

# CHILDREN IN EU MIGRATION LAW: ANALYSIS AND EVALUATION

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I- Introduction; II- The Irregular Migrant Children in the European Union; III- European Common Asylum Policy; Refugee Statute; The European Convention on Human Rights; Charter of the Fundamental Rights of the European Union; IV- Structural Elements of the European Common Asylum System 08 Directives 08 Regulations; United Nations Convention on the Rights of the Child; Non-Discrimination; The Best Interests of The Unaccompanied Minor; The Right to Life and to Development; The Right to Participation; Resolution of the European Union's Council on the 26th July of 1997; Action Plan on the Unaccompanied Children 2010-2014; Data Prevention of the Unsafe Migration and of The Human Beings Traffic; Reception and Procedural Guarantees in the European Union 16 Search of Long Lasting solutions; Conclusions Regarding the Validity of the Action Plan on the Unaccompanied Children 2010-2014; IX- Analysis of the Efficiency of the European Common Asylum System towards the unaccompanied migrant children; X- Conclusion.

## I-Introduction

Each year migrations increase considerably, drawing the attention of the international community. The reasons behind the migratory movement are diverse. Besides the refugees, who fly away from persecution and wars, there are also environmental and economic migrations as well. Migrants move from one country to another, sometimes accompanied by their families and sometimes also unaccompanied, and it is particularly interesting to note the growing number of unaccompanied migrant children. Only in 2015, according to data provided by Eurostat (2016) 88,300 unaccompanied children requested refuge in the European Union member countries.<sup>1</sup>

This especially vulnerable group has deserved special attention from the European Union authorities. In this work, we will analyze the laws that apply to these migrant children in the European Union, seeking to observe their historical origins and to evaluate their practical application by the Member States. In order to do this, it is necessary to clarify the parameters and requirements adopted to define who are the unaccompanied minors migrants, what are the reasons for their migration, their objectives and the risks they face on their journey, so then we can understand and evaluate how the European Union's legislation is built to meet the needs and rights of this public that has the particular dual status of child and irregular immigrant.

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<sup>1</sup> EUROSTAT. Asylum applicants considered to be unaccompanied minors almost 90 000 unaccompanied minors among asylum seekers registered in the EU in 2015, 87/2016, 2 May 2016. Available in: <http://ec.europa.eu/eurostat/documents/2995521/7244677/3-02052016-AP-EN.pdf>. Last checked on 03.01.2018

Taking a brief look at European policies towards asylum-seeking immigrants, it is noted that the European Union has as a basis for the procedures for this public the Common European Asylum System. Thus, we will assess how this unifying mechanism provides assistance to unaccompanied minors in specific, and whether they are in accordance with the United Nations Convention on the Rights of the Children, which is a document with universal character.

Although some of the norms that will be addressed in this article are not exclusive to migrant minors, it is clear that the legislative foundations are unified when it comes to community and public policy guidelines for the migrant portion, families, minors, or adults in search of refuge, with the common objective of guaranteeing all their respective rights.

Therefore, once the laws, directives and procedures for migrants as a whole have been examined, we will pay attention to the initiatives of the European Council, specifically the Resolution of the Council of the European Union of 26 June 1997 and the Plan of Action on Unaccompanied Children 2010-2014 as our objects of study, in order to analyze how the Resolution favors the minor with regard to the procedures that involve him and his protection. Then, about de plan of action, we will verify through which ways this document calls for cooperation of the Member States to manage better the issue of unaccompanied minors.

Finally, after examining the main documents concerning the treatment of unaccompanied minors in the European Union, we will identify the administrative failures, the institutional lacks in the Member States behavior towards those children, which still obstruct the much-desired effective assistance of such vulnerable public.

## **II-The Irregular Migrant Children in the European Union**

According to research data gathered by María Cabeza Castro, in her article Foreign minors not accompanied in the judicial process: the legal framework of Public International Law<sup>2</sup>, the vast majority of foreign minors are between 14 and 17 years old and migrate due to the belief in the infamous European myth, which spreads the belief that EU Member States offer more job opportunities than the countries of origin, so that minors could raise their quality of life and economically help their families. However, this search for a better life quality is due to nefarious constant factors in the countries of origin, among them the fear of becoming victims of persecution, the occurrence of armed conflicts, the power of criminal organizations and the lack institutional protection.

In addition, it can be seen that the majority of the migrant children are male, which is due to the fact that the female portion is an even more vulnerable public, since they are subject to irregular domestic work and prostitution, causing their migration to go unnoticed, through clandestine ways.

Migrant children face a special, singular, situation on what refers to their legal treatment, since that in one hand, their condition of children makes them subject to the Child Protection Act of the country in which they immigrate, on the other, they are dignified the status of irregular

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<sup>2</sup> CASTRO, María Cabeza. Los menores extranjeros no acompañados en el proceso judicial: el marco jurídico del Derecho Internacional Público, p. 10. Available in: <https://repositorio.comillas.edu/xmlui/bitstream/handle/11531/680/TFG000575.pdf?sequence.1> La st checked on 02.02.2018.

immigrant, being subject to legislation related to foreigners. "The main problem we have with unaccompanied minors is that they are located between two systems, protection and immigration, inspired by contradictory principles, protection and rejection or control. And in many cases, their status as an immigrant prevails and all that entails."<sup>3</sup>

However, this double condition means that the treatment of the unaccompanied children has as primary reference the International Treaties and Instruments agreed by the entered country, and so, the rules for the protection of minors must prevail above the regulations related to the treatment of general migrants.

