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Unaccompanied children in Europe: issues of arrival, stay and return

Report[1]
Committee on Migration, Refugees and Population
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Summary

Statistics are patchy, but it is thought there may be up to 100 000 unaccompanied migrant children in Europe, predominantly boys aged 14 to 17. They come for multiple and complex reasons, but escaping war, violence or extreme poverty ranks high. However, it is clear that once they are in Europe their treatment varies from country to country. In many cases – despite the commitments made by all Council of Europe member states including under the United Nations Convention on the Rights of the Child – they face abuse and neglect, or become victims of trafficking and other criminal networks.

According to the Committee on Migration, Refugees and Population, protecting these children should be the starting point for European policies, rather than immigration control, with the overriding emphasis on acting in the child's best interests. No unaccompanied child should be refused entry at a border or summarily deported; they should immediately be provided with an independent legal guardian and given special assistance commensurate with their age. They should never be held in detention, but should receive appropriate care, preferably foster care. If put up in a centre, they should be accommodated separately from adults. Age assessments should be made sparingly, and the young person given the benefit of the doubt in cases of uncertainty.

Finding a durable solution for the future should be the ultimate aim from first contact, including family tracing, if the child requests it. Such a solution might be integration into the host country, family reunification in a third country, or return and reintegration in the country of origin. An individual "life project" should be drawn up for each child – as recommended in 2007 by the Committee of Ministers (Recommendation CM/Rec(2007)9) – and the child should be granted legal residence until this is fulfilled. Unaccompanied migrant children should receive access to the same education, training and health care as nationals. If return is foreseen, it should only be if this is in the best interest of the child, when secure care arrangements are known in advance – especially if no parents or extended family have been identified.

The committee proposes a set of 15 common principles for member states to apply when handling unaccompanied migrant children. For its part, the Committee of Ministers should set up a working group to establish guiding principles for member states based on these principles.

1. 2011 - Second part-session

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A. Draft resolution[2]

1. There is a growing awareness of the need to tackle the problems faced by unaccompanied migrant children arriving and remaining in Europe. There may be up to 100 000 of them, although little reliable data exists on their movement other than statistics on asylum claims. These children, predominantly boys of 14 to 17 years of age, arrive in Europe for multiple and complex reasons. However, once in Europe, their chances of protection and assistance vary fundamentally from one country to another, which creates disparities in treatment and different interpretations of the best interests of the child. In many cases these children are in an extremely vulnerable position and face abuse, neglect and can become victims of trafficking and criminal networks.

2. The Parliamentary Assembly recalls that by virtue of the United Nations Convention on the Rights of the Child, which all member states of the Council of Europe have ratified, there exists a special duty of protection and assistance to all unaccompanied children, irrespective of their nationality, immigration status or statelessness. The way in which immigration and asylum rules affect these children must be anchored in this obligation and perspective.

3. The Assembly has previously raised the above concerns in its Recommendation 1596 (2003) and Recommendation 1703 (2005) which called, *inter alia*, for the recognition of the binding character of the best interests of the child as a primary consideration in all actions, the harmonisation of national laws on legal guardianship, and the establishment of coherent and effective protection regimes for children who are asylum seekers or victims of trafficking. Regrettably, little progress has been achieved in these fields.

4. In this regard, the Assembly commends the decision by the European Union to make unaccompanied minors a priority policy issue within its 2010-2014 Stockholm Programme and welcomes the adoption of a European Union Action Plan on Unaccompanied Minors. It nevertheless highlights the need for implementation of the Action Plan to take place in a way that is fully compliant with the United Nations Convention on the Rights of the Child.

5. The Assembly believes that child protection rather than immigration control should be the driving concern in how countries engage with unaccompanied children. With this in mind, the Assembly establishes the following set of 15 common principles, which it invites member states to observe and work together to achieve:

5.1. Unaccompanied children must be treated first and foremost as children, not as migrants;

5.2. The child's best interests must be a primary consideration in all actions regarding the child, regardless of the child's migration or residence status;

5.3. No child should be denied access to the territory or summarily deported at the borders of a member state. Immediate referral to assistance and care should be arranged by specialised services with a view to identifying if he or she is a minor, ascertaining his or her individual circumstances and protection needs and ultimately identifying a durable solution in his or her best interest;

5.4. Child victims of human trafficking should benefit from special arrangements in terms of identification, reception and protection. These should be adapted to their needs and assure their protection in line with the Council of Europe Conventions on Action against Trafficking in Human Beings (CETS No. 197) and on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201);

5.5. Every unaccompanied child should be provided immediately with a legal guardian mandated to safeguard the child's best interest. The legal guardian should be independent and should have the necessary expertise in the field of childcare. Every guardian should undergo regular training and be subject to regular and independent review/monitoring;

5.6. Legal, social and psychological assistance should be provided without delay to unaccompanied children. Children should be informed immediately upon arrival or interception, individually and in a language and form that they can understand, about their right to protection and assistance, including their right to seek asylum or other forms of international protection, and the necessary procedures and their implications;

5.7. All interviews with an unaccompanied child concerning his or her personal details and background should be conducted individually by specialised and well-trained staff and in the presence of the child's guardian;

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2. Draft resolution adopted unanimously by the committee on 25 January 2011.

5.8. Access to asylum and international protection procedures must be granted to all unaccompanied children where relevant. A harmonised child-focused asylum system needs to be established, to include procedures that take into consideration the additional difficulties children have in withstanding trauma and in expressing a coherent account of their experiences and child-specific experiences of persecution. Asylum applications by unaccompanied children should be given priority and processed within the shortest appropriate time frame, while allowing children sufficient time to understand and prepare for the process. All unaccompanied children in asylum proceedings must be represented by a lawyer in addition to a guardian, provided free of charge by the state;

5.9. No detention of unaccompanied children on migration grounds should be allowed. Detention should be replaced with appropriate care arrangements, preferably foster care, with living conditions suitable for children's needs and for the appropriate period of time. Where children are accommodated in centres, they must be separated from adults;

5.10. Age assessment should only be carried out if there are reasonable doubts about a person being underage. The assessment should be based on the presumption of minority, involve a multidisciplinary evaluation by an independent authority over a period of time and not be based exclusively on medical assessment. Examinations should only be carried out with the consent of the child or his or her guardian. They should not be intrusive and should comply with medical ethical standards. Their margin of error should be clearly indicated. If doubts remain that the person may be underage, he or she should be granted the benefit of the doubt. Assessment decisions should be subject to administrative or judicial appeal;

5.11. The child's views should be heard and given due weight in all relevant procedures, in accordance with his or her age and maturity. An effective procedure of appeals against administrative and judicial decisions should be available and accessible to an unaccompanied child;

5.12. Finding a durable solution for the unaccompanied child should be the ultimate goal from the first contact with him or her. It should include family tracing if requested by the child or his or her guardian, and an individualised best-interest assessment that looks at all options for durable solutions on an equal basis. A durable solution may be the child's integration into the host country, family reunification in a third country, or return and reintegration in the country of origin. An individual life project should be identified jointly by the authorities, the legal guardian and the child concerned, and monitored throughout the accomplishment of the project in line with Committee of Ministers Recommendation CM/Rec(2007)9. Pending identification of a durable solution, the child should benefit from legal residence status in the host country. This should be valid throughout the duration of the child's personal life project conducted in the host country, even if the project extends to the age of adulthood;

5.13. Access to adequate accommodation, education, vocational training and health care must be guaranteed to all unaccompanied children, regardless of their migration status and under the same conditions as to citizen children;

5.14. Family reunification possibilities should be extended beyond the country of origin and approached from a humanitarian perspective exploring wider family links in the host country and third countries, guided by the principle of the child's best interest. The Dublin II Regulation should only be applied to unaccompanied children if transfer to a third country is in the child's best interests;

5.15. The best interests of the child should be taken into account in all steps leading to the return of the child to his or her country of origin. Return is not an option if it would lead to a risk that such a return would violate the child's fundamental human rights. If no parents or members of the extended family are identified, return should only take place with advance secure, concrete and adequate care and reintegration arrangements in the country of origin. Return to institutional care should not in and of itself be viewed as a durable solution. A professional child protection body should conduct the assessment of return conditions. A follow-up plan should be established in order to ascertain that the protection of the child is guaranteed following the return. Non rights-based arguments such as those relating to general migration control, must not override best-interest consideration in return decisions. Returns to countries where the child's security, protection – including against *refoulement* – and welfare cannot be guaranteed, must not be envisaged.

