

# Accesso alla giustizia per i bambini migranti

Materiale di formazione sull'accesso  
alla giustizia per i migranti



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# **Access to Justice for Migrant Children**

Materiale di formazione sull'accesso alla giustizia  
per i migranti

International Commission of Jurists (ICJ)

Greek Council for Refugees (GCR)

Forum for Human Rights (FORUM)

Immigrant Council of Ireland (ICI)

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# Access to Justice for Migrant Children

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This training module is the last of a five-part series of training materials<sup>1</sup> relevant to protecting the rights of migrants in Europe. This part provides an overview of the guiding principles on access to justice for migrant children and lists the main relevant rights.

## I. Definitions

### 1. Definition of the child and migrant child

For the purpose of these training modules on the rights of migrant children, we use the definition of a child set out in the Convention on the Rights of the Child (CRC) (United Nations General Assembly (UNGA) resolution 44/25 of 20 November 1989). It is important to be aware that a different definition may be used in varying national laws, including various laws of the same State, which may use differing definitions of a child or the age in which a person reaches majority.

Under international law, the CRC establishes in its Article 1 that “a child means every human being below the age of eighteen years”. Under Council of Europe standards, most instruments relating to children adopt the CRC definition of a child. Examples include article 4(d) of the Council of Europe Convention on Action against Trafficking in Human Beings (CETS 197, 16 May 2005) or article 3(a) of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse ([Lanzarote Convention](#), CETS No. 201, 25 October 2007).

Everyone under the age of 18 should be treated as a child, entitled to special care and procedures, despite of national legal provisions.

#### Convention on the Rights of the Child, 1989

##### Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

#### Council of Europe Convention on Action against Trafficking in Human Beings, 2005

##### Article 4(d)

(d) “Child” shall mean any person under eighteen years of age

There is no international legal definition specifically of a migrant child. A migrant child within the meaning of the CRC, is anyone under the age of eighteen and encompasses three categories:

1. Children of migrant workers, as such persons are defined by the Committee on the Protection of Migrant Workers (CMW),
2. Unaccompanied minors/minors separated from their parents outside of their country of nationality and, in case of statelessness, their country of residence (as defined in the CRC [General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin](#), CRC/GC/2005/6, 1 September 2005)
3. Children considered as refugees as defined by the [UN Refugee Convention](#) (Convention and Protocol Relating to the Status of Refugees, Resolution 2198 (XXI) 1951) and asylum seekers.

#### International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CRMW), UNGA Resolution 45/158 of 18 December 1990

##### Article 2

For the purposes of the present Convention:

1. The term “migrant worker” refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.

<sup>1</sup> These training materials on access to justice for migrants were developed as part of the FAIR PLUS (Fostering Access to Immigrant’s Rights PLUS) project and include the following training modules:

0. Access to justice
- I. Fair asylum procedures and effective remedy
- II. Access to justice in detention
- III. Access to justice for economic, social and cultural rights
- IV. Access to justice in the protection of migrant’s right to family life
- V. Access to justice for migrant children

### **CRC, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 2005**

(...)

7. **Unaccompanied children** (also called unaccompanied minors) are children, as defined in article 1 of the Convention (CRC), who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.
8. **Separated children** are children, as defined in article 1 of the Convention, who have been separated from both parents, or from their previous legal or customary primary care-giver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members.

## **2. Vulnerability**

Under international law, children, owing to their physical and mental immaturity, are entitled to special legal protection, care and safeguards. Apart from all human rights being applicable to them, children have rights that are additional to those of adults. Migrant children often find themselves in a situation of double or even multiple vulnerability, as a child, refugee or migrant child, unaccompanied or separated from their family, having a disability, being a victim of abuse, etc. **Migrant children frequently face limited access to justice, education, social and health services.**

### *International law*

In a joint General Comment (CMW/C/GC/3-CRC/C/GC/22, 16 November 2017), the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and the Committee on the Rights of the Child (CRC) acknowledge **the particular vulnerability of children affected by migration**. The International Organization for Migration (IOM) defines vulnerability in the context of migration as "*a limited capability to avoid, resist, cope with or recover from violence, exploitation, and abuse*".<sup>2</sup> The vulnerable status of migrant children can depend on the factual situation of the child or to personal characteristics.

### **Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration**

3. In the context of international migration, children may be in a situation of double vulnerability as children and as children affected by migration who (a) are migrants themselves, either alone or with their families, (b) were born to migrant parents in countries of destination or (c) remain in their country of origin while one or both parents have migrated to another country. Additional vulnerabilities could relate to their national, ethnic or social origin; gender; sexual orientation or gender identity; religion; disability; migration or residence status; citizenship status; age; economic status; political or other opinion; or other status
40. Unaccompanied and separated children may face further vulnerabilities and can be more exposed to risks, such as gender-based, sexual and other forms of violence and trafficking for sexual or labour exploitation. Children travelling with their families often also witness and experience violence.

### **Parliamentary Assembly of the Council of Europe (PACE), Resolution 1509(2006) on the Human rights of irregular migrants**

(...)

- 13.7. All children, but also other vulnerable groups such as the elderly, single mothers and more generally single girls and women, should be given particular protection and attention.

<sup>1</sup> IOM Handbook, *Protection and Assistance for Migrants Vulnerable to Violence, Exploitation and Abuse*, 2019

**UN Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/GC/14, 29 May 2013**

e) Situation of vulnerability

75. An important element to consider is the child's situation of vulnerability, such as disability, belonging to a minority group, being a refugee or asylum seeker, victim of abuse, living in a street situation, etc. The purpose of determining the best interests of a child or children in a vulnerable situation should not only be in relation to the full enjoyment of all the rights provided for in the Convention, but also with regard to other human rights norms related to these specific situations, such as those covered in the Convention on the Rights of Persons with Disabilities, the Convention relating to the Status of Refugees, among others.
76. The best interests of a child in a specific situation of vulnerability will not be the same as those of all the children in the same vulnerable situation. Authorities and decision-makers need to take into account the different kinds and degrees of vulnerability of each child, as each child is unique and each situation must be assessed according to the child's uniqueness. An individualized assessment of each child's history from birth should be carried out, with regular reviews by a multidisciplinary team and recommended reasonable accommodation throughout the child's development process.

**Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, ECtHR, Application no. 13178/03, Judgment of 12 October 2006**

The [separated child]'s position was characterized by her very young age, the fact that she was an illegal immigrant in a foreign land and the fact that she was unaccompanied by her family from whom she had become separated so that she was effectively left to her own devices. She was thus in an extremely vulnerable situation.

**Human Rights Council (HRC), Report of the Special Rapporteur on the independence of judges and lawyers – Protecting children's rights in the justice system, A/HRC/29/26 (and corrigendum A/HRC/29/26/Corr.1), 1 April 2015**

24. The principle of non-discrimination is especially relevant when justice systems are dealing with **particularly vulnerable groups of children**, such as street children, children belonging to minorities, **migrant children or asylum seekers**, children with disabilities, or child soldiers, who may require particular attention, protection and skills from the professionals interacting with them, especially lawyers, prosecutors and judges.

**Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies)**

**D. Protection from discrimination**

1. The rights of children shall be secured without discrimination (...).
2. Specific protection and assistance may need to be granted to more vulnerable children, such as migrant children, refugee and asylum seeking children, unaccompanied children, children with disabilities, homeless and street children, Roma children, and children in residential institutions.

In February 2019, the European Court of Human Rights (ECtHR) affirmed that the situation of vulnerability of migrant children should have primary consideration when assessing their case and that States have positive obligations stemming from Article 3 to protect and take care of the children in vulnerable situation. This is clearly laid out in the UN Office of the High Commissioner for Human Rights (OHCHR)'s [Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations](#) (2017) establishing the need to ensure that migrant children are treated as children first and foremost (Principle 10, p. 42-44).

**H.A. and Others v. Greece, ECtHR, Application no. 19951/16, 28 February 2019**

171. La situation des requérants se caractérisait par leur jeune âge, le fait qu'ils étaient étrangers en situation d'illégalité dans un pays inconnu, qu'ils n'étaient pas accompagnés et donc livrés à eux-mêmes. Eu égard à la protection absolue conférée par l'article 3 de la Conven-



tion, il convient, selon la Cour, de garder à l'esprit que ces éléments sont déterminants. Les requérants relevaient incontestablement de la catégorie des personnes les plus vulnérables de la société et il appartenait à l'État grec de les protéger et de les prendre en charge en adoptant à leur égard des mesures adéquates au titre des obligations positives découlant de l'article 3 (*Mubilanzila Mayeka et Kaniki Mitunga*, précité, § 55).