There is a numerous variety of particular and national criteria for designating who are in fact unaccompanied children. However, the European Union's procedures are based on the legal ordering of Community legislation in order to establish an embracing and valid parameter in all Member States, which is superior to national designations.

Accordingly, the Directive 2011/95 / EU of the European Parliament and of the Council of 13 December 2011 declares, in Article 2, that the unaccompanied foreign minor eligible for international protection is (art.2. L) is the person who is under 18 years old, that is not national of the UE or stateless person, who arrives in the territory of the Member States without being accompanied by an adult responsible for it, either legally or within the scope of the practice, as long as the adult is not effectively in charge of it, including the minor who is no longer accompanied after having entered the territory of the Member States ".<sup>4</sup>

### III-The Common Asylum Policy

The Article 14 of the Universal Declaration of Human Rights declares: 1. Everyone, as a victim of persecution, has the right to seek and enjoy asylum in other countries. 2. This right may not be invoked in the case of persecution legitimately caused by crimes under ordinary law or by acts contrary to the purposes and principles of the United Nations<sup>5</sup>. Flavia Piovesan, commenting on the referred article, mentions "By focusing on the contours of the right of asylum, it is perceived that the declaration guarantees the fundamental right of every person to be free from persecution. Consequently, in the event of persecution, the fundamental right to seek and enjoy asylum in other countries arises."<sup>6</sup> Evidently, this article also applies to children, who are guaranteed by international norms the right to seek asylum in their own name.

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<sup>3</sup> SAVE THE CHILDREN. La protección jurídica y social de los Menores Extranjeros No Acompañados en Andalucía. Available in: [https://www.savethechildren.es/sites/default/files/imce/docs/proteccion\\_juridica\\_menores\\_ext\\_ranjeros\\_no\\_acompanados\\_andalucia.pdf](https://www.savethechildren.es/sites/default/files/imce/docs/proteccion_juridica_menores_ext_ranjeros_no_acompanados_andalucia.pdf). Last checked on 24.02.2018

<sup>4</sup>COUNCIL OF THE EUROPEAN UNION. **Directive 2011/95/EU of the European Parliament of the Concil.** 2011. Available in: <http://eur-lex.europa.eu/legal-content/PT/TXT/HTML/?uri=CELEX:32011L0095&from=ES>. Last checked on 03.03.2018.

<sup>5</sup> UNITED NATIONS. Universal Declaration of Humans Wrights, 1948. Available in: <http://www.un.org/en/universal-declaration-human-rights/>. Last Check on 03.03.2018.

<sup>6</sup> PIOVESAN, Flávia. **Direitos humanos e o Direito Constitucional Internacional.** Temas de Direitos Humanos, 1998. p. 95. São Paulo, Brasil: Max Limonad,1998.

Therefore, in order to verify the current Community legislation on refugee children, it is necessary to examine before the steps being taken to build the common European asylum policy since although the specifications of this common policy are not exclusive for the smaller migrants, they also are applicable to this especially vulnerable collective.

In the first instance, it is worth noting the construction of a common asylum policy, based on tradition-valid, versatile pillars.

In this process, the Treaty of Lisbon materializes itself as a unifying document in a manner that it guides its Signatory States towards standards common to all.

The requirements of the Treaty of Lisbon for the common European asylum system include: uniform asylum and subsidiary protection status, common system of temporary protection, common procedures for granting or withdrawing statuses, common rules relating to the conditions of reception and to the cooperation of third countries, besides common mechanisms to define the Member State that will be responsible for the application for asylum.

The enlightened provisions of Article 3 of the Treaty on European Union include, as a duty of the Member States "to provide their citizens with an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured, accordingly with appropriate measures on control at the external border, asylum and immigration (...).<sup>7</sup>

In this way, the Treaty on European Union directs a series of measures and principles that should be adopted in favor of the common asylum policy. Among them, we highlight the regency of the solidary initiative and of the sharing in matters regarding to the responsibilities of the Member States in all socioeconomic scopes.

In our opinion, one of the most important documents on the basis of the construction of this common policy is the Refugee Statute, formalized in the Geneva Convention and its additional protocol of 1967, being it also of great importance to note the Treaty of European Union, the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights.

It is important, therefore, that we go through a brief analysis of these instruments, which contains normative provisions that served as guiding principles for the construction of this common policy, which as such said before, although not addressed to refugee children and adolescents apply to them.

## **Refugee Statute**

To begin with, it should be noted, again, that the Geneva Convention materializes itself as a parameter of conformity of the actions related to the procedures involving the refugees in the

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<sup>7</sup> European Union Treaty - Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - Consolidated version of the Treaty on European Union - Protocols - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 - Tables of equivalences. Available in: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT>. Last check on 03.03.2018.

European Union, defining guidelines for the implementation of the common asylum policy adopted by member countries.

This document defines how refugees declared by definition, that is to say, as Article 1 (A) (2) of this Convention clarifies: "Any person who, rightly fearing persecution by reason of race, religion, nationality, membership of a certain social group or political opinion, is outside the country of which he or she is a national and can not, or because of that fear, does not wish to seek the protection of that country; or if he is not a national of the country in which he was habitually resident, is unable or, because of such fear, he does not wish to return"<sup>8</sup> relate to the public authorities of the Contracting State which granted them asylum.

