



INTERNATIONAL
COMMISSION
OF JURISTS

Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC)

Response by the International Commission of Jurists

February 2012

1. Introduction

The International Commission of Jurists (ICJ) welcomes the publication of this Green Paper on the right to family reunification of third-country nationals living in the European Union, and the initiative of the European Commission to consult widely on the issue of family reunification. This initiative has the potential to be a very positive step in the direction of bringing the Council Directive 2003/86/EC (hereinafter, “the Family Reunification Directive”) in line and up to date with international human rights law.

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

In this response, the ICJ will answer certain of the questions, which relate to its expertise on international law, and in particular international human rights law and international refugee law. It will not deal with statistics and factual findings, which it believes other sources are better suited to provide.

2. The European Union and international human rights law

Family reunification and the laws that regulate it must be devised and implemented in full compliance with international human rights law. The relevant framework in this respect consists of the *Treaty on the European Union* (TEU) and the *Treaty on the Functioning of the European Union* (TFEU), and in particular Member States' obligations under the *Charter of Fundamental Rights of the European Union* (EU Charter), as well as their obligations under the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) and international law treaties.

Discussion within the EU of family reunification standards and procedures must take place in the context of the international law obligations which already apply to EU Member States, as well as the associated jurisprudence of international courts and tribunals, and other standards which have been accepted and supported by the EU and its Member States. In terms of treaty standards, the *International Covenant on Civil and Political Rights* (ICCPR), the *Convention on the Rights of the Child* (CRC) and the European Convention on Human Rights (ECHR) contain provisions binding upon all EU member States. Article 6 TEU provides for binding legal force to the provisions of the EU Charter, including Articles 7 (the right to respect family life) and Article 24 (children rights) which have a particular importance for the issue of family reunification.

The ICJ also recalls that the European Council, in the Stockholm Programme, has affirmed that "[t]he Union must ensure fair treatment of third country nationals who reside legally on the territory of its Member States. A more vigorous integration policy should aim at granting them rights and obligations comparable to those of citizens of the Union. This should remain an objective of a common immigration policy and should be implemented as soon as possible, and no later than 2014."¹ It is in this context that it has asked the Commission to consider whether to reform the Family Reunification Directive.

The European Pact on Immigration and Asylum also stated that, "[i]n line with the values that have consistently informed the European project and the policies implemented, the European Council solemnly reaffirms that migration and asylum policies must comply with the norms of international law, particularly those that concern human rights, human dignity and refugees."²

3. International human rights law and standards on family reunification

The issue of family reunification has been dealt in various ways by international law instruments. Some of them consider it as a self-standing right. Others treat it as a corollary to the right to enjoy a family life and/or, in the case of children, from the right not to be separated from one's family and the principle of the best interest of the child.

¹ Council of the European Union, "The Stockholm Programme – An open and secure Europe serving and protecting the citizens", EU Doc. 16484/1/09 REV 1 JAI 866 + ADD 1, 2 December 2009, para. 6.1.4.

² European Pact on Immigration and Asylum, p. 3.

A holistic approach sees family reunification as an integral element of the obligation of States to respect, protect and fulfil the right to respect for family life. In the case of children, the obligations of international law related to family reunification are derived from the child's right to family life strengthened by the right of children not to be separated arbitrarily from their parents (Article 9 CRC, and Article 24.3 EU Charter) and the principle that the best interests of the child must be the basis in the assessment of any decision related to the child (Article 3 CRC, and Article 24.2 EU Charter).

3.1. The right to a family life

The *Universal Declaration of Human Rights* (UDHR) provides that the family "is entitled to protection by society and the State",³ a principle also recalled in Article 33.1 of the EU Charter: "The family shall enjoy legal, economic and social protection". In refugee law, the *Final Act of the Conference of Plenipotentiaries* which adopted the *Geneva Refugee Convention* proclaimed that "the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee".⁴ The right to respect for family life is enshrined in Article 8 of the ECHR, Article 17 of ICCPR, and Article 7 of the EU Charter. All of these instruments are binding upon the EU Member States. The EU Charter is binding directly on EU institutions.

The circumstances in which the right to respect for family life gives rise to obligations in respect to family reunification have been considered most comprehensively by the European Court of Human Rights.⁵ While the Court has emphasised that Article 8 does not require States to respect a choice of matrimonial residence or authorise family reunion in their territory,⁶ it has affirmed that there is a positive obligation on the State of destination to facilitate family reunification on its territory where there is an **insurmountable objective obstacle** preventing the migrant already within its

³ Article 16.3 UDHR; The same principle of human rights law is enshrined in Article 23.1 ICCPR; Article 10.1 ICESCR; Paragraph X, Preamble, CRPD; Article 16 ESC(r). The principle is also recognised by the UN General Assembly in, *inter alia*, resolutions No. 49/182, UN Doc. A/RES/49/182, 2 March 1995, Article 2; No. 50/175, UN Doc. A/RES/50/175, 27 February 1996, Article 2; No. 51/89, UN Doc. A/RES/51/89, 7 February 1997, Article 2; No. 52/121, UN Doc. A/RES/52/121, 23 February 1998, Article 2; No. 53/143, UN Doc. A/RES/53/143, 8 March 1999, Article 2; No. 57/227, UN Doc. A/RES/57/227, 26 February 2003; No. 59/203, UN Doc. A/RES/59/203, 23 March 2005, Article 2; No. 61/162, UN Doc. A/RES/61/162, 21 February 2007, Article 2. As for the Council of Europe, the principle was recognized by the Committee of Ministers in *Recommendation Rec(2002)4 of the Committee of Ministers to Member States on the legal status of persons admitted for family reunification*, adopted by the Committee of Ministers of the Council of Europe on 26 March 2002 at the 790th meeting of the Ministers' Deputies, Preamble; and by *Recommendation R(1999)23 of the Committee of Ministers to Member States on Family Reunion for Refugees and Other Persons in Need of International Protection*, adopted by the Committee of Ministers of the Council of Europe on 15 December 1999 at the 692nd meeting of the Ministers' Deputies, Preamble; *Resolution (78) 33 on the Reunion of Families of Migrant Workers in Council of Europe Member States*, adopted at by the Committee of Ministers on 8 June 1978 at the 289th meeting of the Ministers' Deputies, Preamble.

⁴ Family Unity has been considered as a fundamental principle of international refugee law by the UNHCR Executive Committee in, *inter alia*, its *Conclusion No. 1 (XXVI) Establishment of the Subcommittee and General*, ExCom, UNHCR, 26th Session, 1975, para. (f); *Conclusion No. 7 (XXVIII) Expulsion*, ExCom, UNHCR, 28th Session, 1977, para. (a); *Conclusion No. 24 (XXXII) Family Reunification*, ExCom, UNHCR, 32nd Session, 1981, para. 1.