**Khan v. France, ECtHR, Application no. 12267/16, 28 February 2019**

74. In cases concerning foreign minors, whether accompanied or unaccompanied, the child's situation of extreme vulnerability is the decisive factor and it takes precedence over considerations relating to his or her status as an irregular migrant (...). The Court thus emphasised in *Rahimi* (ibid.) that as an unaccompanied foreign minor without leave to remain the applicant fell into "the category of the most vulnerable individuals in society", and that it had been incumbent on Greece to protect him and provide for him by taking appropriate measures in accordance with its positive obligations under Article 3.

**OHCHR, Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations, 2017**

**Principle 10: Guarantee the human rights of all children in the context of migration, and ensure that migrant children are treated as children first and foremost.**

1. (...) The child's best interests should always take precedence over migration management objectives or other administrative considerations. Children in the context of migration must be treated first and foremost as children. All children, regardless of age, should enjoy equal standards of protection.

### 3. Age assessment and benefit of the doubt

Given the definition of a child and the entitlement of children to special care and protection, it is important to ensure that all individuals who are under the age of 18 are treated as children. In case of doubt the individual should be treated as a child (unless and until proven otherwise).

Age assessment refers to procedures through which authorities seek to establish the age of a migrant to determine whether the individual is or may be a child and thus whether special procedures and rules applicable to children must be applied and the individual must receive special care and treatment.

Age assessment for the purpose of determining an individual's procedural and substantive rights should only be carried out when there is doubt as to whether or not an individual is a child. In the context of migration, such assessment must be carried out in a positive, human and expeditious manner, in order to comply with article 10 of the CRC. Until otherwise proven, the individual should be treated as a child.

**ECtHR, Abdullah Elmi and Aweys Abubakar v. Malta, Applications nos. 25794/13 and 28151/13, 22 November 2016**

145. The Court is, on the one hand, sensitive to the Government's argument that younger looking individuals are fast tracked, and that the procedure is lengthier only in cases of persons close to adulthood, as well as their statement that in 2013 out of 567 individuals, only 274 were ruled to be minors (...). The Court observes that, as noted in *Mahamed Jama*, cited above, less than 10% of arrivals claimed to be minors in 2012 (that is when the applicants started their age assessment procedure). In this connection, the Court considers that despite the fact that "borderline" cases may require further assessment, the numbers of alleged minors per year put forward by the Government cannot justify a duration of more than seven months to determine the applicants' claims. Indeed, the Government have not explained why it was necessary for the first applicant in the present case to wait for a few weeks for his first age-assessment interview (see paragraph 18 above) and to wait for around seven months to have a decision following a standard medical test. The Court notes that during this time the first applicant remained in detention, despite having been told orally that he had been found to be a minor six months before (see paragraph 18). Similarly the Government have not explained why, following his interview, the second applicant had to wait for five months to have the FAV test and to wait for another two and a half months for such a decision, and therefore for his release under a care order. Indeed, in the present case it transpires that in

October 2012 the authorities were already aware that the first applicant was a minor, and yet he remained in detention until a care order was issued on 19 April 2013, while the second applicant remained in detention for at least another month after his age was determined. In this connection the Court notes that Government policy clearly states that vulnerable people are exempt from detention and that unaccompanied minors are considered as a vulnerable category (see paragraphs 30 and 31 above).

146. It follows that, even accepting that the detention was closely connected to the ground of detention relied on, namely to prevent an unauthorised entry, and in practice to allow for the applicants' asylum claim to be processed with the required prior age assessment, the delays in the present case, particularly those subsequent to the determination of the applicants' age, raise serious doubts as to the authorities' good faith. A situation rendered even more serious by the fact that the applicants lacked any procedural safeguards (as shown by the finding of a violation of Article 5 § 4, at paragraph 124 above), as well as the fact that at no stage did the authorities ascertain whether the placement in immigration detention of the applicants was a measure of last resort for which no alternative was available (...).

The consent of the child to age assessment procedure is required. Age assessment should be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity. Any medical examination shall be performed with full respect for the individual's dignity, shall be the least invasive examination and shall be carried out by qualified medical professionals. Identification measures such as age assessment should not only take into account the physical appearance of the individual, but also their psychological maturity.<sup>3</sup>

A person should not be declared to be an adult exclusively on this basis of his or her refusal to undergo medical tests (*J.A.B v. Spain op. cit.*).

There must be an effective opportunity to challenge an age assessment decision through judicial review.<sup>4</sup> Children should be provided with legal and procedural information, including on how a decision can be challenged.

### Convention on the Rights of the Child (CRC), 1989

#### Article 10

1. 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 a joint General Comment (CMW/C/GC/4-CRC/C/GC/23, 16 November 2017), the CMW and the CRC set out principles to be applied to the age assessment process. The general principles of the CRC, such as the best interest of the child, free and informed consent and non-discrimination are applicable, as well as any relevant provision of the Convention.<sup>5</sup> The age assessment process must be conducted using a holistic and multidisciplinary approach which ensures that all the necessary safeguards and principles explored are in place and the rights of the applicant are protected.

### Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return

4. To make an informed estimate of age, States should undertake a comprehensive assessment of the child's physical and psychological development, conducted by specialist paediatricians or other professionals who are skilled in combining different aspects of development. Such assessments should be carried out in a prompt, child-friendly, gender sensitive and culturally appropriate manner, including interviews of children and, as appropriate, accompanying adults, in a language the child understands. Documents that are available should be considered genuine unless there is proof to the contrary, and statements by children and their parents or relatives

<sup>3</sup> See CRC recommendations in *N.B.F v. Spain*, CRC/C/79/D/11/2017, 27 September 2018, para 12.7; *A.L v. Spain*, CRC/C/81/D/16/2017, 31 May 2019, para 12. 7; *J.A.B v. Spain*, CRC/C/81/D/22/2017, 31 May 2019, para 13.6; *R.K v. Spain*, CRC/C/82/D/27/2017, 18 September 2019, para 9.7.

<sup>4</sup> See CRC recommendations in *R.K v. Spain op.cit.* para 10. C; and *M.T. v. Spain*, 18 September 2019, CRC/C/82/D/17/2017, para 14.c

<sup>5</sup> For more information on the general principles of the CRC cfr. Section II Guiding Principles of children's rights, of this Module.

must be considered. The benefit of the doubt should be given to the individual being assessed. States should refrain from using medical methods based on, inter alia, bone and dental exam analysis, which may be inaccurate, with wide margins of error, and can also be traumatic and lead to unnecessary legal processes. States should ensure that their determinations can be reviewed or appealed to a suitable independent body.

**CRC, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 2005**

(V) RESPONSE TO GENERAL AND SPECIFIC PROTECTION NEEDS

(a) Initial assessment and measures

31. The best interests of the child must also be a guiding principle for determining the priority of protection needs and the chronology of measures to be applied in respect of unaccompanied and separated children. This necessary initial assessment process, in particular, entails the following:
  - (i) Prioritized identification of a child as separated or unaccompanied immediately upon arrival at ports of entry or as soon as their presence in the country becomes known to the authorities (art. 8). Such identification measures include age assessment and should not only take into account the physical appearance of the individual, but also his or her psychological maturity. Moreover, the assessment must be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity; and, in the event of remaining uncertainty, should accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, she or he should be treated as such; [...].

**CRC, NBF v. Spain, CRC/C/79/D/11/2017, 27 September 2018**

- 12.3 The Committee considers that the determination of the age of a young person who claims to be a minor is of fundamental importance, as the outcome determines whether that person will be entitled to or excluded from national protection as a child. Similarly, and this point is of vital importance to the Committee, the enjoyment of the rights contained in the Convention flows from that determination. It is therefore imperative that there be due process to determine a person's age, as well as the opportunity to challenge the outcome through an appeals process. While that process is under way, the person should be given the benefit of the doubt and treated as a child. Accordingly, the Committee considers that the best interests of the child should be a primary consideration throughout the age determination process.
- 12.4 The Committee recalls that, in the absence of identity documents or other appropriate evidence, "to make an informed estimate of age, States should undertake a comprehensive assessment of the child's physical and psychological development, conducted by specialist paediatricians or other professionals who are skilled in combining different aspects of development. Such assessments should be carried out in a prompt, child-friendly, gender-sensitive and culturally appropriate manner, including interviews of children and, as appropriate, accompanying adults, in a language the child understands. Documents that are available should be considered genuine unless there is proof to the contrary, and statements by children must be taken into account. The benefit of the doubt should be given to the individual being assessed. States should refrain from using medical methods based on, inter alia, bone and dental exam analysis, which may be inaccurate, with wide margins of error, and can also be traumatic and lead to unnecessary legal processes."