It is important to highlight that the wording is subsequent to the 1967<sup>9</sup> additional protocol, since through this protocol signed at the New York Convention the previously existing geographical and temporal limitations were removed from the text of the statute, expanding its scope.

The Geneva Convention, through the Statute, brought important principles to the normative scenario, as the principle of nonrefoulement, which is the prohibition of the return of the foreigner to his country of origin, if such expulsion is a risk to the refugee's life. Also, the application of criminal sanctions to irregular migrants who enter the territory of the negotiating nation with the purpose of putting themselves in safe custody in their country of origin is still prohibited.

It is also a responsibility of the Contracting State to grant the refugee the same favorable conditions as would be accorded to a regular foreigner, with the obligation to facilitate the naturalization of the foreigner as soon as possible. This fairness of treatment is based on the principle exalted by the Convention as regards the treatment of migrants. On the other hand, it is the duty of the migrant to comply with public ordinances regarding the maintenance of social harmony, which apply to all citizens of the country.

This way, it essential to emphasize that this document classifies the refugee issue as a problem that has "social and humanitarian" character, what makes this perspective to be adopted by subsequent conventions within the framework of the European Community. "It is useful to see how the provisions of the Refugee Convention relate to those of other conventions. Certain benefits are peculiar to the status of refugees. In addition to the provisions concerning personal status, the rule of *nonrefoulement*, and the stipulations for the Convention travel document, this is also true of the exemption from reciprocity and the provision for administrative assistance. Provisions similar to those of Articles 7 (exemption from reciprocity), 12 (personal status), 25 (administrative assistance), 28 (travel documents), and 33 (*nonrefoulement*) of the Refugee Convention are not found in any other Convention relating to the Status of Stateless Persons (1954), which is in fact

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<sup>8</sup> UNITED NATIONS. Convention Relating to the Status of Refugees, July 1951. Available in: [http://www.acnur.org/t3/fileadmin/Documentos/portugues/BDL/Convencao\\_relativa\\_ao\\_Estatuto\\_dos\\_Refugiados.pdf](http://www.acnur.org/t3/fileadmin/Documentos/portugues/BDL/Convencao_relativa_ao_Estatuto_dos_Refugiados.pdf). Last Check on 02.26. 2018.

<sup>9</sup> UNITED NATIONS. Protocol Relating to the Status of Refugees, January 1967. Available in: <http://www.dhnet.org.br/direitos/sip/onu/asilo/prot67.htm>. Last Check on 02.26. 2018.

modeled on the Refugee Convention, but which does not contain any provision on *nonrefoulement*.<sup>10</sup>

### **The European Convention on Human Rights**

The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights does not have in its normative body any specific content on refugee or refugee children although their articles are invoked to ensure that human rights are respected.<sup>11</sup>

Regarding the present study, it is worth noting the prediction contained in article 3: “No one shall be subjected to torture or inhuman or degrading treatment or punishment.”<sup>12</sup>

Through the analysis of this article, the European Court of Human Rights held that the determination of the return of a migrant to his country of origin when this return can cause him life risk resembles torture, determination that makes this practice harmful to the inherent human rights of the migrant.

“The prohibit provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to article 3 if removed for another state, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nation 1951 Convention on the Status of Refugees.”<sup>13</sup>

### **Charter of the Fundamental Rights of the European Union**

The Charter of the Fundamental Rights of the European Union, provides, its article 24 provisions concerning the rights of the child: 1. Children shall have the right to such protection and care as is necessary for their well being. They may express their views freely. Such views shall be taken into consideration on matters that 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

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<sup>10</sup> GRAHL- MADSEN, *Atle. Refugees and Refugee Law in a World in Transition*, 3 MICH . J. INT’LL. 65 (1982). Available in: <https://repository.law.umich.edu/mjil/vol3/iss1/4/> Last checked on 02.24.2018.

<sup>11</sup> ANNONI, Danielle; VALDES, Carolina. *O Direito Internacional dos Refugiados e o Brasil*. Curitiba, Juruá, 2013. P. 119.

<sup>12</sup> European Convention on Human Rights, 1950. Available in: [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf) Last check on 03.03.2018

<sup>13</sup> THE EUROPEAN COURT OF HUMAN RIGHTS. *Case of Chahal v. The United Kingdom*. 1996. Available in: <http://www.refworld.org/pdfid/3ae6b69920.pdf> Last check in 03.03.2018.

on a regular basis a personal relationship and direct contact with both her parents, unless that is contrary to his or her interests.<sup>14</sup>

These norms emphasize the need for the observance of the best interests of the child and her right to be in the company of her parents and because of such measure the mentioned norms are especially relevant for migrant children.

#### **IV-Structural Elements of the European Common Asylum System**

According to the official website of the European Parliament<sup>15</sup>, the Common European Asylum System has four directives and two regulations, which are implemented as functional parameters for the effectiveness of this system. We will now go through a brief examination of these elements, according to Nuno Piçarra.<sup>16</sup>

##### **Directives**

The first directive to be commented is the Directive 2011/95 / EU called by the teacher of Directive of Qualification, which aims to clarify the standard requirements and conditions of attendance needed by migrants in order to benefit from international protection. In this way, the Qualification Directive establishes common concepts and criteria for dealing with eligibility for international protection. These are: 1: "need for protection arising in loco", 2: "origin of persecution or serious offense", 3: "agents of protection ", 4: " internal protection "and 5: " acts and reasons of persecution".<sup>17</sup>

The Directive of Temporary Protection, corresponding to Directive 2001/55/EC, has as its objective establish measures to ensure a balanced distribution of burdens to the Member States, in accordance with the principle of solidarity, in the event of an intense flow of migrants. In this way, it aggregates interdependent norms in order to maintain the coherence and effectiveness of the European Common Asylum System according to the need of immediate protection, consequently, avoiding the risk of secondary movements.