6. The Assembly calls upon the European Union to, in particular:

6.1. promote full implementation of the European Union Action Plan on Unaccompanied Minors, in accordance with the United Nations Convention on the Rights of the Child;

6.2. consider proposing new legislative standards to close existing protection gaps in European Union law for all unaccompanied children, irrespective of whether they seek asylum;

6.3. establish a harmonised method for gathering relevant information on unaccompanied children Europe-wide, to enable an apt comparison at European level, while ensuring that personal data is protected; support national independent institutions capable of collecting the data and creating a suitable resource centre regarding all areas touching upon the situation of unaccompanied children;

6.4. adopt and implement common standards and procedural safeguards on guardianship and legal aid for all unaccompanied children to ensure their interests and protection needs are safeguarded throughout all administrative and judicial procedures;

6.5. support the adoption of a common protocol for carrying out age assessments in accordance with ethical, medical and legal principles in order to balance the current divergent approaches and practices;

6.6. continue to work towards the creation of a harmonised system of asylum for unaccompanied minors within the framework of the revised Asylum Directive as well as a harmonised system for assisting and protecting trafficked children within the framework of the European Union asylum and trafficking instruments which are currently under revision; ensure that all European Union member states comply with their obligations under European Union law with regard to unaccompanied children;

6.7. establish improved transnational mechanisms for dealing with child protection concerns as unaccompanied children move across Europe, including when they disappear from reception centres;

6.8. refrain from supporting or financing the construction of reception facilities for the purpose of deporting children to countries of origin which do not have proper functioning child protection systems providing sufficient safeguards and operating in a transparent fashion; ensure that in no case would the existence of centres pre-empt a case-by-case decision as to whether return is indeed in the child's best interest;

6.9. reinforce support to countries of origin in their efforts to promote child protection systems and life opportunities for all children in order to reduce the risk of unsafe and unnecessary migration; ensure co-operation with countries of origin on the assessment of the child's circumstances with a view to finding durable solutions for children on a case-by-case basis;

6.10. promote good practices throughout Europe on the return process, including co-operation with third countries, to ensure proper reintegration support;

6.11. ensure proper integration of unaccompanied children in the host country where this has been considered in the child's best interest.

B. Draft recommendation[3]

1. The Parliamentary Assembly refers to its Resolution … (2011) on unaccompanied children in Europe: issues of arrival, stay and return.

2. It recalls the important role that the Council of Europe has played in rendering child rights and child protection more visible in migration policy discussions around Europe, as well as providing practical tools for addressing the situation of unaccompanied children, in particular through developing life projects for unaccompanied migrant minors (Committee of Ministers Recommendation CM/Rec(2007)9), which is a unique tool providing unaccompanied children with meaningful and lasting solutions.

3. The Assembly considers that the Council of Europe should continue to play a prominent role by helping to create a viable and harmonised Europe-wide protection system for unaccompanied children. In this respect, the Council of Europe should closely co-operate with the European Commission on the implementation of the European Union Action Plan on Unaccompanied Minors and on further identification and closing of protection gaps concerning this vulnerable group. The Council of Europe should also work with other relevant European Union institutions on harmonising data collection systems and asylum procedures applicable to unaccompanied children in Europe.

4. In light of the above, the Assembly invites the Committee of Ministers to:

4.1. take note of the Assembly's recommendations to member states set out in its above-mentioned resolution and urge member states to comply with them;

4.2. urge member states to comply with General Comment No. 6 by the United Nations Committee on the Rights of the Child, the relevant guidelines adopted by the Office of the United Nations High Commissioner for Refugees (UNHCR), UNICEF, Save the Children, the Separate Children in Europe Programme (SCEP) and other international organisations, and notably with the UNHCR 2008 guidelines on determining the best interests of the child, the UNHCR 2009 guidelines on child asylum claims and the fourth version of the SCEP Statement of Good Practices;

4.3. instruct the relevant body within the Council of Europe to set up a working group comprising government experts, members of civil society, and representatives of relevant international organisations and Council of Europe bodies to examine further the 15 common principles, as presented in Resolution…, with a view to elaborating Council of Europe guiding principles on the protection of unaccompanied children;

4.4. fully integrate unaccompanied children-related issues into the transversal project "Building Europe for and with children"; in particular, in this context, contribute to the development of common guidelines on the assessment of the best interests of the child, on the legal guardianship of unaccompanied children, age assessment and on the application of child-friendly justice in the context of unaccompanied children;

4.5. find resources for implementing life projects for unaccompanied minors as an invaluable tool for finding durable solutions for them; designate a single interlocutor within the Council of Europe to ensure the co-ordination and follow-up of the problem of unaccompanied children in all Council of Europe member states;

4.6. encourage member states to submit projects to the Council of Europe Development Bank with a view to funding or co-funding life projects for unaccompanied children.

3. Draft recommendation adopted unanimously by the committee on 25 January 2011.

C. Explanatory memorandum by Ms Reps, rapporteur

1. Introduction

1. At any one time, there may be as many as 100 000 unaccompanied migrant children in Europe, mostly in the European Union countries. Many of these children have fled from wars, violence or extreme poverty in their home countries; some have been trafficked to Europe, others have been sent by parents or come for mixed motivations. Whatever the reasons for their flight, once in Europe, too many of these minors remain without appropriate assistance and protection.

2. It is evident that Europe has no capacity to absorb all those who wish to move here in search of a better life. It can often be in the child's best interest not to have to leave home in the first place. However, once children find themselves unaccompanied on the territory of the Council of Europe member states, these states have the responsibility to offer them adequate and age-appropriate assistance and protection, irrespective of their immigration status or whether they have applied for asylum or not.[4]

3. The issue is not new. Over the last decade much ink has been spilled on various recommendations, including by the Council of Europe.[5] Yet, in practice, many European governments still pay insufficient attention to the vulnerabilities of unaccompanied children and their needs, and they hold divergent positions as regards their best interests. In some countries, unaccompanied children are primarily dealt with as irregular migrants destined to be sent back home; only a meagre percentage ever receives refugee or other form of more regular status.[6] Instead, many end up in situations of prolonged detention, are registered as adults after unreliable age assessment examinations, face bureaucratic obstacles to accessing education or health care, and have access to increasingly narrow channels for obtaining a regular residence permit once they reach adulthood. Furthermore, they are easy prey for violence, trafficking and exploitation.

4. Whereas until recently the problem touched mostly western and northern Europe, today it is southern Europe that bears the brunt of unaccompanied children arriving in mixed migration flows, and several new members of the European Union and some of the traditional countries of origin outside the European Union are becoming increasingly affected. Low awareness and even lower protection standards in many parts of Europe put unaccompanied children in a particularly vulnerable situation, which highlights the need for prompt responses from all Council of Europe member states.

5. The fact that the European Union has also made the issue of unaccompanied minors a priority within its five-year asylum and migration strategy 2010-2014 (commonly known as the "Stockholm Programme"), and that it has recently adopted an Action Plan on unaccompanied asylum-seeking minors, indicates all the more the need to develop an appropriate policy response across Europe.

6. The present report identifies a number of key problem areas which your rapporteur regards as being of particular concern to the member states, or where she considers the Council of Europe to possess specific or complementary expertise to contribute to the current international debate on the issue. It also outlines possible durable solutions and how member states should go about attaining them.

7. The report is primarily based on the information available from recent publications by the various bodies of the European Union, the Council of Europe, the United Nations, the International Organization for Migration (IOM), Human Rights Watch (HRW), the Platform for International Cooperation on Undocumented Migrants (PICUM), Save the Children, as well as on the information gathered at the hearing held by the Committee on

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4. It is a well-known fact that a majority of unaccompanied children on the move never file an asylum claim, either because they do not wish to do so, they are too afraid to do so, they do not know how to apply or they cannot do so for practical reasons or legal obstacles.

5. The Assembly has adopted two recommendations: Recommendation 1596 (2003) on the situation of young migrants in Europe and Recommendation 1703 (2005) on the protection and assistance for separated children seeking asylum. Since 2007, the Council of Europe has been engaged in a transversal Action Programme "Building a Europe for and with children" with the aim of streamlining a child rights perspective into all of the Council of Europe activities. In 2007, the Committee of Ministers adopted Recommendation CM/Rec(2007)9 on life projects for unaccompanied migrant minors, offering a concept of a lasting solution to the issue. The Council of Europe Commissioner for Human Rights has on several occasions spoken up on the rights of unaccompanied minors.

6. The United Nations High Commissioner for Refugees (UNHCR) estimates that only 1% to 3% of unaccompanied children receive refugee status, compared to the average of 13% to 15% for asylum seekers in general in western Europe. This notwithstanding, the number of asylum claims by unaccompanied children increased by 13% between 2008 and 2009 in 22 European Union member states.

Migration, Refugees and Population on 12 December 2008 in Las Palmas (Gran Canaria, Spain) and at a recent conference on "Unaccompanied children: what protection at the European level?" organised jointly by the Council of Europe and France Terre d'Asile in Strasbourg, France.

