	Art. 17	Art. 20(3)// Art. 29(3)/ Art. 30(4)	Art.17(4)(a) and (b); Art.23(3)[131]	X	Arts 3(9) and 16(3)/Art.14(d)/ Art.4(4)(a)
"Best Interests" principle	Art. 3(1)	Arts 18; 19(2) and (3)	Preamble, rec. 12; Arts 20, 30(4) and (5)	Preamble, rec.14; Art.17(6)	Arts 6 and 15(3)	Preamble, rec. 22; Arts. 5, 10(1), and 17.5
Non-discrimination	Art.2(1)	Preamble, rec.6	Preamble, rec. 11 and 33	Preamble, rec.9	X	Preamble, rec. 21

[123] Art.19 is entitled "Unaccompanied Minors"
[124] Art. 30 is entitled "Unaccompanied Minors"
[125] Art. 17 is entitled "Guarantees for Unaccompanied Minors"
[126] Art.18 is entitled "Minors".
[127] In due line with the Preamble, Recital 20 and Art.9(2)(f), acts of persecution can have a child-specific nature that Member States shall have regard to when assessing an application from a minor
[128] There is no specific Article about minors in the Asylum Procedures Directive, but minor is mentioned several times in the text: Art 6(3)(a) "Member States may determine in national legislation the cases in which a minor can make an application on his/her own behalf; Art. 6(4)(c) " Member States may determine in national legislation the cases in which the lodging of an application for asylum is deemed to constitute also the lodging of an application for asylum for any unmarried minor."; Art.12(1) "Member States may determine in national legislation the cases in which a minor shall be given the opportunity of a personal interview"; Art.23(4)(o): "Member States may also provide that an examination procedure in accordance with the basic principles and guarantees of Chapter II be prioritised or accelerated if the application was made by an unmarried minor to whom Article 6(4)(c) applies, after the application of the parents or parent responsible for the minor has been rejected and no relevant new elements were raised with respect to his/her particular circumstances or to the situation in his/her country of origin."
[129] The terminology "child" is used in the Convention when "minor" is used in the EU legislation
[130] The notion of "vulnerable persons" is not used within the CRC. As far as "needs" are concerned, they are mentioned in the following articles, but do not seem do have the same meaning as "needs" or "special needs" as used in the EU legislation: according to the Preamble, Recital 9 "[b]earing in mind that [...] "the child, by reason of his physical and mental immaturity, needs special safeguards, and care, including appropriate legal protection, before as well as after birth". It should also be highlighted that Art.17 also mentions the "linguistic needs" of a child who belongs to a minority group Art. 23(3) addresses the special needs of disabled persons, while it is mentioned in Art.37(c) that "[e]very child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes account the needs of persons of his or her age."
[131] In Art.17 related to "guarantees for the unaccompanied minors", is it mentioned in (4)(a) that "if an unaccompanied minor has a personal interview [...] that interview is conducted by a person who has the necessary knowledge of the special needs of minors". According to Art. 23(3), the examination procedure may be prioritized or accelerated where the applicant has special needs

Right to life and personal development	Art.6	X	X	X	X	X
Consideration of the views of the child/participation	Art.12	X	Art.30(4)	Art.17(1)(b)	X	X
Evolving capacities	Art.5	Art 19(2)	Art.30(4)	Art.17(2)(a)		Art.17(3)
Identification process (including Documentation and registration)	Arts 8 and19(2)	Arts(6) and17(2)	Arts 4 and 20(3)	X	X	
Asylum Determination Process (including the interview phase)	Art 22	X		Chapter II	Arts. 16 to 20	
Material Reception Conditions	Art. 27(3)	Arts 13(1) (2) and 14	X		X	Art.10(2)[132]
Guardianship and Representation	Arts 5, 12(2), and 14(2)	Art.19(1)	Art.30(1)	Arts 2(i), 6(4)(b), 17(1)(2)(3) and 35(3)(f)	X	Arts 10(1), 13(3) and (4)
Legal Assistance or advice	Preamble, Rec. 9; Art.20(1)	Arts18[133], and 21(2)	X	Preamble, rec.13; Arts 15, 16 and 17(2)	X	Preamble, Rec. 11; Arts 13(3) and (4)
Access to procedural safeguards/appeals	Arts 37/41	Preamble, rec. 11, Art. 21	X	Preamble, rec. 14/ Arts 14(2), 15(3)(a) and (d), and Art. 39	Arts 18, 19 and 20	Preamble, rec.11, Art. 6 and Chapter III
Education/Vocational training[134]	Arts. 28/29(1)(c); 40(4)	Art.10/Art.12	Art. 27/Art.26(2)		X	Arts 7.2[135] and 14(1)(c)[136]/ 17(3)
Healthcare and rehabilitation	Art. 3(3) 23, 24, 39	Arts 15(2) and 18(2)[137]	Art.29(3)	X	X	Arts 4(4)(a), 14(1)(b) and 16(3)
Standard of Living	Art.27	Preamble, rec. 7; Art.13.2	Art.23	X	X	X
Social welfare	Art.26	X	Art.28	X	X	X
Accommodation	Art.20(2)[138]	Art.19(2)	Art.30(3)	X	X	17(4)

[132] Reception facilities in the country of origin are mentioned in this Article

[133] Qualified Counselling is mentioned in Art. 18 related to "Minors"; "legal assistance" is only mentioned in Art.5 .1, about the information "on organisations and groups of persons that provide specific legal assistance" that Member States shall provide to the applicants for international protection

[134] Education and vocational training of children are handled together in the CRC, when it appears that vocational training is meant for adults in the EU legislation

[135] Art.7(2) states that "Member States shall, where necessary, extend the period for voluntary departure by an appropriate period, taking into account the specific circumstances of the individual case such as [...] the existence of children attending school [...]."

[136] According to Art.14(1)(c), Member States shall , with the exceptions of the situation covered in Articles 16 and 17, ensure as far as possible that minors are granted access to the basic education system subject to the length of stay, during the period for voluntary departure

[137] Health is also mentioned in Art.13(2) of the Reception Directive but in relations to the standard of living which shall be adequate for the health of applicants and capable of ensuring their subsistence

[138] Accommodation is not mentioned in the Convention, but "alternative care" in Art.20(2) - Child deprived of their family

Access to information	Arts 13 and 17	Preamble, rec. 11; Art.5	Art.22	Arts 9(2), 13(2), 14, and 17(5)(a)	Art.3(4)	Arts 12 and 16(5)
Interpretation	Art.40(2)(vi)	X	X	Preamble, Rec. 13; Arts 10(1)(b); 13(3)(b); 35(3)(c)	X	13(3)[139]
Family Tracing	Art. 22	Art.19(3)	Art.30(4)	X	X	Art.10(2)
Family unity[140]	Arts 9(3) and 10(2)	Arts 8 and 19(2)		X	Preamble, rec.6 and 7; Arts 7,8, 14 and 15(3)	Preamble, rec.22, Arts 5(b), 7(2), 10(2) and 14(1)(a)
Detention	Art. 37	Preamble, rec. 10; Arts 2(k), 6(2), 13(2) and 14(8)	X	Art.18	Art. 17(2)	Arts 15, 16 and 17
Victims of torture or other inhuman or degrading treatment or punishment	Art.37(a)	Arts 17, 18(2) and 20	Arts 20(3) and 29(3)	Preamble, rec. 21, Arts 27(1)(c), Art.30(2)(b), and Annex II [141]	X	Art.3(9)
Periodic review of treatment/regular assessment	Art.25	Art. 19(1)	Art.30(2)	X	X	Art.15(3)
Confidentiality	Arts16; 40(2)(vii)	Art.19(3), and 19(4)	Arts 30(5) and 36	Arts13(2) and 41	X	X
Staff specific Training for minors' needs	Art.3(3)	Art.19(4)	Art.30(6)	Art.13(3)(a)[142]	X	X
Respect for cultural identity	Art. 30	X	Art.10(1)(c)	Art. 13(3)(a)	X[143]	X
Reintegration	Art. 39	X	X	X	X	X
Leisure, rest, play and recreational activities	Art.31	X	X	X	X	Art.17(3)

LEGEND:

	Not Relevant, as per the scope of the legislation
X	Rights not addressed

[139] Linguistic assistance (not "interpretation" is mentioned in Art.13(3)
[140] Though mentioned in this table, this topic will not be addressed in this paper
[141] There is nothing specific about UMs, but in relation to the safe third country concept in the quoted articles
[142] Art.13(3)(a) is applicable to all applicants and not only to UMs
[143] Although not directly related to the respect of cultural identity, according to Art.15(1), family members as well as other dependent relatives may be brought together on humanitarian grounds based in particular on family or cultural considerations

II.2 –LEGAL ANALYSIS

UMs' rights highlighted in table 2 above will be cross-checked with the Convention to establish whether the EU wording is in line with the related CRC's Article(s). **Sub-section II.1** will address the best interests of the child, non-discrimination and participation. Indeed, these principles which are rights in themselves should also be considered in the interpretation and implementation of all other rights in the Convention. The rights to maximum survival and development as well as the consideration of UMs' evolving capacities will also be addressed in this framework. **Sub-section II.II** will focus on the analysis of some of the other rights.

II.2.1 – Consideration of the Convention's Four General Principles and the Evolving Capacities within the EU Asylum and Immigration Legislation

The Convention's four general principles, namely the best interests of the child, the right not to be discriminated against, and respect of the views of the child as well as consideration of evolving capacities will be analysed here since these rights are addressed in each legal instrument. In any case, **these principles should be complied with even if they were not clearly stated in EU asylum and immigration legislation**. Indeed, since these principles are contained in the Convention, they are to be taken into consideration in applying the EU general principles of law. **The issue** is thus less on the fact that they should be mentioned or not, than on **the way these flexible principles should be taken into.** This is also true as far as child's rights to maximum survival and development (Art.6 CRC)[144] are concerned. This principle, though not mentioned in any of the instruments under review in this paper, still remains a holistic concept crucial to the implementation of the whole Convention.

In the following Sub-sections, provisions related to each right in the EU legislation will be presented and then examined from the perspective of the Convention.

[144] According to Art.6, States parties should "create an environment conductive to ensuring, to the maximum extent possible, the survival and physical, mental, spiritual, moral, psychological and social development of the child, in a manner consistent with human dignity in order to prepare the child for an individual life in a free society[144]".

II.2.1.1 - The Best Interests of the Child

In EU legislation

The principle[145] is mentioned in all the instruments, sometimes as a very general provision, sometimes more specifically in relation to a specific aspect of the children's rights.

Art.18 of the Qualification Directive states that the best interests of the child shall be a primary consideration for the Member States when implementing the provisions of this Directive that involve minors. In **Art.19(2) of the Reception Directive**, the principle is mentioned in relation to the accommodation, "siblings having to be kept together, taking into account the best interests of the minor concerned, and in particular, his or her age and degree of maturity" and in relation to "family tracing" **(Art.19(3))**.

The principle of **the "best interests of the child"** which is to be considered as a primary consideration when applying the **Qualification Directive (QD**) is mentioned in the **preamble, Rec. 12**. **Art.20(5)** of this Directive states that "the best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Chapter that involves minors". The principle is also mentioned in relation to the accommodation with siblings and family tracing as in the Reception Directive. As far as the **Asylum Procedures Directive** is concerned, the best interests of the child should be a primary consideration when laying down specific procedural guarantees for UMs on account of their vulnerability (Preamble, Rec.14). **Art.17(6)** of the same Directive also mentions that the principle shall be a primary consideration for Member States when implementing this Article. The principle is mentioned in both **Arts 6 and 15(3) of Dublin II**: as far as the former is concerned, the Member State responsible for examining the application shall be where a family member is legally present, provided that this is in the best interest[146] of the child. In the latter, related to the humanitarian clause, if the asylum seeker is an UM who has a relative or relatives in another Member State who can take care of him or her, Member States shall if possible unite the minor with their relatives unless this is not in the child's best interests. Eventually, as far as the **Returns Directive** is concerned, the respect of the "best interests of the child" principle is mentioned in the **Preamble (Rec. 22);** as well as in **Arts 5** (when

[145] According to the Convention, Art.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) States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. (3) States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

[146] The fact that "interest" is written without a "s" in this Article is probably a typographical error

implementing this Directive, Member States shall take due account of this principle) and **10** (due consideration being given to their best interests when UMs are granted assistance).

Comment

The "best interests of the child"[147] as stated in the Convention is a new principle of interpretation in international law.[148] **It is an "umbrella" provision laying down the general standards which underpins the rights set out in the subsequent Articles;** it applies widely to all actions concerning children, i.e. even if the child is not the object of the decision but that a decision affects him. "The basic structure of the Convention is that of a combination of the rights of the child, and the best interests; the one cannot be separated from the other."[149]

The principle was introduced for the first time in the non-binding Declaration on the Rights of the Child in 1959.[150] However, the content of the principle was not discussed at any length neither in 1959 nor during the drafting of the Convention, despite the Venezuelan representatives concerns of the apparent subjectivity of the standard. The initial draft of Art.3(1) was identical to Art.2 of the non-binding 1959 Declaration, which set the best interests of the child as of "paramount" importance; some delegations were uncomfortable with that provision, leading to its reformulation as a "primary" consideration as contained in the Convention today. Besides, one should note that the *travaux préparatoires* of the Convention (and of the 1959 Declaration) did not give any definition of the "best interests" concept. To date, a General Comment on this principle has not been issued either.