The Directive 2013/32/EU, named as the Directive of Procedures by the teacher, intendeds to complement the Qualification Directive as it seeks to create common conditions for the functioning of the last, by instituting equivalent procedures for the Union in what refers to asylum acts. It also looks forward to regulate secondary flows, requiring the formation of multi-purpose

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<sup>14</sup> The Charter of the Fundamental Rights of the European Union, 2000. Available in <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>. Last check on 03.03.2018.

<sup>15</sup> European Parliament, 2017. [http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU\\_4.2.2.html](http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_4.2.2.html). Last check on 03.03.2018

<sup>16</sup> PIÇARRA, Nuno. **The European Union and the “unprecedented migratory and refugee crisis”**: brief chronicle of a rupture of the Common European Asylum System. 2016. Available in: [http://www.scielo.mec.pt/scielo.php?script=sci\\_arttext&pid=S2183-184X2016000200001](http://www.scielo.mec.pt/scielo.php?script=sci_arttext&pid=S2183-184X2016000200001). Last Check on 03.03.2018.

<sup>17</sup> PIÇARRA, Nuno. **The European Union and the “unprecedented migratory and refugee crisis”**: brief chronicle of a rupture of the Common European Asylum System. 2016. Available in: [http://www.scielo.mec.pt/scielo.php?script=sci\\_arttext&pid=S2183-184X2016000200001](http://www.scielo.mec.pt/scielo.php?script=sci_arttext&pid=S2183-184X2016000200001). Last Check on 03.03.2018.

principles for the adequacy of third countries as worthy of offering asylum. Lastly, the Directive of Reception, which corresponds to the Directive 2013/33/EU, seeks to harmonize and equate the conditions of reception of the applicant refugees in the Member States in all their extension, including transit zones, borders and territorial waters. Once the standardization is obtained, secondary movements that originate from inequalities are avoided. The Directive, therefore, establishes a set of principles to be ensured by the Member States with regard to their implementation by applicants, they are: the principles of free movement and residence, family unity, regulation of schooling, education of minors, access to the labor market and material reception conditions. In addition, the Directive of Reception identifies the classification of applicants considered to be vulnerable, among which are included, among others, minors, unaccompanied children and single-parent families, so that they can enjoy a specific reception for their needs.

## **Regulations**

The purpose of the Dublin III Regulation is to establish guidelines and norms for the definition of which Member State will have the designated responsibility for examining the application for asylum of each applicant refugee in order to streamline this process and organize it effectively, thus, avoiding the increase of the number of the transit applicants across the EU and double asylum applications.

In addition, the referred document addresses principles for designating asylum in a given country, taking into account the factors of the family unit, the first country entered by the applicant and the residence authorization and / or visas.

Therefore, in the first instance it is taken into account if the applicant has relatives in one of the EU countries, if this is the case and is compatible with the will of the migrant, the country where the relative(s) reside(s) will be responsible for examining the asylum application. Otherwise, the rule that the first European country in which the refugee joins will have responsibility for the immigration application prevails. Another important factor is the possession of authorization of residences or visas previously granted by one of the EU Member States, in which case the country of so will proceed with the request.

In this way, EU Member States favor applicants as the above criteria aim to provide greater comfort and agility to the processes regarding the migrant in transit.

The purpose of the Eurodac Regulation, known as the Eurodac system, is to facilitate the application of the provisions established in the Dublin III Regulation. Its operation is based on the comparison of fingerprints of applicants with prior data from the European Union's central system, with the objective to check if there are not multiple applications in different countries and to grant that the asylum to illegal migrants and potential terrorist agents do not occur.

The website still mentions as legal instruments in force under the Common European Asylum System two decisions of the European Council, which are named the EU Decision 2015/1601 and 2015/1523, both of which date from September 2015 and establish in favor of Greece and Italy provisory measures of international protection through which Member States undertake to support the relocation of refugees arriving in these countries, who are known to be the main countries that receive the numerous flow of irregular migrants.



## V- United Nations Convention on the Rights of the Child

Approved by the General Assembly of the United Nations on November 20, 1989, the United Nations Convention on the Rights of the Child presents itself as a major landmark in the construction of the rights of minors, what makes itself as a relevant international legal instrument. The Convention recognizes in its preamble "that in all countries of the world there are children living in particularly difficult conditions and that special attention must be given to these children", highlighting "the importance of international cooperation for the improvement of living conditions of children in all countries."<sup>18</sup>