Whenever a child is required to prove age and they do not have a birth certificate, the State should provide the child with a birth certificate promptly and free of charge. If there is no proof of age by birth certificate, the responsible authority should accept all documentation that can prove age, such as notification of birth, extracts from birth registries, baptismal or equivalent documents or school reports. Documents should be considered genuine unless there is proof to the contrary ([CRC General Comment No. 24 on children's rights in the child justice system](#), CRC/C/GC/24, paras 33. See also [R.K v. Spain](#), CRC/C/82/D/27/2017, para 10. C; [M.T. v. Spain](#), CRC/C/82/D/17/2017, para 14.c). Authorities should allow for interviews with or testimony by parents regarding age, or for affirmations to be filed by teachers or religious or community leaders who know the age of the child. Only if these measures prove unsuccessful may there be an assessment of the child's physical and psychological development, conducted by specialist paediatricians or other professionals skilled in evaluating different aspects of development ([CRC General Comment No. 24](#) op. cit. para. 33).

At EU level, in addition to all the safeguards provided by the Convention on the Rights of the Child, the EU Asylum Procedures Directive (2013/32/EU of 2013) provides requirements on how age assessment should be carried out, and enshrines the presumption of minority.

**Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (EU Asylum Procedures Directive), Doc no. 32013L0032**

**Article 25**

(...)

5. Member States may use medical examinations to determine the age of unaccompanied minors within the framework of the examination of an application for international protection where, following general statements or other relevant indications, Member States have doubts concerning the applicant's age. If, thereafter, Member States are still in doubt concerning the applicant's age, they shall assume that the applicant is a minor.

Any medical examination shall be performed with full respect for the individual's dignity, shall be the least invasive examination and shall be carried out by qualified medical professionals allowing, to the extent possible, for a reliable result.

Where medical examinations are used, Member States shall ensure that:

- (a) unaccompanied minors are informed prior to the examination of their application for international protection, and in a language that they understand or are reasonably supposed to understand, of the possibility that their age may be determined by medical examination. This shall include information on the method of examination and the possible consequences of the result of the medical examination for the examination of the application for international protection, as well as the consequences of refusal on the part of the unaccompanied minor to undergo the medical examination;
- (b) unaccompanied minors and/or their representatives consent to a medical examination being carried out to determine the age of the minors concerned; and
- (c) the decision to reject an application for international protection by an unaccompanied minor who refused to undergo a medical examination shall not be based solely on that refusal.

The fact that an unaccompanied minor has refused to undergo a medical examination shall not prevent the determining authority from taking a decision on the application for international protection.

In the event of a negative decision (discordant with the claimed age), the authorities should explain the reasons for the decision and inform the applicant about how it can be challenged. As the childhood/ adulthood of the applicant may influence how the international protection procedure is conducted (prioritisation, safeguards, etc.), a decision on the age assessment should be issued separately from and prior to the decision on international protection. If there is no separate right to appeal against the result of the age assessment decision itself, the opportunity to challenge the outcome through judicial review or as part of the consideration of the overall protection claim should be available. The individual should have access to a representative or to legal support to assist him or her in the process.

**EASO Practical Guides Series, Practical Guide on Age Assessment (2nd edition), p. 37**

In response to these challenges, EASO has devised key recommendations, which will be discussed in depth in this publication. These can be summarised as follows.

1. The best interest of the child (BIC) should be observed not only when a child is identified as such but also when there are doubts as to whether the applicant may be a child.
2. Age assessment should not be a routine practice. The necessity of the assessment should be duly justified based on substantiated doubts on the stated age.
3. The implementation of the principle of the BIC requires a child-centred age assessment which should place the child at the centre and be adapted to the specific needs of the applicant (gender, range of disputed age, cultural background, etc.).
4. Benefit of the doubt must be given as soon as doubts on the claimed age appear, during the

age assessment and until conclusive results are provided. The applicant should be considered and treated as a child until he or she is found to be an adult.

5. The child, or the presumed child, must be appointed a guardian/representative who ensures that the child can participate in the assessment, has been informed about the age assessment process in a child-friendly, gender-sensitive and age-appropriate manner in a language that the child can understand and does, in fact, fully understand the assessment process. This information is essential to allow the child to express views, wishes and opinions and make an informed decision to participate in the process.
6. The age assessment process must be conducted using a holistic and multidisciplinary approach which ensures that all the necessary safeguards and principles explored are in place and the rights of the applicant are protected.
7. Since no single method currently available can determine the exact age of a person, a combination of methods assessing not only the physical development but also the maturity and the psychological development of the applicant can reduce the range of age in question.
8. No method involving nudity or the examination, observation or measurement of genitalia or intimate parts should be used for age assessment purposes.

**EASO Practical Guide on Age Assessment op. cit. p. 11-12**

The principle of the benefit of the doubt must be applied when assessing the age of an individual, including a migrant:

1. Until the age assessment has been completed and whilst doubts remain the individual should be afforded the benefit of the doubt, and treated as a child.
2. In cases where it is the duty of the applicant to substantiate the application for international protection, but the applicant's statements are not supported by documentary or other evidence, in accordance with Article 4(5) of the **Qualification Directive**<sup>6</sup> if:
  - a) the applicant has made a genuine effort to substantiate his [or her] application;
  - b) all relevant elements at the applicant's disposal have been submitted, and a satisfactory explanation has been given regarding any lack of other relevant elements;
  - c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;
  - d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and
  - e) the general credibility of the applicant has been established.

Consistent with General Comment 6 of the Committee on the Rights of the Child and the EU Asylum Procedures Directive if, following age assessment, uncertainty remains, the individual should be given the benefit of the doubt: if there is a possibility that the individual is a child, she or he should be treated as such.

The benefit of the doubt is a key principle and safeguard in the field of age assessment since none of the current methods of age assessment are able to determine a specific age with certainty.

**EASO Practical Guide on Age Assessment op. cit., p. 22**

<sup>6</sup> Directive 2011/95/EU of the European Parliament and the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).



## II. Guiding principles on children's rights

The guiding principles on children's rights are underlying requirements for the realization of all the rights of a child set out in the Convention on the Rights of the Child (CRC). These guiding principles include:

1. Non-discrimination;
2. The best interest of the child;
3. The right to life, survival and development; and
4. The right to participate and to be heard.

This section introduces all these guiding principles as well as the positive obligation of States to provide care and protection to migrant children.

### **CRC, General Comment No. 5 on general measures of implementation of the Convention on the Rights of the Child, CRC/GC/2003/5, 27 November 2003**

12. The development of a children's rights perspective throughout Government, parliament and the judiciary is required for effective implementation of the whole Convention and, in particular, in the light of the following articles in the Convention identified by the Committee as general principles:

#### **Article 2**

the obligation of States to respect and ensure the rights set forth in the Convention to each child within their jurisdiction **without discrimination** of any kind. This non-discrimination obligation requires States actively to identify individual children and groups of children the recognition and realization of whose rights may demand special measures. For example, the Committee highlights, in particular, the need for data collection to be disaggregated to enable discrimination or potential discrimination to be identified. Addressing discrimination may require changes in legislation, administration and resource allocation, as well as educational measures to change attitudes. It should be emphasized that the application of the non-discrimination principle of equal access to rights does not mean identical treatment. A general comment by the Human Rights Committee has underlined the importance of taking special measures in order to diminish or eliminate conditions that cause discrimination.

#### **Article 3(1)**

the **best interests of the child** as a primary consideration in all actions concerning children. The article refers to actions undertaken by "public or private social welfare institutions, courts of law, administrative authorities or legislative bodies". The principle requires active measures throughout Government, parliament and the judiciary. Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions - by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children.

#### **Article 6**

**the child's inherent right to life** and States Parties' obligation to ensure to the maximum extent possible the survival and development of the child. The Committee expects States to interpret "development" in its broadest sense as a holistic concept, embracing the child's physical, mental, spiritual, moral, psychological and social development. Implementation measures should be aimed at achieving the optimal development for all children.

#### **Article 12**

**the child's right to express his or her views freely** in "all matters affecting the child", those views being given due weight. This principle, which highlights the role of the child as an active participant in the promotion, protection and monitoring of his or her rights, applies equally to all measures adopted by States to implement the Convention.