⁵ *Gül v. Switzerland*, ECtHR, Case No. 53/1995/559/645, Judgment of 19 February 1996, para. 38. See also, *Tuquabo-Tekle and Others v. the Netherlands*, ECtHR, Application No. 60665/00, Judgment of 1 December 2005, para. 42; *Sen v. the Netherlands*, ECtHR, Application No. 31465/96, Judgment of 21 December 2001, para. 31; *Abdulaziz, Cabales and Balkandali v. United Kingdom*, ECtHR, Plenary, Case No. 15/1983/71/107-109, Judgment of 24 April 1985; *Ahmut v. the Netherlands*, ECtHR, Case No. 73/1995/579/665, Judgment of 26 October 1996, para. 63; *Haydarie and Others v. the Netherlands*, ECtHR, Application No. 8876/04, Admissibility Decision, 25 October 2005, The Law; *Benamar v. the Netherlands*, ECtHR, Application No. 43786/04, Admissibility Decision, 5 April 2005, The Law; *Chandra and Others v. the Netherlands*, ECtHR, Application No. 53102/99, Admissibility Decision, 13 May 2003, The Law.

⁶ *Gül v. Switzerland*, ECtHR, Case No. 53/1995/559/645, Judgment of 19 February 1996, para. 38. See also, *Tuquabo-Tekle and Others v. the Netherlands*, ECtHR, Application No. 60665/00, Judgment of 1 December 2005, para. 43; *Abdulaziz, Cabales and Balkandali v. United Kingdom*, ECtHR, Plenary, Case No. 15/1983/71/107-109, Judgment of 24 April 1985, para. 68; *Haydarie and Others v. the Netherlands*, ECtHR, Application No. 8876/04, Admissibility Decision, 25 October 2005, The Law; *Benamar and Others v. the Netherlands*, ECtHR, Application No. 43786/04, Admissibility Decision, 5 April 2005, The Law; *Chandra and Others v. the Netherlands*, ECtHR, Application No. 53102/99, Admissibility Decision, 13 May 2003, The Law.

jurisdiction from realising his or her family life rights in any other place.⁷ Any obstacles to or conditions imposed on family reunification that can be shown to be **unreasonable** will violate the right to respect for family life.⁸ Finally, a rule that discriminates as to family reunification (whether detrimentally or preferentially) based on the gender of the person settled in the country of destination or presumably other prohibited grounds, would breach the **prohibition of non-discrimination** in connection with the right to family life.⁹

The UN Human Rights Committee has based its jurisprudence on family reunification on Article 23.1 of the ICCPR, which provides that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”¹⁰

3.2. The rights of the child

When children are involved, the decision on whether and how to provide for family reunification will not only affect the child’s right to a family life, but also the child’s right not to be separated arbitrarily from his or her parents and the principle of the best interests of the child.

The principle of the best interests of the child, which applies to all of the normative provisions of the CRC, is expressed in Article 3.1 CRC:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

The same principle is present in Article 24.1 of the EU Charter.

In addition, children have a right not to be arbitrarily separated from their parents as expressed in Article 9.1 CRC:

“States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.”

⁷ See, *Benamar and Others v. the Netherlands*, ECtHR, Application No. 43786/04, Admissibility Decision, 5 April 2005, The Law. See also, *Gül v. Switzerland*, ECtHR, Case No. 53/1995/559/645, Judgment of 19 February 1996, paras. 38-42; *Sen v. the Netherlands*, EctHR, Application No. 31465/96, Judgment of 21 December 2001, para. 31.

⁸ *Haydarie and Others v. the Netherlands*, ECtHR, Application No. 8876/04, Admissibility Decision, 25 October 2005, The Law. Also previously held by the Committee of Ministers of the Council of Europe in *Resolution (78) 33 on the Reunion of Families of Migrant Workers in Council of Europe Member States*, adopted at by the Committee of Ministers on 8 June 1978 at the 289th meeting of the Ministers’ Deputies,, Article B.1(b)(iii). See, *Concluding Observations on Switzerland*, CCPR, Report of the Human Rights Committee to the General Assembly, 52nd Session, Vol.I, UN Doc. A/52/40 (1997), paras. 103 and 114. The Committee of Ministers in 1978 stressed that the waiting period should be reduced to a minimum and not exceed twelve months: *Resolution (78) 33 on the Reunion of Families of Migrant Workers in Council of Europe Member States*, adopted at by the Committee of Ministers on 8 June 1978 at the 289th meeting of the Ministers’ Deputies,, Article B.1(b)(i).

⁹ See, *Abdulaziz, Cabales and Balkandali v. United Kingdom*, ECtHR, Plenary, Case No. 15/1983/71/107-109, Judgment of 24 April 1985, paras. 74-83. See also, *Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius*, CCPR, Communication No. 35/1978, Views of 9 April 1981 (Mauritian Women Case), on discrimination based on sex.

¹⁰ Although it has not decided on this situation, the Human Rights Committee has found the right of family reunification to be protected under Article 23 ICCPR in *Ngambi and Nébol v. France*, CCPR, Communication No. 1179/2003, Views of 16 July 2004, para. 6.4. Concerns about family reunification have been also raised by the *Concluding Observations on Denmark*, CESCR, UN Doc. E/C.12/1/Add.102, 14 December 2004, paras. 16 and 24; *Concluding Observations on Hungary*, CESCR, UN Doc. E/C.12/HUN/CO/3, 16 January 2008, paras. 21 and 44; *Concluding Observations on Austria*, CCPR, UN Doc. CCPR/C/AUT/CO/4, 30 October 2007, para. 19; *Concluding Observations on France*, CCPR, UN Doc. CCPR/C/FRA/CO/4, 31 July 2008, para. 21.

Article 9.1 CRC is replicated in Article 24.3 of the EU Charter.

3.3. The international instruments on “family reunification”

The CRC was the first international human rights treaty to recognise specific rights connected to family reunification, which applies in both asylum and other migration situations. In terms of an application to enter a country for the purposes of family reunification, Article 10.1 CRC spells out the State's obligations:¹¹

“In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.”

In the European human rights system, according to the *European Social Charter (revised)*, Member States that accept to be bound by Article 19 of the Charter have an obligation to “facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory.”¹² This obligation must include “at least the worker's spouse and unmarried children, as long as the latter are considered to be minors by the receiving State and are dependent on the migrant worker.”¹³

Family reunification is also addressed by the *European Convention on the Legal Status of Migrant Workers* of 1977. Article 12.1 of the Convention says that:

“the spouse of a migrant worker who is lawfully employed in the territory of a Contracting Party and the unmarried children thereof, as long as they are considered to be minors by the relevant law of the receiving State, who are dependent on the migrant worker, are authorised on conditions analogous to those which this Convention applies to the admission of migrant workers and according to the admission procedure prescribed by such law or by international agreements to join the migrant worker in the territory of a Contracting Party, provided that the latter has available for the family housing considered as normal for national workers in the region where the migrant worker is employed. Each Contracting Party may make the giving of authorisation conditional upon a waiting period which shall not exceed twelve months”.

