

# UNACCOMPANIED MIGRANT MINORS: VULNERABLE AND VOICELESS

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## 1. INTRODUCTION

More than half of the world's refugee population are children. Alone or accompanied, they flee from armed conflict, persecution, generalized violence and the rampant violation of fundamental rights. They leave their places of origin and engage in extremely dangerous journeys, which in many cases are fatal. The situation of these children in the general context of migration generates great concern, due to the vulnerability of fundamental rights. With the emergence of the social agenda, the growing concern for poverty and the particular risks that children, together face, together with the awareness of the overriding importance of robust fundamental rights protection, the rights of the child have arrived at the forefront of European policies and the political agenda in the last decade (Bhabha, 2016).

From a legal perspective, the most significant recent development at European level is the entry into force of the Lisbon Treaty which establishes among the aims of the Union: '... the protection of the rights of the child' (Art. 3) and whereby the European Charter of Fundamental Rights (the Charter) became binding. In this respect, Art. 24 is taxative:

*'children have the right to such protection and care as is necessary for their well-being'; their best interests must be*

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*a primary consideration in 'all actions relating to children, whether taken by public authorities or private institutions'; and every child has*

*'the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests' (European Parliament, 2012).*

From a policy perspective, the European Commission promoted in 2011, 'An EU Agenda for the Rights of the Child', with 11 points to step up efforts in protecting and promoting the rights of children and a child-friendly system of justice (European Commission, 2011).

At international level, the Convention on the Rights of the Child (UN), with its two Optional Protocols, is the cornerstone instrument to protect children's rights at the international level. It lays down social, civil, economic and political standards on children's protection. It has been ratified worldwide, except the United States of America and the European Union<sup>2</sup>.

Other bodies have passed legislation on this, such as the International Labour Organisation (ILO) with the Conventions aim towards the effective abolition of child labour and the setting of a minimum age for employment. The Council of Europe's European Social Charter guarantees social and economic rights including for children. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) protects and promotes key fundamental rights applicable to children (FRA, 2015). The EU Member States have ratified the key international conventions on the rights of the child. Future accession of the EU to the ECHR could reinforce the legal framework for the protection of the rights of children in the EU.

The analysis is carried out for the preparation of this paper concentrated on three methodological resources: (a) I provide an overview of international and European law which draws the reference framework established by human rights instruments. (b) I review reports and documents issued by international governmental and non-governmental organisations and the consultation of secondary literature on the subject.

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<sup>2</sup> The UNCRC is open for signature and accession to States only, although the EU could bind itself to its provisions through a unilateral declaration or the conclusion of an accession Protocol.

(c) I give the experience provided by participant observation research carried out by the paper-giver in a Caritas Refugees Centre.

## 2. IDENTIFICATION AS CHILDREN AND AS SUBJECTS OF INTERNATIONAL PROTECTION

The vision of the “rights of life” for children is the result of a structured process inserted in an institutionalized set of norms (Stoecklin, 2018). These ‘rights of life’ are the new frame of reference through institutionalization as a dual structure, where the subjects (the children) and the objects (the rights) occur in specific contexts. “The rights of children” emerge, according to this vision, as an interdisciplinary concept (Pobjoy, *The Child in International Refugee Law*, 2017).

The rights of children have followed a process parallel to the rights recognized to adults. Historically, children were the property of their parents and lacked any articulated set of rights. Trust in adults was the only way to claim their rights. During the first half of the 20th century, the need to restrict the responsibility of parents to protect minors became widespread. In the latter part of the last century, the minor came to be considered as a legal person, regardless of their parents. It was the prologue for the recognition of the well-being of children in their own right (Therborn, 1993).

Within a new approach generated at the international level, the first text that proclaimed the protection of the rights of the child, with reference to society as a whole, was the Declaration of the Rights of the Child of 1959 (Pobjoy, *The Best Interest of the Child principle as an Independent Source of International Protection*, 2015). The long process of discussions ended with the approval in 1989 of the Universal Convention of the United Nations on the Rights of the Child (UN Convention on the Right of the Child, 1989).

The Convention defines the main rights of children, recognizing them as citizens of the world and with the possibility of sharing their resources, with the corresponding duties that countries and competent authorities must assume. In addition, it granted effectiveness as one of its characteristics: “... States shall assure to the child who is capable of forming his or her own views the right to express those views freely ...” (Art 12 of UNCRC). With the best interests of the child as the main

objective, the 1989 Convention has gained respect and acceptance throughout the world.