Art.3(1) is probably the single Article of the CRC which has been the most discussed. Questions like what does "interests" mean? Why "interests" and not "rights"? What are the implications of the principle being "a" primary consideration and not "the" primary one? Why "primary" and not "paramount", etc have also been addressed at length in books and scholars. The inclusion of the principle in the Convention has been largely criticized as being an indeterminate open-ended bold normative statement which gave no precise options when assessing the best interests of the child. In the absence of legal rules or a hierarchy of values, the best interests approach depends upon the value system of the decision maker. Absent any rule or guideline that approach simply created an unimaginable discretion in the repository of

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[147] The principle is also addressed in other provisions of the CRC: Articles 9(1)(3), 18(1), 20(1), 21, 37(c), and 40(2) (b) iii

[148] The International Law on the Right of the Child, *G. Van Bueren, 1998, p.45*

[149] *Joachim Wolf, (1992),* The Concept of the "Best Interests" in terms of the UN Convention on the Rights of the Child, p. 129, *in The Ideologies of Children's Rights, 1992, pp 125-134*

[150] Principle 2 of this Declaration reads as follows: The Child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually, and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactments of laws for this purpose, the bests interests of the child shall be the paramount consideration.

the power.[151] Michael Freeman rightly points out that this principle - together with the four other first Articles of the Convention assume an overarching importance. Yet, since there had been no discussion at the time of the Convention drafting process on the implications of including the best interests of the child in the instrument, **"what are we to do when there is a conflict, or seeming conflict, between one of the rights enunciated in the Convention and what is considered (by whom) to be in a child's best interests?"**

As mentioned here above, the principle is mentioned in all the instruments studied in the context of this report; **it nevertheless remains open to many interpretations and does not necessarily lead to a better drafting of provision related to UMs and the protection of their rights in practice.** D. Archard notes that because it is a maximizing principle, the best interests' requirements seem unfeasibly demanding. It contains too many complex variables: the number of options, the value of these options, and the probabilities of various outcomes being realized.[152]

The UNICEF Implementation Handbook and the UNHCR Guidelines mentioned previously in the report are considered as reference documents to understand the meaning of this Article, the way it should be put in balance with other provisions within the Convention itself or within other legislation. Still, one should also remember **that this principle is to be applied on a case-by-case basis, since the best interests of a child depends on his/her individual situation**. As far as UMs in the EU are concerned, legal guardians and local authorities interfacing directly with the minors are the best placed to make the assessment of the best interests; indeed, the principle implies an assessment of the situation which should allow to take a sustainable decision considering short and long term consequences. Still, where could the EU added-value be with regard to the interpretation of this principle? Does the fact that this principle is introduced in all legislation change anything in practice? What could be done for the Member States to fulfill their obligations within the Convention, more particularly to ensure the child's well-being as per Art.3(2) CRC? Is the European Commission better placed to draft guidelines about the content and the interpretation of this principle?

The "best interests of the child" being "a" primary consideration, and not "the" primary consideration, children's interests have to be balanced against other considerations, and the principle cannot be the paramount consideration in every case since some parties might have equal or even higher legal interests.[153] According to some Commentators, the CRC's drafters

[151] *Stephen Parker, (1994),* The Best Interests of the Child – Principles and Problems, *International Journal of Law and Family*
[152] *D. Archard, (2008),* Philosophical Perspectives, International Inter-disciplinary course, Children's Rights in a Globalized World: From Principles to Practices, Gent-Antwerpen, September 2008
[153] *Bruce Abramson, (2008),* Commentaries on the United Nations Convention on the Rights of the Child: Article 2 - The Right of Non-Discrimination

wished to ensure a degree of flexibility in the application of the principle, not because they thought that the children's interests should not be paramount in some circumstances, but because the principle as contained in Art.3 was to be of broad application and that an approach that gave paramount importance to children's best interests could not be justified in all of the situations to which the Article might apply. Michael Freeman in his Commentary of Art.3 CRC notes that "*paramount* emphasizes that the child's best interests are determinative; they determine the course of action to take. If a child's best interests are paramount, it is difficult to see any other consideration being seriously taken into account. The Child's best interests would be more than just the top item in the list: they would come close to being the only consideration. How close of course, would be ultimately dependent on the values of the decision-maker. *Primary* by contrast means "first". That a child's best interests should be 'first consideration' is an exhortation to consider specifically the best interests of the child and to give the child's best interests greater weight than other considerations." **This issue is particularly relevant as far as asylum and migration are concerned.** How is it possible to balance the best interests principle with migration concerns, especially when States have a right to "control their freedom", that individuals have a right to leave their country but that there is no equivalent right to enter another one and that migration concerns are being dealt with by our governments at European level in a globalised world, whereas the best interests of the child is to be considered on a case-by-case basis, the focus being put on taking appropriate actions for individual children in particular circumstances? These are conflicting interests that still need to be resolved.

The best interests principle is strongly linked to the child's full development as contained in Art.6 CRC; it should consequently be mentioned with regard to the application of the entire piece of legislation and not only in relation to some provisions. What is more, according to the Preamble of the Convention, the child should be fully prepared to live an individual life in society and brought up in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity. Thus, **either decisions-makers decide that migrant children's best interests should be <u>the</u> primary consideration (if not the paramount consideration), and draft policies and legislation with the best interests of the child prevailing over any other consideration; or migration concerns are more important and related policies will be drafted with other interests and pressures in mind, with CRC principles sprinkled here and there, Member States ensuring as such that they respect (at least on paper) the obligations they have taken in the human rights instruments that they have signed up to.**

II.2.1.2 - Non-Discrimination

In EU legislation

The issue of discrimination[154] is addressed in all the legal instruments studied in the framework of this paper, except for the Dublin II.

It is stated in the various **Preambles of the Reception, Qualification and Asylum Procedures Directives** (respectively in **Rec. 6, 11 and 9**) that "with respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party and which prohibit discrimination". The **Qualification Directive's preamble** further states in its **Recital 33**, that "especially to avoid hardship, it is appropriate, for beneficiaries of refugee or subsidiary protection, to provide without discrimination in the context of social assistance the adequate social welfare and means of subsistence." A different wording is used in the preamble of the Returns Directive, Member States being requested to implement this Directive "without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinions, membership of a national minority, property, birth, disability, age or sexual orientation."

Comment

Non-discrimination[155] is an absolute right which is discussed in Arts 2(1), 3(2) and 4 of the Convention, but is not defined. As stated in GC6, this principle "prohibits any discrimination on the basis of the status of a child as being unaccompanied or separated, or as being a refugee, asylum-seeker or migrant". States Parties have the obligations to "respect and ensure" all the rights in the Convention to all children in their jurisdiction without discrimination of any kind. States have the obligation to respect, to protect, to facilitate and to fulfil these rights; they should thus refrain from any action which would violate any of the

[154] According to Art.2 (1) 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, ethic or social origin, property, disability, birth or other status. (2) States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members. (3) rights are therefore enshrined in Art.2: the right to non-discrimination (Art.2(1)), and the right not to be discriminated against for reasons pertaining to the actions of the youngster's parents, and a right not to be punished on account of the deeds of the parents (Art.2(2)).

[155] The Convention does not provide any definition of non-discrimination

rights of the child under the Convention; and have to do what is necessary to enable individuals to enjoy and exercise the relevant rights, including protection from third parties.[156]

Art.2(1) of the Convention requires the State to ensure rights "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". An open-ended interpretation of "other status" would lead to absurd results, and should thus be read in conjunction with more limited terms in this Article (race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth). "New grounds could thus be added through the process of interpretation, on the conditions that they bear a sufficient similarity to the specified characteristics."[157] In that right, age which is not mentioned in the CRC could thus be mentioned as one of the grounds of non-discrimination within the EU legislation. **This is the approach followed within the Returns Directive, which not only adds age but also sexual orientation to the grounds of discrimination found in other Directives.**

However, non-discrimination does not mean equal treatment for all children. Law by its very nature makes distinctions and as far as the Convention is concerned, every sectoral right requires the State to make distinctions and children in certain categories will benefit from special treatment (e.g. those who have been temporarily deprived of their family environment; refugee children; the disabled; etc.)[158]; the implementation of certain rights will also vary from child to child because of the difference of age, maturity and evolving capacities as cited in Arts 5 and 12 CRC.

The issue of the different treatment between UMSA and UMs who are considered as irregular economic migrants at EU level has already been addressed in the previous section, with the conclusion that there is no obligation to address the rights of UMs irregular economic migrants at EU level. However, **the discrimination established within the same category of vulnerable people, i.e. UMSA of different ages should be discussed.** Indeed, it should be reminded that according to the **Asylum Procedures Directive**, "Member States may also refrain from appointing a representative where the unaccompanied minor "will in all likelihood reach the age of maturity before a decision at first instance is taken" (**Art.17(2)(a))** and when the UM "is 16 years old or older, unless he/she is unable to pursue his/her application without a representative." **(Art.17(3)).** Reference to the *Family Reunification case* is interesting in this respect.

[156] Human Rights of Migrant Children, *International Migration Law – International Organization for Migration No 15, 2008*
[157] *Sharon Detrick (1992), The United Nations Convention on the Rights of the Child: A Guide to the Travaux Preparatoires*, p.28
[158] Ibid, p.27

Some of the provisions which were contested within the *Family Reunification Directive* permitted Member States to restrict family reunification in certain situations where the children in question are over 12 years old, or in certain cases over 15 years old.[159] According to the European Parliament's reasoning in the case, there should be no distinction between younger and older children, and this difference would constitute a breach of the principle of equal treatment when transposed in the various Member States. In her Opinion given on the *Family Reunification Case*, Advocate General Kokott notes that not every distinction according to age constitutes age-based discrimination and the "the emphasis on the need to protect children demonstrates that age may be an objective parameter serving to distinguish dissimilar situations requiring different treatment. Age limits can thus be lawful."[160] With regard to the possibilities given to Member States as far as children over 12 years old are concerned, the Advocate General reminds us that the contested provisions do not draw a distinction between younger and older children but allow for a supplementary requirement (in that case the "integration condition") to be applied to children over 12 if they arrive independently from the rest of their family. "The distinction is therefore not based solely on age, but on several parameters, including age, which apply cumulatively."[161] **In other words, and according to this interpretation, there is no discrimination on the grounds of age when there is a valid justification for imposing a supplementary requirement.** The ECJ follows the same approach as far as minors older than 15 years old are concerned, stating in its judgment that Member States also have to consider the best interests of the child (Art.5(5) of the Family Directive) and with a view to promoting family life when they decide not to apply the general conditions of Art.4(6) to children over 15 years old. Besides, according to the Court, the age of 12 or 15 "does not appear to amount to a criterion that would infringe the principle of non-discrimination on grounds of age, since the criterion corresponds to a stage in life when the latter has already lived for a relatively long period in a third-country without the members of his or her family, so that integration in another environment is liable to give rise to more difficulties."[162] Similarly, the Advocate General considers that "children who have reached 15 are less dependent than younger children on their parents; the criterion is therefore

[159] According to the final paragraph of Art.4(1) of the Family Reunification Directive "[b]y way of derogation, where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member State may, before authorising entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its existing legislation on the date of implementation of this Directive." The 12th Recital also deals with this point: "[t]he possibility of limiting the right to family reunification of children over the age of 12, whose primary residence is not with the sponsor, is intended to reflect the children's capacity for integration at early ages and shall ensure that they acquire the necessary education and language skills in school."Art.4(6) states that "[b]y way of derogation, Member States may request that the applications concerning family reunification of minor children have to be submitted before the age of 15, as provided for by its existing legislation on the date of the implementation of this Directive. If the application is submitted after the age of 15, the Member States which decide to apply this derogation shall authorise the entry and residence of such children on grounds other than family reunification."

[160] Opinion of Advocate General Kokott delivered on 8 September 2005, Case C-540/03, *paragraph 109*

[161] Ibid, *paragraph* 110

[162] ECJ, Case-540/03, 27 June 2006, Parliament v. Council, OJ C 47, 21.02.2004, *paragraph* 74

without doubt appropriate."[163] Besides, she notes that even though the age-limit is a distinguishing criterion "where the particular circumstances of an individual case are such that family reunification is required, entitlement thereto will arise as a matter of human rights."[164] Does it mean that when considered remotely the right to non-discrimination is not a human right and/or is less relevant than other human rights such as in the present case the right to family reunification? The Advocate General's statement raises serious concern about the legal interpretation given to the principle of non-discrimination in the European Union, especially when examined in the context not only of the Convention that should inspire Community law, but also when the Charter is considered.

In view of this argumentation, it could be said that the possible restriction to access a representative where the UM is 16 years old or older is justified, since this could only occur when the UM is unable to pursue his/her application without a representative. However, as demonstrated above in Sub-section I.2.1, the ECJ's argumentation suffers from an inadequate consideration of the Convention child-rights based approach. The criteria used to determine that 12 or 15 "does not appear to be a criterion that would infringe the principle of non-discrimination" are not clear. How should "does not appear" be understood? Besides, according to the Advocate General, denying the right to family reunification to a 15 year-old child would be possible simply because he or she will only remain a minor for a further 3 years or because he or she might almost reach the age of majority in the event his application takes longer to process than the target time-limit of 9 months due to the complexity of his situation.[165] Art.2(1) CRC states that Member States have to "ensure" rights set forth in the Convention without any discrimination, implying a strong obligation to do so. Besides, the Convention does not put any qualifying measure such as the necessity of an additional requirement to determine when there is discrimination. Accordingly, there is discrimination when there is a difference of treatment on grounds of age among the same category of children. **It is thus submitted that the EU approach with regard to the difference of treatment between UMs older than 16 and younger ones is not in line with the Convention.**

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[163] Opinion of Advocate General Kokott delivered on 8 September 2005, Case C-540/03, *paragraph* 120

[164] Ibid, *paragraph* 121

[165] According to Art.5(4) of the Family Reunification Directive "[t]he competent authorities of the Member State shall give the person, who has submitted the application, written notification of the decision as soon as possible and in any event no later than nine months from the date on which the application was lodged. Yet, in exceptional circumstances linked to the complexity of the examination of the application, the time limit referred to in the first subparagraph may be extended.

II.2.1.3 - Respect of the Views of the Child (Participation)

In EU legislation**,** the fact that "the views of the child shall be taken into account in accordance with his or her age and degree of maturity" is mentioned in **Art.30(3) of the Qualification Directive** but is limited to the context of UM's placement with adults relatives, foster family, accommodations specialised for minors, or in other accommodations designed for minors. The respect of the views of the child is not addressed in any of the other legal instruments.

Comment

Article 12(1)[166] is one of the most innovative Articles of the Convention and is a unique provision in a human rights treaty; It states that "States Parties shall assure to the child who is capable of forming his or her 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." Together with the child's rights to freedom of expression (Art.13) and other rights to freedom of thought, conscience and religion (Art.14), Art.12 underlines children's status as individuals with fundamental human rights, and views and feelings of their own. It should also be read in combination with Art.5 CRC to consider children's "evolving capacities" as far as decision-making is concerned. Although the provisions of Art.12(1) are usually contained in the concept of "participation", the latter has a broader meaning described in GC12 as "on-going processes which include information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes." Children are considered as subjects of rights and as active participants, with no lower age limit placed on their capacity to express their views freely "in all matters affecting them", i.e. not just limited to those matters addressed within the Convention.