¹¹ The Committee on the Rights of the Child has repeatedly reminded States of this obligation in its Concluding Observations, in particular concerning the length of the family reunification procedure. See, *inter alia*, *Concluding Observations on Belgium*, CRC, Report of the Committee on the Rights of the Child to the General Assembly, 51st Session, UN Doc. A/51/41 (1996), p. 86, para. 595; *Concluding Observations on Estonia*, CRC, Report of the Committee on the Rights of the Child on its 32nd Session, UN Doc. CRC/C/124, 23 June 2003, paras. 56-57; *Concluding Observations on Finland*, CRC, Report of the Committee on the Rights of the Child on its 25th Session, UN Doc. CRC/C/100, 14 November 2000, p. 8, paras. 61-62; *Concluding Observations on France*, CRC, UN Doc. CRC/C/15/Add.240, 30 June 2004, paras. 31-32; *Concluding Observations on Sweden*, CRC, UN Doc. CRC/C/15/Add.248, 20 March 2005, paras. 41-42; *Concluding Observations on Ireland*, CRC, UN Doc. CRC/C/IRL/CO/2, 29 September 2006, paras. 30-31; *Concluding Observations on Sweden*, CRC, UN Doc. CRC/C/SWE/CO/4, 12 June 2009, paras. 64-65.

¹² Article 19.6 ESC(r).

¹³ Appendix to the ESC(r), Part II. See also, Scope, Articles 2 and 3.

Article 12 furthermore allows States to include the condition that the sponsor must also have “steady resources sufficient to meet the needs of his family” (Article 12.2)¹⁴ and allows for derogations in times of high numbers of requests for family reunification which exceed the country’s capacity (Article 12.3).

There are two reasons, however, for which this Convention should not be used as a primary indicator as to the developments of international human rights law on family reunification. First, the Convention refers to migrant worker as “a national of a Contracting Party who has been authorised by another Contracting Party to reside in its territory in order to take up paid employment.”¹⁵ As the Convention is reciprocal in character, its scope of application is narrowly circumscribed. Secondly, the Convention has only eleven State Parties, six of which are Member States of the European Union: France, Italy, Netherlands, Portugal, Spain, and Sweden.

Declarations also provide guidance for some measures of family reunification, in particular for people who have been granted international protection. The UNHCR Executive Committee (ExCom) has recommended that States facilitate the admission to their territory of the spouse or dependent children of persons granted temporary refuge or durable asylum.¹⁶ The ExCom, along with the Committee on the Rights of the Child and the Council of Europe’s Committee of Ministers, has also recommended that these persons should be granted the same legal status and facilities as the principal protected person.¹⁷ In the case of requests of family reunion by family members of refugees or persons in need of international protection, the Committee of Ministers of the Council of Europe has recommended that applications be treated “in a positive, humane and expeditious manner” and stipulated that “[w]here applications for family reunion by such persons are rejected, independent and impartial review of such decisions should be available.”¹⁸

3.4. Problems linked with family reunification: dependency

Although this question has not been directly addressed by the Green Paper, the ICJ would like to draw the European Commission’s attention to certain human rights concerns related to the linkages of a family member’s permit to that of his or her sponsor.

These situations may lead such persons to a situation of dependency, whereby they are unable to exercise or claim protection for their human rights. In cases of divorce or

¹⁴ France, the Netherlands and Norway decided to avail themselves of the option to insert the “steady resources” conditionality on family reunion of migrant workers.

¹⁵ European Convention on the Legal Status of Migrant Workers, Article 1.1.

¹⁶ Conclusion No. 15 (XXX) *Refugees Without an Asylum Country*, ExCom, UNHCR, 30th Session, 1979, para. (e); Conclusion No. 85 (XLIX) *International Protection*, ExCom, UNHCR, 49th Session, 1998, para. (w).

¹⁷ See, Conclusion No. 24 (XXII) *Family Reunification*, ExCom, UNHCR, 32nd Session, 1981, para. 8; Conclusion No. 88 (L) *Protection of the Refugee’s Family*, ExCom, UNHCR, 50th Session, 1999, para. (b)(iii); Concluding Observations on Estonia, CRC, Report of the Committee on the Rights of the Child on its 32nd Session, UN Doc. CRC/C/124, 23 June 2003, para. 56; Recommendation Rec(2002)4 of the Committee of Ministers to Member States on the legal status of persons admitted for family reunification, adopted by the Committee of Ministers of the Council of Europe on 26 March 2002 at the 790th meeting of the Ministers’ Deputies, Article II; Recommendation R(1999)23 of the Committee of Ministers to Member States on Family Reunion for Refugees and Other Persons in Need of International Protection, adopted by the Committee of Ministers of the Council of Europe on 15 December 1999 at the 692nd meeting of the Ministers’ Deputies, Article 3.

¹⁸ Recommendation R(1999)23 of the Committee of Ministers to Member States on Family Reunion for Refugees and Other Persons in Need of International Protection, adopted by the Committee of Ministers of the Council of Europe on 15 December 1999 at the 692nd meeting of the Ministers’ Deputies, Article 4.

separation from the principal residence permit holder, they may find themselves at risk of deportation or, in the absence of a valid residence permit, face increased vulnerability to exploitation. These situations may give rise to a range of human rights impairment for those concerned, and in particular women migrants.¹⁹ For example, they may be unable or unwilling to seek protection from domestic violence or to leave abusive relationships because their legal right to remain in a country is premised on the relationship concerned. The limited rights often associated with family-reunification permits can significantly limit the ability of holders to seek educational and/or employment opportunities, which in the case of women who migrate for family reunification may perpetuate stereotyped gender-roles and give rise to integration difficulties. On the other hand, women who are the primary permit-holder may be at particular risk of violence if they seek to end relationships with partners whose residency rights are wholly connected with the relationship.²⁰

Indeed, the UN Committee on the Elimination of Discrimination against Women has found that, pursuant to the obligation Article 2(f) of the *Convention on the Elimination of All Forms of Discrimination against Women*, “when residency permits of women migrant workers are premised on sponsorship of an employer or spouse, States parties should enact provisions relating to independent residency status. Regulations should be made to allow for the legal stay of a woman who flees her abusive employer or spouse or is fired for complaining about abuse”.²¹

In recognition of the particular risks of human rights violations and abuses which may arise in these contexts, in the Council of Europe, the Committee of Ministers has recommended to Member States that, “in the case of divorce, separation or death of the principal, a family member having been legally resident for at least one year may apply for an autonomous residence permit. Member States should give due consideration to such applications. In their decision, the best interest of the children concerned shall be a primary consideration.”²²

The Parliamentary Assembly of the Council of Europe has repeatedly recommended that an individual legal status be granted to migrant women who join their spouses and non-married partners through family reunion, if possible within one year of their date of arrival, and to children who reach the age of majority in order to afford them protection in the event of deportation, divorce, separation or the death of the principal right-holder.²³

¹⁹ See *General Recommendation No. 26 on women migrant workers*, CEDAW, UN Doc. CEDAW/C/2009/WP.1/R, 5 December 2008, para. 22.

²⁰ E.g. see facts of *Yıldırım v. Austria*, CEDAW, Communication No. 6/2005, Views of 6 August 2007.

²¹ See *General Recommendation No. 26 on women migrant workers*, CEDAW, UN Doc. CEDAW/C/2009/WP.1/R, 5 December 2008, para. 8, para. 26(f).