The Convention requires Member-States to take appropriate measures to prevent any discriminatory criteria against children (Article 2), provides elements for the so-called "best interest of child" (Article 3); establishes the obligation of the Member-States to respect the responsibilities, rights and obligations of parents to provide appropriate direction for the child's exercise of the rights recognized in the Convention in a manner consistent with the development of their capacities (art. 5), establishes the child's rights to life article 6), to birth registration, name and nationality, to know their parents and to be cared for by them (article 7), to their identification (article 8), the right not to be separated from their parents, to maintain personal relationships and direct contact with their parents, to know their location (Article 9), the right to express opinions on issues that concern them (Article 12), to freedom of expression and information (Article freedom of association (Article 15), privacy (Article 16), to information (Article 17), to protection against violence and abuse (Article 13), to freedom of thought, belief and religion (Article 14), freedom of association 18), to the protection and assistance of the State (Article 19), to the adoption (Article 20 and 21) to protection in case of becoming a refugee (Article 22), to special care in case of disability (Article 23), to health (Articles 24 and 25), to social security assistance (Article 26), to an adequate standard of living (Article 27), to education (Articles 28 and 29), to exercise of rights as ethnic / religious and linguistic minorities (Article 30), to leisure, cultural and artistic life (Article 31), to protection against economic exploitation (Article 32), to protection against drugs (Article 33), to protection against sexual exploitation (Article 34), to protection against kidnapping, sale and trafficking (Article 35), to protection against exploitation harmful to their well-being (Article 36), to protection against torture, the prohibition of the death penalty and life imprisonment (Article 37); to humanitarian protection in times of war (Article 38), to physical and psychological recovery (Article 39), and to dignified treatment in case of criminal prosecution (Article 40).<sup>19</sup>

Regarding unaccompanied migrant children in specific, there are four principles established in articles 2, 3, 6 and 12 that we can consider as of primordial importance:

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<sup>18</sup> BRASIL. DECRETO No 99.710, de 21 de novembro de 1990. **CONVENÇÃO SOBRE DIREITOS DA CRIANÇA**. Available in: < [http://www.planalto.gov.br/ccivil\\_03/decreto/1990-1994/D99710.htm](http://www.planalto.gov.br/ccivil_03/decreto/1990-1994/D99710.htm) >. Last checked on 03.03.2018

<sup>19</sup> DOLINGER, Jacob. **Direito Internacional Privado- A criança no Direito Internacional**. Rio de Janeiro: Renovar, 2003, p. 95/97.

- The protection of the child against any and all kinds of discrimination.
- The prevalence of the best interest of the child in all instances, whether in the institutional, public or private sphere.
- The recognition and zeal for the right to life of the child, ensuring the maximum development of the migrant minor.
- The child's freedom of expression and self-judgment regarding issues concerning him or her. Therefore, it ensures that the opinions of the minor will be listened to and taken into account.

### **Non-discrimination**

The principle of non-discrimination is the materialization of the principle of equality, which values the maxim that all minors should have access to the same opportunities, regardless of their sex, religion, age, race and nationality. As such, unaccompanied minors should receive the same treatment as the local minor in the host Member State, which is guaranteed above their irregular immigrant and asylum seeker status.

### **The Best Interests of the Unaccompanied Minor**

The Committee on the Rights of the Child<sup>20</sup>, regarding this principle, provides a series of criteria for the beneficial evaluation of the best interest of the unaccompanied minor, a balance is sought between the minor's opinion, his identity, the preservation of the family environment, the maintenance of relationships, the care, protection and safety of the minor, his right to health and education.

In this way, once this balance is reached, the committee identifies five possible ordinations of long lasting solution. They are: family reunification, return to the country of origin, integration into the host country, international adoption or resettlement in a third country.

### **The Right to Life and to Development**

It guarantees the right to life through the implementation of the human rights that refer to it. In the case of unaccompanied migrant minors this right is violated by the traffic of human beings, violence and sexual exploitation, so therefore, it turns out to be the duty of the host Member State to protect the minor against such issues and, if the child is a victim, to provide all the necessary assistance so that it can recover and normally develop.

Regarding the development of the child, the hosting Member State must provide an adequate standard of living to enable access to health, education, recreation, and sport, which must be accompanied by measures of readiness such as the appointment of tutors and the identification of possible risks to which minors are subject, in order to avoid them.

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<sup>20</sup> COMMITTEE ON THE RIGHTS OF THE CHILD. **General Comment n 6 (2005): on treatment of unaccompanied and separated children outside their country of origin.** 7-10. Available in: < <http://www.unhcr.org/protection/migration/4bf687729/convention-rights-child-general-comment-6-2005-treatment-unaccompanied.html>>. Last checked on 03.03.2018.

## **The Right to Participation**

The right to participation refers to the minor's guarantee to be properly informed, taken in consideration, consulted and listened in matters that concern their personal scope such as awareness of their rights, guardianship and legal representation. Accordingly, it is the duty of the hosting Member State to provide all conditions for the minor to be understood, including interpreters.

## **VI-Resolution of the European Union's Council on the 26th July of 1997**

The European regulations that specifically concern the unaccompanied migrant children are few, despite this, however, the Resolution of the Council of the European Union of 26 June 1997 aims to "establish guidelines for the treatment of unaccompanied minors as regards their reception, stay, return and, in the case of asylum seekers, the implementation of all and every applicable procedures."<sup>21</sup>

In this way, this document declares a series of minimum guarantees to be materialized throughout the possible procedures involving the minor. Primarily, the convenience of determining the child's identity as quickly as possible is ensured, so that it turns out to be possible that the search for family members is expedited. In addition, it determines their right to receive any and all necessary protection, as well as basic and medical care, according to the law of the country, even if the child has to remain at the border zone.