Besides, it should be noted that the last General Comment – GC12 - released by the Committee in July 2009 specifically addressed the issue of participation.

[166] "Is it surprising (or is it?) that on the content of the Convention, children as such were given no opportunity to input their views?". *Michael Freeman in "Introduction: Rights, Ideology and Children"*

As far as the wording of Art.12 CRC is concerned, it should be highlighted that the use of the wording "shall assure" leaves no leeway for States Parties' discretion. Accordingly States Parties are under strict obligation to undertake appropriate measures to fully implement this right.[167] Besides, two conditions are attached to the right of the child to express one's view, both of equal value:

- the capacity condition, the right being assured only to a child who is capable of forming his/her own views, and is able to understand and assess the implications of the matter in question; as noted in the CRC implementation handbook "this in turns places obligations on the decision-makers to give the child sufficient information". and,
- the weighting condition, according to which views of the children have a weight proportionate to their age and maturity.

The CRC indicates in GC12 that "Maturity" refers to the ability to understand and assess the implication of a particular matter, and must therefore be considered when determining the individual capacity of a child. Still, maturity is difficult to define; any definition would remain subjective, based on the level of evolution which the child has reached rather than solely on age? In the context of Art.12, it is the capacity as a child to express her or his views in a reasonable and independent manner."[168]

The final phrase "the views of the child being given due weight in accordance with the age and maturity of the child" indicates that not only should the views be expressed freely, they should also be fully considered.[169]

Another important issue is the opportunity which should be provided to children "to be heard in any judicial and administrative proceedings affecting them". Indeed, as we are reminded by GC5, for rights to have a concrete meaning, effective remedies must be available to redress the situation. Child-sensitive procedures should thus be put in place for the children and their representatives. In that respect, the role of legal aid and guardians for UMs is particularly important; and, they should therefore be adequately trained to properly transmit the views of the child. Besides, these children must be given the opportunity to be heard "either directly or through a representative or an appropriate body". In that respect the Committee notes in GC12 that "after the child has decided to be heard, he or she will have to decide how to be heard". The Committee "recommends that, wherever possible, the child must be given the opportunity to be heard directly in any proceedings."

[167] General Comment No.12 – The right of the child to be heard – CRC/C/GC/12, 20 July 2009, p.6
[168] Ibid, p.8
[169] *Bruce Abramson, (2008),*Commentaries on the United Nations Convention on the Rights of the Child: Article 2 - The Right of Non-Discrimination, p.222

Finally, the fact that the right to be heard is to be provided "in a manner consistent with the procedural rules of national law" should not interpreted as permitting the use of procedural legislation which restricts or prevents the enjoyment of this fundamental right but instead as an encouragement "to comply with the basic rules of fair proceedings, such as the right to a defence and the right to access one's files."[170]

As stated in GC6 "to allow for a well-informed expression of such views, it is imperative that such children are provided with all relevant information concerning, for example, their entitlements, services available including means of communication, the asylum process, family tracing and the situation in their country of origin (Arts 13, 17 and 22(2)). In guardianship, care and accommodation arrangements, as well as legal representation, children's view should also be taken into account. Such information must be provided in a manner that is appropriate to the maturity and level of understanding of each child. As participation is dependent on reliable communication, when necessary, interpreters should be made available at all stages of the procedure."

Although "the views of the child shall be taken into account in accordance with his or her age and degree of maturity" is mentioned in Art.30(3) of the Qualification Directive, this is limited to the specific context of UM's placement with relatives, family or in specific accommodation. Accordingly, this does not reflect the fact that "participation", as one of the Convention's four general principles is not only a right in and of itself, but should also be considered in the interpretation and implementation of all other rights, and that a child who is capable of forming his or her own views should be allowed to do so in all matters affecting them.

One must also mention the glaring gap in the other instruments as regards participation. Indeed no mention of the child's participation is made in the Reception, Asylum Procedures or Return Directives, or in the Dublin II Regulation.

II.2.1.4 - Evolving Capacities

In EU legislation

The fact that due consideration should be given to the age and maturity of the UMs is mentioned in Arts **19(2) of the Reception Directive** and **30(4) of the Qualification Directive** in relation to family unity with siblings in accommodation. There is no reference to this

[170] General Comment No.12 – The right of the child to be heard – CRC/C/GC/12, 20 July 2009, p.10

principle in the Dublin II Regulation. The **Asylum Procedures Directive** speaks about "the age of maturity" of UMs which Member States may consider to refrain appointing a representative; as far as the **Returns Directive** is concerned, minors in detention must be access to play and recreational activities "appropriate to their age".

Comment

Though not part of the four general guiding principles, Art.5 CRC[171] is also particularly relevant with regard to UMs evolving capacities. Pursuant to this Article, "States Parties shall respect the responsibilities, rights and duties of parents, or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention."

Art.5 of the Convention puts the emphasis on the exercise of the rights "by the child" as a subject of rights. It is strongly linked to the requirement that the views of the children should be given "due weight in accordance with the age and maturity of the child" contained in Art.12 CRC. It introduces the concept of "parental responsibilities" and "evolving capacities", the latter being referred to as an "enabling principle". As far as migrant children are concerned, the following statements from the Committee in GC7 (paragraph 17) are worth quoted in full: "Art.5 CRC draws on the concept of 'evolving' capacities to refer to processes of maturation and learning whereby children progressively acquire knowledge, competencies and understanding, including acquiring understanding about their rights and about how they can be best realized". The Committee adds that one "should take account of a child's interests and wishes as well as the child's capacities for autonomous decision-making and comprehension for his or her best interests". Eventually, "evolving capacities should be seen as a positive and enabling process, not an excuse for authoritarian practices that restrict children's autonomy and self-expression."

A possible definition of maturity has been provided when addressing participation (see Sub-section I.1.2.3 here above); yet, one might wonder what "the age of maturity" as addressed in the Asylum Procedures Directive is and whether it means majority. The wording "majority considering his or her age and maturity" appears to be more relevant and consistent with the

[171] Art. 5 (CRC): States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

drafting of the other instruments in this respect. As for the participation principle, the EU wording suggests that age and maturity should only be considered in relations to some rights, when under the Convention, participation is required in all matters affecting the child. There is thus also a gap that requires to be filled.

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The analysis here above has demonstrated how the interpretation given to the four general principles as well as to the evolving capacities of the Convention is important with regard to the implementation of the EU legislation. What is more, it has been repeated that each UM should be treated on a case-by-case basis; accordingly, there cannot be a "one-size-fits-all" approach with regard to these principles. Eventually, the wording used in the legislation should not induce a false believe that a right is being created by an EU instrument when it actually ensues from the CRC. Reference to the Convention is therefore of utmost important in any legislation adopted after its entry into force; in this respect, it should be acknowledged that the Returns Directive is the only legal instrument which does so explicitly.

II.2.2 – LEGAL ANALYSIS OF SOME OTHER RIGHTS

In the following Sub-sections, other rights highlighted in Table 2 here above will be put in perspective with the Convention.

It should be noted that no **definition of "minor"** is provided in any of the EU legal instruments studied in this paper; it is argued that this definition should be provided, at least insofar as EU legislation in the field asylum and immigration is concerned, and that the term "child" should be added, to reflect the Convention's terminology.[172] Besides, it would demonstrate a child-rights based approach in the drafting of the EU legislation.

II.2.2.1 - Material Reception Conditions and Standard of Living

In EU legislation

"**Material Reception Conditions**" are only defined in the **Reception Directive** in **(Art.2(2)(j))** as "the reception conditions that include housing, food, and clothing, provided in kind, or as financial allowances or in vouchers, and a daily expenses allowance". According to

[172] Child is defined in Art. 1 CRC, as a "human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier."

Art.13 of the Reception Directive (General rules on material conditions and health care), Member States shall ensure that material reception conditions are available to applicants when they make their application for asylum **(Art.13(1))**. Member States shall make provisions on material reception conditions to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence **(Art.13(2))**. Besides, Member States shall ensure that standard of living is met in the specific situation of persons who have special needs in accordance with **Art.17** (Persons with special needs), as well as in relation to the situation of persons who are in detention. Material reception conditions may be a combination of the various elements mentioned in the definition here above **(Art.13(4))**. The **Returns Directive** does not speak about "material reception conditions" but mentions "adequate reception facilities" when returning UMs to their countries of origin **(Art.10(2))**. **Material reception conditions are not addressed within the Qualification and Asylum Procedures Directives, and in the Dublin II either**.

As far as the "**standard of living**" is concerned, Art.13(2) of the **Reception Directive** already mentioned above according to which the standard of living should be adequate for the health of the applicants and capable of ensuring their subsistence, is given further meaning by **Recital 7 of this Reception Directive** which states that "minimum standards for the reception of asylum seekers will normally suffice to ensure them a dignified standard of living and comparable living conditions in all Member States."

Comment

Although it is not specially related to the case of UMs or minors, the definition of "material reception conditions" appears in line with Art.27(3) CRC.

Indeed, according to **Art.27** CRC on **the right of the child to a standard of living**, this latter shall be adequate for the child's physical, mental, spiritual, moral and social development (**Art.27(1)**), the parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living for the necessary child's development **(Art.27(2))**. **Art.27(3)** deals with the "secondary responsibility"[173] of the State to secure these conditions of living, by taking appropriate measures in accordance with national conditions and within their means, to assist parents and others responsible for the child to implement this right. In case of need, States Parties are under a further obligation to provide material assistance and support programmes particularly with regard to nutrition,

[173] *Nigel Cantwell and Anna Holzscheiter, (2008),* Commentaries on the United Nations Convention on the Rights of the Child: Article 27 – The Right to an Adequate Standard of Living, p.460

clothing and housing. States obligations with regard to the recovery of the maintenance for children from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad are addressed in **Art.27(4)**: States must take all appropriate measures to secure the recovery of maintenance for these children. In this respect, where the person having financial responsibility for the child lives in a State different from that of a child, the concerned States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as making other appropriate arrangements.

Art.27 of the Convention illustrates the generally accepted notion that a State's obligation under international human rights law exists at three levels: the obligation to respect, the obligation to protect, and the obligation to fulfil; this latter being divided into the obligation to facilitate and the obligation to provide. This Article is closely related to Art.26 CRC (rights of the child to social security); it also elaborates on the general principle set in Art.6 CRC, which confirms the inherent right of every child to life and requires the host state to ensure to the maximum extent possible the survival and development of the child.[174]

While the obligation to provide material reception assistance is to be welcomed, one could nevertheless criticise the fact that it only starts when the UMs make their application and not as soon as they are identified as UMs. Still, there is nothing in the Convention related to the timing of the obligation to provide such assistance.

When Art.27(1) of the Convention speaks about standards of living adequate for the child's physical, mental, spiritual, moral and social development, there seems to be a special emphasis on health in Art.13(2) of the Reception Directive, which speaks about "a standard of living adequate for the health of applicants." According to the same Article, this standard of living shall also be capable of ensuring their subsistence. As subsistence is not further defined one could wonder if this is similar to "the conditions of living for the necessary child's development" as per Art.27(2) CRC. It also appears that standard the requirement to provide adequate standards of living under the Directive only extends to persons who have special needs as well as for persons who are in detention. Eventually, and since there is no definition of "special needs", one might wonder about the adequate standard of living of vulnerable persons who do not have special needs. Does it also mean that a vulnerable person who does not have special needs is not entitled to an adequate standard of living? Or is it that UMs could be considered as having special needs in their own right?

[174] *Ibid*, p.1

II.2.2.2 – Representation and Assistance

In EU legislation

Representation by a "representative", a "legal guardian" or "appropriate assistance" is addressed in all the legal instruments studied in the framework of this report, except for the Dublin II Regulation. As will be further demonstrated here below, it appears that the wording used in the EU legislation (e.g. "assistance and/or representation" in the Asylum Procedures Directive and the fact that Member States may refrain from appointing a guardian when UMs can avail themselves of the services of a legal adviser or other representative free of charge) indicates that legal guardians and representatives could have the same role and responsibilities towards the UMs.

The definition of representative is only contained in the Asylum Procedures Directive. **Art.2(i)** states that a representative is "a person acting on behalf of an organization representing an unaccompanied minor as legal guardian, a person acting on behalf of a national organization which is responsible for the care and well-being of minors, or any other appropriate representation appointed to ensure his/her best interests."

As per the Reception and Qualification Directives, Member States shall take measures to ensure the necessary representation by a legal guardian or where necessary, representation by an organization which is responsible for the care and well-being of minors, or by any other appropriate representation (respectively **Arts 19(1) and 30(1)**). Such representation must occur as soon as possible in institutions falling within the Reception Directive, and as soon as possible after the granting of international protection as per Qualification Directive. **Art.18 of the Reception Directive**, related to "minors", states that Member States shall ensure that appropriate counselling (rather than legal assistance) is provided when needed. **Art.21(2)** should also be mentioned since it is related to the procedures for legal assistance in case of appeals, for which systems are required to be established under.