### **1. The non-discrimination principle**

In accordance with international law, including the Convention on the Rights of the Child, the rights of children shall be secured without discrimination on any grounds such as their or their parent(s)' or guardian's sex, race, colour or ethnic background, language, religion, political or other opinion, national or social origin, disability socio-economic background, association with a national minority, property, birth, sexual orientation, gender identity or other status.

## Convention on the Rights of the Child, 1989

### Article 2

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.

States must ensure that migrant children are treated with equality both *de facto* and *de jure*, and must eliminate both direct and indirect discrimination against migrant children.

### Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration

9. (...) The non-discrimination principle of the Convention on the Rights of the Child obliges States parties to respect and ensure the rights set forth in the Convention to all children, whether they are considered, inter alia, migrants in regular or irregular situations, asylum seekers, refugees, stateless and/or victims of trafficking, including in situations of return or deportation to the country of origin, irrespective of the child's or the parents' or legal guardians' nationality, migration status or statelessness.

In particular, States obligations to ensure equality and non-discrimination include, among other things, the duty to

1. Refrain from discriminatory actions that undermine the enjoyment of rights, eliminate discriminatory laws and practice – and review laws and practice with a view to ensuring that they do not amount to or facilitate discrimination (duty to respect);
2. Prevent and protect against discrimination by private actors (duty to protect);
3. Take positive proactive steps to ensure the equal enjoyment of human rights (obligation to fulfill).

States must not only eliminate plainly discriminatory laws, policies and practices but also ensure that seemingly neutral measures do not have a discriminatory effect in real terms.

### Direct/indirect discrimination

Direct discrimination is differential treatment on grounds, such as race and colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability, age, nationality, marital and family status, sexual orientation and gender identity, health status, place of residence, economic and social situation that is not based on reasonable and objective criteria and is not for the purpose of achieving or proportionate to that aim. Direct discrimination is not justifiable or lawful. Indirect discrimination takes place when an apparently neutral provision, criterion or practice, when applied, would put a person sharing a particular characteristic at a disadvantage compared to others similarly situated on grounds such as race, colour, gender, sex, disability, sexual orientation, gender identity, religion, language, political or other opinion, national or ethnic origin, property, birth or other status, without a legitimate aim or in a disproportionate manner. A difference in treatment on grounds such as race, colour, gender, sex, disability, sexual orientation, or gender identity, religion, language, political or other opinion, national or ethnic origin, property, birth or other status, that pursues a legitimate aim and is proportionate to achieving that aim is not discriminatory.

In order to correct situations of inequality and discrimination, a State may also be required to implement temporary special measures necessary in order to (re)establish equality.

### Positive measures

Positive measures may be needed to protect children or certain groups of children against vulnerabilities to discrimination, including on the basis of their age. The principle of equality sometimes requires States Parties to take affirmative action in order to diminish or eliminate conditions, which cause or help to perpetuate discrimination prohibited by international law (e.g. [the International Covenant on Civil and Political Rights \(ICCPR\) UNGA resolution 2200A \(XXI\)](#), 16 December 1966). For example, in

a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a period of time certain preferential treatment in specific matters to the part of the population concerned as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the ICCPR (HRC, *CCPR General Comment no. 18: Non-Discrimination*, 10 November 1989, para. 10).

Although some differences in treatment between nationals and non-nationals are not covered by the provisions of the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) (UNGA resolution 2106 (XX) of 21 December 1965), the Committee on the Elimination of Racial Discrimination (CERD) has clarified that differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation are not applied pursuant to a legitimate aim and are not proportional to the achievement of this aim.

### International law

#### International Covenant on Civil and Political Rights (ICCPR), 1966

##### Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

##### Art 24(1)

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

##### Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

#### International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966

##### Article 2(2)

The contracting states shall "... undertake to respect and to ensure ... the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

##### Article 10

The States Parties to the present Covenant recognize that: (...)

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

#### CRC, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 2005

18. The principle of non-discrimination, in all its facets, applies in respect to all dealings with separated and unaccompanied children. In particular, it prohibits any discrimination on the basis of the status of a child as being unaccompanied or separated, or as being a refugee,

<sup>7</sup> See CESCR, *General Comment No. 20: Non-discrimination in economic, social and cultural rights*, E/C.12/GC/20, 2 September 2009, paras. 19-35.



asylum-seeker or migrant. This principle, when properly understood, does not prevent, but may indeed call for, differentiation on the basis of different protection needs such as those deriving from age and/or gender. Measures should also be taken to address possible misperceptions and stigmatization of unaccompanied or separated children within the society. Policing or other measures concerning unaccompanied or separated children relating to public order are only permissible where such measures are based on the law; entail individual rather than collective assessment; comply with the principle of proportionality; and represent the least intrusive option. In order not to violate the prohibition on non-discrimination, such measures can, therefore, never be applied on a group or collective basis.

### **International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 1965**

Art 1(1) '...any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin ...'

### **UNGA, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), resolution 34/180 of 18 December 1979**

#### **Article 1**

For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

### **UNGA, Convention on the Rights of Persons with Disabilities (CRPD) A/RES/61/106, 13 December 2006**

#### **Article 5 Equality and non-discrimination**

1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

### **Council of Europe (CoE) European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights or ECHR), ETS No. 5, adopted 4 November 1950**

#### **Article 14**

Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

### **Protocol 12 to the European Convention on Human Rights (ECHR), ETS no. 177, 4 November 2000**

#### **Article 1 General prohibition of discrimination**

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

### **Ponomaryovi v. Bulgaria, ECtHR, Application no. 5335/05, Judgment of 21 June 2011**

Discrimination against migrant children on the grounds of nationality/immigration status is prohibited. In this case two Russian nationals, aged 16 and 18, complained that they had been discriminated against because, unlike Bulgarian nationals and aliens having permanent residence permits, they had been required to pay school fees to pursue their secondary education. Both of them had been in possession of a permanent residence permit until their eighteenth birthdays, but did not have the money to pay the fees for an independent residence permit, which they needed in order to continue residing in Bulgaria lawfully. According to the Court, the distinction as regards the obligation to pay school fees was due exclusively of their nationality and immigration status. Although States are usually allowed a wide margin of appreciation when it comes to general measures of economic or social policy, very weighty reasons have to be put forward to prove difference of treatment based exclusively on the ground of nationality. Strict scrutiny was applied in this case as education is a right that enjoys direct protection under the Convention (article 2 Protocol 1). The Court found that the requirement for the applicants to pay fees for their secondary education on account of their nationality and immigration status was not justified. The Court therefore concluded that the State had violated Article 14 of the European Convention (prohibiting discrimination) taken in conjunction with article 2 of Protocol No. 1 to the European Convention (the right to education).

### **European Social Charter (revised), 1996**

Part V, Article E

#### **Non-discrimination**

The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.

## **2. The best interest of the child**

In all actions concerning children, including migrant children, the principle of the best interests of the child must be a primary consideration (Article 3 Convention on the Rights of the Child). The best interests of the child is an overarching component of substantive rights, a fundamental interpretative legal principle. It is applicable to all official procedures pertaining to children and must be based on an assessment of all elements of a child's or children's interests in a specific situation.

The fact that the child is very young or in a vulnerable situation (e.g. has a disability, belongs to a minority group, is a migrant, etc) does not deprive them of the right to express their views, nor reduces the weight given to the child's views in determining their best interests. The adoption of specific measures to guarantee the exercise of equal rights for children in such situations must be subject to an individual assessment which assures a role to the children themselves in the decision-making process (see [CRC General Comment no. 14](#) op. cit. para 54; Views of the CRC in [Y.B. and N.S v. Belgium](#), CRC/C/79/D/12/2017, 22 March 2017, para 8.7).

### *International law*

### **Convention on the Rights of the Child, 1989**

#### **Article 3**

1. 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.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

**General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)**

**The Committee underlines that the child's best interests is a threefold concept:**

- (a) A substantive right: The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general.

Article 3, paragraph 1, creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court.

- (b) A fundamental, interpretative legal principle: If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen. The rights enshrined in the Convention and its Optional Protocols provide the framework for interpretation.
- (c) A rule of procedure: Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases.