8. In the course of preparing the report, the rapporteur visited an emergency centre for unaccompanied foreign minors in the Canary Islands (DEAMENAC Gran Canaria) and met with the Immigration and Naturalisation Service of Schiphol Airport as well as with representatives of the Dutch Council of Refugees, Nidos, Defence for Children and Samah in Amsterdam, the Netherlands. She also sent out a questionnaire to the national parliaments of the 47 member states of the Council of Europe. She extends her gratitude to the 21 member and two observer states which replied. However, she regrets that the replies received came almost exclusively from the European Union member states, thus reflecting the low awareness of the issue outside the European Union countries, and underlining even more vividly the need to understand the issues at stake and to share best practices among all member states of the Council of Europe.

2. The current situation as regards unaccompanied children in Europe

9. Unaccompanied migrant children (more commonly referred to as "unaccompanied minors"[7]) are a multifaceted and diverse group: they can be asylum seekers who have fled their countries of origin because of armed conflicts or persecution, often to avoid being forcefully recruited to militias or other armed groups; they can be sent by their families to Europe in search of better living conditions; they may be runaways; those who arrive in Europe to be reunited with their family but who do not fall under the official family reunification programmes; or children who are victims of trafficking. They often arrive in Europe for mixed motivations and/or move from one category to another.

10. The issue of unaccompanied children is marked by the absence of quantitative and qualitative statistical information regarding their situation in a large number of countries. The hands-on experience of relevant non-governmental organisations (NGOs) and the little data available from local and national institutions allow nonetheless for some tendencies to be distinguished. Most unaccompanied children arriving in Europe are boys aged 14 and over, originating from countries such as Afghanistan, Albania, Algeria, China, Eritrea, Iraq, Morocco, Nigeria, Romania, Russia, Somalia, Turkey and the Democratic Republic of Congo. A growing proportion of these minors are thought to be seeking to join (wider) family already living on the European continent.[8] Recently, the European Union, and in particular the European Commission and the European Union Agency for Fundamental Rights (FRA), published two complementary studies on the situation of these children in the European Union. While the first one, carried out by the European Migration Network, concerns policies on reception, return and integration arrangements for and numbers of unaccompanied children,[9] the FRA's study, based on hundreds of interviews with such children and with adults responsible for their care, provides a unique insight into social and legal aspects of their life in the European Union as well as the respect and protection of their rights.[10]

11. However, a recent study by the Office of the United Nations High Commissioner for Refugees (UNHCR) on asylum-seeking Afghan children in Sweden reveals that very few children had the initial intention to come to Europe at all. In around half of the cases, the neighbouring countries, Iran and Pakistan, constituted the initially intended destination, based on a rational choice of where the best opportunities for survival may be found, whereas the final place of destination seems frequently to have been decided at a later stage, once already in Europe.[11]

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7. Your rapporteur finds that when discussing the issue of children who are left on their own to deal with very difficult and often dangerous situations, or who are sometimes accompanied by adults (traffickers) who pose more of a threat than protection to them, the term "unaccompanied minors" is overly bureaucratic and does not convey an appropriate image. For the purposes of this report, she therefore prefers to use the less legalistic and more humane term of "unaccompanied children".

8. According to the French Red Cross, approximately 10% of unaccompanied minors entering France via Roissy Charles de Gaulle Airport are intending to join their parents, close relatives or other family members in another European Union country. Source: French Red Cross, background paper to the Seminar on Migration: Family reunification of unaccompanied migrant minors in Europe, 19-20 February 2009, Council of Europe, Strasbourg.

9. European Migration Network, Unaccompanied Minors – an EU comparative study, 14 January 2011, http://emn.intrasoft-intl.com/Downloads/prepareShowFiles.do;?directoryID=115.

10. European Union Agency for Fundamental Rights (FRA), "Separated, asylum-seeking children in European Union Member States", Comparative Report, Conference Edition, November 2010, http://fra.europa.eu/fraWebsite/research/publications/publications_per_year/pub_sep_asylum_en.htm.

11. Voices of Afghan children – A study on asylum-seeking children in Sweden, UNHCR Regional Office for the Baltic and Nordic Countries, June 2010.

12. Some European states are dealing with significant numbers of arrivals every year, even if the only available statistical data relates to those children who seek asylum. According to the UNHCR, over 15 000 unaccompanied and separated children claimed asylum in the European Union, Norway and Switzerland in 2009.[12] However, this is likely to be the tip of the iceberg of unaccompanied children actually in need of protection in Europe.

13. There exists no single definition of unaccompanied children or minors; the application of different terms varies in international reports, national legal frameworks, guidelines and bibliography. The General Comment No. 6 of the United Nations Committee on the Rights of the Child distinguishes between two types of minors – unaccompanied and separated ones – and so does the Committee of Ministers Recommendation CM/ Rec(2007)9 on unaccompanied migrant minors.

14. According to these definitions, unaccompanied minors are children (under 18) outside their country of origin who have been separated from both parents and from other relatives and are not being cared for by an adult who by law or custom is responsible for doing so. Separated minors are children (under 18) outside their country of origin separated from both parents and from previous primary caregivers, but not necessarily from other relatives, and include children accompanied by other adult family members.[13]

15. The term "unaccompanied children" will be used throughout this report to refer to children who are under 18 years of age, living in a country outside their country of origin and unaccompanied by a legal representative.

16. All such children may be in a position of triple vulnerability: as children above all; as children in the process of migration or asylum; and, for many, as irregular migrants. In fact, unaccompanied children fall into two broad categories: those known to the state authorities and in their care, and those outside the radar of state authorities. The latter are particularly vulnerable; living in fear of being identified by the authorities and consequently of being detained and expelled, they are exposed to risks of discrimination, exploitation and abuse.

17. The lack of reliable statistical and profile information of unaccompanied children is dangerous insomuch as it allows myths and generalisations to develop, which can lead to wrong and ineffective policy responses. Your rapporteur is therefore adamant that countries and organisations should invest in getting a better picture of the realities of the situation. An organised method of data collection should be established that would enable apt comparison and take into consideration the transnational dimension of unaccompanied children moving or being transferred from one European Union member state to another.

3. Major issues of concern

3.1. Legislative and policy framework: children first or migrants first?

18. Under public international law, states have the exclusive competence to establish laws governing the conditions of entry and residence of foreign nationals on their territory. Nonetheless, they must respect international treaties and norms regulating treatment of persons within their jurisdiction.

19. There exists an abundance of conventions and regulations covering a wide array of aspects concerning the protection of unaccompanied children and their best interests.[14] However, these measures are not always effectively transcribed into national law or put into practice. The European Union provisions for the protection of the rights of unaccompanied children are dealt with in a fragmented way across different laws, giving rise to some gaps in protection.

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12. FRA, Separated, asylum-seeking children in European Union Member States, Summary Report, April 2010.

13. S. Valenti, "The protection of separated or unaccompanied minors by national human rights structures", Workshop debriefing Paper, Joint European Union – Council of Europe Programme on setting up an active network of independent non judicial human rights structures, 20-22 October 2009, Padua (Italy).

14. All member states of the Council of Europe have signed the main United Nations treaty protecting the rights of children, the Convention on the Rights of the Child (CRC), which obliges them to give special protection and assistance to children deprived of their family environment and to consider every child's best interests as a primary factor in all actions concerning the child. They are also parties to the 1951 United Nations Geneva Convention relating to the Status of Refugees and its 1976 Protocols, the European Convention on Human Rights (ETS No. 5), the European Social Charter (ETS Nos. 35 and 163), and the Council of Europe Convention on Action against Trafficking in Human Beings (ETCS No. 197). Furthermore, 27 of the 47 member states are also signatories to the European Union Charter of Fundamental Rights and are bound by various European Union regulations and directives.

20. With a few exceptions, no national legislation deals with unaccompanied children in a comprehensive manner. Most commonly, unaccompanied children are dealt with under two, often contradictory, sets of legislation: immigration/asylum legislation and child-protection legislation. All too often, national authorities resort to immigration legislation first and child-protection legislation second, which has dire consequences for children.[15] It is noteworthy that ALL respondents to your rapporteur's questionnaire pointed first and foremost to immigration and asylum legislation, and only a few referred additionally to child-protection legislation.

21. There are also considerable divergences in member states' policies and practices. An unaccompanied child may have a completely different experience depending simply on where he or she is in Europe. These fundamental disparities in treatment exacerbate movements of children from one country to another without protection of any real kind.[16]

22. Sometimes divergences exist even within member states. For instance, in some countries there are two sets of legislation applying to unaccompanied children, which can mean having at least two government bodies in charge of them. This often means that children fall through bureaucratic loopholes. Social policy ministries and interior or immigration ministries (the two types of bodies typically in charge) have inherently different approaches and often there is no in-built communication system between these different authorities. Similarly, social workers who are supporting and protecting children are increasingly required to behave as if they are immigration officials, despite the fact that these roles are ultimately incompatible. Sometimes problems also arise between regional and central authorities, with both pointing fingers at each other, neither taking responsibility for the children, who are in turn left without necessary protection.[17]

23. It flows from the above that Council of Europe member states need to make sure that their policies do not undermine but help to realise their obligations under applicable human rights treaties while these children are on their territory. Member states must fulfil their international obligations to protect children, including from abuse, ill treatment or neglect; and they must be held to account for their actions.