The **Asylum Procedures Directive** states in its **Preamble, Recital 13**, that the procedure in which an application for asylum is examined should normally provide an applicant at least with the opportunity to consult a legal adviser or other counsellor. The appointment and role of the representative is addressed in **Art.17** (Guarantees for Unaccompanied Minors) in paragraphs 1 to 3. Without prejudice to the provisions of Arts 12 to 14 related to the personal interview, Member States must as soon as possible take measures to ensure that a **representative** represents and/or assists the UM with respect to the examination of the application. This representative can also be the representative referred to in Art.19 of the

Reception Directive. The representative shall also be given the opportunity to inform the UMs about the meaning and possible consequences of the personal interview, and where appropriate, to prepare them for the personal interview. The representative must be allowed to be present at the interview and to ask questions or make comments, within the framework set by the person who conducts the interview. Member States may require the presence of the UM at the personal interview, even if the representative is present **(Art.17(1))**. Member States may refrain from appointing a representative where the UM will, in all likelihood, reach the age of maturity before a decision at 1st instance or can avail himself, free of charge, of a legal adviser or other counsellor, admitted as such under national law to fulfil the tasks assigned to the representative in the framework of this Directive; or is married or has been married **(Art.17(2))**. Member States may also refrain from appointing a representative where the UM is 16 years old or older, unless he/she is unable to pursue his/her application without a representative **(Art.17(3))**. It is also important to stress that according to **Art.6(4)(b),** Member States may determine in national legislation "the cases in which the application of an unaccompanied minor has to be lodged by a representative as provided for in Art.17(1)(a)." In cases of border procedures, Member States must ensure that the persons concerned "have a representative appointed in the case of unaccompanied minors, as described in Art.17(1), unless Art.17(2) or (3) applies." **(Art.35(3)(f))**

As far as the **Asylum Procedures Directive** is concerned, the provisions of **Arts 15** (right to legal assistance and representation) and **16** (scope of legal assistance and representation), though not specific to the case of UMs are also relevant. As per Art.15 the rule is that access to legal assistance must be granted to applicants for asylum at their own cost **(Art.15(1)**. Member States may nevertheless provide that free legal assistance and/or representation is granted (a) only for procedures before a court or tribunal in accordance with Chapter V and not for any onward appeals or reviews provided for under national law, including a rehearing of an appeal following an onward appeal or review; and/or (b) only to those who lack sufficient resources; and/or (c) only to legal advisers or other counselors specifically designated by national law to assist and/or represent applicants for asylum; and/or (d) only if the appeal or review is likely to succeed. Member States shall nevertheless ensure that legal assistance and/or representation granted under (d) is not arbitrarily restricted. Rules concerning the modalities for filing and processing requests for legal assistance and/or representation may be provided by Member States **(Art.15(4)).** As per **Art.15(5)** Member States may also: (a) impose monetary and/or time-limits on the provision of free legal assistance and/or representation, provided that such limits do not arbitrarily restrict access to legal assistance and/or representation; (b) provided that, as regards fees and other costs, the treatment of applicants shall not be more favourable than the treatment generally accorded to their nationals in matters pertaining to legal assistance. Eventually, pursuant to **Art.15(6)**

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

In the **Returns Directive**, pursuant to the preamble, **Recital 11,** "the necessary legal aid should be made available to those who lack sufficient resources; Member States should provide in their national legislation for which cases legal aid is to be considered necessary." **Art.10(1)** does not specifically mentions "guardianship" or "representative" but it could be assumed that this can be included in the "appropriate bodies other than the authorities enforcing return" that shall assist the UMs before the decision to issue a return decision is taken. As far as remedies are concerned, third-country nationals shall have the possibility to obtain legal advice (advice and not assistance), representation, and where necessary, linguistic assistance **(Art.13(3))**. **Legal assistance and/representation** shall be granted on request free of charge; this shall be done in accordance with relevant national legislation or rules regarding legal aid, which may provide that such legal aid is subject to conditions as set in out in Arts 15(3) to (6) of the Asylum Procedures Directive **(Art.13(4))**. According to **Art.19**, the Commission shall report every three years to the European Parliament and Council on the application of this Directive in the Member States and, if appropriate, propose amendments. The Commission shall report for the 1st time by 24 December 2013 and focus in particular on the application of Arts 11 (entry ban) 13(4) (free legal assistance) and 15 (detention). In relation to Art.13(4), the Commission shall assess in particular the additional financial and administrative impact in Member States.

Representation and assistance are not addressed within Dublin II.

Comment

Representation and legal assistance have been addressed together in this part of the report since they are enshrined in "assistance" and "representation", both undefined terminology used equally in the Convention and in EU legislation. According to the Convention there is a clear obligation to provide assistance to children who are deprived of their family environment, whatever their status is (Art.20(1)). "Special protection and assistance" in relation to UMs deprived of their family environment is also addressed within Art.20. However there is no definition of what "special protection and assistance" entails[175], neither is

[175]According to Nigel Cantwell and Anna Holzscheiter "[special protection and assistance] implies targeted measures […] over and above those required for children in general, and adapted to the specific situation of those without parental care, in order to compensate for their special vulnerability and thereby to enable their overall rights to be fulfilled. *Nigel Cantwell and*

there any clarification given as to who shall provide such assistance, or when it should be provided. What is more, it is mentioned in GC12, (paragraph 36) that "the representative can be the parent(s), a lawyer, or another person (inter alia a social worker)", suggesting that all these people have the same role. Eventually, it is also worth noting that "legal protection" is only mentioned in the Convention's preamble; and in two other Articles addressing "legal assistance and other appropriate assistance."[176] Broad reference to "counselling" or "assistance" in EU legislation may, at first, appear to be justified. However, a holistic approach, with due consideration of the four general principles, supports the Committee interpretation in GC6 (paragraph 21)[177] according to which "in cases where children are involved in asylum procedures or administrative or judicial proceedings, they should, in addition to the appointment of a guardian, be provided with legal representation."[178]

The issue of equal treatment has already been addressed in Sub-section I.1.2.2 here above, concluding that the possibility (through the use of the word "may") given to EU Member States to refrain from appointing a representative when the minor will soon reach the age of 18 or when he is over 16 (respectively Arts 17(2)(a) and 17(3) in the Asylum Procedures Directive) seems to be possible, since according to the ECJ, there is no discrimination on grounds of age when there is a supplementary requirement and that age is not the sole criterion to be considered. One might still wonder if this is in line with Art.20(1) CRC which puts a clear obligation on host States ("shall be entitled") to provide the special protection and assistance. Reference to Art.3(2) and (3) CRC might be helpful in this respect. According to Art.3(2) "States Parties [have] to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties for his or her parents, legal guardians, or other legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures." This Article should be read as an umbrella provision directed at ensuring through one means or the other, the well-being of the child. Philip Alston notes "[...] its comprehensiveness means that it constitutes an important reference point in interpreting the general or overall obligations of governments in the light of the more specific obligations contained in the remaining parts of the Convention. The obligation which is explicit in the undertaking 'to ensure the child such protection and care as

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Anna Holzscheiter, (2008), Commentaries on the United Nations Convention on the Rights of the Child: Article 27 – The Right to an Adequate Standard of Living, pp 49 - 51

[176] It is mentioned in Recital 9 of the Preamble "[b]earing in mind that the, as indicated in the Declaration of the Rights of the Child, 'the child, by reason of his physical and mental immaturity, need special safeguards and care including appropriate legal protection, before as well as after birth." It's a very important statement since this is the only reference to "legal protection", "legal assistance or other appropriate assistance" being mentioned in Arts 37(d) (child deprived of liberty), 40(2) (b) (ii) and (iii) (juvenile justice)

[177] This issue is also addressed in GC6; see n3 above *paragraph* 36

[178] In that respect, it is also worth quoting GC12, *paragraph* 37: "The representative must be aware that she or he represents exclusively the interests of the child and not the interests of other persons (parent(s)), institutions or bodies (e.g. residential home, administration or society). Codes of conduct should be developed for representatives who are appointed to represent the child's views.

is necessary for his or her ‘well-being’ is an unqualified one. [...] The verb used to describe the obligation (‘to ensure’) is very strong and encompasses both passive and active obligations. The term ‘protection and care’ must also be read expansively, since the objective is not stated in limited or negative terms but rather in relation to the comprehensive ideal of ensuring the child’s ‘well-being’ [...]”[179]. Accordingly it could be concluded that the derogation given in Art.17 of the Asylum Procedures Directive is not in line with Art.20 of the Convention.

A last issue which should be addressed is whether legal assistance should be free. As far as the CRC is concerned, assistance is only required to be provided free of charge in relations to assistance provided by an interpreter, under Art.40(2)(vi). Therefore it could be concluded that there is no obligation to provide free legal assistance. The issue is addressed at more length in GC6; according to the Committee, “[i]n order to effectively secure the rights provided by Art.37(d) of the Convention, unaccompanied or separated children deprived of their liberty shall be provided with free and prompt access to legal and other appropriate assistance, including the assignment of a legal representative. ”[180] It is also worth noting that in GC6 paragraph 69, UMs and separated children should in all cases be provided access free of charge, to a qualified legal representative.

II.2.2.3 – Healthcare and Rehabilitation

In EU legislation

According to Art.18(2) of the Reception Directive, Member States must ensure that “appropriate mental healthcare is developed”, while **Art.15(2)**, states that applicants who have special needs should receive “the necessary health care or other assistance”; necessary healthcare is defined as including “at least emergency care and essential treatment of illness.”[181] Healthcare is dealt within **Art.29(3) of the Qualification Directive**: adequate healthcare should be provided to beneficiaries of international protection who have special needs such as minors who have been victims of any form of abuse, neglect, exploitation, torture, cruel, inhuman or degrading treatment or those who have suffered armed conflict. The **Returns Directive** states in **Art.4(4)(a)** that Member States shall ensure that third-country nationals excluded from the scope of this Directive benefit from a treatment and level of protection which is no less favourable than as set out in Art.14 which refers to **Art.16(3)**

[179] Implementation Handbook, pp.40-41, in reference to an article written by Philip Alston “The Legal framework of the Convention on the rights of the child, Bulletin of Human Rights, 91/2, p.9
[180] See n3 above, p. P.19.
[181] Health is also mentioned in Art.13(2) of the Reception Directive but in relations to the standards of living which shall be adequate for the health of applicants and capable of ensuring their subsistence.

according to which “particular attention shall be paid to the situation of vulnerable persons; emergency health care and essential treatment of illness shall be provided.”) As far as **“Rehabilitation”** is concerned, it is only addressed in **Art.18(2) of the Reception Directive**: rehabilitation services should be provided by Member States for minors victims of any form of abuse, neglect, exploitation, torture or cruel, inhuman or degrading treatment or to those who have suffered from armed conflicts. Member States must also ensure that appropriate mental health care is developed and qualified counselling is provided when needed.

Healthcare is mentioned neither in the Asylum Procedures Directive nor in the Dublin II Regulation.

Comment

While **Art.3(3)** of the Convention states that “States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision”, health and health services are mainly addressed in **Art.24** CRC.[182] According to the 1st paragraph of **Art.24(1)**, 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. Furthermore, States Parties are encouraged to ensure that no child is deprived of his or her right of access to such health and care services. States Parties are obliged to take appropriate measures to ensure that the provision of necessary medical assistance and health care to all children, with a particular emphasis on the development of primary health**.** Paragraph 3 deals with the abolition of traditional practices that are prejudicial to the health of children. Eventually, and according to the 4th paragraph, States Parties should promote and encourage international cooperation with a view to achieving progressively the full realization of the right recognized in the present Article. In this respect, particular account must be taken of the needs of developing countries. Health is also addressed in **Art.23** of the Convention in relations to disabled children. **Art.39** CRC should also be mentioned since it deals with the

[182] Several other articles of the CRC are related to Health: Art.6(2) which deals with the survival and development of the child; Art.23 addressing disabled children, mentions health care and rehabilitation services in its paragraphs 2 and 3, and obligates States Parties to promote, in the spirit of international cooperation, the exchange of appropriate information in the fields of preventive health care and medical, psychological and functional treatment of disabled children. Art.25 deals with the right of a child who has been placed for the purpose of *inter alia* treatment of his or her physical and mental health” to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement. The right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development is recognized in Art.27. Finally, Art.33 obligates States Parties to take all appropriate measures to protect children from the illicit use of narcotic drugs and psychotropic substances. *Sharon Detrick, (1999),* A Commentary on the United Nations Convention on the Rights of the Child, p. 398

psychological and social reintegration of children who are victims of any form of neglect, exploitation, or abuses; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. States Parties are required to take appropriate measures to promote such rights. Such recovery and reintegration should take place in an environment which fosters the health, self-respect and dignity of the child.

One should first of all note that the obligation for necessary healthcare to include at least emergency healthcare and essential treatment of illness (Art.18(2) of the Reception Directive) is in line with the definition of primary healthcare provided here above in the framework of the Declaration of Alma-Ata.[183]

In their Commentary on Art.24 of the Convention, the authors note that the formulation that "no child" should be deprived of healthcare and psycho-social services is also a reminder that there must be no discrimination in access to such services, irrespective of the child's or the parents' race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. They also stress that the "highest sustainable standard of health" is a right to the best possible health outcomes taking into account both the child's biological precondition and his/her living condition as well as his/her access to health care. It includes both physical and mental health.[184] In this respect, one could say that Art.18(2) of the Reception Directive should focus not only on mental health but should also include physical health.

Besides, the fact that "appropriate" is also mentioned in Art.18 of the Reception Directive does not seem to be an issue. Indeed, although full implementation of Art.24 CRC requires the State to undertake all appropriate legislative, administrative and other measures, whether the measures adopted are "appropriate" depends to some extent on the particular situation as the availability of health and related services in a particular country.[185] The specific attention which should be given to vulnerable persons is also considered in the EU legislation, though some consistency in the terminology used in the various instruments would be welcome. For example, it is not clear whether the mention of applicants or beneficiaries of international

[183] Primary health care is defined in the Declaration of Alma-Ata on primary health care (result of the 1978 International Conference on Primary Health Care) as "essential healthcare based on practical, scientifically sound and socially acceptable methods and methodology made universally accessible to individuals in the community through their full participation and at a cost that the Community and country can afford to maintain at every stage of their development in the spirit of self-reliance and self-determination. It forms an integral part of the country health system, of which it is the central function and main focus, and of the overall social and economical development of the community. It is the first level of contact of individuals, the family and community with the national health system bringing healthcare as close as possible to where people live and work, and constitutes the first element of a continuing health care process."

[184] *Eide and Wenche Barth Eide, (2006),* Commentaries on the United Nations Convention on the Rights of the Child: Article 24 – The Right to Health *Asbjørn*

[185] Ibid.

protection who have special needs is only related to "vulnerable persons with special needs". It is not clear either what "essential treatment of illness" means.

As far as "rehabilitation" is specifically concerned, it should be mentioned that the Reception Directive is in line with Art.39 of the Convention.