32. The concept of the child's best interests is complex and its content must be determined on a **case-by-case basis**. It is through the interpretation and implementation of article 3, paragraph 1, in line with the other provisions of the Convention, that the legislator, judge, administrative, social or educational authority will be able to clarify the concept and make concrete use thereof. Accordingly, the concept of the child's best interests is flexible and adaptable. It should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs. For individual decisions, the child's best interests must be assessed and determined in light of the specific circumstances of the particular child. For collective decisions – such as by the legislator –, the best interests of children in general must be assessed and determined in light of the circumstances of the particular group and/or children in general. In both cases, assessment and determination should be carried out with full respect for the rights contained in the Convention and its Optional Protocols.

46. As stated earlier, the "best interests of the child" is a right, a principle and a rule of procedure based on an assessment of all elements of a child's or children's interests in a specific situation. When assessing and determining the best interests of the child in order to make a decision on a specific measure, the following steps should be followed:

- (a) First, within the specific factual context of the case, find out what are the relevant elements in a best-interests assessment, give them concrete content, and assign a weight to each in relation to one another; (b) Secondly, to do so, follow a procedure that ensures legal guarantees and proper application of the right.

47. Assessment and determination of the child's best interests are two steps to be followed when required to make a decision. The "best-interests assessment" consists in evaluating and balancing all the elements necessary to make a decision in a specific situation for a specific individual child or group of children. It is carried out by the decision-maker and his or her staff – if possible a multidisciplinary team –, and requires the participation of the child. The "best-interests determination" describes the formal process with strict procedural safeguards designed to determine the child's best interests on the basis of the best-interests assessment. [...]

Elements to be taken into account when assessing the child's best interests

52. Based on these preliminary considerations, the Committee considers that the elements to be taken into account when assessing and determining the child's best interests, as relevant to the situation in question, are as follows:

- (a) The child's views [...]  
 (b) The child's identity [...]

- (c) Preservation of the family environment and maintaining relations [...]
- (d) Care, protection and safety of the child [...]
- (e) Situation of vulnerability [...]
- (f) The child's right to health [...]
- (g) The child's right to education [...]
- [...]

**Procedural safeguards to guarantee the implementation of the child's best interests**

85. To ensure the correct implementation of the child's right to have his or her best interests taken as a primary consideration, some child-friendly procedural safeguards must be put in place and followed. As such, the concept of the child's best interests is a rule of procedure [...].
86. While public authorities and organizations making decisions that concern children must act in conformity with the obligation to assess and determine the child's best interests, people who make decisions concerning children on a daily basis (e.g. parents, guardians, teachers, etc.) are not expected to follow strictly this two-step procedure, even though decisions made in everyday life must also respect and reflect the child's best interests.
87. States must put in place formal processes, with strict procedural safeguards, designed to assess and determine the child's best interests for decisions affecting the child, including mechanisms for evaluating the results. States must develop transparent and objective processes for all decisions made by legislators, judges or administrative authorities, especially in areas which directly affect the child or children.

**Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration**

29. States parties shall ensure that the best interests of the child are taken fully into consideration in immigration law, planning, implementation and assessment of migration policies and decision-making on individual cases, including in granting or refusing applications on entry to or residence in a country, decisions regarding migration enforcement and restrictions on access to social rights by children and/or their parents or legal guardians, and decisions regarding family unity and child custody, where the best interests of the child shall be a primary consideration and thus have high priority.

**UNHCR, Executive Committee Conclusion No. 47 (XXXVIII) – 1987 – Refugee Children, 12 October 1987, para. (d)**

[...] all action taken on behalf of refugee children must be guided by the principle of the best interests of the child as well as by the principle of family unity.

**UN Committee on the Rights of the Child, General Comment No. 24 on children's rights in the child justice system, UN Doc. CRC/C/GC/24, 18 September 2019**

2. Children differ from adults in their physical and psychological development. Such differences constitute the basis for the recognition of lesser culpability, and for a separate system with a differentiated, individualized approach. Exposure to the criminal justice system has been demonstrated to cause harm to children, limiting their chances of becoming responsible adults.
3. (...) As the Convention clearly states in article 40, every child alleged as, accused of or recognized as having infringed criminal law should always be treated in a manner consistent with the promotion of the child's sense of dignity and worth. Evidence shows that the prevalence of crime committed by children tends to decrease after the adoption of systems in line with these principles.
76. The Committee emphasizes that the reaction to an offence should always be proportionate not only to the circumstances and the gravity of the offence, but also to the personal circumstances (age, lesser culpability, circumstances and needs, including, if appropriate, the mental health needs of the child), as well as to the various and particularly long-term needs of the society. A strictly punitive approach is not in accordance with the principles of child justice spelled out in article 40 (1) of the Convention. Where serious offences are committed

by children, measures proportionate to the circumstances of the offender and to the gravity of the offence may be considered, including considerations of the need for public safety and sanctions. Weight should be given to the child's best interests as a primary consideration as well as to the need to promote the child's reintegration into society.

**UN Committee on the Rights of the Child, General Comment no. 6: Treatment of Un-accompanied and Separated Children Outside Their Country of Origin, UN Doc. CRC/GC/2005/6, 1 September 2005**

19. Article 3(1) states that "[i]n 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". In the case of a displaced child, the principle must be respected during all stages of the displacement cycle. At any of these stages, a best interests determination must be documented in preparation of any decision fundamentally impacting on the unaccompanied or separated child's life.
20. A determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child's identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs. Consequently, allowing the child access to the territory is a prerequisite to this initial assessment process. The assessment process should be carried out in a friendly and safe atmosphere by qualified professionals who are trained in age and gender-sensitive interviewing techniques.

**CRC, K.Y.M v. Denmark, CRC/C/77/D/3/2016, views adopted 8 March 2018**

- 11.3 [T]he Committee recalls its general comment No. 6, in which it states that States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37 of the Convention; and that (...)The assessment of the risk of such serious violations should be conducted in an age- and gender-sensitive manner.<sup>8</sup>(...)

In particular, the refugee definition in that Convention must be interpreted in an age- and gender-sensitive manner, taking into account the particular motives for, and forms and manifestations of, persecution experienced by children. Persecution of kin; under-age recruitment; trafficking of children for prostitution; and sexual exploitation or subjection to female genital mutilation, are some of the child-specific forms and manifestations of persecution which may justify the granting of refugee status if such acts are related to one of the 1951 Refugee Convention grounds. **States should, therefore, give utmost attention to such child-specific forms and manifestations of persecution as well as gender-based violence in national refugee status-determination procedures.**<sup>9</sup>

- 11.8 The Committee recalls that the best interests of the child should be a primary consideration in decisions concerning the deportation of a child and that such decisions should ensure — within a procedure with proper safeguards — that the child will be safe and provided with proper care and enjoyment of rights (See joint general comment No. 3 and 22 (2017) of the CMW and CRC, paras. 29 and 33).
- 11.8.c The evaluation of the risk that a child may be subjected to an irreversible harmful practice such as female genital mutilation in the country to which he or she is being deported should be carried out following the **principle of precaution and, where reasonable doubts exist that the receiving State cannot protect the child against such practices, State parties should refrain from deporting the child.**

**Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice, 17 November 2010, Part III Fundamental Principles, paras. (B)(2) and (3) Best interests of the Child**

2. In assessing the best interests of the involved or affected children:
  - a. their views and opinions should be given due weight;

<sup>8</sup> CRC [Committee's General Comment No. 6](#), para. 27; and the CEDAW [General recommendation No. 32 \(2014\) on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women](#), CEDAW/C/GC/32, 14 November 2014, para. 25.

<sup>9</sup> CRC Committee's General Comment No. 6, para. 74.

- b. all other rights of the child, such as the right to dignity, liberty and equal treatment should be respected at all times;
  - c. a comprehensive approach should be adopted by all relevant authorities so as to take due account of all interests at stake, including psychological and physical well-being and legal, social and economic interests of the child.
3. The best interests of all children involved in the same procedure or case should be separately assessed and balanced with a view to reconciling possible conflicting interests of the children.

**ECtHR, *El Ghatet v. Switzerland*, Application no. 56971/10, 8 November 2016**

46. The Court has further held that there is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests must be paramount (...). For that purpose, in cases regarding family reunification the Court pays particular attention to the circumstances of the minor children concerned, especially their age, their situation in their country of origin and the extent to which they are dependent on their parents (...). While the best interests of the child cannot be a “trump card” which requires the admission of all children who would be better off living in a Contracting State (...), the domestic courts must place the best interests of the child at the heart of their considerations and attach crucial weight to it (...).
47. The Court reiterates that the task to assess the best interests of the child in each individual case is primarily one for the domestic authorities, which often have the benefit of direct contact with the persons concerned (...). In line with the principle of subsidiarity, it is not the Court’s task to take the place of the competent authorities in determining the best interests of the child, but to ascertain whether the domestic courts secured the guarantees set forth in Article 8 of the Convention, particularly taking into account the child’s best interests, which must be sufficiently reflected in the reasoning of the domestic courts (...). Where the reasoning of domestic decisions is insufficient, with any real balancing of the interests in issue being absent, this would be contrary to the requirements of Article 8 of the Convention (...).