²² See *Recommendation Rec(2002)4 of the Committee of Ministers to Member States on the legal status of persons admitted for family reunification*, adopted by the Committee of Ministers of the Council of Europe on 26 March 2002 at the 790th meeting of the Ministers' Deputies, Article III.

²³ See *Resolution 1811 (2011) of the Parliamentary Assembly of the Council of Europe on Protecting migrant women in the labour market*, adopted by the Parliamentary Assembly on 15 April 2011 (18th Sitting), Article 7.2.1; *Resolution 1697 (2009) of the Parliamentary Assembly of the Council of Europe on Migrant women: at particular risk from domestic violence*, adopted by the Standing Committee, acting on behalf of the Assembly, on 20 November 2009, Article 5.2.1; *Recommendation 1686 (2004) of the Parliamentary Assembly of the Council of Europe on Human mobility and the right to family reunion*, adopted by the Standing Committee, acting on behalf of the Assembly, on 23 November 2004, Article 12.iii.j-l; *Recommendation 1261 (1995) of the Parliamentary Assembly of the Council of Europe on the situation of immigrant women in Europe*, adopted by the Standing Committee, acting on behalf of the Assembly, on 15 March 1995, Article 9.iii-iv.

4. Replies of the International Commission of Jurists to the Green Paper's questions

Q1: Are these criteria (reasonable prospect for the right of permanent residence at the time of application as regulated in Article 3 and a waiting period until reunification can actually take place as regulated in Article 8) the correct approach and the best way to qualify the sponsors?

The Family Reunification Directive is applicable to the sponsors who have a residence permit for a period of one year or more and have reasonable prospects of obtaining the right to permanent residence (Article 3). Furthermore, the State may require the sponsor for a period not exceeding two years before having his or her family rejoining (Article 8).

The ICJ finds the two provisions problematic in light of international human rights law. The ICJ recalls that family reunification is a positive obligation where there is an insurmountable objective obstacle preventing the migrant already with a State's jurisdiction from realising family life rights in any other place,²⁴ and that the imposition of obstacles to or conditions for family reunification will violate the right to respect for family life where they can be shown to be unreasonable.

The ICJ considers that the requirement of having "reasonable prospects of obtaining the right to permanent residence" is not an objective criterion. First, it does not spell out the conditions upon which a person may be deemed to have "reasonable prospects"; secondly, it leaves an impermissibly wide scope of discretion to the national authorities to decide, without reasoned grounds, on the prospect that the sponsor will obtain such a permit. The ICJ considers that this requirement constitutes an unreasonable obstacle to family reunification and is highly likely to lead to violations of the applicants' right to respect for family life.

The situation is even more worrying when children are involved. These provisions of the Directive refer to both children and adults. The provisions of Article 3 of the Directive requiring reasonable prospects to have permanent residence and the possibility to apply a waiting period of two years for family reunification (Article 8) would be highly likely to lead to situations in breach of Article 10.1 CRC, according to which applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification must be dealt with by States Parties "in a positive, humane and expeditious manner".

The ICJ is aware that the European Court of Justice has considered that the waiting period provided in Article 8 and even the exceptional derogation period of three years do not constitute an infringement of the principle of the best interests of the child and of the right to a family life. The Court reached this decision by considering that the best interests of the child, included in Article 5.5 of the Directive, already limited the application of Article 8, as well as did the criteria of evaluation of Article 17, which mirror those used by the European Court of Human Rights in family reunification

²⁴ See, *Benamar and Others v. the Netherlands*, ECtHR, Application No. 43786/04, Admissibility Decision, 5 April 2005, The Law. See also, *Gül v. Switzerland*, ECtHR, Case No. 53/1995/559/645, Judgment of 19 February 1996, paras. 38-42; *Sen v. the Netherlands*, ECtHR, Application No. 31465/96, Judgment of 21 December 2001, para. 31.

cases.²⁵ Regrettably, however, the Court, although considering the CRC as source of law in EU law, did not base its reasoning on that Convention. Instead, it limited its authority to the European Court of Human Rights the jurisprudence of which is confined to the European Convention, which contains only a part of the overall normative protective framework in this area.

The ICJ recalls that the UN Human Rights Committee has found, in its concluding observations on Switzerland, that a rule prohibiting family reunification for foreign workers until 18 months after the obtaining of a temporary residence permit was not in compliance with Article 23 ICCPR, as the possibility of reunification should be given “shortly after” obtaining the permit.²⁶

The ICJ also recalls that the Council of Europe’s Parliamentary Assembly (PACE) has recommended that Member States “facilitate the family reunification of separated children with their parents in other member states even when parents do not have permanent residence status or are asylum seekers, in compliance with the principle of the best interest of the child.”²⁷

Finally, the ICJ concurs with the PACE Committee on Migration which, in its replies to this Green Paper, has found “the condition requiring a sponsor to have a reasonable prospect of obtaining the right of permanent residence problematic because of the possibility to exclude almost anybody.”²⁸

Q3: Do you see an interest in maintaining those standstill clauses which are not used by Member States, such as the one concerning children older than 15?

The Family Reunification Directive provides that, “by way of derogation, where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member State may, before authorising entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its existing legislation on the implementation of this Directive” (Article 4.1, last indent). It also allows for Member States to “request that the application concerning family reunification of minor children have to be submitted before the age of 15, as provided for by its existing legislation on the date of the implementation of this Directive. If the application is submitted after the age of 15, the Member States which decide to apply this derogation shall authorise the entry and residence of such children on grounds other than family reunification” (Article 4.6).

²⁵ *European Parliament v. Council of the European Union*, European Court of Justice, Grand Chamber, C-540/03, Judgment of 27 June 2006.

²⁶ *Concluding Observations on Switzerland*, CCPR, Report of the Human Rights Committee to the General Assembly, 52nd Session, Vol.I, UN Doc. A/52/40 (1997), paras. 103 and 114.

²⁷ *Recommendation 1596(2003) of the Parliamentary Assembly of the Council of Europe on the situation of young migrants in Europe*, adopted by the Parliamentary Assembly on 31 January 2003 (8th Sitting).

²⁸ See, Parliamentary Assembly of the Council of Europe, “Linking the position of the Committee on Migration, Refugees and Displaced Persons with the questions posed by the European Commission in its Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC)”, http://www.assembly.coe.int/CommitteeDocs/2012/recapitulatif_questions_EN.pdf, Question 1 ; *Position Paper on family reunification*, Committee on Migration, Refugees and Displaced Persons of the Parliamentary Assembly of the Council of Europe, CoE Doc. AS/Mig (2012) 01, 2 February 2012, paragraph 15.

The Green Paper and the Commission's evaluation²⁹ have observed that Article 4.6 has not been used by any EU Member States. Considering that it may be activated only "as provided for by its **existing legislation on the date of the implementation** of this Directive",³⁰ it follows that it is already an inert provision devoid of any substantive impact and rationale.