II.2.2.4 – Access to Information

In EU legislation

The **Asylum Procedures Directive** is the only instrument which mentions information in relations to the specific situation of UMs; however, this seems to be limited to information related to the medical examination which might be used to determine age **(Art.17(5)).** Information should be provided prior to the examination of UMs' application for asylum, and in a language which they may reasonably be supposed to understand. This should include information on the method of examination and of the possible consequences of the result of the medical examination as regards the outcome of the application, as well as the consequences of refusal on the part of the UM to undergo such medical examination. According to **Art.9(2)** which is related to all applicants, "Member States shall also ensure that, where an application is rejected, the reasons in fact and in law are stated in the decision and information on how to challenge a negative decision is given in writing."

In the Reception Directive, all asylum seekers must be informed within a reasonable time not exceeding fifteen days after they have lodged their application for asylum of the availability of established benefits and of the obligations with which they must comply relating to their reception. They must also be provided with information on organizations or groups of persons that provide specific legal assistance and organizations that might be able to help to inform them concerning the available reception conditions including health care. These information shall be provided in writing and as far as possible in a language that applicants may reasonably be supposed to understand; when appropriate this information may also be provided orally **(Art.5).** Information is also addressed in the **Preamble of the above mentioned Directive, in Recital 11**, pursuant to which "in order to ensure compliance with the minimum procedural guarantees consisting in the opportunity to contact organizations or groups of persons that provide legal assistance, information should be provided on such organizations and groups of persons. "According to **Art.22 of the Qualification Directive**, as soon as possible after the respective protection status has been granted Member States should provide migrants with access to information in a language likely to be understood by them, on

the rights and obligations of that status. According to **Dublin II**, the asylum seeker must be informed in a language that he/she may reasonably be supposed to understand regarding the application of this Regulation, its time limits and its effects **(Art.4(4)).** As far as the **Returns Directive** is concerned, information is addressed in the part related to procedural safeguards in Chapter III of the instrument. Any decision must be issued in writing and give reasons in fact and in law as well as information about available legal remedies; written or oral translation of the main elements of decisions related to return shall be provided in a language the third-country national understands or may reasonably be presumed to understand. The information on reasons in fact may be limited where national law allows for the right to information to be restricted in particular in order to safeguard national security, defence, public security and for the prevention, investigation, detection and prosecution of criminal offences. Member States may nevertheless decide not to do so when third-country nationals have illegally entered the territory of a Member State and have not thereafter obtained an authorization or a right to stay in that Member State **(Art.12)**.

Interpretation is only mentioned in the **Asylum Procedures Directive** and is not specific to the case of UMs. It is stated in the **Preamble, Recital 13** that "the procedure in which an application for asylum is examined should normally provide an applicant at least with the right to stay pending a decision by the determining authority, access to the services of an interpreter for submitting his/her case if interviewed by the authorities [...]". According to **Art.10(1)(b)** and with respects to the procedures provided for in Chapter III[186], Member States shall ensure that all applicants for asylum "receive the services of an interpreter for submitting their cases to the competent authorities whenever necessary. Member States shall consider it necessary to give these services at least when the determining authority calls upon the applicant to be interviewed as referred to in Arts 12 and 13 and appropriate communication cannot be ensured without such services. In this case and in other cases where the competent authorities call upon the applicant, these services shall be paid for one of public funds." Pursuant to **Art.13(3)(b)** that Member States must select an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview. The communication need not necessarily take place in the language preferred by the applicant for asylum if there is another language which he/she may reasonably be supposed to understand and in which he/she is able to communicate. Eventually, in cases of border procedures, Member States shall ensure that the persons concerned have access if necessary to the services of an interpreter **(Art.35(3)(c)).**

[186] Chapter III of the Asylum Procedures Directive is related to procedures at 1st instance

Comment

Art.13 of the Convention deals with the child's **right to freedom of expression** which includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice. There is a limitation in **Art.13(2)** since the exercise of this right may be subject to certain restrictions as provided by law and are necessary for the respect of the rights or reputations of others, or for the protection of national security or of public order, or of public health or morals. This Article should be read with **Art.17** CRC addressing the importance of mass media, access to appropriate information from a diversity of national and international sources, but also access to information and material aimed at the promotion of the child's well-being and health.

It is also worth mentioning that a Commentary has been released on Art.13 CRC. The author notes that the different components protected under Art.13 form an almost coherent whole. The right to *seek* is the active component and the tool to become informed. In reference to the Committee's concluding observations to the report of Albania in 2005, the author notes that the right to *receive* information is somehow the passive component of a broader obligation on States to ensure that the public is kept well-informed on all matters of legitimate concern. He calls the right to *impart* "the active phase of the whole process" since this is the way individuals express themselves and make their opinions known and can have an impact in the world surrounding them.

In view of the above mentioned comments, it should first of all be recognized that the fact that information should be provided in writing or orally in the EU legislation is in line with the drafting of Art.13 CRC. Besides, restriction placed on accessing information on grounds of national security purposes (Art.12 of the Return Directive) is also permitted by Art.13(2) CRC.

Second of all, it should be stated that when put in context of the Convention, EU legislation only gives a partial access to information, when the reading of Art.13, together with Arts 17 and 12 of the Convention calls for the provisions of comprehensive information in order for the child to be able to provide a well-informed expression of their views.[187] In this respect, the first major concern in the EU instruments is thus related to the timing of the obligation to provide information. When it should be acknowledged that the Convention does not address

[187] This is also stressed in General Comment No.6 (2005) – Treatment of Unaccompanied and Separated Children outside Their Country of Origin, *United Nations Committee on the Rights of the Child, CRC/GC/2005/6, 1 September 2005, paragraph* 25

this specific matter either, it goes without saying that information should be provided as soon as practicable after the unaccompanied minor is found. Indeed, according to GC6 (paragraph 82), "fulfilment of the child's right to information, consistent with Art.17 is, to a large degree, a prerequisite for the effective realization of the right to express views. Children need access to information in formats appropriate to their age and capacities on all issues of concern to them. This applies to information, for example, related to their rights, any proceedings affecting them, national legislation, regulations and policies, local services, and appeals and complaint procedures [...]."

The third important aspect when addressing access to information is the language used to provide this information, and the related assistance of an interpreter, if necessary. Reference should be made to Art.40(2)(vii) of the Convention according to which every child accused alleged as or having infringed the criminal law has at least the guarantee to "have the free assistance of an interpreter if the child cannot understand or speak the language used." Art. 30 related to cultural rights is also relevant as far as access to information is concerned, since it is mainly related to the right for children who belong to an ethnic, religious or linguistic minority to use their own language in community with other members of his or her group.[188] It should therefore be acknowledged that the Convention itself seems to address the assistance of an interpreter only in relation to juvenile justice and thus does not provide any obligations as far as other matters are concerned. The reading of GC6 does not provide further support in this respect; indeed, it is stressed in paragraph 25 that participation is dependent on reliable communication, "where necessary, interpreters should be made available at all stages of the procedures."[189] The initial interview related to the registration should be conducted in a language that the child understands (paragraph 31 (ii)). Eventually "[...] whenever the child is unable to communicate directly with the qualified official in a common language, the assistance of a qualified interpreter should be sought."[190] GC12 – the latest General Comment to have been released by the Committee in 2009 and related to the "right of the child to be heard" could be the source of confusion as far as the use of language and interpretations are concerned. The right to obtain information in their own language seems to be limited to "children who come to a country following their parents in search of work or as refuges in a particularly vulnerable situation."[191] The rights of access to information of other

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[188] Neither the terms "ethnic, religious or linguistic minorities" nor "persons of indigenous origin" are defined in the Convention. The following definition has been proposed by Carpotori: "a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, tradition, religion or language."
[189] General Comment No.6 (2005) – Treatment of Unaccompanied and Separated Children outside Their Country of Origin, *United Nations Committee on the Rights of the Child, CRC/GC/2005/6, paragraph* 25
[190] General Comment No.6 (2005) – Treatment of Unaccompanied and Separated Children outside Their Country of Origin, *United Nations Committee on the Rights of the Child, CRC/GC/2005/6, paragraph* 71
[191] *Nigel Cantwell and Anna Holzscheiter, (2008),* Commentaries on the United Nations Convention on the Rights of the Child: Article 27 – The Right to an Adequate Standard of Living, *paragraph*s 123 and 124

unaccompanied minors who do not belong to these categories is not clear. Moreover, it is stated in GC12 (paragraph 21) that "it is not necessary that the child has a comprehensive knowledge of all aspects of the matter affecting her or him, but that she or he has sufficient understanding to be capable of appropriately forming her or his own view on the matter; [...] Efforts must also be made to recognize the right to expression of views for minority, indigenous and migrant children and other children who do not speak the majority language."[192]

Statements such as "appropriate understanding" and "efforts should be made" thus imply that Member States do not have any absolute legal obligation in this respect. Therefore, the fact that according to EU legislation the information might be provided in "a language likely to be understood" by the UMs, or that they "may reasonably be presumed to understand" seems to be in line with the CRC.

II.2.2.5 – Family Tracing

In EU legislation

Family tracing is addressed in **Art.19(3)** of the **Reception Directive**; it must be carried out as soon as possible, while protecting the UM's best interests and on a confidential basis. In doing so, Member States must ensure that their endeavours do not jeopardize the safety of UMSA and close relatives. Provisions related to family tracing in the **Qualification Directive (Art.30(4))** are phrased in a similar fashion, except for the use of the wording "so as to avoid jeopardizing their safety" which is added at the end of Art.19(3) of the Reception Directive, but is not mentioned in Art.30(4) of the Qualification Directive. As far as the **Returns Directive** is concerned, it is stated in **Art.10(2)** that "Before removing an unaccompanied minor from the territory of a Member State, the authorities of that Member State shall be satisfied that he or she will be returned to a member of his or her family, a nominated guardian or adequate reception facilities in the State of return."

The matter is addressed neither in the Asylum Procedures Directive, nor in Dublin II.

[192] Ibid, *paragraph* 21

Comment

Art.10(2) CRC is relevant in the case of **family tracing**[193] since a child whose parents reside in different States have the right to maintain on a regular basis, personal relations and direct contacts with both parents, save in exceptional circumstances.[194] Family tracing is also addressed in **Art.22(2)** CRC, which states that children seeking asylum or who have already been granted refugee status should be protected and assisted to trace their parents or other members of their family in order to obtain information necessary for reunification with their families.

The wording of Arts 19(3) and 30(4) appears in line with the Convention. The concern with regard to EU legislation is related more to the time when the family tracing procedure should be initiated, but this issue is not addressed in the Convention either. GC6 does not clarify this issue either since it states that "tracing is an essential component of any search for a durable solution and should be prioritized [...]"[195]; the initial assessment process should in particular entail "tracing of family to be commenced as early as possible."[196]

With regard to the Returns Directive, Art.10(2) does not specifically states that Member States' authorities have to trace the family but that "they shall be satisfied" that the minors will be returned to a member of their family, a nominated guardian or adequate reception facilities in the State of return. It could be argued that the wording "satisfied" does not imply any Member States' legal obligation to actually initiate a process to trace the family. However, according to the Convention, there is no obligation to trace the family of children who have to be returned since Art.22(2) only addresses children seeking asylum or who have already been granted refugee status. Consequently, addressing family tracing within the Returns Directive does not seem to be mandatory.

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[193] Sharon Detrick reminds that "it is an innovative provision when compared with the major universal and regional conventions on human rights, since it specifically addresses family reunification; p. 185. She also rightfully points out that "the right of the child to leave any country, including his or her own, and the right of the child to enter his or her own country are not specifically recognized in the CRC. However, the two issues dealt with in Article 10 of the CRC, family reunification and the maintenance of contact between children and parents who reside in different countries, are directly related to the exercise of these rights.

[194] Article 10 makes an explicit reference to Article 9(1). Sharon Detrick notes in her Commentary of the Convention that "it is the understanding of the working group that Article 9 of this Convention is intended to apply to separations that arise in domestic situations involving different countries and relating to cases of family reunification, whereas Article 10 is intended to apply to separations involving different countries and related to family reunification. Article 10 is not intended to affect the general rights of States to establish and regulate their respective immigration laws in accordance with their international obligations.

[195] General Comment No.6 (2005) – Treatment of Unaccompanied and Separated Children outside Their Country of Origin, *United Nations Committee on the Rights of the Child, CRC/GC/2005/6, paragraph* 80

[196] Ibid, *paragraph* 31(v)

II.2.2.6 – Detention and Deprivation of Liberty

In EU legislation

The **specific detention of minors for the purpose of removal** is only addressed in the **Returns Directive** – more specifically in **Art.17** (detention of minors and families). Other provisions of the Directive contained in **Arts 15 and 16**, which are not specific to the case of UMs and/or minors' detention are also relevant.

- Member States may only keep in detention third-country nationals who are subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when there is a risk of absconding or avoiding or hampering the preparations for return or for removal **(Art.16(1)).** As far as UMs are concerned, they can only be detained as a measure of last resort and for the shortest period of time **(Art 17(1)).** Minors[197] in detention "shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age, and shall have, depending on the length of their stay, access to education." **(Art.17(3)).**
- Although the best interests of the child must be a primary consideration in the context of the detention of minors pending removal **(Art.17(5)),** those UMs must as far as possible be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of person of their age **(Art.17(4))** and that particular attention must be paid to the situation of vulnerable persons **(Art.16(3)),** UMs may be detained in prison accommodation where a Member State cannot provide accommodation in a specialized detention facility **(Art.16(1))**[198];
- Third-country nationals in detention must be kept separated from ordinary prisoners **(Art.16(1))**, and emergency health care and essential treatment of illness must be provided **(Art.16(3))**.
- Detention must be ordered in writing with reasons being given in fact and in law by administrative or judicial review. When the detention has been ordered by administrative authorities, Member States must either provide for a speedy judicial review of the lawfulness of the detention (to be decided on as quickly as possible from the beginning of the detention), or grant the third-country national concerned the right to take proceedings to challenge the lawfulness of detention by way of judicial review which must be decided as quickly as possible after the launch of the relevant proceedings **(Art.15(2) (a) and (b))**;

[197] It is assumed that minors include UMs although this is not specifically mentioned
[198] Families detained pending removal shall be provided with separate accommodation guaranteeing adequate privacy (Art.17(2))

- Third-country nationals shall be released immediately if the detention is not lawful **(Art.15(2)(b))**. When it appears that a reasonable prospect for removal no longer exists for legal or other considerations or when there is no more risk of absconding or the TCN is no longer attempting to avoid or hamper the preparations for return or removal, detention ceases to be justified and the person concerned should be released immediately **(Art.15(4))**.
- The limit of detention may not exceed 6 months **(Art.15(5))** but this period may be extended for another 12 months in accordance with national law in cases where regardless of all their reasonable efforts, the removal operation is likely to last longer owing to a lack of cooperation by the TCN concerned or due to delays in obtaining the necessary documentation from third-countries **(Art.15(6))**.
- It is also mentioned in **Art.16** that on request, third-country nationals in detention must be allowed to establish in due time contact with legal representatives, family members and competent consular authorities **(Art.16(2))**[199]; that relevant organizations and competent national authorities and NGOs shall have the possibility to visit detention facilities, though such visits may be subject to authorization; and that third- country nationals kept in detention shall be systematically provided with information which explains the rules applied in the detention facilities, sets out their rights and obligations, and inform them of their entitlement under national law to contact the organizations mentioned above **(Art.16(5))**.
- In every case **(Art.15(3))**, detention must be reviewed at reasonable intervals of time either on application by the TCN concerned or ex-officio. In the case of prolonged detention periods, reviews must be subject to the supervision of a judicial authority.