*EU law*

**Charter on Fundamental Rights of the European Union (EU Charter) 2012/C 326/02, adopted 6 October 2012**

**Article 24(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.”

**Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (Asylum Procedures Directive)**

- (33) The best interests of the child should be a primary consideration of Member States when applying this Directive, in accordance with the Charter of Fundamental Rights of the European Union (the Charter) and the 1989 United Nations Convention on the Rights of the Child. In assessing the best interest of the child, Member States should in particular take due account of the minor’s well-being and social development, including his or her background.

### **3. The right to participate and to be heard**

The right to be heard must be applied in any procedure determining status in a country or rights or otherwise affecting the child, including both civil and criminal proceedings.

The right to be heard is both a substantive right in itself and a necessary right for the interpretation and implementation of all other rights.

The State’s obligation to respect and protect a child’s right to be heard means that a child is to be given the opportunity and means to present his or her views and have those views given due weight



when decisions are being made which will affect the child. The views of children should be taken into account in all decisions concerning them, even when the child is not able to express their views verbally.

This right is set out in international standards including the Convention on the Rights of the Child (CRC) and the EU Charter on Fundamental Rights (EU Charter).

In order to effectively exercise the right to be heard, children have the right to counseling (access to a lawyer), to information, to interpretation when needed, and other procedural rights.

### **Convention on the Rights of the Child, 1989**

#### **Article 12**

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

### **Committee on the Rights of the Child, General Comment No. 12: The right of the child to be heard, UN Doc. CRC/C/GC/12, 20 July 2009**

21. The Committee emphasizes that article 12 imposes no age limit on the right of the child to express her or his views, and discourages States parties from introducing age limits either in law or in practice which would restrict the child's right to be heard in all matters affecting her or him. In this respect, the Committee underlines the following:
  - First... full implementation of article 12 requires recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preferences;
  - Second, it is not necessary that the child has comprehensive knowledge of all aspects of the matter affecting her or him, but that she or he has sufficient understanding to be capable of appropriately forming her or his own views on the matter;
  - Third, States parties are also under the obligation to ensure the implementation of this right for children experiencing difficulties in making their views heard. For instance, children with disabilities should be equipped with, and enabled to use, any mode of communication necessary to facilitate the expression of their views. Efforts must also be made to recognize the right to expression of views for minority, indigenous and migrant children and other children who do not speak the majority language;
  - Lastly, States parties must be aware of the potential negative consequences of an inconsiderate practice of this right, particularly in cases involving very young children, or in instances where the child has been a victim of a criminal offence, sexual abuse, violence, or other forms of mistreatment. States parties must undertake all necessary measures to ensure that the right to be heard is exercised ensuring full protection of the child.
34. A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms.

### **Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, 17 Nov 2010**

44. Judges should respect the right of children to be heard in all matters that affect them or at least to be heard when they are deemed to have a sufficient understanding of the matters in question. Means used for this purpose should be adapted to the child's level of understanding

and ability to communicate and take into account the circumstances of the case. Children should be consulted on the manner in which they wish to be heard.

45. Due weight should be given to the child's views and opinion in accordance with his or her age and maturity.
46. The right to be heard is a right of the child, not a duty of the child.
47. A child should not be precluded from being heard solely on the basis of age. Whenever a child takes the initiative to be heard in a case that affects him or her, the judge should not, unless it is in the child's best interests, refuse to hear the child and should listen to his or her views and opinion on matters concerning him or her in the case.
48. Children should be provided with all necessary information on how effectively to use the right to be heard. However, it should be explained to them that their right to be heard and to have their views taken into consideration may not necessarily determine the final decision.
49. Judgments and court rulings affecting children should be duly reasoned and explained to them in language that children can understand, particularly those decisions in which the child's views and opinions have not been followed.

**Report of the UN High Commissioner for Human Rights on Access to justice for children (A/HRC/25/35), 16 December 2013**

59. States must also ensure that the views of children, including children from the youngest age, even when they may be unable to express themselves verbally, are given due consideration. Moreover, in order to avoid (re-)victimization of children participating in judicial processes, States should make sure that their privacy and confidentiality are safeguarded at all times. States also must ensure that children are protected from all forms of violence when coming into contact with the justice system.

**Committee on the Rights of the Child, General Comment No. 12: The right of the child to be heard, UN Doc. CRC/C/GC/12, 20 July 2009**

**9. In immigration and asylum proceedings**

123. Children who come to a country following their parents in search of work or as refugees are in a particularly vulnerable situation. For this reason it is urgent to fully implement their right to express their views on all aspects of the immigration and asylum proceedings. In the case of migration, the child has to be heard on his or her educational expectations and health conditions in order to integrate him or her into school and health services. In the case of an asylum claim, the child must additionally have the opportunity to present her or his reasons leading to the asylum claim.
124. The Committee emphasizes that these children have to be provided with all relevant information, in their own language, on their entitlements, the services available, including means of communication, and the immigration and asylum process, in order to make their voice heard and to be given due weight in the proceedings. A guardian or adviser should be appointed, free of charge. Asylum-seeking children may also need effective family tracing and relevant information about the situation in their country of origin to determine their best interests. Particular assistance may be needed for children formerly involved in armed conflict to allow them to pronounce their needs. Furthermore, attention is needed to ensure that stateless children are included in decision-making processes within the territories where they reside.

**Committee on the Rights of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, UN Doc. CRC/GC/2005/6, 1 September 2005**

71. Minimum procedural guarantees should include that the application will be determined by a competent authority fully qualified in asylum and refugee matters. Where the age and maturity of the child permits, the opportunity for a personal interview with a qualified official should be granted before any final decision is made. Wherever the child is unable to communicate directly with the qualified official in a common language, the assistance of a qualified interpreter should be sought. Moreover, the child should be given the "benefit of the doubt", should



there be credibility concerns relating to his or her story as well as a possibility to appeal for a formal review of the decision.

72. The interviews should be conducted by representatives of the refugee determination authority who will take into account the special situation of unaccompanied children in order to carry out the refugee status assessment and apply an understanding of the history, culture and background of the child. The assessment process should comprise a case-by-case examination of the unique combination of factors presented by each child, including the child's personal, family and cultural background. The guardian and the legal representative should be present during all interviews.

**Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration**

35. The Committee on the Rights of the Child, in its general comment No. 12, underlines that adequate measures to guarantee the right to be heard should be implemented in the context of international migration, as children who come to a country could be in a particularly vulnerable and disadvantaged situation. For that reason, it is critical to implement fully their right to express their views on all aspects affecting their lives, including as an integral part of immigration and asylum proceedings, and for their views to be given due weight. Children may have their own migration projects and migration-driving factors, and policies and decisions cannot be effective or appropriate without their participation. The Committee also emphasizes that these children should be provided with all relevant information, inter alia, on their rights, the services available, means of communication, complaints mechanisms, the immigration and asylum processes and their outcomes. Information should be provided in the child's own language in a timely manner, in a child-sensitive and age-appropriate manner, in order to make their voice heard and to be given due weight in the proceedings.
37. States parties should take all measures appropriate to fully promote and facilitate the participation of children, including providing them with the opportunity to be heard in any administrative or judicial proceeding related to their or their families' cases, including any decision on care, shelter or migration status. Children should be heard independently of their parents, and their individual circumstances should be included in the consideration of the family's cases. Specific best-interests assessments should be carried out in those procedures, and the child's specific reasons for the migration should be taken into account. Regarding the significant relationship between the right to be heard and the best interests of the child, the Committee on the Rights of the Child has already stated that there can be no correct application of article 3 if the components of article 12 are not respected. Likewise, article 3 reinforces the functionality of article 12, facilitating the essential role of children in all decisions affecting their lives.
38. States parties should take all appropriate measures aimed at ensuring children's right to be heard in the immigration procedures concerning their parents, in particular where the decision could affect the children's rights, such as the right to not be separated from their parents, except when such separation is in their best interests (see art. 9 of the Convention on the Rights of the Child).