24. Your rapporteur finds that if the European Union governments are to take the priorities they set under the Stockholm Programme and the 10-principle Action Plan on Unaccompanied Children seriously, and if the Council of Europe member states are to truly place the principle of the best interest of the child on a pedestal, then the focus needs to shift from policies and practices which concentrate on immigration control and status as a primary consideration to ones that make the welfare of the child central to all decisions made concerning unaccompanied children. In short, an unaccompanied child should be treated first as a child, and only then as migrant. An unaccompanied child must have the same rights as other children.

25. The latter would require a major shift in attitudes as well as harmonisation of national legislation and practices as regards the division of responsibilities between competent national authorities and their responses to the needs and vulnerabilities of unaccompanied children.

3.2. Concerns related to the arrival of unaccompanied children

3.2.1. First contact with the unaccompanied child: initial identification and access to the territory

26. There exist wide disparities among European states in practices with regard to the reception and access to their territory. Sweden, for instance, authorises unaccompanied children to enter the territory in order to be issued with the application of general procedures. Likewise, the United Kingdom does not detain

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In addition, a number of soft law instruments provide guidance for member states, including the UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (1997), United Nations Inter-agency Guiding Principles on Unaccompanied and Separated Children (2004), UNICEF Guidelines for Protection of the Rights of Children Victims of Trafficking in South-Eastern Europe (2003), General Comment No. 6 of the United Nations Committee on the Rights of the Child on the treatment of unaccompanied and separated children outside their country of origin (2005), Council of Europe Twenty Guidelines on Forced Return (2005), UNHCR Guiding Principles on Formal Determination of the Best Interest of the Child (2006), or the UNHCR Guidelines on International Protection of child asylum claims.

Furthermore the European Court of Human Rights and the European Committee of Social Rights have developed a substantial case law on child rights and their enjoyment by all children without discrimination, including children of illegal and undocumented migrants.

15. S. Troller, *In the Migration Trap: Unaccompanied Migrant Children in Europe*, Human Rights Watch World Report 2010, www.hrw.org/en/node/87786.

16. Save the Children, Addressing the Protection Gap for Unaccompanied and Separated Children in the EU: The Role of the Stockholm Programme.

17. Troller, op. cit.

or send children back to the border if their minority is confirmed at the initial identification. Spain and France, on the other hand, may refuse access to their territory to foreigners (including unaccompanied children) who are stopped at airport borders, land borders or ports if they cannot present the necessary entry documents.

27. The situation is the toughest in extra-territorial zones, such as for example the Roissy Charles de Gaulle Airport in France, where unaccompanied children may be sent back when getting off the plane, during gateway controls, applying the principle of responsibility of the carrier. According to a recent report,[18] around 30% of unaccompanied minors arriving on the territory by air are sent back without real guarantee of welcoming conditions upon returning home. Often they are returned, without the due right to appropriate procedures, to countries they merely transited from.

28. This practice has been criticised by a number of refugee organisations and the Parliamentary Assembly itself as a possible violation of the principle of *non-refoulement*. When it is applied to unaccompanied children, it is even more likely to put their life and security in serious danger.

29. Your rapporteur is adamant that in no circumstances should an unaccompanied child be refused entry to the territory of a Council of Europe member state. On the contrary, upon coming into contact with a person who is potentially a minor, the border authorities should immediately refer this person to specialised services to identify him or her, ascertain the reasons and individual circumstances why he or she is seeking entry into a member state and establish their protection needs, and ultimately identify a durable solution in the child's best interest. Likewise, prompt steps should be taken to appoint a legal guardian and to place the child in suitable care and reception structures, similar to the procedures foreseen for national children who are in the same situation.

3.2.2. Age assessment

30. Age determination is a key gateway to special protection and assistance for unaccompanied children. In practice, however, there is no consensus on standards or a common approach to age assessment between or even within member states.

31. The United Nations Committee on the Rights of the Child established in 2005 that age assessment of an unaccompanied child should not only take into account physical appearance, but also psychological maturity. The assessment should be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child. It should give due respect to human dignity, and, in the event of remaining uncertainty, should accord the individual the benefit of doubt; if there is a possibility that the individual is a child, he or she should be treated as such.[19]

32. Despite these provisions, state practices vary. Some states practise age assessment as standard practice, even where there is actually no doubt. Assessment procedures apply a variety of methods, most commonly checking documentary evidence, interviews or medical examinations (for example by magnetic resonance tomography, bone and dental assessment and radiological testing), or a combination of these. However, medical procedures bear a level of uncertainty and can therefore not be considered as fully conclusive. Nevertheless, some governments (for example Spain, France, Italy and Romania) predominantly use medical examination only, involving a risk that an unaccompanied child is arbitrarily declared an adult. Furthermore, procedural inconsistencies exist in the mechanisms and variations of the quality of age assessment itself. There is also little consistency in the use or interpretation of documentary, expert and medical evidence in the age-assessment procedures. It also happens that different national authorities (for example immigration, education, health and child welfare) have diverging views on the validity of assessment methods used and results. Finally, age assessment is only rarely subjected to independent review.

33. Most European states have legal provisions for age determination and require the informed consent of the individual. Refusal to undergo a test may have a negative impact on the asylum procedure. In Finland or Germany, for example, refusal to undergo age assessment medical tests may result in the applicant being treated as an adult, unless there is a valid reason for the refusal. In most other European countries, the minor is accorded the benefit of the doubt and the lowest possible age is recorded.

34. All in all, most of the above methods are controversial and contested among policy makers, the courts and the scientific community.

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18. M. Carlier et al. (France terre d'asile), "The reception and care of unaccompanied minors in eight countries of the European Union", comparative study and perspectives of harmonisation, Synthesis, October 2010.
19. The United Nations Committee on the Rights of the Child, General Comment No. 6 (2005), "Treatment of unaccompanied and separated children outside their country of origin", paragraph 31.

35. It therefore seems appropriate that member states should avoid age assessment as standard practice, and only apply it where there is reasonable doubt about the person being underage. Where age assessment is necessary, it should involve a multidisciplinary evaluation over a period of time (ideally a minimum of one week) and take into account, *inter alia*, the child's behaviour, migration history, and way of interacting with adults. Medical examinations should only be performed with the consent of the child or his or her guardian after any possible health and legal consequences have been explained in a simple, child-friendly way and in a language that the child understands. It is also essential that age assessment should be undertaken in an age- and gender-appropriate manner by independent experts familiar with the child's cultural background, and in full respect of the child's dignity. Age assessments must indicate the margin of error involved in examination results. In cases of doubt, the child must be given the benefit of the doubt. He or she must also have access to a lawyer and legal procedure to challenge flawed results.

36. Finally, your rapporteur deems it important that a common approach to balance the current divergent approaches and practices should be adopted. To this end, she supports the recent recommendation of the UNHCR Bureau for Europe's Working Group on Unaccompanied and Separated Children to fill the gap and draft minimum standards for safeguards in age-assessment procedures. She also welcomes the European Union project, under the Action Plan on Unaccompanied Children, to issue best practice guidelines in collaboration with scientific and legal experts and in co-operation with the European Asylum Support Office.

3.2.3. Detention of unaccompanied children

37. All major international and national human rights monitoring bodies have for years advocated the use of detention only as the last resort and never on the basis of a child being unaccompanied or lacking immigration status. The Assembly's recent Resolution 1707 (2010) on the detention of asylum seekers and irregular migrants in Europe explicitly outlined that unaccompanied minors should never be detained.

38. Regardless of this, detention of unaccompanied children is still a common practice in several member states. Children are often detained together with adults and have no legal advice or any form of counselling available to them.

39. The European Union Action Plan indicates detention as a measure of last resort, if this is for the shortest appropriate period of time and taking into account the best interests of the child as a primary consideration. Your rapporteur strongly believes that detention can never be in the child's best interest. On those grounds, detention of children for reasons relating to their residence status, or their lack of it, should simply be abolished. This should include detention at the border and detention pending deportation in, for example, international zones, detention centres, police cells, prisons or in any other special centres.

40. Detention should be replaced with placement in appropriate reception and care arrangements, with living conditions suitable for children's needs (concerning nutrition, health, hygiene, education, leisure, etc.) and for the minimum of time needed. Children placed in reception centres should be accommodated separately from adults.

3.2.4. Identification and assistance to victims of human trafficking

41. Unaccompanied children are particularly at risk of being trafficked and exploited, which can take the form of forced labour, of servitude or slavery, or even sexual exploitation. In July 2010, the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201) entered into force, and has to date been ratified by 10 and signed by 31 member states. In December 2010, a new European Union directive on trafficking was agreed upon, which includes provisions on how unaccompanied children should obtain assistance and protection when they are victims of trafficking.