The minor also has the right to have designated representative who will take care of his needs.

It is of paramount importance the ordination that a Member State can only allow the return of the unaccompanied minor without his necessary documentation to their country of origin or to a third country if they prove that those countries can provide the necessary conditions for the proper reception and care of the child, even if this option is contrary to family reunification.

In any case, the "Directive of Return" establishes that unaccompanied minors "will only be detained as a measure of last resort and for the shortest and most adequate period possible,"<sup>22</sup> however, if this occurs, minors have the right to education, participation in recreational activities appropriate to their age and accommodation during the meantime.

## **VII-Action Plan on the Unaccompanied Children 2010-2014**

The Action Plan on Unaccompanied Minors was announced in 2009 by the European Commission, that, conscious of the need for greater coherence and greater international cooperation

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<sup>21</sup> COUNCIL OF THE EUROPEAN UNION. 1997. **Council Resolution of 26 June 1997 on Unaccompanied Minors Who Are Nationals of Third Countries (97/C 221/03)** [http://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=CELEX:31997Y0719\(02\)&from=PT](http://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=CELEX:31997Y0719(02)&from=PT). Last check on 03.03.2018.

<sup>22</sup> COUNCIL OF THE EUROPEAN UNION. 2008. **Directive 2008/115/EC of the European Parliament and of the Council**. Available in: <http://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=CELEX:32008L0115&from=PT> Last check on 03.03.2018

on the regulation concerning unaccompanied migrant minors, projected this document as plan with binding and evolving character.

Thus, the plan is based on the principle of supremacy of the best interest of the minor and the impossibility of recognizing the return of the minor to the country of origin as the only long lasting alternative, turning out to be necessary to take these two maxims into account throughout any and every procedure involving the minor.

The document in vogue is structured in four main sessions, they are: Data; Prevention of unsafe migration and trafficking in human beings; Reception and procedural safeguards in the European Union and The search for durable solutions

## **Data**

According to the Commission, it is first of all necessary for Member States and for the countries of origin to combat the scarcity of accurate data on unaccompanied minors entering European Union's Member States in order to guarantee the effectiveness of the current procedures. This scarcity is due to the fact that Member States are only obliged to collect information on minors if they have already applied for asylum, which is not the case for most migrants.

Therefore, the Action Plan aims to improve these statistics so that they are worthy of use in future European Council projects.

## **Prevention of Unsafe Migration and Trafficking in Human Beings.**

This session of the Plan aims to seek, together with the countries of origin of the minors, ideas that are capable of preventing the migration of unaccompanied minors towards the European Union. Thus, the document identifies the main causes of migration, which need to be defended through international cooperation. They are: dangerous situations harmful to children and the lack of resources to build a prosperous future in the country of origin.

The Commission therefore proposes to raise collective awareness of the issues above in order to provide greater protection to potential victims of child trafficking.

Another measure proposed by the Commission is to increase the amount of provided information concerning the risks of immigration to European Union's countries, as most migrant minors are not aware of the complications they may face during the journey and arrival in the Member State of destination.

## **Reception and Procedural Guarantees in the European Union**

The Commission emphasizes in this session the need of the Member- States to provide protection and immediate care to the unaccompanied minor as soon as their presence is detected. In this way it is no longer possible to initiate procedures only if conditioned to the asylum application.

In addition, the document identifies administrative lacks regarding the appointment of the representatives of the minors, the wide and diffused interpretation of their duties and the communication of the guarantees of minors, so that they can exercise their rights and use mechanisms that favor them.

The Commission also expresses significant concern about the large number of missing unaccompanied minors who should be under the responsibility of the national authorities of the Member State. Facing the above-mentioned difficulties, the Plan recommends, therefore, the introduction of more efficient control mechanisms for this especially vulnerable migrant public in order to provide greater protection to them, recommending as well the adoption of more embracing and clear regulations regarding reception procedures.

### **The Search of Long Lasting Solutions**

As already mentioned in this article, the Plan emphasizes the need for the prevalence of the best interest of the unaccompanied minor, which should be compatible with one of the following long lasting solutions, which should be defined in less than six months from the arrival of the minor in the territory of the Member-State, they are: the return to the country of origin and the reintegration to the same; the granting of international protection or other legal mechanism that allows the minor to effectively integrate into the hosting Member State and also the resettlement in a third country.

### **VIII- Conclusions Regarding the Validity of the Action Plan on the Unaccompanied Children 2010-2014.**

The implementation of the Plan has made it possible to conclude that the issue of unaccompanied migrant minors towards the Member States of the European Union is a timeless matter requiring clarified regulations and universal measures.

From the general analysis made, it was observed that the collection of data remains scarce and obtuse. The Commission therefore suggests that the European Council should monitor data on minors entering the European Union, accompanying those who return to their home country, those who leave the reception centers instead of concentrating the collection of data on only those who are entering the Member-States territory.

With regard to the prevention of irregular migration and trafficking in human beings, the Commission suggests to the European Council that this organ should organize training programs to streamline the location of the victims and to better inform families and minors about the risks of migration in order to reduce the flow of unaccompanied children towards the European Union.