Despite this impact and its effectiveness worldwide, critics argue that the standards established for the best interest of the child are arbitrary, vague and obsolete (Dalrymple, 2006). Thus, the rights of children in relation to migration, mobility and related institutional responsibilities remain unclear.

Children's human rights are universally proclaimed and are the subject of multiple declarations at all levels of public administrations. However children's rights are a field of intersectoral law (Connolly, 2015). European states often forget the duality of the legal status of unaccompanied asylum seekers. In general, they tend to focus exclusively on their status as migrants and often as irregular migrants.

In fact, the critical and crucial aspect of the reception process is the difficulty of identifying children and securing the need for international protection as follows:

1. Minors under international protection.
2. Irregular migrants subject to national migration laws and border control.
3. Refugees, subjected to the asylum procedure, equal to adults.

Children who are classified as UMMs face protection systems that overlap among themselves, since the time of their arrival in a new country (Rinaldi, 2012).

### 3. THE RIGHT TO BE INFORMED

The Convention on the Rights of the Child (UNCRC) asserts that children and young people have the right to freely express their views and that there is an obligation to listen to children's views. This should facilitate their participation in all matters affecting them within their families, schools, local communities, public services, institutions, government policies and judicial procedures. And it ought to include the opportunity for children to express their points of view and opinions and thus to influence decisions which may affect their lives.

Participation includes different kinds of involvement, contribution, assistance and codetermination. They differ in quality and have to

be distinguished in participation initiated and controlled by adults, equal decision-making, and children's self-determined and initiated participation.

The right to participation manifests itself in several articles of the UNCRC (see, for instance, Arts. 12, 13, 14, 15, 17, and 31). Participation is one of the Convention's guiding principles and most advanced innovations. In particular, Art. 13 of UNCRC establishes the right to freely express ideas and to be informed. Both are so important for the exercise of the right to be heard in order for the child to be able to say what he/she thinks and wants. Adequate information is to be provided in order to exercise this right:

- a. In understandable language.
- b. In accessible formats adapted to his/her circumstances.
- c. In child-friendly facilities.

Both the EU Charter of Fundamental Rights (Art. 11) and the ECHR guarantee the right to freedom of expression, which includes the freedom to hold opinions and to receive and provide information and ideas without interference by public authorities and regardless of frontiers. Under CoE legislation, freedom of expression is guaranteed by Art. 10 of the ECHR and may be limited only if the limitation is prescribed by law, pursues one of the legitimate aims listed in Article 10(2) and is necessary in a democratic society.

In its case law, *Handyside v. the United Kingdom*, No. 5493/72, 7 December 1976, para. 49, the ECtHR stressed that “[f]reedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man”<sup>3</sup>.

Children have the right to receive information about issues affecting their lives. The participation of children in the community, their opinion in the decisions that affect them, the respect they deserve as humans and not as object, depend on the respect to the right that the child has to be informed. In this process in which asylum-seeking children are immersed, this obligation of the state to offer adequate information has not been given relevance. No information is directly addressed to the child, no guide adapted to children has been prepared that explains matters to children (a very large group among asylum seekers in European Union

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<sup>3</sup> See also: ECtHR, *Gaskin v the United Kingdom*, No. 1044/83, 7 July 1989, para 52.

States) (Duran Castello, 2018). Likewise, there is no guide for social workers, not even the legal temporary tutors of the children themselves. There is no doubt that there is a discrepancy between the information provided and the information received. Different language and culture, the psychological conditioning resulting from the traumas in the country of origin, and in the migratory journey are the causes of this imbalance. The need for interpreters, intercultural mediators, responsible for the transmission of information on a regular basis becomes evident. The elaboration of elementary information written in the refugee source language on the functioning of the centres and attention to their basic needs would ease this situation (Arnold; Goeman; Fournier, 2014; Byrne, 2017).