42. Your rapporteur calls for the ratification of the Council of Europe Convention and the full and proper implementation of the newly agreed European Union provisions, especially as regards introducing specific measures and indicators permitting the early identification of unaccompanied children who are victims of trafficking. Child victims of trafficking should benefit from unconditional care, which is adapted to their needs and assures their protection.

3.2.5. Initial assistance and care for unaccompanied children in countries of transit and destination

3.2.5.1. Access to child-friendly forms of information and legal representation

43. In a recent publication, the European Union Fundamental Rights Agency reports a considerable lack of adequate, easy to understand, child-friendly information regarding the legal procedures or the opportunities for unaccompanied children to stay in the host country. Even where information is provided to these children upon arrival or at a later stage, very often they do not understand it. As a result, they frequently turn to possibly unreliable information sources, such as compatriots, peers or even those who have smuggled them.

44. The European Union Action Plan on Unaccompanied Children establishes that "reception measures and access to relevant guarantees should apply from the moment an unaccompanied minor is detected at external borders or on EU territory until a durable solution is found". Guardianship and legal representation of the child are of crucial importance.

45. Your rapporteur finds that child protection services should provide without delay legal, social and psychological support, intercultural mediation and interpretation for unaccompanied children to ensure the child's protection and well-being at all times. Children should be informed immediately upon arrival or interception, individually and in a language and form that they can understand, about their right to protection and assistance, including their right to seek asylum or other forms of international protection, and the necessary procedures and implications.

46. It is equally important to promptly designate a legal guardian who would safeguard the child's best interest. In addition, free legal aid should be provided by the state during the period that the child's case is under examination or review by the judicial and police authorities. Furthermore, as soon as the unaccompanied child comes into contact with immigration and social services and when the child's best interest and protection needs are defined, there should be a possibility to also identify durable solutions for the child (see also chapter 4).

3.2.5.2. Role and qualifications of guardians

47. The timely provision of an appropriate guardianship is fundamental in order to ensure the protection of rights of unaccompanied children. Guardianship is also pivotal for the concrete application of the best interest of the child and it is central to establishing appropriate action for resolving the situation for any unaccompanied child.

48. It is to be regretted that, regardless of the many efforts to harmonise the system of guardianship, guardianship functions are to this day not commonly defined, interpretations and understanding of this role differ, and the system is in many cases dysfunctional. Those who are meant to protect the best interests of the child often lack the necessary powers or expertise, or worse, do not challenge government action and as a result fail to serve children's best interests.[20]

49. Furthermore, even if this is being increasingly contested,[21] in several countries children lack the legal capacity to challenge deportations, to file an asylum application, or to appeal a rejected claim for asylum. Besides the lack of legal capacity, many children simply do not understand the immigration procedure they are caught up in and the rights they may claim. Unless guardians and lawyers assist these children, they may never be able to access their entitlements or challenge deportation decisions that send them to ill treatment, exploitation and neglect.[22]

50. Your rapporteur believes that the Council of Europe should further encourage its member states, as well as the European Union, to adopt common standards on guardianship and legal aid for all unaccompanied children so that children can defend their rights, including when faced with deportation decisions.

51. These common standards should establish that as soon as a child is identified as unaccompanied, a person should be appointed by the competent authorities to act as a legal guardian who is mandated to safeguarding the child's best interest, empowered to represent these best interests, and to have a say in all

20. Idem.

21. International law is silent on whether and when a child should have legal capacity. However, recent jurisprudence (Spanish Supreme Court and similar jurisprudence on persons with disabilities) suggest that there are serious human rights concerns if persons are declared void of legal capacity.

22. S. Troller (HRW), presentation at the meeting of the Committee on Migration, Refugees and Population on 6 October 2010.

decision making regarding the unaccompanied child. Guardians should be independent from immigration officials and possess expertise on the rights of children and migrants. They should undergo regular training and be subject to regular and independent monitoring.

3.2.5.3. Access to basic services

52. As recognised by the United Nations Convention on the Rights of the Child, member states owe a special duty of protection and assistance to unaccompanied children. They have an immediate obligation to address the child protection concerns, such as providing safe accommodation, protecting children from exploitation, meeting their medical needs and providing legal assistance. The rights and needs of these children to assistance often arise even before the appropriate protection route or long-term solution options are known.[23]

53. Various NGOs report, however, that in many cases unaccompanied children are de facto excluded from the social services set up for them and end up living in situations of social exclusion.

54. There are different models for the reception of separated children. Contrary to the UNHCR Guidelines on Determining the Best Interests of the Child, European countries seem to privilege the placement of separated children in reception centres rather than foster families, at least for children who are over 14 years of age. In central and eastern Europe, where the number of unaccompanied minors has been very limited until recently, specialised care for unaccompanied minors is still largely lacking.

55. Closely linked to placement of unaccompanied minors in accommodation centres is the issue of disappearances, which is a symptom of children lacking durable solutions rather than a problem in its own right. Many Council of Europe member states, including Belgium, the Czech Republic, Finland, Ireland, Italy, the Netherlands, Poland and the United Kingdom have experienced a disturbing number of disappearances from the accommodation provided. It is observed that most disappearances occur within the first days of arrival at the centre, and even before the guardian has been appointed. A number of children who disappear are runaways but some are probably intercepted or abducted by smugglers or traffickers. In both cases they are at risk of neglect and ill treatment. Police and judicial authorities are, however, often powerless when trying to trace these young people.

56. Certain types of accommodation incite more disappearances. Your rapporteur is aware of the paradox that whilst smaller and more open (loose control) type accommodation for unaccompanied minors have been considered preferable, these also tend to attract traffickers, who are well aware of the locations of such centres. This concern was raised by a number of specialised NGOs during your rapporteur's visit to the Netherlands. In 2006-2007, more than 20 Nigerian girls disappeared in the Netherlands from these small centres. Concerned that these disappearances were linked to trafficking, the Aliens Police, the Dutch Refugee Council, the guardians, reception centres, and the Royal Constabulary joined together to co-operate against trafficking of unaccompanied minors. These endeavours, and notably the introduction of protected reception at the beginning of 2008, seem to have borne fruit, as the disappearances have reportedly since decreased.

57. Your rapporteur therefore encourages member states to devote more resources to establishing reception arrangements for unaccompanied minors that provide, on the one hand, the necessary legal, social or psychological services that they need and, on the other hand, safety and physical protection of children from criminal networks.

58. Unaccompanied children also face difficulties accessing adequate health care. According to PICUM, only in Spain does legislation fully conform to the international standards guaranteed by the Convention on the Rights of the Child. In Spain, access to health care for all children, documented or not, is the same as for Spanish children. In some other countries, in cases where the protection of the child has been established and the unaccompanied child is institutionalised, minimum health care is generally provided for free, although some restrictions may apply, for example requiring that the child is regularly attending school. However, in the majority of cases access to health care for unaccompanied children does not differ much from that of irregular migrants in general, which means that health care is mostly provided in case of emergency only. The interpretation of urgent care varies from country to country, and even from the discretion of one doctor to another. Access to specialised services, for instance dental or ophthalmic care, has proved to be particularly problematic.[24] Access to care often depends on the goodwill of the doctor rather than on a correct interpretation of law.

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23. Save the Children's Background Paper to a Conference on "Addressing the protection gap for unaccompanied and separated children in the EU: Role of the Stockholm Programme", Brussels, 15 September 2009.
24. PICUM, 2010.

59. Your rapporteur wishes to emphasise that access to adequate health care must be guaranteed to all children without discrimination and irrespective of their legal or other status, and incorporate mandatory professional interpretation and intercultural mediation support. A thorough assessment of health needs should be conducted as soon as the unaccompanied child enters into contact with the authorities, while ensuring their informed consent. The results of this assessment should in no way influence or negatively affect the outcome of any child's asylum or protection claim.

3.2.6. Access to asylum and international protection

60. All unaccompanied children who have entered any of the Council of Europe member states have by law access to the asylum procedure, directly or through their legal guardian. In practice, however, a number of children never manage to gain access to the asylum procedure due to practical or legal hurdles: they might not be properly informed about how to apply for asylum; they might not be in the right place to apply for asylum; they might not do so in time; they might be advised not to apply as they are considered to be sufficiently protected within the child-welfare system; or they may not have a legal guardian to act on their behalf, due to either administrative delays or lack of appropriate legislation.

61. It is essential that all unaccompanied children can access the asylum process unconditionally, removing all obstacles linked to the eligibility of the application. Member states should guarantee the access to asylum procedures immediately upon the arrival of an unaccompanied child, but also at any later stage if the child is intercepted on the territory of the member state. Unaccompanied children who do not appear to be in need of international protection should not automatically be referred to asylum procedures, but should be protected pursuant to other relevant child protection mechanisms for children deprived of a family environment.

3.2.6.1. Protection from child-specific forms of persecution

62. In general, one can observe a positive tendency as regards global awareness about violence, abuse and discrimination experienced by children, and many national asylum authorities are increasingly acknowledging that children may have refugee claims in their own right. Nevertheless, access to effective protection of children, including unaccompanied children, against *refoulement* remains a continuing problem in many Council of Europe member states.