In these documents, the Commission has also pointed out that only two countries, Germany and Cyprus, have made use of the derogation of Article 4.1. The derogation by Cyprus, it was noted, was inserted after the Directive's implementation deadline. As such, the ICJ remarks that the derogation was made in breach of the Family Reunification Directive. Only Germany, therefore, has implemented the exception in compliance with the Directive.

The ICJ stresses that in all EU Member States the age of majority is at least 18 and that, according to Article 1 of the CRC, "a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier." As the UN Committee on the Rights of the Child pointed out, "[t]his means that any instruments governing children in the territory of the State cannot define a child in any way that deviates from the norms determining the age of majority in that State."³¹

The guarantees of Articles 9 and 10 CRC and Article 24.3 EU Charter considered above on family reunification and the principle of the best interest of the child, enshrined in Article 3 CRC and Article 24.2 EU Charter, are therefore valid and operative for everyone until the age of 18. The European Court of Human Rights has found a breach of the right to family life of a child who could not join the family because the age limit for family reunification had been downgraded to 15.³²

The principle of non-discrimination when applied to children is particularly compelling. Article 2 of the CRC provides that:

- “1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction **without discrimination of any kind**, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.”³³

The exceptions expressed by Article 4 appear to be unnecessary at a European level, considering that only one State has applied any of them since the adoption of the Directive in 2003. They are also incompatible with international human rights law on the rights of the child. These provisions discriminate against certain children on account

²⁹ Report from the Commission to the European Parliament and the Council on the Application of Directive 2003/86/EC on the right to family reunification, EU Doc. COM(2008) 610 final, Brussels, 8 October 2008 ("Evaluation Report").

³⁰ Emphasis added.

³¹ General Comment No. 6 on the Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, CRC, UN Doc. CRC/GC/2005/6, 1 September 2005, para 9.

³² See *Osman v. Denmark*, EctHR, Application no. 38058/09, Judgment of 14 June 2011.

³³ Emphasis added.

of their age, without reasonable justification for making any such distinction. This is in breach of Article 2 CRC and Article 21 of the EU Charter, which expressly prohibit discrimination on the base of age. Furthermore, it is difficult to comprehend how a child's separation from his or her family of the child through denial of family reunification, whether for reasons of integration from the age of 12 or without a reason from age 15, could be consistent with the best interest of the child, which is a paramount principle of international human rights law.

The ICJ is aware that the European Court of Justice has considered that Articles 4.1, last indent, and 4.6 do not contravene the principles of non-discrimination, the best interest of the child, and the right to a family life. The Court reached this result by considering that the best interest of the child, included in Article 5.5 of the Directive, already limited the application of Articles 4.1 and 4.6, as well as it did the criteria of evaluation of Article 17, which mirror those used by the European Court of Human Rights in family reunification cases.³⁴ The ICJ, however, regrets that the Court, although considering the UN CRC as source of law in EU law, did not base its reasoning on the CRC. Instead it confined its reliance only to the jurisprudence of the European Court of Human Rights, which contains only a part of the overall normative protective framework in this area.

The Council of Europe's Commissioner for Human Rights, Thomas Hammarberg, has forcefully and repeatedly affirmed the principle that "[c]hildren have the right to live with their relatives [and that t]he right to family reunification applies to all children."³⁵ In this context, he has also stressed that limiting the right to family reunification to children below 14 or 15 years of age is contrary to international human rights law and, in particular, the UN Convention on the Rights of the Child.

Finally, the ICJ agrees with the PACE Committee on Migration which, in its replies to this Green Paper, has expressed its concern at these derogation and optional clauses and recommended their withdrawal.³⁶

Q4: Are the rules on eligible family members adequate and broad enough to take into account the different definitions of family existing other than that of the nuclear family?

The International Commission of Jurists considers that the definition of family and the rules on eligible family members are not adequate and not broad enough to meet the requirements of international human rights law, in particular in light of the wide definition of "family" to which family life rights apply.

The European Court's definition of family is a broad one, which has developed over time in accordance with changing conceptions of family, and is likely to continue to do

³⁴ *European Parliament v. Council of the European Union*, European Court of Justice, Grand Chamber, C-540/03, Judgment of 27 June 2006.

³⁵ Commissioner for Human Rights of the Council of Europe, *Positions on the rights of minor migrants in an irregular situation*, CommDH/PositionPaper(2010)6, 25 June 2012, <https://wcd.coe.int/ViewDoc.jsp?id=1654377>; Commissioner for Human Rights of the Council of Europe, "Refugees must be able to reunite with their family members", 4 August 2008, http://www.coe.int/t/commissioner/Viewpoints/080804_en.asp; Commissioner for Human Rights of the Council of Europe , "Children in migration deserve better protection", 6 August 2007, http://www.coe.int/t/commissioner/Viewpoints/070806_en.asp.

³⁶ Parliamentary Assembly of the Council of Europe, "Linking the position of the Committee on Migration, Refugees and Displaced Persons with the questions posed by the European Commission in its Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC)", http://www.assembly.coe.int/CommitteeDocs/2012/recapitulatif_questions_EN.pdf

so in light of evolving social attitudes.³⁷ The Court has addressed two broad categories of relationships: relationships between children and their parents and partnerships between adults.³⁸

In the context of relationships between minor children and their parents, family life will always be considered to exist between a child and the parent(s) with whom the child cohabits. Where a child's parents are married or cohabiting, this family relationship will continue to exist even where, due to parental separation, the child ceases to live with one parent.³⁹ Where a child's parents have never been married or cohabiting, other factors may serve to demonstrate that the child's relationship with the parent with whom the child does not live, amounts to a family relationship. These factors will include the nature and duration of the parents' relationship prior to the birth of the child and, in particular, whether they had planned to have a child, contributions made to the child's care and upbringing, and the quality and regularity of contact. In a case concerning migration, the European Court held that for adult parents and adult children, an additional element of dependence is normally required to give rise to the protection of the right to a family life.⁴⁰

In the context of adult partnerships, family life will be held to exist in relation to both opposite-sex and same-sex⁴¹ marital relationships and stable and committed cohabiting non-marital relationships.⁴² When determining whether a relationship amounts to family life, a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means.⁴³

The Human Rights Committee has affirmed that "the term 'family', for purposes of the Covenant, must be understood broadly to include all those comprising a family as understood in the society concerned. The protection of such family is not obviated by the absence of formal marriage bonds, especially where there is a local practice of customary or common-law marriage. Nor is the right to protection of family life necessarily displaced by geographical separation, infidelity, or the absence of conjugal relations. However, there must first be a family bond to protect."⁴⁴

The Parliamentary Assembly of the Council of Europe has on several occasions urged "states to interpret the concept of asylum seekers' families as including *de facto* family members (natural family), for example an asylum seeker's partner or natural children as

³⁷ *Schalk and Kopf v. Austria*, ECtHR, Application No. 30141/04, Judgment of 24 June 2010, paras. 93- 95.

³⁸ See restatement of the Court's jurisprudence in *Onur v. United Kingdom*, ECtHR, Application No. 27319/07, Judgment of 27 February 2009, paras. 43-45. See also, *Konstantinov v. the Netherlands*, ECtHR, Application No. 16351/03, Judgment of 26 April 2007, para. 52.