As far the **Reception Directive** is concerned, it provides a definition of "detention" in Art.2(k)[200] (contrary to the Returns Directive) but does not contain any specific Article relating to detention, be it for the detention of UMs or other irregular immigrants, the theme being included in other Articles as follows:

- The application of **Art.6(1)** related to documentation and according to, which Member States must ensure within three days after the applications are lodged, that applicants are provided with a document issued in their name certifying the asylum seeker status or testifying that they are allowed to stay in the territory of the Member State while their applications is pending or being examined, can be excluded when asylum seekers are in detention **(Art.6(2))**

[199] The fact that family unity with family members present in the territory shall be maintained pending return is also addressed in Art.14(a)

[200] Detention is defined as "confinement of an asylum seeker by a Member State within a particular place where the applicant is deprived of his or her freedom of movement" in Art.2(k) of the Reception Directive

- **Art.13(2)** related to general rules on reception conditions and healthcare, and according to which Member States shall ensure that appropriate standards of living are maintained in the case of persons who are in detention;
- **Art.14(8)** related to modalities for reception conditions, which states that "Member States may exceptionally set modalities for material reception conditions different from those provided for in this Article, for a reasonable period which shall be as short as possible when the asylum seeker is in detention or confined to border posts".

Detention is addressed in the **Asylum Procedures Directive, Art.18,** according to which a person must not be held in detention for the sole reason of applying for asylum **(Art.18(1))**; if in detention, the applicant must benefit from the right to speedy judicial review proceedings **(Art.18(2))**. As far as **Dublin II** is concerned **(Art.17(2))**, it is stated that the Member States who request to take charge or to take back asylum seekers may ask for an urgent reply where the application for asylum was lodged after leave to enter or remain was refused, after an arrest for an unlawful stay or after the service or execution of a removal order and/or where the asylum seeker is held in detention. **Detention is not mentioned in the Qualification Directive.**

Comment

Detention of minors and UMs has been addressed at length by NGOs and various UN Agencies, the general consensus being that this category of vulnerable persons should not be detained. As for the background history of the Convention drafting process, it should be reminded that there were no provisions on deprivation of liberties in the first draft proposal of the Convention in 1978, discussions on the matter starting in 1986, only few years prior to the adoption of the Convention by the UNGA. The provisions contained in Art.37 raised so much discussion, revealing the lack of consensus that several informal working groups had to be created at several occasions during the drafting process to come up with new drafts.

In the Commentary on Art.37, Helmut Sax reminds us that "every social problem has a corresponding detention structure" and that "asylum seeking children may spend months in administrative detention pending their deportation, though depriving children of liberty, interfere with many other rights of the child concerned and leave them particularly vulnerable to violence and exploitation."[201]

[201] *William Schabas and Helmut Sax, (20060,* Commentaries on the United Nations Convention on the Rights of the Child: Article 37 – Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty

The author also notes in his Commentary that:

- Positive and prohibitive obligations ensue from this Article:
  - o <u>Obligation to respect</u>: The obligation to respect the right of the child to personal liberty requires States Parties to refrain from any interference without proper justification provided by international and national law. Art.37(b) CRC demands that deprivation of liberty must satisfy certain criteria, such as lawfulness and non-arbitrariness, and pass specific tests, like qualifying as a measure of last resort and for the shortest period of time, in order to receive justification. If not, legitimacy of the interference is lost, and the child's right to personal liberty is violated.
  - o <u>Obligation to protect</u>: the issue at stake for the State Party is not to refrain from intervention, but on the contrary, to take positive action to avoid restriction of personal liberty through private persons, thus, acknowledging horizontal effect of the child's right to personal liberty.
  - o <u>Obligation to fulfill</u>: this obligation requires States Parties to realize the child's personal liberty and safeguards on deprivation of liberty through comprehensive positive action. The crucial underlying aspect of the obligation to fulfill concerns the question of the establishment and maintenance of the necessary infrastructure and resources; the issue of prevention of violations to the child's personal liberty and of disrespect for standards on deprivation of their liberty; and the issue of training of the personnel.

- Personal liberty is not mentioned in Art.37 CRC or in the whole Convention, which is more concerned with safeguards for its limitation in Art.37 (b)(c)(d).

- There is no definition of what amounts to deprivation of liberty contained in the CRC.

From a purely legal point of view, lawful detention of minors is not prohibited, but should be used as a measure of last resort. While the Asylum Procedures Directive and Dublin II can be criticised for not considering the provisions of Art.37 - because all applicants in detention are treated similarly, with no consideration of UMs' specific vulnerability - the provisions related to detention in the Returns Directive comply with Art.37 of the Convention. Indeed, in accordance with Art.37 which sets out conditions for any arrest, detention or imprisonment of the child, detention shall be:

- In conformity with the law; (reflected in Art.15(2) of the Directive);
- Used only as a measure of last resort; (reflected in Art.17(1) of the Directive); and

- For the shortest possible period of time (reflected in Arts 17(1) and 15(6) of the Directive).

There are further conditions set out in Art.37 for the treatment of any child deprived of liberty:

- Children must be treated with humanity and respect for the inherent dignity of the human person; (as reflected in Recital 2 of the Preamble and Art.8(4) of the Directive, though not specifically addressing UMs' specific vulnerability);
- Deprivation of liberty must be undertaken in a manner which takes into account the needs of persons of his or her age; (as reflected in Arts 17(3) and (4) of the Directive)
- Children must be separated from adults unless it is considered in the child's best interest not to do so; (as reflected in Art.17(2) of the Directive)
- Children must be allowed to maintain contact with his or her family, through correspondence and visits, save in exceptional circumstances; (as reflected in Arts 14(a), 16(2) of the Directive)
- Children must have the right to prompt access to legal and other appropriate assistance; (as reflected in Art.16(2) of the Directive, though only on request)
- Children must have the right to challenge the legality of the deprivation of liberty before a court or other competent, independent and impartial authority; (as reflected in Art.15(3) of the Directive)
- Children must have the right to a prompt decision on such action (as reflected in Art.15(2) of the Directive).

II.2.2.7 – Periodic Review of Treatment

In EU legislation

Periodic review of treatment in the specific case of UMs is only addressed in the **Reception and Qualification Directives**. In the former Directive, a regular assessment must be made of the representation by the legal guardian or by any other organization or representation which is responsible for the care and well-being of minors **(Art.19(1))**. In the latter Directive, a regular assessment must be made to ensure that the minor's needs are duly met by the appointed guardian or representative in its implementation **(Art.30(2))**. As far as the **Returns Directive** is concerned, it is stated in **Art.15(3)** that detention must be reviewed at reasonable intervals of time either on application by the third-country nationals concerned or ex-officio.

In the case of prolonged detention periods, reviews must be subject to the supervision of a judicial authority.

The matter is not addressed in the Asylum Procedures Directive and Dublin II.

Comment

Pursuant to **Art.25 CRC** "States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement." It should first of all be noted that this Article gives lots of leeway to States Parties, with no specific details being provided on when the periodic review should happen and how it should be organised. However, in view of the wording of the above mentioned Articles of the EU legislation, the assessment seems to be more related to the tasks of the UMs' representatives than to the treatment of the UMs. Mentioning the specific review of UMs' treatment would be more appropriate in order to ensure compliance with the Convention.

II.2.2.8 – Confidentiality

In EU legislation

Confidentiality is addressed in **Arts 19(3) and (4) of the Reception Directive**, when conducting family tracing **19(3)**, as well as for "those" working with the UMs who are bound by confidentiality, as defined in the national law, in relation to any information they obtain in the course of their work **19(4)**. **Arts 30(5) and 36 of the Qualification Directive** (the latter being applicable to all applicants and not only to UMs or minors in general) is drafted similarly, "those" being replaced by "the authorities and other organizations implementing this Directive" in **Art.36**, and with a specific obligation placed on Member States to "assure that the authorities and other organizations implementing this Directive [...] [are] bound by the confidentiality principle [...]." in Art.36. Confidentiality is also mentioned in **Art.13(2) of the Asylum Procedures Directive** as one of the criteria applicable to personal interviews, as well as in **Art.41** which states that "Member States shall ensure that authorities implementing this Directive are bound by the confidentiality principle as defined in national law, in relation to any information they obtain in the course of their work." **Confidentiality is addressed neither in Dublin II nor in the Returns Directive.**

Comment

Art.16 of the Convention is relevant as far as **confidentiality** is concerned; it provides in paragraph 1 that no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation; and that the child has the right to the protection of the law against such interference or attacks in paragraph 2. **Art.40(2)(b)(vii)** CRC should also be mentioned as far as confidentiality is concerned since it states that each child alleged or accused of having infringed the criminal law has his/her privacy fully respected at all stage of the proceedings.

As far as Art.16 is concerned, it should be noted that:

- The word "interference" is qualified by the words "unlawful" and "arbitrary". Sharon Detrick notes that according to the UN Human Rights Committee, the term "unlawful" infers that no interference can take place except in cases envisaged by law; and the expression "arbitrary interference" is relevant since it can also extend to interference provided by the law.[202]
- The concept of "privacy" has not been defined in much detail. According to the Committee, the term "home" should be understood as indicating the place where a person resides or carries out his usual occupation; "correspondence" should be understood in the strict sense but also include other forms of communication; family is to be given a broad interpretation to include all those all those compromising the family as understood in the society of the State party concerned; the word "unlawful" before "attacks" was intended to meet the objection that, unless qualified, the clause might be construed in such a way to stifle free expression of public opinion.[203]
- The Convention's *travaux préparatoires* reveal that there has been some discussion on the word "honour" and "reputation" but no clear definition or interpretation have been provided in this respect.

In view of the above mentioned statements, one should acknowledge that the EU legislation complies with the Convention's provisions related to confidentiality. However, this matter should also be mentioned in Dublin II as well as in the Returns Directive.

[202] *Bruce Abramson, (2008),*Commentaries on the United Nations Convention on the Rights of the Child: Article 2 - The Right of Non-Discrimination, p. 272
[203] Ibid, p. 273

II.2.2.9 – Training of Personnel dealing with UMs

In EU legislation

According to **Arts 19(4) of the Reception Directive and 30(6) of the Qualification Directive** "those working with UMs shall have or had received appropriate training concerning their needs". In the **Asylum Procedures Directive (Art.13(3)(a)),** in order for applicants to present the grounds for their applications in a comprehensive manner, Member States shall ensure that interviews are performed by persons sufficiently competent to take account of the personal or general circumstances surrounding the application, including the applicant's cultural origin or vulnerability insofar, as it possible to do so.

Comment

Pursuant to **Art.3(3)** CRC Member States assume the obligation to ensure that the institutions, services and facilities responsible for the care or protection of children conform with the standards established by competent authorities, particularly in the area of safety, health, in the number and suitability of their staff as competent supervision.

One should acknowledge that training, when it is mentioned in EU legislation, is addressed in compliance with the Convention.

II.2.2.10 – Social Welfare

In EU legislation

Social welfare is only addressed in **Art.28 of the Qualification Directive**, with no specific provisions applicable to the case of UMs or minors. It states that "Member States shall ensure that beneficiaries of refugee or subsidiary protection status receive, in the Member State that has granted such status, the necessary social assistance, as provided to nationals of that Member State.

Comment

Art.26 CRC addresses the **right of the child to social security**. Pursuant to **Art.26(1)** States Parties recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law. Moreover, **Art.26(2)** provides that benefits from social security, including social insurance, should be granted, where appropriate, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other considerations relevant to an application for benefits made by or on behalf of the child. This Article is closely related to Art.27 CRC on the right of the child to a standard of living. It should also be read in conjunction with Art.4 of the Convention since in the latter provision, States undertake to take all appropriate measures for the implementation of the economic, social and cultural rights and introducing the concept of the "progressive realisation of rights."

In this respect, it should be mentioned that social welfare is poorly addressed in the EU legislation and is not in line with the Convention.

II.2.2.11 – Right to Rest and Leisure, Play and Recreational Activities

In EU legislation

Leisure activities are only addressed in the **Returns Directive**, which states in **Art.17(3)** that minors in detention "shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age [...]."

Comment

According to the first paragraph of **Art.31** of the Convention, States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts. Pursuant to paragraph 2 "States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activities.

In the Commentary issued on Art.31 CRC [204], the author notes that:

- The Convention is the only legally binding document which expressly recognizes the right of children to engage in play and recreational activities.
- The right to rest and leisure remains strongly interweaved; the assumption is that right to leisure can only be enjoyed when the right to rest is guaranteed. The author further quotes Hodgkin and Newell who states that "the right to leisure encompasses more than just having time to sleep at night […] children need some space for themselves between work and education. In this context, Art.16 of the Convention is also crucial in that it guarantees the right to privacy of the child. Leisure time intends to offer free space for children outside of formal settings to engage in activities of their own choice.
- Protection and participation rights should also be respected in the context of play and recreational activities.

One can only observe that the right to rest and leisure, play and recreational activities is not addressed as it should in the EU legislation. Rest is not addressed at all; besides, it is ironic that the right to engage in leisure activities is only mentioned in the Returns Directive, i.e. pending removal.