63. It is widely recognised that children may be subjected to specific forms of persecution that are influenced by their age, lack of maturity or vulnerability. The fact that the asylum claimant is a child may be a central factor in the harm inflicted or feared. This may be because the alleged persecution only applies to, or disproportionately affects, children or because specific child rights may be infringed. The UNHCR's Executive Committee has recognised that child-specific forms of persecution which fall under the terms of the 1951 Geneva Convention may include underage recruitment, child trafficking and female genital mutilation. Other examples include, but are not limited to, family and domestic violence, forced or underage marriage, bonded or hazardous child labour, forced labour, forced prostitution and child pornography. Such forms of persecution also encompass violations of survival and development rights as well as severe discrimination of children born outside strict family planning rules and of stateless children as a result of loss of nationality and attendant rights.

64. While children may face similar or identical forms of harm as adults, they may experience them differently. Actions or threats that might not reach the threshold of persecution in the case of an adult may amount to persecution in the case of a child merely because he or she is a child. Immaturity, vulnerability, undeveloped coping mechanisms and dependency as well as the differing stages of development and hindered capacities may be directly related to how a child experiences or fears harm. To assess accurately the severity of the acts and their impact on a child, it is necessary to examine the details of each case and to adapt the threshold for persecution to that particular child.[25]

65. The Assembly, in its Recommendation 1703 (2005) on protection and assistance for separated children seeking asylum regretted that, "at substantive level, most Council of Europe member states do not recognise child-specific forms of persecution, such as forced recruitment in armed forces, forced child labour, female genital mutilation, forced marriages or forced pregnancies, as persecution under the terms of the 1951

25. See UNHCR Guidelines on International Protection, "The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked", www.unhcr.org.au/pdfs/IOMtraffickingvictims.pdf.

Geneva Convention relating to the Status of Refugees". The same recommendation encouraged the Council of Europe to adopt a single coherent instrument on the issue of separated children seeking asylum, which would remedy the above deficiencies.

66. The United Nations Committee on the Rights of the Child has also emphasised, in its 2005 General Comment No. 6, that the refugee definition must be interpreted in an age-sensitive manner, "taking into account the particular motives for, and forms and manifestations of, persecution experienced by children". More recently, the concept of child-specific persecution has been enshrined in the European Union's legal framework.[26] As a result, the term has been transposed into national legislation throughout Europe. Yet, only a handful of countries have adopted guidelines to assist decision-makers in assessing protection claims from children.

67. Regrettably, studies show that child-specific persecution is not sufficiently taken into account in practice and that children are often granted temporary humanitarian protection, rather than refugee status, even when they may have a strong claim. In many countries, the lack of formal recognition of refugee status will likely affect the child's access to services, education and long-term residency options, and – in the long run – to durable solutions.

68. In order to improve current practice, there is an urgent need for those member states that do not yet recognise child-specific forms of persecution to revise their approach and end the double jeopardy which is denying children fleeing such practices the right to seek refuge in other countries. It is also crucial that more be done to promote the existing UNHCR and other guidelines and good practice in this field in order to recognise the rights of children and ensure protection including a durable solution that provides long-term safety and stability.

69. Council of Europe member states need to establish a harmonised child-sensitive asylum system, which includes procedures that take into consideration the additional difficulties children have in withstanding trauma and in expressing a coherent account of their experiences and child-specific experiences of persecution.

3.2.6.2. Legal assistance within asylum procedures

70. Legal representation and assistance within asylum procedures in Council of Europe member states is assured in a very diverse way. Relevant European Union legislation[27] demands that a minor should be represented by a legal representative or guardian wherever possible, to inform the minor and to intervene during the interview. The designation of a legal representative is, however, not obligatory in cases where the child has been empowered with a lawyer, if the case involves a minor of more than 16 years of age capable of representing his or her application, or if the minor is married. The United Nations Committee on the Rights of the Child recommends that unaccompanied children be represented by a lawyer in all administrative and judicial proceedings.

71. Nevertheless, practices differ. In Italy, for example, the appointment of a guardian is compulsory in order for an application for asylum to be examined, whereas in Greece, children over 14 years of age can draw up an application for asylum by themselves. In very rare cases, guardians have legal knowledge or have undergone specific training in child-specific forms of persecution or determination of the best interest of the child. It therefore follows that unaccompanied children in asylum and all other judicial or administrative proceedings should be represented by a lawyer, provided free of charge by the state, in addition to their legal guardian.

3.2.6.3. Processing the application and reception of unaccompanied asylum-seeking children

72. Asylum interviews should be conducted with primary consideration for the best interest of the child, in a child-friendly manner and in a non-intimidating environment. Staff involved in status determination procedures of children must receive appropriate training and country of origin information should include information on the situation of children, including those belonging to minorities or marginalised groups.

73. Member states should make every effort to process asylum applications by unaccompanied children as the highest priority and as speedily as possible, not exceeding six months. They should ensure that accelerated asylum determination procedures are not applied to children.

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26. European Union Qualification Directive recitals state that it is necessary, when assessing applications from minors for international protection, that member states should have regard to child-specific forms of persecution. Article 9(2) clarifies that acts of persecution can take the form of acts of a gender-specific or child-specific nature.
27. Directive 2005/85/EC.

74. At the end of the process, unaccompanied children should receive adequate and clear explanations of the decisions affecting them, in a language and manner that they understand, including an explanation of the underlying reasons. They should be able to challenge decisions regarding their asylum application.

3.2.6.4. Implementation of the Dublin II Regulation

75. The European Union Dublin II Regulation[28] establishes that it is the first state which the applicant has entered which is required to process the application for asylum. Under this regulation, certain states (mostly those that serve as entry points of immigration) face the challenge of dealing with numbers of asylum applications that are beyond their capacities, or they suffer from structural deficiencies and have problems meeting their human rights obligations.

76. Thus, for example, the UNHCR advises governments to refrain from returning asylum seekers to Greece under the Dublin Regulation or otherwise. More recently, the Council of Europe Commissioner of Human Rights expressed his support for the European Commission's proposal to introduce a mechanism for the temporary suspension of transfers, which could give states that are under particular strain short-term relief from their responsibilities under the Dublin Regulation, as well as the possibility to seek financial or technical assistance to cope with the situation.

77. The Assembly's Resolution 1695 (2009) on improving the quality and consistency of asylum decisions in the Council of Europe member states also called upon the European Union to revise, as a matter of urgency, the Dublin II Regulation and the "safe country" mechanism and to promote responsibility sharing amongst European Union member states to relieve the burden on those states which are struggling to handle large-scale arrivals of asylum seekers.

78. Your rapporteur shares these positions and underlines that the Dublin II Regulation should be revised and only be applied to unaccompanied children if transfer to a third country is in the child's best interest.

3.3. Concerns related to stay in host country

3.3.1. Right of residence

79. In accordance with the 1951 Geneva Convention relating to the Status of Refugees, all children who have expressed a wish for asylum are authorised to remain on the territory of the member state during the processing of their application. For unaccompanied children who do not apply for asylum, some states recognise a right for them to stay. For example, France and Spain recognise that unaccompanied children are automatically in a legal situation on their territory and therefore the obligation to obtain a right to remain is not applicable to them. Similarly, in Italy and Romania, all unaccompanied children benefit from an automatic right of residence. This is not the case in some other countries, such as Greece, Hungary, Sweden or the United Kingdom, where limited access to asylum or a negative asylum decision may put children in an irregular situation.

80. The right of residence is closely linked with family tracing and reunification. Whereas the recent recast proposal of the Dublin II Regulation strengthens the obligation of European Union countries to trace family members of unaccompanied children, in reality family reunification rarely occurs. Sometimes this is because reuniting with their family in the country of origin is not considered to be in the best interest of the child, either because of mistreatment or neglect in the past or out of fear for adverse effects on their asylum claim or exposing their family to harm. However, in many cases, it is because it has proven impossible to trace the family. Similarly, whilst considered as a possible means for the remainder of an unaccompanied minor's family to subsequently enter the European Union, there is little evidence to suggest that requests for family reunification by an unaccompanied minor once granted refugee status occur to any large extent.[29]

81. Your rapporteur believes that further harmonisation of practices towards granting a right of residence on the territory for unaccompanied children until adulthood would be desirable.

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28. Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the member state responsible for examining an asylum application lodged in one of the member states by a third-country national.

29. European Migration Network (EMN), Policies on Reception, Return and Integration arrangements for, and numbers of, Unaccompanied Minors – an EU comparative study, May 2010.

3.3.2. Reaching adulthood

82. No legal instrument currently governs the transition of unaccompanied minors to the majority age, and national practices are divergent. Your rapporteur identifies two main problem areas which affect these young adults.