³⁹ *Ciliz v. the Netherlands*, ECtHR, Application No. 29192/95, Judgment of 11 July 2000, para. 59. See also, *Boughanemi v. France*, ECtHR, Case No. 16/1995/522/608, Judgment of 24 April 1996, para. 35.

⁴⁰ The dependency must be a strong one: *A.W. Khan v. United Kingdom*, ECtHR, Application No. 47486/06, Judgment of 12 January 2010, para. 32.

⁴¹ *Schalk and Kopf v. Austria*, ECtHR, Application No. 30141/04, Judgment of 24 June 2010, para. 94; *P.B. and J.S. v. Austria*, ECtHR, Application No. 18984/02, Judgment of 22 July 2010, para. 30.

⁴² *Elsholz v. Germany*, ECtHR, GC, Application No. 25735/94, Judgment of 13 July 2000, para. 43; *Hoffmann v. Germany*, ECtHR, Application No. 34045/96, Judgment of 11 October 2001, para. 34. See also, *Marckx v. Belgium*, ECtHR, Plenary, Application No. 6833/74, Judgment of 13 June 1979, p. 14, para. 31; *Keegan v. Ireland*, ECtHR, Application No. 16969/90, Judgment of 26 May 1994, p. 17, para. 44; *Kroon and Others v. the Netherlands*, ECtHR, Application No. 18535/91, Judgment of 27 October 1994, pp. 55-56, para. 30.

⁴³ *X, Y and Z v. United Kingdom*, ECtHR, GC, case No. 75/1995/581/667, Judgment of 20 March 1997, para. 36.

⁴⁴ *Ngambi and Nébol v. France*, CCPR, Communication No. 1179/2003, Views of 16 July 2004, para. 6.4

well as elderly, infirm or otherwise dependent relations.”⁴⁵ It also urged states “to apply, where possible and appropriate, a broad interpretation of the concept of family and include in particular in that definition members of the natural family, non-married partners, including same-sex partners, children born out of wedlock, children in joint custody, dependent adult children and dependent parents.”⁴⁶

The European Commissioner for Human Rights also noted that “many [European countries] have used a strictly limited definition of family to include only parents and their immediate children. This ignores the obvious fact that the shape of the core family differs depending on traditions and situations. In war-torn and HIV affected areas, for instance, it is not unusual for orphaned children to be cared for by other relatives. Often grandparents, or other members of the extended family, depend on the active generation. A positive and humane policy should consider the real family pattern in each individual case.”⁴⁷

The ICJ believes that a definition of family members appropriate to the tenets of international human rights law should be based on the existence of family ties *de facto* and not only *de iure*, regardless of sexual orientation and gender identity, thus including parents, children, direct descendants, and other siblings, from families also *de facto* and also from same-sex families. The ICJ also believes that the concept of family members who may be a sponsor of a child or may reunite with unaccompanied child should be driven by the paramount principle of the best interests of the child, and not be limited by a strict classification of eligible family members.

Q6: In view of its application, is it necessary and justified to keep such a derogation in the Directive to provide for a three year waiting period as from the submission of the application?

Article 8.2 of the Directive introduces the possibility for States to derogate from the ordinary waiting period:

“where the legislation of a Member State relating to family reunification in force on the date of adoption of this Directive takes into account its reception capacity, the Member State may provide for a waiting period of no more than three years between submission of the application for family reunification and the issue of a residence permit to the family members.”

The European Court of Human Rights has found, in the case *Nunez v. Norway*, that two years of separation between a mother and child would not be in compliance with the best interest of the child, which is a limit to the State’s margin of appreciation in restricting the enjoyment of the right to a family life.⁴⁸ Even if the case dealt with the expulsion and entry ban of the mother, the reasoning is also applicable to the case of

⁴⁵ Recommendation 1686 (2004) of the Parliamentary Assembly of the Council of Europe on Human mobility and the right to family reunion, adopted by the Standing Committee, acting on behalf of the Assembly, on 23 November 2004, Article 8;

⁴⁶ Recommendation 1686 (2004) of the Parliamentary Assembly of the Council of Europe on Human mobility and the right to family reunion, adopted by the Standing Committee, acting on behalf of the Assembly, on 23 November 2004, Article 12.iii.a; Recommendation 1470 (2000) of the Parliamentary Assembly of the Council of Europe on the Situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of the Council of Europe, adopted by the Parliamentary Assembly on 30 June 2000 (24th Sitting), Article 6.

⁴⁷ Commissioner for Human Rights of the Council of Europe, “Refugees must be able to reunite with their family members”, 4 August 2008, http://www.coe.int/t/commissioner/Viewpoints/080804_en.asp.

⁴⁸ *Nunez v. Norway*, EctHR, Application no. 55597/09, Judgment of 28 June 2008, paras. 81-85.

pending reunification if the period of separation would last two years or more. The ICJ's observations on Question 1 above, concerning the waiting period of two years for reunification, are also relevant here.

It should also be noted that the Parliamentary Assembly of the Council of Europe has previously urged States "to make administrative procedures as straightforward and transparent as possible and to harmonise at European level waiting periods, limiting them to a maximum of twelve months, and not to consider as grounds for rejecting the application the failure to provide certain documents that are not instrumental in the fulfilment of the conditions for family reunification."⁴⁹

The ICJ believes that the clause in question is obsolete. It was requested by one State only, Austria, which is the only State to have made use of it.⁵⁰ More than eight years after the adoption of the Directive, this provision is and must be considered an unacceptable derogation to the purpose of building a more integrated Common European Asylum System as mandated by Article 79 TFEU and by the Stockholm Programme.⁵¹ A waiting period of three years is capable of rendering almost void the right to respect for family life, in particular in cases involving children.

Q8: Should the family reunification of third country nationals who are beneficiaries of subsidiary protection be subject to the rules of the Family Reunification Directive?

Should beneficiaries of subsidiary protection benefit from the more favourable rules of the Family Reunification Directive which exempt refugees from meeting certain requirements (accommodation, sickness insurance, stable and regular resources)?

In the Stockholm Programme, which all EU institutions have a duty to implement, the European Council clearly required creation of a uniform status for all those deserving international protection, be that refugee or subsidiary protection.⁵² The same obligation is expressed by Article 78 TFEU.

The ICJ maintains that a uniform status for beneficiaries of international protection entails a uniform access to their human rights, including their right to respect for family life. For this reason, the ICJ considers that it is implied in these obligations enshrined in the TFEU and the Stockholm Programme that the protection of refugees and beneficiaries of subsidiary protection should be equal as regards family reunification.

Furthermore, the ICJ recalls that the impossibility of returning to one's own country, regardless of whether this is due to persecution or to the principle of *non-refoulement*, constitutes an insurmountable objective obstacle to the enjoyment of the right to a family life somewhere else (see case law at paragraph 3.1) and gives rise to an obligation on the State of presence of the beneficiary of international protection to

⁴⁹ Recommendation 1686 (2004) of the Parliamentary Assembly of the Council of Europe on Human mobility and the right to family reunion, adopted by the Standing Committee, acting on behalf of the Assembly, on 23 November 2004, Article 12.iii.e.