The manner of ascertaining/"hearing" a child's views may vary, depending on the age and maturity of the child and the particular circumstances of the case. In some cases, for example, requiring a child to appear in court may not be in the child's best interest - for instance it may risk traumatizing the child. In this respect, the ECtHR does not interpret the right to respect for private and family life (Article 8 of the ECHR) as always requiring the child to be heard in court.

In the particular case of *Sahin v. Germany* (below), the child was under the age of 4 when the appeal in the proceedings started. The court heard evidence of an expert who had held several meetings with the child and based her opinion on careful analysis of the child's opinion.

**Sahin v. Germany, ECtHR, Application no. 30943/96, Judgment of 8 July 2003**

73. As regards the issue of hearing the child in court, the Court observes that as a general rule it is for the national courts to assess the evidence before them, including the means used to ascertain the relevant facts [...]. It would be going too far to say that domestic courts are always required to hear a child in court on the issue of access to a parent not having custody, but this issue depends on the specific circumstances of each case, having due regard to the age and maturity of the child concerned.

**UN Committee on the Rights of the Child, General Comment No. 24 on children's rights in the child justice system, UN Doc. CRC/C/GC/24, 18 September 2019**

45. Children have the right to be heard directly, and not only through a representative, at all stages of the [judicial] process, starting from the moment of contact. The child has the right to remain silent and no adverse inference should be drawn when children elect not to make statements.

**EU law**

Under EU law, article 24 (1) of the EU Charter of Fundamental Rights provides that children may express their views freely, and that such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. This provision is of general applicability, and is not restricted to particular proceedings (Fundamental Rights Agency (FRA), [Handbook on European law relating to the rights of the child](#) (2015) p. 41).

The Court of Justice of the European Union (CJEU) interpreted the meaning of this provision in conjunction with States obligations under the [Brussels II bis Regulation](#) (cited below). The Court said that hearing of the child, particularly when, as may be the case, the physical presence of the child before the court is required, may prove to be inappropriate, and even harmful to the psychological health of the child who is often exposed to tensions among the parents that adversely affect them. The national court must take into account the best interests of the child in assessing this.

**EU Charter on Fundamental Rights**

**Article 24 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 which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

**Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000) ([Brussels II bis Regulation](#))**

**Article 11**

Return of the child  
[...]

2. When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.

**Joseba Andoni Aguirre Zarraga v. Simone Pelz, CJEU, C-491/10 PPU, Judgment of 22 December 2010**

62. In that regard, it must first be observed that it is clear from Article 24 of that charter and from Article 42(2)(a) of Regulation No 2201/2003 that those provisions refer not to the hearing of the child per se, but to the child's having the opportunity to be heard.
63. First, it is a requirement of Article 24(1) of the Charter that children should be able to express their views freely and that the views expressed should be taken into consideration on matters which concern the children, solely 'in accordance with their age and maturity', and of Article 24(2) of the Charter that, in all actions relating to children, account be taken of the best interests of the child, since those interests may then justify a decision not to hear the child. Secondly, it is a requirement of Article 42(2)(a) of the regulation that the child be given the opportunity to be heard 'unless a hearing was considered inappropriate having regard to his or her age or degree of maturity'.
64. Consequently, it is for the court which has to rule on the return of a child to assess whether

such a hearing is appropriate, since the conflicts which make necessary a judgment awarding custody of a child to one of the parents, and the associated tensions, create situations in which the hearing of the child, particularly when, as may be the case, the physical presence of the child before the court is required, may prove to be inappropriate, and even harmful to the psychological health of the child, who is often exposed to such tensions and adversely affected by them. Accordingly, while remaining a right of the child, hearing the child cannot constitute an absolute obligation, but must be assessed having regard to what is required in the best interests of the child in each individual case, in accordance with Article 24(2) of the Charter of Fundamental Rights.

65. It follows that, as provided for in Article 24 of the Charter of Fundamental Rights and the first subparagraph of Article 42(2) of Regulation No 2201/2003, it is not a necessary consequence of the right of the child to be heard that a hearing before the court of the Member State of origin take place, but that right does require that there are made available to that child the legal procedures and conditions which enable the child to express his or her views freely and that those views are obtained by the court.

66. In other words, whilst it is not a requirement of Article 24 of the Charter of Fundamental Rights and Article 42(2)(a) of Regulation No 2201/2003 that the court of the Member State of origin obtain the views of the child in every case by means of a hearing, and that that court thus retains a degree of discretion, the fact remains that, where that court decides to hear the child, those provisions require the court to take all measures which are appropriate to the arrangement of such a hearing, having regard to the child's best interests and the circumstances of each individual case, in order to ensure the effectiveness of those provisions, and to offer to the child a genuine and effective opportunity to express his or her views.

#### 4. The positive obligation to provide care and protection to migrant children

It is the duty of the State to provide care and protection to children in all situations where their families are unwilling or unable to do so. The duty implies positive obligations on the State to take necessary steps to ensure the well-being of children.

The obligation to care and protection for children is provided for in several articles of the CRC and covers diverse situations such as children deprived of their family environment (art. 20), refugee children (art. 22), and children who are victims of abuses (art. 39).

The European Social Charter also entitles children to social, legal and economic protection (Article 17). In [CEC v. The Netherlands](#) (Complaint No. 90/2013, 1 July 2014), the European Committee on Social Rights declared that the scope of the Charter must not be construed to exclude migrants when it comes to the right to human dignity. The case was about the non-conformity of the Dutch social welfare system, which did not provide irregular migrants with accommodation and medical assistance, not even short-term assistance to persons in immediate and urgent need. The Committee found that the Netherlands had an obligation to provide shelter and medical assistance to irregular migrants as long as they were in the jurisdiction of the Netherlands.

As well, in [Rahimi v. Greece \(Application No. 8687/08, 5 April 2011\)](#), the Court found that Greece had the duty to ensure care for the minor after his release from detention (paras 87-94).

#### Convention on the Rights of the Child, 1989

##### Article 3

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

##### Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special pro-

tection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.
3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

#### Article 22

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.
2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

#### Article 39

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

#### CRC, *D.D v. Spain*, CRC/C/80/D/4/2016, 15 May 2019

- 14.3 [T]he Committee considers that "the positive aspect of these protection obligations also extends to requiring States to take all necessary measures to identify children as being unaccompanied or separated at the earliest possible stage, including at the border"<sup>10</sup>. Accordingly, it is imperative and necessary that, in order to comply with its obligations under article 20 of the Convention and to respect the best interests of the child, the State conducts an initial assessment, prior to any removal or return, that includes the following stages: a) assessment, as a matter of priority, of whether the person concerned is an unaccompanied minor, with, in the event of uncertainty, the individual being accorded the benefit of the doubt such that, if there is a possibility that the individual is a child, he or she is treated as such; b) verification of the child's identity by means of an initial interview; and c) assessment of the child's specific situation and particular vulnerabilities, if any<sup>11</sup>.

#### European Social Charter (revised), 1996

##### Article 17 –The right of children and young persons to social, legal and economic protection

With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed:

- 1 a. to ensure that children and young persons, taking account of the rights and duties of their parents, have the care, the assistance, the education and the training they need, in particular by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose;

<sup>10</sup> CRC General comment No. 6, para 13.

<sup>11</sup> *Ibid*, para 31.

- b. to protect children and young persons against negligence, violence or exploitation;
- c. to provide protection and special aid from the state for children and young persons temporarily or definitively deprived of their family's support;
- 2. to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools.

**CEC v. The Netherlands, European Committee of Social Rights Complaint No. 90/2013, Decision on the Merits of 1 July 2014**

- 65. The Committee recalls that pursuant to paragraph 1 of the Appendix the persons covered by Articles 1 to 17 and 20 to 31 of the Charter include foreigners only insofar as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned.
- 66. When human dignity is at stake the restriction of the personal scope should not be read in such a way as to deprive migrants in an irregular situation of the protection of their most basic rights enshrined in the Charter nor to impair their fundamental rights such as the right to life or to physical integrity or human dignity (Defence for Children International (DCI) v. Belgium Complaint No. 69/2011 decision on the merits of 23 October 2012 §28).