83. First, those unaccompanied children who are under national welfare systems principally lose their "primary" support systems, including guardianship support and accommodation. The state responsibility is transferred from children's/social services to immigration authorities, which will subsequently decide on whether or not the young adult has the right to an extended stay in the country. Their financial support is reduced or terminated, and access to education diminishes, pending the outcome of any regularisation opportunity.

84. Second, coming into adulthood also changes the whole context of immigration determination: unaccompanied minors once attaining adulthood can no longer benefit from procedural safeguards; they have no entitlement to family reunification; they are exposed to an increased risk of detention; and the safeguards regarding return cease to exist. In short, unless their residence permits are extended on individual compassionate or humanitarian grounds, the former unaccompanied minors automatically join the ranks of irregular migrants who are expected to return voluntarily to their countries of origin or risk forced return as an adult under the Return Directive.

85. It goes without saying that, in the case of those unaccompanied children who have not sought protection before the age of 18, once they reach maturity, they lose all safeguards that might have been applied under the best interest of the child clause, and their passage to total irregularity is automatic.[30]

86. The result of this is that the majority of unaccompanied children in state care (mostly those whose asylum claims have been declined but whom the states have not been able to return and those in the process of asylum who know that there is a high probability that their requests will be rejected) simply "vanish" from care centres shortly before their 18th birthday. Your rapporteur finds it deplorable that states' incapacity to provide more effective and extended protection of the child's best interest or more durable solutions puts these youngsters directly at the mercy of trafficking networks and criminal gangs, leading to the high likelihood of their exploitation and abuse.

87. However, in reality, the situation is much more complex. Your rapporteur's survey on this subject reveals that the possibility or not to remain in the country beyond the age of 18, alongside the existence of a life project for the child, is the most determining factor for the fate of unaccompanied children in Europe.

88. Considerable differences exist in how member states currently address this issue. Some (like France) grant the right to apply for citizenship to unaccompanied minors who have continuously stayed in state care for a certain period of time, or have been brought up by a citizen of the country concerned during the same period. Some offer the possibility to apply for permanent residence (for example the Czech Republic), requests being reviewed on an individual basis. Most commonly, however, states grant the possibility for a temporary extension of stay (for example Finland, France, Spain and the United Kingdom), subject to confirmation that the person continues to need international protection and if there are individual compassionate grounds to grant a residence permit. In Italy, a residence permit may be granted to those who have either been entrusted to a family or are subject to protection, or to those who have been present in Italy for at least three years and have participated in an integration project of at least two years' duration.

89. On the other hand, as a general rule, when a residence permit is not issued, the former unaccompanied minor is under an obligation to leave (Germany, France, Italy, Norway, the United Kingdom). Obtaining refugee status is in some cases the only permanent solution after the age of 18 (Slovak Republic, Switzerland, Turkey).

90. Some "new Schengen" countries, such as Estonia, Latvia or Slovenia, which have had little experience with the issue, claim not to have expelled a single minor on reaching adulthood. In Greece, on the contrary, where the annual inflow of unaccompanied minors reaches many thousands, children reaching adulthood automatically lose their subsidiary protection and are expelled or usually end up in an irregular situation.

91. As regards social benefits, the Czech Republic and the United Kingdom also provide aftercare in terms of accommodation and financial assistance. In the Czech Republic, unaccompanied minors can stay in accommodation and educational facilities under state care up to the age of 26. Some countries (for example

30. PICUM, *Undocumented Children in Europe: Invisible Victims of Immigration Restrictions*, Brussels, 2008, p. 81.

Belgium and Poland) transfer those who have applied for asylum from childcare centres to refugee centres or grant both the right to live outside the centre and to receive an allowance. These are a few examples of best practices.

92. But all in all, your rapporteur finds the current approach by many member states, whereby they make considerable investments in the education and care of an unaccompanied child only to return that child when he or she turns 18, to be of benefit to nobody. Europe has a structural need for migrants, not least because of its declining population; therefore, what better means is there than to use the potential of minors who have been educated and trained in the country, and who have a long-term life project, to integrate them in the local labour market and societies. As has been pointed out by the Separated Children in Europe Programme in its Statement of Good Practice, the solution is unlikely to be durable if it is based on a decision to allow the child only to remain up to their 18th birthday, even if the stay can be temporarily extended.

93. It therefore appears highly relevant that the potential of the child's long-term integration in the local community be taken into account as a key element when deciding on the child's legal stay in the host country on reaching adulthood. The criteria to be considered should include: the length of time spent in the country of reception, the child's life project, the level of integration and education pursued, the emotional ties of the person with the host family or society, and the young person's own views on his or her future.

94. A "buffer age" between the age of majority and when a solution is found should be established, which would enable the young person – at least for a specified period of time – to continue education or training, or to compete on the labour market on the same basis as the national population. Assistance should be extended until that durable solution is met, even if it goes beyond the child's 18th birthday.

95. Unaccompanied children who become adults during the course of the asylum status determination process should continue to benefit from the same special determination procedures as those who are under 18 years of age. However, states should eliminate unnecessary delays that can result in a child reaching the age of majority during the process.

3.4. Concerns regarding return to country of origin

96. Return of unaccompanied children to their families or country of origin is identified as one of the possible durable solutions, provided this is in the child's best interest and if safeguards for the safety and well-being of the child upon his or her return are guaranteed. And yet, the return of unaccompanied minors is also one of the most contentious issues where the flaws of the applicable regulations, boundaries of member states' freedom of action and failures to implement human rights standards become apparent.

97. Problems mostly arise in areas where little or no common understanding or practices exist. These include defining the best interests of the child; guaranteeing safeguards of human rights and dignity; defining what constitutes adequate care in the country of origin, and the applicability of the return orders.

98. States often take the view that, unless there is an asylum claim, it is almost always in the best interest of a child to return to family; in other words, there is no need for a thorough individual assessment. Your rapporteur wishes to argue that return to the family may but does not automatically constitute the best interest for the child even if no serious ground for protection is established. Any return should be conditional upon a careful assessment of the situation that the child would find upon return, and of whether the child's family or childcare agency in the country of return would be able to provide appropriate care. If no parents or members of the extended family are identified, return should only take place if secure, concrete and adequate care and reintegration arrangements in the country of origin have been established in advance. The assessment of return conditions should be conducted by a professional and independent organisation or person and should be objective, non-political and aimed at ensuring respect of the principle of the best interests of the child. The child's own views and those of his or her guardian should also be heard.

99. In cases where return of a child is decided to be in the child's best interest and conditions are guaranteed, the decision to return an unaccompanied child should be reasoned and notified to the child and his or her legal guardian in writing, together with information on how to appeal against it. The child and/or his or her legal guardian should have the right to challenge the return decision in court. Such an appeal should have suspensive effect and be extended to the lawfulness and the merits of the decision.

100. Return to the country of origin is not an option if it would lead to a risk that such return would violate the child's fundamental human rights. In this respect, your rapporteur shares the concern of leading international organisations and agencies as regards the setting up of reception centres in the countries of origin so that European Union countries can send unaccompanied children back if they cannot trace family members. Such centres have been set up in Africa (the Democratic Republic of Congo, Angola), Europe (Romania, Bulgaria),

Afghanistan and Iraq. According to Save the Children, there are serious concerns that the mere existence of these reception centres could serve as an automatic justification to refuse residence permits to unaccompanied minors, as there is a "safe and adequate place" for the child to return to. Some states have signed readmission agreements specific to minors with Morocco, Senegal, Bulgaria or Romania, but which lack transparency and safeguards for children.

101. Children should never be returned to places where their safety and well-being is at risk. Without proper guarantees for safety and reintegration, the reception centres in countries of origin do not cater for the child's best interest. Most of the countries where such centres have been set up are dysfunctional, war-torn or struggle to operate any child protection system at all. Without proper protection and opportunities for reintegration there is a clear risk that the children may simply disappear from institutions and try to undertake dangerous journeys again.[31]

102. Human Rights Watch also argues that investing in such a way in the returns of children may not only be a waste of money, with those returned leaving their countries again soon afterwards, but it may also put children back at serious risk. Besides, European governments remain directly responsible if the child is ill-treated, detained or disappears upon arrival if they ignored relevant information before returning a child and did nothing to mitigate such risks. The European Court of Human Rights, in a decision against Belgium[32] concluded that governments are obliged to take "measures and precautions" against the inhuman treatment of a returned child. Therefore, the well-being of the child following return should be monitored by appropriate authorities or agencies on the spot, who should liaise with and report to the authorities of the country from which the child has been returned. Furthermore, instead of seemingly quick and easy solutions that focus on returns, increased investments in services and institutions accessible to all children in their home countries are needed.[33]

103. Another area of concern is the applicability of return orders. Notwithstanding the European Union policies to encourage the return of a higher number of unaccompanied children who are deemed not to need international protection, very few states have actually returned minors in recent years, either forcibly or voluntarily.[34] The major reason is that even where deportation orders are issued, in most cases they cannot be executed because of the absence of identity and/or travel documents, the child's willingness to co-operate in the departure, difficulties in tracing the child's family and the impossibility to obtain a travel document from the countries of origin in time. Thereby many orders remain pending until children reach the age of 18.