⁵⁰ Commission of the European Communities, *Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to family reunification*, COM(2008)610 final, 8 October 2008, para. 4.3.5.

⁵¹ Council of the European Union, "The Stockholm Programme – An open and secure Europe serving and protecting the citizens", EU Doc. 16484/1/09 REV 1 JAI 866 + ADD 1, 2 December 2009, para. 6.2.

⁵² Council of the European Union, "The Stockholm Programme – An open and secure Europe serving and protecting the citizens", EU Doc. 16484/1/09 REV 1 JAI 866 + ADD 1, 2 December 2009, para. 6.2.

facilitate and fulfil his or her right to family reunification. For children, as has been discussed, this obligation is further reinforced by the obligation to respect their best interests and their right not to be separated from their parents.

The European Commissioner for Human Rights has noted that “[s]ome governments argue that family unity could be reached in many cases if the newcomers go back to their family members in the country of origin; the implied message is that the family separation is self-inflicted. However, many just cannot go back home for the same reasons which forced them once to flee. This is the case not only for those who have been granted asylum but also for those who are seeking such status and a great number of those who have temporary or subsidiary protection. Again, a positive and humane policy would give room for considering the real situation.”⁵³

The Parliamentary Assembly of the Council of Europe has also stressed that, “[w]hile welcoming the preferential treatment granted to refugees in the recent European Union Council Directive on the right to family reunification (2003/86/EC), the Assembly expresses its regret that it does not recognise the right to family reunion for persons granted subsidiary protection, nor does it lay down harmonised provisions with regard to the conditions, procedures and timeframes for granting resident status and associated rights.”⁵⁴ The Parliamentary Assembly recommended that States “grant the right to family reunification to persons benefiting from subsidiary protection.”⁵⁵

The ICJ considers therefore that, since the same considerations regarding return to their country of origin apply to beneficiaries of subsidiary protection as to refugees, no distinction may be drawn under international human rights law between these two categories of people as regards family reunification. The Directive must likewise treat the two categories equally, in order to comply with international law and the EU Charter.

Q9: Should Member States continue to have the possibility to limit the application of the more favourable provisions of the Directive to refugees whose family relationships predate their entry to the territory of a Member State?

Should family reunification be ensured for wider categories of family members who are dependent on the refugees, if so to which degree?

Should refugees continue to be required to provide evidence that they fulfil the requirements regarding accommodation, sickness insurance and resources if the application for family reunification is not submitted within a period of three months after granting the refugee status?

⁵³ Commissioner for Human Rights of the Council of Europe, "Refugees must be able to reunite with their family members", 4 August 2008, http://www.coe.int/t/commissioner/Viewpoints/080804_en.asp.

⁵⁴ *Recommendation 1686 (2004) of the Parliamentary Assembly of the Council of Europe on Human mobility and the right to family reunion*, adopted by the Standing Committee, acting on behalf of the Assembly, on 23 November 2004, Article 10.

⁵⁵ *Recommendation 1686 (2004) of the Parliamentary Assembly of the Council of Europe on Human mobility and the right to family reunion*, adopted by the Standing Committee, acting on behalf of the Assembly, on 23 November 2004, Article 12.iii.b.

The ICJ is concerned by the possibility, under Article 9.2 of the Directive, to limit the application of the more favourable provisions aimed at refugees, only to the family relationship predating the refugee's entry in the Member State's territory.

International refugee law and international human rights law do not distinguish between families formed in the country of origin as opposed to any other place. Such a limitation on the definition of family would constitute an undue infringement of the refugees' and the family members' right to respect for family life. The ICJ recalls that under Article 8 ECHR and Article 7 EU Charter there is a positive obligation on the State of refuge to facilitate family reunification and ensure family unity on its territory where there is an **insurmountable objective obstacle** preventing the refugee already within its jurisdiction from realising his or her family life rights in any other place.⁵⁶ Fleeing armed conflict and/or seeking asylum are likely to present such obstacles to the development of family life outside of the country of destination.⁵⁷

With regard to the second part of this question, the ICJ refers to its observations in relation to Question 4. The ICJ believes that an approach in compliance with international human rights law must not merely contain a fixed list of family members, otherwise than as a minimum standard, but must be a flexible one which tries to fully ensure the right to respect for family life of the beneficiary of international protection, taking into account the best interests of the child in relevant cases, and with regard to the individual situation of the person concerned.

With regard to the obligation to satisfy conditions when the application for family reunification has been submitted more than three months subsequent to the granting of refugee status (Article 12.1 of the Directive), the ICJ believes that this requirement is highly problematic. The very recognition of refugee status or of subsidiary protection constitutes an insurmountable objective obstacle to the achievement of the applicant's family life in his or her state of origin. In such circumstances, in the absence of the possibility of family reunification elsewhere, the State in which the individual is present has an obligation of family reunification. While the attachment of conditions might ensure a better integration of the refugee's family, the refusal or undue delay of family reunification because of these conditions would be in breach of Article 8 ECHR, Article 7 EU Charter and Article 17 ICCPR.

The ICJ recalls that the Parliamentary Assembly of the Council of Europe, referring to both refugees and all other categories of migrants, expressed its belief "that certain provisions allowing for derogations that enable states to make applications subject to financial and housing-related conditions, integration criteria or age limits could, if applied strictly, pose a threat to the right to respect for family life, particularly the rights granted to children, and reinforce the risk of social exclusion of certain nationals of non-EU member states."⁵⁸

⁵⁶ See, *Benamar and Others v. the Netherlands*, ECtHR, Application No. 43786/04, Admissibility decision, 5 April 2005, The Law. See also, *Gül v. Switzerland*, ECtHR, Case No. 53/1995/559/645, Judgment of 19 February 1996, paras. 38-42; *Sen v. the Netherlands*, ECtHR, Application No. 31465/96, Judgment of 21 December 2001, para. 31.

⁵⁷ See, *Tuquabo-Tekle and Others v. the Netherlands*, ECtHR, Application No. 60665/00, Judgment of 1 December 2005, para. 47.

⁵⁸ Recommendation 1686 (2004) of the Parliamentary Assembly of the Council of Europe on Human mobility and the right to family reunion, adopted by the Standing Committee, acting on behalf of the Assembly, on 23 November 2004, Article 11; Resolution 1811 (2011) of the Parliamentary Assembly of the Council of Europe on Protecting migrant women in the labour market, adopted by the Parliamentary Assembly on 15 April 2011 (18th Sitting), Article 7.2.2.

It also recommended in 2004 that States “impose less strict conditions for applicants in respect of financial guarantees, health insurance and housing and, in particular, to avoid any discrimination against women migrants and refugees which could result from their imposition.”⁵⁹ PACE even stressed the importance “to facilitate family reunion [...] before the completion of the sometimes very lengthy procedure for determining refugee status, in exceptional cases and for humanitarian reasons.”⁶⁰

Q12: Should administrative fees payable in the procedure be regulated? If so, should it be in a form of safeguards or should more precise indications be given?