#### 4. THE RIGHT TO BE HEARD

Under international law, Art. 12(1) of the CRC states that a child who is capable of forming her or his own views has the right to express these views freely in all matters affecting her or him. The child's views should be given due weight in accordance with her or his age and maturity. Furthermore, Art.12(2) of the CRC prescribes that the child must be provided with the entitlement to be heard in any judicial and administrative proceedings affecting her or him, either directly or through a representative of an appropriate body, in a manner consistent with the procedural rules of national law. According to Art. 12 the child has the right to be heard in matters that concern him, without discrimination because of his age, disability or any other circumstance, provided that a decision affecting his personal, family or social sphere is adopted (UNHCR, 2009). Under the ECHR, there is no absolute requirement to hear a child in court. Whether or not to do so has to be assessed in light of the specific circumstances of each case and is dependent on the child's age and maturity (FRA, 2015).

The entry into force of the Lisbon Treaty also marks the incorporation of the Charter of Fundamental Rights of the European Union (the Charter) as part of the EU legal framework, on the basis of Article 7 TEU. It became directly binding on all EU institutions and Member States on 1 December 2009. The Charter enshrines the rights of the child, in particular in Article 24:

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

Under CoE legislation, the ECtHR does not interpret the right to respect for private and family life (Art. 8 of the ECHR) as always requiring the child to be heard in court. As a general rule, it is for the national courts to assess the evidence before them, including the means used to ascertain the relevant facts. Domestic courts are not always required to hear a child in court on the issue of access to a parent who does not have custody rights. This issue has to be assessed in light of the specific circumstances of each case, having due regard to the age and maturity of the child concerned. Moreover, the ECtHR will often ensure, under the procedural limb of Art. 8, that the authorities have taken appropriate steps to accompany their decisions with the necessary safeguards. See, for example, the sentence *Sahin v German* ECtHR, No. 30943, 8 July 2003, para 73.

The European Convention on the Exercise of Children's Rights deals with the right of children to express their views freely. This convention aims to promote children's rights by granting them specific procedural rights in family proceedings before a judicial authority, in particular for proceedings involving the exercise of parental responsibilities, such as residence and access to children. Art. 3 of the convention grants children the right to be informed and to express their views in proceedings as a procedural right. In Art. 4, the child is granted the right to apply for the appointment of a special representative in proceedings before a judicial authority affecting her or him. In line with Art. 6, authorities must ensure that the child has received all relevant information, consult her or him in person, if appropriate, and allow the child to express her or his views.

Hearing the child is not a mere formality. In order for the exercise of a child's right to be guaranteed, the following requirements must be met:

- a. It will be heard in an appropriate way to their situation and evolutionary development.
- b. With assistance, if necessary, from qualified professionals or experts.
- c. Taking care to preserve his/her privacy.
- d. Using a language that is understandable to him, in accessible formats and adapted to his circumstances.
- e. Notifying you of both what you are asked and the consequences of your opinion.
- f. With full respect for all procedural guarantees.

## 5. CONCLUDING REMARKS

The relevant international framework for “children in movement” is multifaceted and complex. It includes the conventions on the fight against trafficking, asylum and international protection, labour standards, international standards for migrant workers, child victims of crime and the judiciary, as well as private international law for the protection of migrant workers, children and family matters. The UNCRC, which encompasses all of these standards, provides a solid foundation for promoting the best interests of children in all contexts and situations (Kanics, 2016). In both the US and the EU, the treatment of unaccompanied minors is governed by the United Nations Convention on the Status of Refugees of 1951, the 1967 protocol and the Convention against Torture (UN, 1987). The signatories of these treaties must comply with the principle of *non-refoulement* (Gortazar Rotaecche, 1997). Nevertheless, not all national protection systems do not have a protocol where the right to be heard is expressed as a fundamental right.

This lack of standard protocol involves other aspects of the protection process: age assessment tests, the right to access the asylum request, the request for legal assistance, family reunification, decision-making about reception centres, the right to study and training, or the residence permit. Furthermore, psychological support should be provided to those who have faced burdensome situations for children. The right to be heard enters into a common set of asylum, immigration and human trafficking regulations which include specific provisions on the protection of the interests of unaccompanied minors (Byrne, 2017; Galli, 2018). These regulations

require that unaccompanied minors have a legal “representative”, meet with family members whenever possible, that detention be the “last resort and for the shortest possible time”, and decisions take into account your “best interests”, towards the growing need for agency as a factor of integration. Understanding childhood as a changeable part of society also implies attention on how society raises children. The choices children make do not shape only their future, but also that of the entire society.

## ANNEX: DOCUMENTATION AND LEGISLATION

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