104. Such "aging out" is definitely not a meaningful or durable solution, either for the states or for the children concerned, as it often leads to prolonged detention, disappearances and nourishing of trafficking networks, as already referred to in chapter 3.3.2.

105. Family reunification, whenever feasible, is generally regarded as being in the best interest of the child. Once a family is traced, family relationships verified and the willingness of the child and the family members to be reunited has been confirmed, the process is normally not delayed, unless there is reasonable doubt that the child would be exposed to abuse or neglect. However, opportunities for unaccompanied children to be united with "wider family" are sometimes lost because of a narrow definition of "a family" applied by authorities in many European countries. Possibilities for family reunification activities beyond the country of origin are also often limited. However, migrant families are often split across Europe, with members, including the child, having an irregular status. While the unaccompanied child or his/her family remains in an irregular situation, it is almost impossible to provide appropriate services or family unification support. All in all, there is a lack of instruments regarding family reunification of unaccompanied children across Europe.

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31. These concerns were echoed during your rapporteur's discussions with representatives of relevant Dutch NGOs who confirmed that, although being presented as success stories by authorities, the newly built centres in Luanda (Angola), and Kinshasa (Democratic Republic of Congo), financed by the Dutch Government, stood empty as the children brought there disappeared within twenty-four hours. Your rapporteur therefore remains very doubtful as to whether such institutions could offer a durable solution in the best interest of unaccompanied children.

32. *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application No. 13178/03, judgment of 12 October 2006.

33. Troller, *In the Migration Trap: Unaccompanied Migrant Children in Europe*, Human Rights Watch World Report 2010, www.hrw.org/en/node/87786.

34. Only a few countries have available data on the return of unaccompanied minors. Sweden, for instance, returned 53 unaccompanied minors to 29 states between 2007 and 2009; the Netherlands saw 230 unaccompanied children depart voluntarily and 145 through a forced departure between 2003 and 2006, plus another 54 in 2008. Spain returned 292 unaccompanied minors out of 4 410 with return decisions between 2004 and 2008.

106. In this regard, your rapporteur deems it important to encourage a broader interpretation of the term "family" when considering family reunification and an extension of family reunification activities beyond the country of origin, approaching it from a humanitarian perspective of exploring wider family links in the host country and third countries.

4. Establishing durable solutions

4.1. Identification of appropriate procedures and tools for finding durable solutions

107. Identifying the most appropriate durable solutions for an unaccompanied child generally requires carefully balancing many factors. Decisions on voluntary repatriation, family reunification or relocation to a third country or integration in the host society are likely to have a fundamental and long-term impact on the child. All these options for a durable solution should be considered on an equal basis.

108. The identification of durable solutions should start immediately when the unaccompanied child first comes into contact with immigration and specialised services. The UNHCR 2008 Guidelines on Determining the Best Interest of the Child indicate that, before taking a decision on which option of durable solution to apply in the case of a particular unaccompanied child, a best interest determination must be carried out to ensure sufficient focus on the child's rights when choosing the most appropriate durable solution and the right time for it. The assessment must be carried out on a case-by-case basis and with the consent of all parties concerned: immigration authorities, social services, the child's legal guardian and the child himself/herself.

109. The UNHCR guidelines also mention that if it is not possible to determine which durable solution is in the best interest of the child, the temporary care arrangements should be maintained and the case should be reviewed within one year at the latest.

110. When determining the best interests of the child, it is important to consider all rights of the child. In addition to the norms contained in the Convention on the Rights of the Child, there are other relevant international and regional instruments on general human rights, international humanitarian law, refugee law and child-specific hard and soft law instruments, which should be taken into account. The General Comment No. 6 by the Committee on the Rights of the Child and the UNHCR 2008 Guidelines are also valuable interpretative sources. However, your rapporteur is of the opinion that European states need to develop their own common guidelines on the best-interests assessment, which would define clearly the procedures and responsibilities and include all unaccompanied children, not only those who have applied for asylum. These guidelines should also include mechanisms to ensure that the child's views on his or her situation and future are properly heard.

111. A best-interests assessment requires a clear and comprehensive understanding of the child's background, for which it is essential to discover as much as possible about the child's needs and protection risks, affective ties, capabilities, interests, and also the capacity of the adults willing to care for the child. The process needs to be child-centred, gender-sensitive, guarantee the child's participation, and have a forward-looking approach. In order to facilitate credible information collection on the circumstances of children and the situation in their country of origin, a common tool should be developed.

4.2. Implementing durable solutions

112. It is not only important how the durable solutions are identified but even more important how they are put into practice.The life projects for unaccompanied children developed by the Council of Europe (Recommendation CM/Rec(2007)9) offer a constructive way of engaging with the child. Life projects are holistic, personalised and flexible tools which allow minors to acquire and strengthen the skills necessary for becoming independent, responsible and active in society, and to combine integration and their personal development.

113. Drawn up and negotiated between the child and the authorities in the host country, life projects take account of the child's personal profile, background and family situation, the causes of migration and itinerary, and link these to the present, considering the aspirations and perceptions of the minor, the legal situation of the child in the host country and opportunities both in the host country and the country of origin. Life projects seek to clarify and enhance the child's future prospects by ensuring that best interests are respected, rights are upheld and that the child is supported to develop the skills necessary to become a full and active participant in society.[35] Offering specialised training and qualification, they help prevent homelessness and marginalisation after reaching adulthood.

114. Life projects may be followed in the host country or – subject to the child's best interests, safety and human rights being respected, including the principle of *non-refoulement* for those seeking asylum – in the country or origin, or in both countries. Where return cannot be implemented, such projects help youngsters engage in a meaningful self-development project rather than simply letting the child age out. Exceptionally, where family members are living lawfully in a third country, family reunification to that country may be considered and a life project may continue there. Where member states have established safe procedures for moving minors subject to Dublin II regulations, life projects may follow them over national borders within Europe, therefore including an element of multi-planning.

115. Needless to say, in order for the project to be successful, commitment and responsibilities are required from both the relevant authorities and the child. Built within this is also the arrangement for monitoring progress and reviewing or revising the project, both routinely at predetermined intervals and in response to significant changes in the minor's situation.[36]

116. The first pilot phase of implementing the life projects in eight member states, which was completed by the European Committee on Migration (CDMG) in 2010, allows your rapporteur to believe that this is the way forward for ensuring durable solutions.

117. Your rapporteur does not underestimate the states' concerns as regards the additional costs of establishing proper systems for identifying and implementing durable solutions, notably in the current economic climate in Europe. She also hears the argument of better protection and assistance possibly triggering increased immigration flows. Your rapporteur is nevertheless convinced that investment to respect the rights of children does not neglect the migration dimension and that the benefits of helping children develop into positive actors in whatever society they ultimately live, far overrides these costs.

5. Rapporteur's conclusions and recommendations

118. In the preceding chapters, your rapporteur has strived to demonstrate the need for a proper and careful consideration of the realities in respect of unaccompanied children in Europe, as well as for a determined effort that European countries should jointly make with a view to developing procedures that take into account the vulnerabilities and rights of children and provide them with durable solutions.

119. The greatest challenge for member states is to realise that defending the best interest of the child requires a major shift in the current policy approach: policies and practices should be truly rights-based and these children should be treated first and foremost as children, and only then as migrants. And that this applies to all unaccompanied children, not only those who submit a request for asylum or other forms of international protection.

120. The second major challenge is to improve procedures: member states should concentrate on adopting sound and transparent procedures to guarantee every child a fair, comprehensive and individualised assessment that respects age and gender specificities, leading to a lasting and beneficial solution. Instead of overly concentrating on the return of these children to often war-torn and dysfunctional states, which is in most cases anyway impracticable, before they reach the age of majority, member states should engage in finding durable solutions. Children should be given the right to challenge decisions with the help of guardians and lawyers when they face detention, deportation, or go through an asylum procedure.

121. Thirdly, there is a substantial need for harmonisation of policies and practices across Europe. The European Union Action Plan on Unaccompanied Children is far reaching in this respect and establishes good principles, which should be followed by other Council of Europe member states as well. But further challenges remain to be tackled.

122. Your rapporteur believes that, with its expertise in the human rights and child protection fields, the Council of Europe can make a major impact in pushing for the paradigm shift as regards unaccompanied children first treated as children first and foremost. Central to such a shift would be recognition of the principles that these children are entitled to special care and protection, that their best interests should be a primary consideration in all decisions affecting the child, and that the child's views should be heard. In the past, the Council of Europe has made important positive contributions through its Life Projects initiative; hence your rapporteur remains convinced that its voice will continue to improve respect for these children's rights.

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35. L. Drammeh (CDMG), *Life Projects for unaccompanied migrant minors – A handbook for front-line professionals*, Council of Europe Publishing, October 2010.
36. Idem.