### **IX- Analysis of the Efficiency of the European Common Asylum System towards the unaccompanied migrant children.**

The report Children in crisis: unaccompanied migrant children in the EU examines the treatment granted to unaccompanied children in the Member States and identifies four main problems that are the roots of the failure of the European Common Asylum System. They are: the culture of disbelief and distrust towards unaccompanied migrant children, the reluctance of the Member States to be supportive and to accept the responsibility of the unaccompanied children, the

precarious implementation of existing policies and legislation; the loss of confidence of the unaccompanied migrant children.

At first glance, it is noted an exacerbated mistrust of border officials and immigration officers towards minor asylum-seekers in the sense that those children would be lying about their age in order to receive benefits from family reunification.

This is a sensitive issue because of the fact that the first procedure undertaken for the minor to enter a Member State is their identification, which often becomes bureaucratic because many children have their documents proving their origin and age damaged and / or lost during the journey, so it is necessary to use alternative methods of determining age.

However, the methods used such as "bone density and dental examinations are invasive and extremely humiliating,"<sup>23</sup> and were considered imprecise by experts involved in the research mentioned in the report. It is worth to mention that the EU Member States' disregard for assuming and safeguarding responsibility for unaccompanied migrant children is noted in a series of actions. The main attitude that unmasks this administrative loophole is the allowance of the entrance of the minors into a Member State's territory without taking into account their subsequent needs or, in most cases, to leave them in transit through the border areas of neighboring countries, fact that also reveals the lack of solidarity and the divergence of interests between Member States, a sign that solidifies the affirmative that the 'reality is the fragmentation'<sup>24</sup> of the desired homogeneous European policy on asylum.

One of the more concrete evidence of this reluctance and neglect is the following example cited in the report, which is a common practice in Belgium, where the authorities delay the initial registration procedures while encouraging minors to seek asylum in other Member-States, arguing that in those other countries the procedures would be faster. In this context, the report points out that there is a lack of cooperation structures between Member States' authorities regarding good care of minors.

Finally, the report states that the administrative inconsistencies and failures of European Union protection policies have generated a great loss of credibility and confidence among unaccompanied migrant children concerning the rules and guidelines that would protect them. Thus, a large number of these minors avoid registering, motivated by the fear of being kept in detention or being forced to return to transit countries even though they were already in their final destination.<sup>25</sup>

As a result, the Member States' notable reluctance to take responsibility for minors and their failure to implement European legislation lead the children to decide that it will not be in their interest to seek protection through official EU channels.<sup>26</sup>

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<sup>23</sup> United Kingdom Parliament House of Lords European Union Committee. Children in crisis: unaccompanied migrant children in the EU. (2016). p.15. Available in: <https://publications.parliament.uk/pa/ld201617/ldselect/lddecom/34/34.pdf> Last Check on 03.03.2018

<sup>24</sup> *ibidem*, p. 24

<sup>25</sup> *ibidem*, p. 39

<sup>26</sup> *ibidem*, p. 40

In addition, there are several reports that children's asylum conditions are precarious. Our document of study gathered witnesses that minors are accommodated in emergency rooms "without reliable access to food, water, sanitation, and information from responsible institutions."<sup>27</sup> From the gathering of witnesses by the Report in question, it is clear that the hesitation of minors in cooperating with European legal institutions is understandable.

## **X-Conclusion**

When analyzing the European Union's guidelines for unaccompanied migrant children, we can note in the first instance a major effort by the European Council on creating and implementing not only a common asylum system, but also legislation and treatment procedures to the minors who enter the Member States without the company of an adult legally responsible for them.

In this way, we note the validity of the European Common Asylum Policy, which is built on legal foundations that govern the European Union as a whole. In a general manner, the Common European Asylum System seeks to provide basic guarantees for migrants, but it is noted that the directives on those guarantees are subject to wide interpretation and are not differentiated between unaccompanied minors and adults migrants, which gives the Member States the freedom to act in ways that favors themselves.

Another point that is clear of readiness in this study is the fact that institutional material directed specifically to unaccompanied migrant children is scarce. Then, it turns out to be necessary to adopt, as a basis for procedures involving the minors, legal mechanisms that are not inherent exclusively to the European Union. Between those, we highlight the United Nations Convention on the Rights of the Child, which, although having universal character, does not pay close attention to the double condition of age and the foreignness of the unaccompanied minors.

Furthermore, several Member States have reservations to the Convention, which breaks the homogeneity proposed by the European Common Asylum System. However, over the last few years, it has been noted that the European Council has tried to compensate the scarce specific legislation for unaccompanied minors through Directives and Action Plans mainly, but also with the support of additional resolutions and protocols.

This initiative of the European Union authorities can be interpreted as a move to better address the needs of migrant minors and to standardize the treatment offered to them by the Member States.

Finally, it is concluded that the issue of unaccompanied migrant minors is a timeless matter that urgently draws the attention of the European authorities, who, despite all their efforts, have not yet reached the full and effective care of these vulnerable children.

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<sup>27</sup> United Kingdom Parliament House of Lords European Union Committee. Children in crisis: unaccompanied migrant children in the EU. (2016). p.42. Available in: <https://publications.parliament.uk/pa/ld201617/ldselect/lducom/34/34.pdf> Last Check on 03.03.2018.

## REFERENCES

ANNONI, Danielle; VALDES, Carolina. O Direito Internacional dos refugiados e o Brasil. Curitiba, Juruá, 2013. P. 119.

