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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?**

Executive Summary

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



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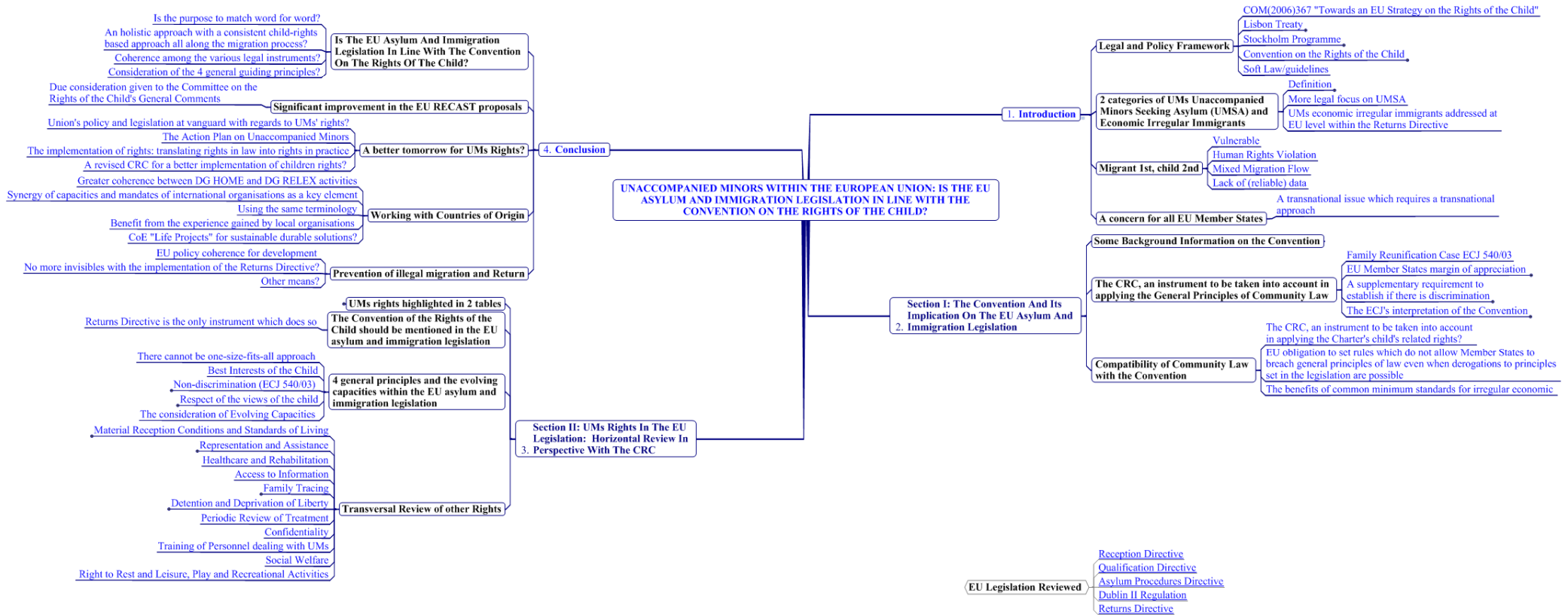
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*May this paper contribute to the ongoing lively discussions on unaccompanied minors.
But most of all may it contribute to the improvement of unaccompanied minors' treatment.*

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Main Points Addressed In The Paper



EU Legislation Reviewed

- Reception Directive
- Qualification Directive
- Asylum Procedures Directive
- Dublin II Regulation
- Returns Directive

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 Treaty⁷ which now includes the protection of children’s rights⁸ entered into force on December 1st 2009 and the Stockholm programme⁹ 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 irregular¹⁰ economic migrants.

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

POLICY AND LEGAL ISSUES AT STAKE

The treatment of Unaccompanied Minors 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.¹¹ 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.

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*"¹² - 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 Treaty and the fact that it confers the Charter of Fundamental Rights¹³ (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.

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

¹¹ "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

¹² 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/>

¹³ 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 except 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)

AIM OF THE 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 Directive¹⁴ will not be addressed; unaccompanied minors' rights within the framework of the Temporary Protection Directive¹⁵ 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 allow 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**.

¹⁴ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification

¹⁵ 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

SUMMARY OF THE PAPER

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 unaccompanied minors' 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 European Court of Human Rights (hereafter "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 unaccompanied minors 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 unaccompanied minors' 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 unaccompanied minors 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 unaccompanied minors 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 unaccompanied minors 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 unaccompanied minors; 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 unaccompanied minors 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 unaccompanied minors 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 unaccompanied minors' 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 unaccompanied minors' 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 decision-makers decide that unaccompanied minors' 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 unaccompanied minors 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."¹⁶ Besides, 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."¹⁷ 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. This reasoning raises serious concerns on the legal interpretation given to the right not to be discriminated against in the European Union. 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

¹⁶ ECJ, Case-540/03, 27 June 2006, *Parliament v. Council*, OJ C 47, 21.02.2004, *paragraph 74*

¹⁷ Opinion of Advocate General Kokott delivered on 8 September 2005, Case C-540/03, *paragraph 110*

limited to the specific context of placement with relatives or in special accommodations. It has been argued that 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 unaccompanied minors 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."¹⁸ 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** addressed in Art.5 CRC were also discussed. As for children's participation, the lack of consideration of the unaccompanied minors' 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 also 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 unaccompanied minors; access to social welfare; and right to rest and leisure, play and recreational activities.