[204] *Paolo David, (2006),* Commentaries on the United Nations Convention on the Rights of the Child: Article 31 - The Right to Leisure, Play and Culture

CONCLUSION RECOMMENDATIONS AND SUGGECTIONS

Children rights and their implication on the EU asylum and immigration legislation have been discussed in Section I of this report. Some general **background information on the Convention and particular UMs' rights** in that framework has been given. The added-value of the Committee on the Rights of the Child's General Comments in the interpretation of some of the Convention's provisions has also been highlighted. The fact that the **CRC is to be taken into account when applying the general principles of Community law has been discussed**, following an in-depth analysis of the *Family Reunification case.* While such recognition should be welcomed, the scope of this statement remains unsettled considering that the ECJ's reasoning is mainly based on jurisprudence from the ECtHR rather than on the Convention, as well as the emphasis put on preserving EU Member States' margin of appreciation. This case could have been the opportunity to shed some light on the interpretation to be given to CRC rights within the EU, most specifically when the best interests of the child is a principle which is a primary consideration to be put in balance with Member States' political concerns with respect to asylum and immigration. However, this was not the line of action taken by the ECJ at the time. The **Court's interpretation** nevertheless **remains very important** since cases involving migrant children could now potentially be brought before the Court on grounds of infringement of the Charter's provisions relating to the rights of the child interpreted in light of the Convention. What is more, the Court has acquired new competences with the entry into force of the Lisbon Treaty, and its role with regard to the interpretation of the Convention in asylum and immigration cases becomes even more important. Future developments in both respects should be followed carefully. Whether the **on-going discussion within the UN Human Rights Council on the possibility to provide a communications procedure complementary to the Convention's procedure** has a positive outcome, the Committee on the Rights of the Child would be able to provide some expert clarification regarding the implementation of the Convention and set jurisprudence which the ECJ as well as any other court would greatly benefit from. **The compatibility of Community law with the Convention has also been discussed,** questioning the potential legal obligation of the EU towards UMs who are considered as irregular economic migrants – whose situation at present is only addressed within the framework of the Returns Directive. Whilst it was argued that adopting common minimum standards at EU level would lead to more coherence with regard to EU Member States practices in this respect and would prevent the misuse of asylum law, it was argued that the EU has no legal obligations to address these vulnerable minors within its asylum and immigration legislation. The obligation thus remains squarely with the Member States. Still, with the ECJ's acknowledgment that the rights contained in the CRC should be taken into consideration when applying the general principles of Community law, the EU should be attentive not to set rules which would allow Member States to breach general principles of law, including when it adopts legislation which may allow Member States to derogate from such principles.

Section II of this paper addressed UMs' rights from their arrival in the EU to their potential return to their country of origin, through a horizontal review of the Reception, Qualification and Asylum Procedures Directives, the Dublin II Regulation and the Returns Directive, to reflect the Convention's holistic integrated approach. Specific provisions applicable to UMs were put in perspective with the related provisions of the Convention. This comparison was presented in tabular form, Table 1 including explicit Articles related to UMs and minors in each piece of legislation, and Table 2 reflecting a more in-depth analysis of each instrument, featuring extracts of all the provisions applicable to UMs including Articles already mentioned in Table 1; Articles related to applicants for international protection in general, which sometimes mention the particular approach to be taken for minors and/or UMs; and eventually, other provisions of each instrument which though not adapted to the special rights of this vulnerable group as per the Convention would nonetheless be applicable in the case of UMs as well as for other applicants for international protection. **The impact of the Convention's four general guiding principles was then discussed.** It was reminded that these principles are of paramount importance since these are not only rights in and of themselves but that they should also be considered when implementing the other rights contained in the Convention. The issue is thus less on the fact that these flexible principles should be mentioned or not, than on their impact on the legislation, and on the way they must be taken into consideration when the EU drafts provisions applicable to UMs in its legal instruments, to allow for an adequate implementation at Member States´ level. The **child's right to maximum survival and development** (Art.6 CRC) is a crucial concept in the implementation of the whole Convention. The best interests of the child and the right to non-discrimination are mentioned in each instrument but it does not necessarily mean that they will effectively be implemented. As far as the **best interests principle** (Art.3(1) CRC) is concerned, the fact that this is "a" primary consideration and not "the" primary consideration means that UMs' interests have to be balanced against other considerations and that the principle cannot be the paramount consideration. Besides, each minor's case requires a case-by-case approach as each situation presents individual issues. This principle thus remains open to divergent interpretations and the fact that it is mentioned in all the legal instruments does not necessarily lead to a consistent application, whether as regards the drafting of EU provisions related to UMs' rights or the protection of their rights in practice. It has thus been argued that the application of this principle suffers from only being "a" primary consideration. This may lead to different outcomes. Either decisions-makers decide that UMs' best interests should be "the" primary consideration (if not the paramount consideration), and therefore they should draft policies and legislation with the best interests of the child prevailing over any other consideration; or, alternatively, migration concerns are more important and related policies will be drafted with other interests and pressures in mind, with CRC principles sprinkled here and there, and Member States ensuring as such that they

respect (at least on paper) the obligations they have taken in the human rights instruments they have signed up to. With regard to **non-discrimination** (Art.2 CRC), it has been argued that the difference of treatment between younger and older UMs was not in line with the Convention, which places strong obligations on Member States to "ensure" that children's rights contained in the Convention are exercised without discrimination of any kind, without containing any qualifying criterion or supplementary requirement that may justify discrimination. The ECJ's ruling in the *Family Reunification case* in that respect is once again very interesting, the Court arguing that the choice of the age of 12 or 15 "does not appear to amount to a criterion that would infringe the principle of non-discrimination."[205] This reasoning raises serious concerns on the legal interpretation given to the right not to be discriminated against in the EU. Almost total absence of provisions ensuring **respect of the views of the child** (Art.12(1) CRC) has also been discussed. At present, this right is only mentioned in the Qualification Directive but is limited to the specific context of placement with relatives or in special accommodations. It has been argued that the EU's approach in this respect does not induce "participation", i.e. it does not include information-sharing and dialogue between children and adults based on mutual respect but a one-way communication from the adult to the child, and does not allow the UMs to learn how their views and those of adults can be taken into account. As has been observed elsewhere "[h]aving a right means having the power to command respect, to make claims and have them heard; thus only claims made by a particular group of (competent) beings will be recognized."[206] The approach towards the respect of the views of the child thus necessitates significant improvement to ensure compliance with the Convention. Though it is not one of the four general guiding principles, children's **evolving capacities** (Art.5 CRC) were also discussed. As for children's participation, the lack of consideration of the UMs' age and maturity in the legislation was identified, since these are only mentioned in the Reception and Qualification Directives but in the limiting context of maintaining family unity. Wording in this respect in other legal instruments ("age of maturity" in the Asylum Procedures Directive; and "appropriate to their age" in the Returns Directive) demonstrate the difficulty in properly integrating this right in the legislation. A gap remains to be filled. Following this review on the general guiding principles and evolving capacities, **Section II continued with a horizontal analysis of other rights, within the context of the Convention**. The following specific rights were addressed: material reception conditions and standards of living; representation and assistance; healthcare and rehabilitation; access to information; family tracing; detention and deprivation of liberty; periodic review of treatment; confidentiality; training of personnel dealing with UMs; access to social welfare; and right to rest and leisure, play and recreational activities.

[205] ECJ, Case-540/03, 27 June 2006, Parliament v. Council, OJ C 47, 21.02.2004, *paragraph* 74
[206] *Katherine Hunt Federle, (2003),* Rights flow downhill, *in Children's rights, volume I Michael Freeman, 2003, pp.244*

Is the current EU asylum and immigration legislation in line with provisions applicable to unaccompanied minors as enshrined in the Convention on the Rights of the Child?"

This horizontal legal analysis helped answering the initial question asked in this paper i.e. "**Is the current EU asylum and immigration legislation in line with provisions applicable to unaccompanied minors as enshrined in the Convention on the Rights of the Child?**"

Whether the question is understood as to be "do the unaccompanied minors' related provisions in the EU asylum and immigration legislation match the wording of the related Convention's provisions", then the answer is yes, most of the time. Indeed, when addressed from this perspective, the wording used for the provisions related to UMs' rights in the EU legal instruments is most of time similar to the wording used in the related Articles of the Convention.

If the question is understood as "does the EU asylum and immigration legislation reflect the holistic approach, with a consistent child's rights-based approach, all along the migration process, for all unaccompanied minors irrespective of their status", then the answer is unfortunately no. Indeed, it has been demonstrated that the four general guiding principles as well as the obligation to give due regards to children's evolving capacities were not considered as they should be. As clearly shown in Table 2, UMs' rights are not mentioned in all the instruments studied in this paper; when they are addressed, there is no coherence between the various instruments. Besides, there is a difference of treatment between UMSA of older and younger age, and UMs who are considered as irregular economic migrants are not addressed at EU level except within the framework of the Returns Directive, which still leaves the possibility for Member States to exclude those who have illegally crossed the EU's external borders. The Returns Directive is also the only instrument which explicitly mentions the Convention, the wording used in the other instruments thus implying that they create minors rights when this is not the case. As stated in the Stockholm programme "the development of legislation in the area of freedom, security and justice is impressive, but it has shortcomings in terms of overlapping and a certain lack of coherence. At the same time, the quality of the legislation including the language used in some of the legal acts could be improved."[207]

The efforts made by the European Union within the recast of the asylum legislation should nevertheless be acknowledged.

[207] The Stockholm Programme – An open and secure Europe serving the citizens, *Brussels, December 2nd 2009, 17024/09, p.6*

Indeed, it looks like the EU is moving towards a new path, where the asylum and immigration legislation would be drafted with a child rights-based perspective. New proposals have been submitted for the Reception Directive[208], the Dublin II Regulation[209], the Qualification[210] and Asylum Procedures[211] Directives, in response to the objective set in The Hague programme to have a second generation of instruments by the end of 2010. As reminded in the explanatory memorandum of these instruments, the aim is to ensure a higher degree of harmonisation and better standards of international protection across the European Union. The envisaged measures are expected to improve the coherence between EU asylum instruments, to simplify, streamline and consolidate procedural arrangements across the EU and to lead to more robust determination at first instance, thus preventing abuse and improving efficiency of the asylum process. The improvement with regard to UMs' rights within these proposals should be acknowledged. Efforts to include the Committee's General Comments – which in principle are not legally binding - and more particularly those contained in GC6 are obvious, although a sustainable child rights-based approach has not been implemented yet and that some instruments would still deserve some enhancements as far as UMs' rights are concerned.

As far as the improvements contained in the Commission proposals within the recast exercise are concerned, it should be highlighted in particular that:

- The Convention is mentioned in all the instruments' preambles;
- The term "minor" is defined in all the instruments as "a third-country national or a stateless person below the age of 18" [212];
- As far as the recast of the Reception Directive is concerned, the detention of vulnerable and persons with special needs is addressed at length. In this respect, it is specifically stated that UMs must never be detained. Other safeguards for children are better specified. Education is no longer conditioned to being younger than the age of legal majority in the Member State in which the application is lodged or being examined, but Member States have now the discretion to stipulate that education is confined to the State's education system;

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[208] Proposal to the European Parliament and to the Council on minimum standards for the reception of asylum seekers (*Recast), (COM(2008)815 final/2)*

[209] Proposal for a Regulation of the European Parliament and of the Council establishing the criteria for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person *(Recast), COM(2008) 820 final, 3 December 2008*

[210] Proposal to the European Parliament and to the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted, COM(2009) 551, *(Recast), SEC(2009) 1373, SEC(2209)1374*

[211] Proposal to the European Parliament and to the Council on minimum standards on procedures in Member States for granting and withdrawing refugee status, *COM(2009)554/4, (Recast), SEC(2009) 1375, SEC(2209)1376*

[212] The Convention on the Rights of the Child defines child (not minor) in Art. 1 as "every human being below the age of 18 years, under the law applicable to the child, majority is attained earlier."

- The proposal for the recast of the Dublin II Regulation is probably the one which contains the most improvement, with the inclusion of Art.6 concerning guarantees for minors. An interesting matter in this respect is that for the first time, factors which should be considered to assess the best interests of the child are proposed, i.e. family reunification possibilities; the minor's well-being and social development taking into particular consideration the minor's ethnic, religious, cultural, and linguistic background; safety and security considerations, in particular when there is a risk of the child being a victim of trafficking; the views of the child, in accordance with his/her age and maturity;
- The insertion of an Article addressing the specific issue of training is also important in the Asylum Procedures Directive, although training with regard to child-specific needs could have been included, not to speak about training to gain knowledge on the scope and application of the Convention. As far as special guarantees for UMs are concerned, not only the representative, but the legal adviser or other counselor admitted as such under national law will now be present at the interview and have the opportunity to ask questions or make comments in the framework set by the person who conducts the interview. It should be mentioned that Member States will have the obligation to organise interviews in this setting, instead of only being given the discretion to do so as in the current Directive. This wording also implies that the actors supporting the UMs indeed have a different role, e.g. that a legal adviser does not hold the same responsibilities as a guardian. UMs should be granted free legal assistance with respect to all the procedures set in this Directive. It is also required that any medical examination undertaken for the purpose of determining age would have to be performed in full respect of the individual's dignity, selecting the least invasive medical procedures. Finally, it is also worth mentioning that the application of some Articles has been excluded in the case of UMs e.g. Articles related to the accelerated procedure, or to the application of the safe third-country concept.

The list established here above is not exhaustive but meant to acknowledge some important improvements which have been proposed by the European Commission with regard to the rights of UMs and minors in general. There is of course further room for improvement in the proposals with regard to UMs' rights since the recast exercise is still proceeding. One can only hope that, as an outcome, the different revised instruments will indeed be consistent, especially as far as vulnerable persons are concerned.

A better tomorrow for the rights of unaccompanied minors?