The ICJ considers that, according to international law, whenever a refugee or other migrant is entitled to family reunification in order to assure the enjoyment of his or her right to a family life, the best interest of the child or the child’s right not to be separate arbitrarily from his or her parents, there is a corresponding obligation of the State to fulfil this right to family reunification. While the fulfilment of this obligation does not *per se* prohibit the imposition of administrative fees, it does exclude administrative fees which would render the family reunification impossible, illusory or impractical, as when the family member or the sponsor cannot reasonably afford to pay the administrative fee.

The ICJ draws the Commission’s attention to the recent case of the European Court of Human Rights, *G.R. v. the Netherlands*, where the Court considered “whether the applicant had effective access to the administrative procedure by which he might, subject to fulfilling the conditions prescribed by domestic law, obtain a residence permit which would allow him to reside lawfully with his family in the Netherlands.”⁶¹ The Court concluded that the State breached the applicant’s right to an effective remedy, under Article 13 ECHR, because of “the disproportion between the administrative charge in issue and the actual income of the applicant’s family [which] unjustifiably hindered the applicant’s use of an otherwise effective domestic remedy.”⁶²

Q14: How could the application of these horizontal clauses be facilitated and ensured in practice?

The horizontal clauses referred to in the question are Article 5.5 of the Directive which states that “[w]hen examining an application, the Member States shall have due regard to the best interest of the child.” The provision is located at the very end of Article 5, which deals with submission and examination of the application for family reunification.

⁵⁹ Recommendation 1686 (2004) of the Parliamentary Assembly of the Council of Europe on Human mobility and the right to family reunion, adopted by the Standing Committee, acting on behalf of the Assembly, on 23 November 2004, Article 12.iii.d.

⁶⁰ Recommendation 1686 (2004) of the Parliamentary Assembly of the Council of Europe on Human mobility and the right to family reunion, adopted by the Standing Committee, acting on behalf of the Assembly, on 23 November 2004, Article 12.ii.g. See also, Recommendation 1327 (1997) of the Parliamentary Assembly of the Council of Europe on the protection and reinforcement of the human rights of refugees and asylum-seekers in Europe, adopted by the Parliamentary Assembly on 24 April 1997 (14th Sitting), Section vii.(o), (p) and (q).

⁶¹ *G.R. v. the Netherlands*, ECtHR, Application no. 22251/07, Judgment of 10 January 2012, para 43.

⁶² *G.R. v. the Netherlands*, ECtHR, Application no. 22251/07, Judgment of 10 January 2012, para 55.

The other horizontal clause is Article 17, almost at the very end of the Directive, which states: “Member States shall take due account of the nature and solidity of the person’s family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin when they reject an application, withdraw or refuse a residence permit or decide to order the removal of the sponsor or the members of his family.”

The first clause enshrines the principle of the best interest of the child, which is a paramount principle of international human rights law and is expressed in Article 3 CRC and Article 24.2 EU Charter. The European Court of Human Rights has also underlined that, “in all decisions concerning children, their best interests must be paramount. As the Grand Chamber recently observed in *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 136, 6 July 2010:

“The child’s interest comprises two limbs. On the one hand, it dictates that the child’s ties with its family must be maintained, except in cases where the family has proved particularly unfit. It follows that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, if and when appropriate, to ‘rebuild’ the family [*Gnahoré v. France*, no. 40031/98, § 59, ECHR 2000 IX] On the other hand, it is clearly also in the child’s interest to ensure its development in a sound environment, and a parent cannot be entitled under Article 8 to have such measures taken as would harm the child’s health and development (see, among many other authorities, *Elsholz v. Germany* [GC], no. 25735/94, § 50, ECHR 2000 VIII, and *Maršálek v. the Czech Republic*, no. 8153/04, § 71, 4 April 2006).”⁶³

As for the CRC, it specifies that in any decision concerning children, the primary consideration must be the **best interests of the child**.⁶⁴ The Committee on the Rights of the Child has affirmed that this overarching consideration as to what is the best interest of a child requires a clear and comprehensive assessment of the child’s identity, including nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs, “allowing the child access to the territory is a prerequisite to this initial assessment process.”⁶⁵ The Committee identifies an obligation to appoint a competent guardian and, if needed, to provide legal representation.⁶⁶ In relation to entry, therefore, unaccompanied or separated children⁶⁷ are always to be granted access under the “best interests” principle.

While it is laudable that Article 5.5 inserts the principle of the best interests of the child in the Directive, the ICJ believes that the language used and the location of the provision may contribute to the disregard by national authorities of this principle,

⁶³ *R. and H. v. the United Kingdom*, EctHR, Application no. 35348/06, Judgment 31 May 2011, para 73.

⁶⁴ Article 3.1 CRC.

⁶⁵ See, *General Comment No. 6 on the Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, CRC, UN Doc. CRC/GC/2005/6, 1 September 2005, para. 20 (emphasis added).

⁶⁶ See, *ibid.*, para. 21.

⁶⁷ “Unaccompanied children” are children who have been separated from their parents and other relatives and are not cared for by an adult responsible, by law or custom, for them. A “separated child” is separated from the parents or any legal or customary caregiver, but not necessarily from other relatives. Definitions provided for by the CRC in *ibid.*, paras. 7 and 8.

despite its central place in international law and in the European Court of Justice's jurisprudence.⁶⁸

The same must be said for the principles enshrined in Article 17, which correspond to the criteria used by the European Court of Human Rights to decide when an obligation of family reunification arises upon a State (see paragraph 3.1).

First, the ICJ considers it important that the language of the provisions reflects the pre-eminence of the principle of the best interests of the child in particular, and the importance of both this and of the right to respect for family life (reflected in Article 17) in international human rights law. The ICJ, therefore, believes that the language of "take due account" and "have due regard to" should be amended to indicate that the best interest of the child must at all times remain paramount. Second, the ICJ believes that the cardinal role of these two provisions must be reflected in the systemic position in the legislative text. These are principles which must inform the whole scheme of the Directive. They should be included in a separate article to be inserted immediately after the "scope" of the Directive, as follows: "Member States must follow the following principles in any decision involving an issue of family reunification: (1) due account must be taken of the nature and solidity of the person's family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin when they reject an application, withdraw or refuse a residence permit or decide to order the removal of the sponsor or the members of his family; (2) in any decision involving children, the best interests of the child must be the primary consideration".

5. General recommendations to the Commission

The International Commission of Jurists considers that the family reunification directive should be revised in order for the European Union and its Member States to be able to meet their international human rights obligations and their EU law obligations under the *Charter of Fundamental Rights of the European Union*. The ICJ therefore would support a reform of the Directive in this sense. However, if the Commission decides not to undertake a thorough reform of the Directive, the ICJ recommends, nonetheless, that provisions in the current Directive which are either not used or underused be deleted in a recast of the Family Reunification Directive.

⁶⁸ See, *European Parliament v. Council of the European Union*, European Court of Justice, Grand Chamber, C-540/03, Judgment of 27 June 2006; *Chakroun v. Minister van Buitenlandse Zaken*, European Court of Justice, C-578/08, Judgment of 4 March 2010.