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?"**

¹⁸ Katherine Hunt Federle, (2003), Rights flow downhill, in *Children's rights, volume I Michael Freeman, 2003, pp.244*

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 unaccompanied minors’ rights in 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, unaccompanied minors’ 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 older and younger unaccompanied minors who are seeking asylum, and unaccompanied minors 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.”¹⁹

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

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 Directive²⁰, the Dublin II Regulation²¹, the

¹⁹ The Stockholm Programme – An open and secure Europe serving the citizens, *Brussels, December 2nd 2009, 17024/09, p.6*

²⁰ Proposal to the European Parliament and to the Council on minimum standards for the reception of asylum seekers (*Recast*), (*COM(2008)815 final/2*)

Qualification²² and Asylum Procedures²³ 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 unaccompanied minors' 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 General Comment No 6²⁴ from the Committee on the Rights of the Child, 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 unaccompanied minors' 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”²⁵;
- 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 unaccompanied minors 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;

²¹ 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

²² 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(2009)1374

²³ 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(2009)1376

²⁴ 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*

²⁵ 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 unaccompanied minors 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 unaccompanied minors indeed have a different role, e.g. that a legal adviser does not hold the same responsibilities as a guardian. Unaccompanied minors 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 unaccompanied minors 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 unaccompanied minors and minors in general. There is of course further room for improvement in the proposals with regard to unaccompanied minors' 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 unaccompanied minors' 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 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"²⁶ comprising of the Charter, general principles of law and the EU's future accession to the European Convention on Human Rights. 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 unaccompanied minors' 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 General Comment No 5²⁷ 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 unaccompanied minors 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 unaccompanied minors. 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-

²⁶ 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.

²⁷ 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*

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 unaccompanied minors' 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 relationship already established within the European Migration Network²⁸ 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 unaccompanied minors. 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."²⁹ 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 ECJ and ECtHR legal cases. An exercise to draft a (legally binding?) instrument at EU level for all unaccompanied minors 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."³⁰

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

²⁸ 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.

²⁹ 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*

³⁰ In "the origins, development and significance of the United Nations Convention on the Rights of the Child"

their infancy.”³¹ **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 Curriculum³² 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 emphasized.”³³ **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 Justice, Liberty and Security work**, thus between the European Commission HOME affairs and RELEX services. The initiation of initiatives towards unaccompanied minors - 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 unaccompanied minors’ 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**

³¹ *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*

³² 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>

³³ *Michael Freeman, The Future of Children’s Rights in Children’s rights, volume I Michael Freeman, 2003, pp.289-305*

Development Initiative (JMDI)³⁴, focusing on unaccompanied minors (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.**³⁵ In that respect, one should follow the evolution of the project “*Mobilités des enfants et des jeunes en Afrique de l’Ouest*”³⁶ 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 which involves 12 countries³⁷ 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

³⁴ 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

³⁵ 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*

³⁶ In December 2009 this project was implemented under the coordination of UNICEF - West and Central Africa

³⁷ 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

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.³⁸ It should however be highlighted that **the approach with regard to unaccompanied minors 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 than 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.

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*³⁹ 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*”⁴⁰ should also be monitored, more particularly with regard to the **participation of unaccompanied minors in this activity**.

³⁸ An interesting project to be monitored in that respect is DRIVE (which stands 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.

³⁹ More information about Village Pilote are available at <http://www.villagepilote.org/La-vie-au-Senegal.html>

⁴⁰ For more information on the project “*Exode précoce et traite des enfants*” are available at http://eja.enda.sn/bur-int/doc%20pdf/EXO_Reunion_Regionale_Banjulfr.pdf

As far as **durable solutions** are concerned, possibilities to set up “**life projects**” with unaccompanied minors should be worked on. This concept proposed by the Council of Europe in 2007⁴¹ 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.”⁴² 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 unaccompanied minors who are seeking asylum.

Prevention of Irregular Migration and Return

Among all the other issues that could have been addressed in relation to unaccompanied minors 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.”⁴³ **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. Whilst in principle, there should be no more “grey zones” with regard to unaccompanied minors within 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 these minors be sent back to **centers established in their countries of origin**?

⁴¹ 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*

⁴² *Ibid*, Art.2

⁴³ 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*

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 unaccompanied minors' 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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The following examples could be used as case studies to demonstrate the policy and legal parameters that surround unaccompanied minors. However, all the issues brought up in these examples have not been addressed in this paper.

I am a 12 year old girl who was born in Somalia. I arrived in Brussels by train, via Italy, and Libya. My parents sent me with another group of children because they thought that I should escape the civil strife and instability in my country. They were told that being a minor fleeing from persecution, I would easily get a refugee status in Europe. I was found in the street by a police officer.

I am a 15 year old boy who was born in Morocco. I decided to come to Spain because I was told I could work in fields, picking up fruits and vegetables; there is a need for workforce, the job might be difficult but is well-paid. I arrived at the airport in Malaga with a tourist visa; I look older than my age so there were no questions about the fact that I was travelling alone although I am a minor; I thus entered legally and overstayed. I was working in the fields in Huelva; once there was a raid and I was arrested.

I was born in Afghanistan. I think I am 16 but I am not sure since, I was not registered at birth in my village. I arrived in Calais with another group of adults and children – none of them being my relatives - and we managed to get into a truck at the harbour and arrived in the United Kingdom. I was told that I could seek international protection coming from a country which is at war, but I just want to work and send some money to my parents and my girlfriend who stayed in my village. I was controlled by the police while walking in the streets of London. I told them that I was 16 but they did not trust me and put me in a detention center with adults.

I am 14, I arrived in Brussels 2 years ago but now I want to go back home. I don't like it here, it's too cold and I don't have friends; my guardian supports my decision. My parents have been found but they don't want me to go back home; they say that I should stay in Europe because they have spent too much money for me to arrive there.

We are all minors.

We are all unaccompanied.

But are we protected as such by the European Union and do we have the same rights?

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