The European Union is now at the vanguard of policy and law making in the field of UMs' rights. With the objective of establishing a Europe of responsibility, solidarity and partnership in migration and asylum matters within the Stockholm programme, and with the on-going exercise of recasting asylum-related legislation, the EU has the opportunity to establish common procedures (and not only common minimum standards) which could even go beyond the Convention's legal requirements. The entry into force of the Lisbon Treaty also brings many positive prospects: there is scope for new legislative initiatives since in principle the three-pillars structure no longer exists; the ECJ has acquired general jurisdiction to give preliminary rulings also in the area of justice and home affairs (hopefully leading to a more coherent approach in the interpretation of EU law); and the Charter of Fundamental Rights has acquired the same value as treaties, leading as such to a "three-part system for the protection of human rights"[213] comprising of the Charter, general principles of law and the EU's future accession to the ECHR. Actions which will be taken in the framework of the action plan on unaccompanied minors will also demonstrate EU's willingness to enter a new era with regards to UMs' rights, potentially shifting from a legislation lead by Member States' concerns on migration control to an asylum and immigration legislation drafted with a child rights-based approach.

As far as the action plan on unaccompanied minors is concerned, one can hope that the following recommendations made by the Committee within GC5 in relations to national policies to be developed by governments will be followed: it should not be a list of good intentions but rather include a description of a sustainable process for realizing the rights of UMs throughout the EU. It should go beyond statements of policy and principle, to set real and achievable targets in relation to the full range of economic, social, cultural, civil and political rights of UMs. Finally, it should set out specific goals, targeted implementation measures and indicate allocation of financial resources for specific themes. Besides, it is argued in this paper that actions taken in the framework of this action plan should be classified between short, mid- and long-term actions, and prioritized, one of the criteria to be considered being the budget which could be allocated to them. Indeed, the European Union and Member States might not always have the capacity and resources at their disposal, even when willing to improve UMs' standards of living. In this respect, the identification of resources for children in national and EU budgets should also be initiated. Working groups should be established to discuss the actions which will be proposed in the action plan and coordinate (i.e. initiate, develop, implement, monitor) their implementation. The working

[213] Steve Peers, « Human Rights in the EU Legal Order: Practice Relevance for EC Immigration and Asylum Law", p.132. Following successive amendments, the fact that the EU shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and as they result from the constitutional traditions common to Member States was included in Art.6(2) TEU.

relationship already established within the EMN could be very useful to set this structure. It is essential to include representatives from Member States in this exercise since they are at the forefront when dealing with UMs. As pointed out by the EU Committee of the Regions "an objective analysis of this phenomenon cannot be implemented without the active and continuous involvement of the local and regional authorities responsible for the care of these minors."[214] Moreover, one of these working groups should focus on horizontal concerns such as the legal and financial issues, to determine which improvements would be necessary by 2014 (when the new multi-annual programme on freedom, security and justice will be drafted), with a child rights-based approach, considering the provisions of the Convention, the Lisbon Treaty, and relevant legal ECJ and ECtHR cases. An exercise to draft a (legally binding?) instrument at EU level for all UMs and separated children could also be initiated in this framework. Indeed "trying to make known and explain an incomplete set of provisions to be found in disparate selection instruments is not likely to be effective."[215]

The issue though is not only to have rights but to have rights which are enforceable. As Jacqueline Bhabha says "the legislative framework is incomplete and ineffective because even when binding obligations or legal requirements exist their implementation is erratic." Ms Bhabha also rightfully notes that "the challenge to translate rights in law into rights in practice is a challenge that is not only political but also conceptual. Crafting the right to have rights is not a mechanism rolling-out of pre-established entitlements but an evolving tool-kit of strategies specifically tailored for change. Efforts to overcome this challenge are just in their infancy."[216] **Decision-makers and their legislative drafters should thus be trained on the Convention** since their decisions will have a direct impact on the actions implemented for the benefit of children. **The approach taken with the European Asylum Curriculum[217] could be followed, this time focusing on migrant children's rights**.

What about the Convention on the Rights of the Child? It has been stated several times in the course of this paper that achieving a consensus on such a human rights' instrument should be celebrated as a great achievement. However, as Michael Freeman states in an article dealing with the future of children's rights "we cannot assume that a Convention formulated in the last third of the 20th century will fit the needs of children of the new millennium. […] There is a need for revision, reform and innovation since there are new rights to be debated, new features of existing rights to be debated an examined, and new child groups to be

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[214] Opinion of the Committee of the Regions on the situation of unaccompanied minors in the migration process – the role and suggestions of regional and local authorities, OJ C 51/07, 6 March 2007, p.37, *paragraph* 1.4

[215] In "the origins, development and significance of the United Nations Convention on the Rights of the Child"

[216] *Jacqueline Bhabha (2009),* Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights?*, Human Rights Quarterly 31, 2009, pp. 410-451*

[217] The European Asylum Curriculum (EAC) is a EU Member States initiative intending to enhance the capacity and quality of the European asylum process as well as to strengthen practical cooperation among the European asylum/immigration systems. More information about EAC are available at http://www.gdisc.org/index.php?id=549

emphasized."[218] **The EU could play a very important role in this respect, based on a forward-looking legislation.**

Working with the countries of origin?

In the framework of the Stockholm programme, the European Council invited the Council and the Commission to enhance the internal co-ordination in order to achieve **greater coherence between external and internal elements of JLS work**, thus between the European Commission HOME affairs and RELEX services. The initiation of initiatives towards UMs - be they preventive or related to the establishment of an integrated return policy - should not be prohibited by existing legal and financial EU mechanisms. This is essential to help establishing a durable solution on a case-by-case basis in the best interests of the child. This will also contribute to a better and coherent setting up of actions within the EU and in the UMs' countries of origin with regard to family tracing and as far as return back home is concerned, should this be considered as the durable solution. The monitoring of these actions is also very important, to ensure that funding allocated to these activities is wisely used, and so that the return to the country of origin is safe and lasting. **An activity similar to the EC-UN Joint Migration Development Initiative (JMDI)[219], focusing on UMs** (if not on migrant children) would also help fostering the relationship between the European Union and the Countries of Origin.

Jorge Agustin Bustamante, special *Rapporteur* on the human rights of migrants also encourages for the **synergy of capacities and mandates of international organizations as a key element in supporting States to fulfill their respective obligations under international instruments.**"[220] In that respect, one should follow the evolution of the project "*Mobilités des enfants et des jeunes en Afrique de l'Ouest*"[221] an initiative initiated at the end of 2007 which involves three International Organizations and five NGOs, i.e. on the one hand, UNICEF, the International Organization for Migrations (IOM) and the International Labour Organization (ILO), and on the other hand, Save the Children Sweden, Plan International, le Mouvement Africain des Enfants et Jeunes Travailleurs (MAEJT), ENDA Tiers Monde Jeunesse Action, and Terre des Hommes Lausanne. On the basis of an in-depth review of each organization's policy and activities with regard to children on the move, this collaboration

[218] *Michael Freeman,* The Future of Children's Rights *in Children's rights, volume I Michael Freeman, 2003, pp.289-305*
[219] The EC-UN JMDI is a 3-years, 15 million initiative funded by the European Union which was launched in December 2008. The overall objective of the Joint Initiative is to support civil society organizations and local authorities seeking to contribute to linking migration and development. The Joint Initiative also aims to 1) set up and reinforce networks of actors working on migration and development and 2) identify good practice in this field and share information on what actually works at the local and international level among those who are active in this field with a view to 3) feeding into policy-making on migration and development. For more information www.migration4development.org
[220] Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development – Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Agustin Bustamante, *United Nations General Assembly, Human Rights Council, Eleventh Session, Agenda item 3, A/HRC/11/7, 14 May 2009*
[221] In December 2009 this project was implemented under the coordination of UNICEF - West and Central Africa

which involves 12 countries[222] is meant to instigate an evolution of the respective institutional and programmatic position of these organizations, which is more realistic and in line with considerations in the field. The first phase of this project focused on research activities while the second phase is meant to be more operational. The evolution of this project should be carefully monitored for several reasons: to learn about legal and policy approach towards children on the move in West Africa, and therefore get a better understanding on the causes of migration; and to replicate the same type of cooperation in the European Union. Indeed, a similar platform could be set up involving main actors and decision-makers in the field (i.e. UN organizations, NGOs, the European Commission, etc.) to clarify each organization policy with regard to migrant children in Europe (thus including minors from Romania and Bulgaria, whose rights are not addressed within the EU asylum and immigration legislation, since Romania and Bulgaria are EU Member States), learn from each other's experience, with a possible evolution of each organization's mandate in this respect; and eventually to strengthen formal links not only among these organizations in the European Union, but also between these organizations and organizations in countries of origin involved in the same type of projects.[223] It should however be highlighted that **the approach with regard to UMs might be different in third-countries than in the EU**. As far as West Africa is concerned, activities might sometimes focus more on child trafficking that on migration. Besides, there seems to be more concerns about migration flows within Africa than on migration to Europe. It should also be stated that the **terminology used in migration related matters is very important for the different actors from countries of origin, transit and destination to understand each other and thus establish successful cooperation**. Indeed, the European Union would speak about "migrant children" when the project "*Mobilités*" mentioned here above use the terminology "children on the move" notably to reflect the fact that a minor's migration might be a personal decision and that it could have positive outcomes for both the minors and their families. It is also very important to note that the word "traffic" does not have a translation in many African dialects. Addressing terminology is thus a prerequisite to any effective cooperation between EU and third countries concerned with migrant children.

[222] The 12 countries involved in this project are Benin, Burkina Faso, Cote d'Ivoire, Gambia, Guinea, Guinea-Bissau, Mali, Mauritania, Niger, Nigeria, Senegal and Togo

[223] An interesting project to be monitored in that respect is DRIVE (which stands cooperation for Differentiation, Refugee Identification, and Vulnerability Evaluations for Referrals). This EC funded project managed by the International Catholic Migration Commission (ICMC) aims at initiating and strengthening networking and capacity-building among NGOs, local service providers, International Organisations and EU member states by promoting, on a regional level, the capacity of engaged stakeholders; at identifying and referring refugees and others in need of protection within mixed maritime flows (including specifically children, women and victims of trafficking, torture and trauma); at establishing protection-sensitive processes through the elaboration of good practices, training and mechanisms for differentiation and referral. DRIVE is a practices and policy partnership of eight national, regional and international non-governmental organisations (NGOs) collaborating with international, intergovernmental and national authorities to analyse current practices and make recommendations for better identification, protection and referral of boat people arriving in Spain, Italy, Malta and Greece.

The European Union policy with regard to migrant children would also **benefit from the experience gained from local organizations who work with migrant children in third-countries**. For instance, *Village Pilote*[224] is an initiative created in Dakar, Senegal in 1993 which establishes direct contacts with minors to prevent unsafe migration and protect children who are already outside of their natural environment. This local organization also has reintegration and rehabilitation activities. Activities set within the MAEJT project "*Exode précoce et traite des enfants"*[225] should also be monitored, more particularly with regard to the **participation of UMs in this activity**.

As far as **durable solutions** are concerned, possibilities to set up "**life projects**" with UMs should be worked on. This concept proposed by the Council of Europe in 2007[226] is based on a joint-undertaking between an "unaccompanied migrant minor" (regardless of status and irrespective of the reasons for migration) and the competent authorities "to define the minor's future prospects, promote the best interests of the child without discrimination and provide a long-term response to the needs of both the minor and the parties concerned."[227] Life projects could be implemented in the host countries and/or in the countries of origin and would allow to consider the specific situation of each minor, with a holistic approach, addressing in particular: the minor's personal profile, his/her migration itinerary; the minor's family environment and particularly the nature of his/her family relationship, the minor's expectations, wishes and perceptions; the situation in the country of origin and in the host countries; as well as potential special guarantees offered to UMSA.

Prevention of Irregular Migration and Return

Among all the other issues that could have been addressed in relation to UMs within the EU, it is believed that **prevention of irregular migration and return are crucial and deserve a particular attention**. With regard to the first issue, the EU Committee of the Regions pointed out in an Opinion issued in 2007 that "the only way of addressing migration in the medium and long-term is to introduce cooperation policies encouraging the sustainable development of immigrants' countries of origin, giving their citizens and their young people, in particular, opportunities in these countries."[228] **EU policy coherence for development** is thus of particular relevance in this respect. As far as return is concerned, the EU adopted the Returns Directive which should be transposed in the EU Member States legislation by the end of 2010.

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[224] More information about Village Pilote are available at http://www.villagepilote.org/La-vie-au-Senegal.html
[225] For more information on the project "Exode precoce et traite des enfants" are available at http://eja.enda.sn/bur-int/doc%20pdf/EXO_Reunion_Regionale_Banjulfr.pdf
[226] Life Projects for Unaccompanied Minors, Recommendation Rec(2007)9 and explanatory memorandum, *Council of Europe Publishing, 2007, Nations Committee on the Rights of the Child, GRC/C/GC/12*
[227] Ibid, Art.2
[228] Opinion of the Committee of the Regions on the situation of unaccompanied minors in the migration process – the role and suggestions of regional and local authorities, OJ C 51/07, 6 March 2007, p.35, *paragraph* 1.7

Whilst in principle, there should be no more "grey zones" with regard to UMs in this framework, the reality might be different, with minors not granted any legal permit to stay but not being returned either. How is the EU going to deal with these vulnerable children, and thus prevent them from ending up in the hands of traffickers, from disappearing and thus become "**invisibles**"? Will the establishment of **arrangements with (safe) third-countries** be helpful in that respect? Should the minors be sent back to **centers established in their countries of origin**? These are very important questions related to the **external dimension of the EU asylum and immigration policy** which will have a fundamental impact on the entire EU justice and home policies. Not only will the perspective taken by the European Union in those respects reflect its interpretation of the Convention and thus the approach taken towards UMs' rights (be they in the EU or returned) but more generally, this will illustrate the European Union's approach towards human rights.

A suivre …

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ACRONYMS

CRC	Convention on the Rights of the Child
ECJ	European Court of Justice
EC	European Commission
ECtHR	European Court of Human Rights
EMN	European Migration Network
EU	European Union
GC	General Comment
JHA	Justice and Home Affairs
JMDI	Joint Migration for Development Initiative
ILO	International Labour Organization
IOM	International Organization for Migration
MAEJT	Africain des Enfants et Jeunes Travailleurs
NGOs	Non Governmental Organizations
REC	Recital
TEC	Treaty establishing the European Community
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty on European Union
UMs	Unaccompanied Minors
UMSA	Unaccompanied Minors Seeking Asylum
UN	United Nations
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children’s Fund

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