BRASIL. DECRETO No 99.710, de 21 de novembro de 1990. Convenção Sobre os Direitos da Criança. Available in: < [http://www.planalto.gov.br/ccivil\\_03/decreto/1990-1994/D99710.htm](http://www.planalto.gov.br/ccivil_03/decreto/1990-1994/D99710.htm) >. Last checked on 03.03.2018.

CASTRO, María Cabeza. Los menores extranjeros no acompañados en el proceso judicial: el marco jurídico del Derecho Internacional Público, p. 10. Available in: <https://repositorio.comillas.edu/xmlui/bitstream/handle/11531/680/TFG000575.pdf?sequence> Last checked on 02.02.2018.

COMMITTEE ON THE RIGHTS OF THE CHILD. General Comment n 6 (2005): on treatment of unaccompanied and separated children outside their country of origin. Available in: < <http://www.unhcr.org/protection/migration/4bf687729/convention-rights-child-general-comment-6-2005-treatment-unaccompanied.html> >. Last checked on 03.03.2018.

COUNCIL OF THE EUROPEAN UNION. 1997. Council Resolution of 26 June 1997 on Unaccompanied Minors Who Are Nationals of Third Countries (97/C 221/03) [http://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=CELEX:31997Y0719\(02\)&from=PT](http://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=CELEX:31997Y0719(02)&from=PT). Last check on 03.03.2018.

COUNCIL OF THE EUROPEAN UNION. 2008. Directive 2008/115/EC of the European Parliament and of the Council. Available in: <http://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=CELEX:32008L0115&from=PT> Last check on 03.03.2018.

COUNCIL OF THE EUROPEAN UNION. Directive 2011/95/EU of the European Parliament of the Council. 2011. Available in: <http://eur-lex.europa.eu/legal-content/PT/TXT/HTML/?uri=CELEX:32011L0095&from=ES>. Last checked on 03.03.2018.

DOLINGER, Jacob. Direito Internacional Privado- A criança no Direito Internacional. Rio de Janeiro: Renovar, 2003.

EUROPEAN UNION TREATY. Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - Consolidated version of the Treaty on European Union - Protocols - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 - Tables of equivalences. 2007. Available in: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT>. Last check on 03.03.2018.

EUROSTAT. Asylum applicants considered to be unaccompanied minors almost 90 000 unaccompanied minors among asylum seekers registered in the EU in 2015, 87/2016, 2 May 2016. Available in: <http://ec.europa.eu/eurostat/documents/2995521/7244677/3-02052016-AP-EN.pdf> Last checked on 03.01.2018



GRAHL- MADSEN, Atle. Refugees and Refugee Law in a World in Transition, 3 MICH. . J. INT’LL. 65 (1982). Available in: <https://repository.law.umich.edu/mjil/vol3/iss1/4/> Last checked on 02.24.2018.

PIÇARRA, Nuno. The European Union and the “unprecedented migratory and refugee crisis”: brief chronicle of a rupture of the Common European Asylum System. 2016. Available in: [http://www.scielo.mec.pt/scielo.php?script=sci\\_arttext&pid=S2183-184X2016000200001](http://www.scielo.mec.pt/scielo.php?script=sci_arttext&pid=S2183-184X2016000200001). Last Check on 03.03.2018.

PIOVESAN, Flávia. Direitos humanos e o Direito Constitucional Internacional. Temas de Direitos Humanos, p. 95. São Paulo, Brasil: Max Limonad, 1998.

SAVE THE CHILDREN. La protección jurídica y social de los Menores Extranjeros No Acompañados en Andalucía. Avalaible in: [https://www.savethechildren.es/sites/default/files/imce/docs/proteccion\\_juridic\\_a\\_menores\\_extranjeros\\_no\\_acompanados\\_andalucia.pdf](https://www.savethechildren.es/sites/default/files/imce/docs/proteccion_juridic_a_menores_extranjeros_no_acompanados_andalucia.pdf). />. Last checked on 24.02.2018

THE EUROPEAN COURT OF HUMAN RIGHTS. Case of Chahal v. The United Kingdom.1996. Available in: <http://www.refworld.org/pdfid/3ae6b69920.pdf> Last check in 03.03.2018.

United Kingdom Parliament House of Lords European Union Committee. Children in crisis: unaccompanied migrant children in the EU. (2016). p.42. Available in: <https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/34/34.pdf> Last Check on 03.03.2018.

UNITED NATIONS. Convention Relating to the Status of Refugees, July 1951. Available in: [http://www.acnur.org/t3/fileadmin/Documentos/portugues/BDL/Convencao\\_relativa\\_ao\\_Estatuto\\_dos\\_Refugiados.pdf](http://www.acnur.org/t3/fileadmin/Documentos/portugues/BDL/Convencao_relativa_ao_Estatuto_dos_Refugiados.pdf). Last Check on 02.26. 2018.

UNITED NATIONS. Guideless for The Alternative Care of Children. February 24, 2010. Available in: [https://www.unicef.org/protection/alternative\\_care\\_Guidelines-English.pdf](https://www.unicef.org/protection/alternative_care_Guidelines-English.pdf)>. Last checked on 11.6.2017.

UNITED NATIONS. Protocol Relating to the Status of Refugees, January 1967. Available in: <http://www.dhnet.org.br/direitos/sip/onu/asilo/prot67.htm>. Last Check on 02.26. 2018.

UNITED NATIONS. Universal Declaration of Humans Wrights, 1948. Available in: <http://www.un.org/en/universal-declaration-human-rights/>. Last Check on 03.03.2018