**ECtHR, Rahimi v. Greece, Application No. 8687/08, 5 April 2011**

- 91. (...) The report mentions, among other things, the treatment often reserved for unaccompanied minor migrants following their release by the Greek authorities. It observes that children were released without any measures being taken regarding their subsequent accommodation and without any attempt on the part of the authorities to protect them from possible violence or acts of exploitation to which they might be prey (...).
- 92. It appears from the foregoing elements that the applicant was left to fend for himself after his release by the Greek authorities. His accommodation and, in general, support he received were provided only by local non-governmental organizations in Lesbos or Athens who looked into his case before and after his arrival in Athens. The Court considers that, owing to the behavior of the authorities, which showed indifference to the applicant, he must have suffered deep anguish and concern, in particular from the moment of his release until he was taken care of by the organization "Arsis". On this point, the Court takes note of the assertions of the organization "Arsis", according to which the applicant, when he was admitted to the accommodation center for minors, had difficulty falling asleep without the light on, spoke with difficulty and presented a strong weight loss. (...)
- 94. In view of the foregoing, the circumstances of the case lead the Court to conclude that, mainly because of the omissions of the competent authorities with regard to the monitoring and supervision of the applicant, the threshold of severity required by Article 3 of the Convention was also reached in the present case as regards the period after his release.

**ECtHR, Khan v. France, Application no. 12267/16, 28 February 2019**

- 73. The obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment. Those Articles, taken together, should enable effective protection to be provided, particularly to children and other vulnerable members of society, including reasonable measures to prevent ill-treatment of which the authorities have or ought to have knowledge (...).
- 74. In cases concerning foreign minors, whether accompanied or unaccompanied, the child's situation of extreme vulnerability is the decisive factor and it takes precedence over considerations relating to his or her status as an irregular migrant (...). The Court thus emphasised in Rahimi (...) that as an unaccompanied foreign minor without leave to remain the applicant fell into "the category of the most vulnerable individuals in society", and that it had been incumbent on Greece to protect him and provide for him by taking appropriate measures in accordance with its positive obligations under Article



92. In view of the foregoing, however, the Court is not persuaded that the authorities, which ultimately failed to implement the decision of the Youth Judge of the Boulogne-sur-Mer *tribunal de grande instance* of 22 February 2016 ordering the applicant's provisional placement, did all that could reasonably be expected of them to fulfil the obligation to provide care and protection to the applicant, such obligation being imposed on the respondent State as he was an unaccompanied foreign unaccompanied minor and irregular migrant, at the age of twelve, and therefore an individual falling with the category of the most vulnerable individuals in society (...).

**ECtHR, SH. D. and Others v. Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia, Application no. 14165/16, 13 June 2019.**

55. The Court notes that States which, such as the respondent State, are parties to the Convention on the Rights of the Child, are required under Article 20 thereof to guarantee to all children "temporarily or permanently deprived of his family environment" which fall under their jurisdiction, "an alternative protection in accordance with national legislation"; Article 20 specifies that this obligation applies regardless of the national origin of the child. It also follows from the case-law of the Court that under the positive obligations arising from Article 3 of the Convention, States Parties are required to protect and take care of unaccompanied foreign minors (...).

56. More specifically, in cases relating to the reception of foreign minors, accompanied or unaccompanied, it should be borne in mind that the extremely vulnerable situation of the child is decisive and takes precedence over the child being a foreigner in illegal stay (...). The Court thus underlined in the aforementioned Rahimi judgment (...) that, as an unaccompanied foreign minor in an irregular situation, the applicant fell within the "category of the most vulnerable persons in society", and that it was up to the Greek State to protect and be in charge of him by adopting adequate measures under the positive obligations arising from Article 3 (...).

60. However, these circumstances in themselves raise questions about the respect, by the respondent State, of the obligation to protect and take care of unaccompanied foreign minors which stem from Article 3 of the Convention (...).

### III. Access to fair and child-sensitive procedures

#### 1. Right to a fair hearing and access to court

Domestic law should facilitate where appropriate the possibility of access to court for children who have sufficient understanding of their rights.

Children must be accorded special protection in any procedure in front of a court or tribunal. Children must have effective access to court in order to ensure protection of their rights.

Specific rights apply only to those accused of criminal charges but comparable guarantees where relevant have been found by the European Court of Human Rights to be required in civil cases if the proceedings are to be adjudged "fair".

In the cases of *T. v. the United Kingdom* (Application no. 24724/94, 16 December 1999) and *V. v. the United Kingdom* (Application No. 24888/94, 16 December 1999), the ECtHR ruled that criminal proceedings must be adapted to children's needs. The defendants T. and V. (both 10 years old) were charged with murder of a two-year-old. The boys were subject to a public hearing for 3 weeks in an adult court. The trial was preceded and accompanied by massive national and international publicity. On occasion, attempts were made to attack the vehicles bringing them to court. A child aged 11 would likely find the highly formal setting of the courtroom intimidating, whether involved as a witness or a defendant. The children suffered from post-traumatic effects of the hearing.

Under Article 6(1), the accused must enjoy the right to understand what is happening at the trial and to play an active role in their defense, at least to the extent which could reasonably be expected of a child. Physical presence alone would not be sufficient.

This section introduces all these guiding principles as well as the positive obligation of States to provide care and protection to migrant children.

## International law

### International Covenant on Civil and Political Rights (ICCPR), 1966

#### Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children. [...]
- (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

### Convention on the Rights of the Child (CRC), 1989

#### Article 40

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that: [...]
- (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees: [...]
- (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians.

### European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights or ECHR), 1950

#### Article 6 Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
- [...] 3. Everyone charged with a criminal offence has the following minimum rights:
- [...] (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; [...]

### Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, 17 November 2010

#### D. Child-friendly justice during judicial proceedings

1. Access to court and to the judicial process
34. As bearers of rights, children should have recourse to remedies to effectively exercise their rights or act upon violations of their rights. The domestic law should facilitate where appro-

appropriate the possibility of access to court for children who have sufficient understanding of their rights and of the use of remedies to protect these rights, based on adequately given legal advice.

35. Any obstacles to access to court, such as the cost of the proceedings or the lack of legal counsel, should be removed.
36. In cases of certain specific crimes committed against children, or certain aspects of civil or family law, access to court should be granted for a period of time after the child has reached the age of majority where necessary. Member states are encouraged to review their statutes of limitations.

**ECtHR, *Adamkiewicz v. Poland*, Application no. 54729/00, 2 March 2010**

70. The Court further recalls that when a minor is involved, the justice system is above all required to act with due respect for the principle of protecting the best interests of the child. Thus, a child accused of an offense should be treated in a manner that takes full account of his or her age, maturity, and emotional and intellectual capacities. In addition, the authorities must take measures to promote his understanding of the procedure and his or her participation in it.

***V. v. The United Kingdom*, ECtHR, Application no. 24888/94, Judgment of 16 December 1999**

88. The Court notes that the applicant's trial took place over three weeks in public in the Crown Court. Special measures were taken in view of the applicant's young age and to promote his understanding of the proceedings: for example, he had the trial procedure explained to him and was taken to see the courtroom in advance, and the hearing times were shortened so as not to tire the defendants excessively. Nonetheless, the formality and ritual of the Crown Court must at times have seemed incomprehensible and intimidating for a child of eleven, and there is evidence that certain of the modifications to the courtroom, in particular the raised dock which was designed to enable the defendants to see what was going on, had the effect of increasing the applicant's sense of discomfort during the trial, since he felt exposed to the scrutiny of the press and public. The trial generated extremely high levels of press and public interest, both inside and outside the courtroom, to the extent that the judge in his summing-up referred to the problems caused to witnesses by the blaze of publicity and asked the jury to take this into account when assessing their evidence [...].
89. There is considerable psychiatric evidence relating to the applicant's ability to participate in the proceedings. Thus, Dr Susan Bailey gave evidence during the trial in November 1993 that on each occasion when she had seen the applicant prior to the trial he had cried inconsolably and had not been able to talk about the circumstances of the offence in any useful way [...]. Dr Bentovim similarly found in his report of September 1993 that the applicant was suffering from post-traumatic effects and found it very difficult and distressing to think or talk about the events in question, making it impossible to ascertain many aspects [...]. Subsequent to the trial, in January 1995, the applicant told Dr Bentovim that he had been terrified of being looked at in court and had frequently found himself worrying what people were thinking about him. He had not been able to pay attention to the proceedings and had spent time counting in his head or making shapes with his shoes. Dr Bentovim considered that, in view of V's immaturity, it was "very doubtful" that he understood the situation and was able to give informed instruction to his lawyers [...]. The report of Dr Bailey dated November 1997 also described the applicant's attempts to distract himself during the trial, his inability to listen to what was said and the distress caused to him by the public nature of the proceedings [...].
91. In conclusion, the Court considers that the applicant was unable to participate effectively in the criminal proceedings against him and was, in consequence, denied a fair hearing in breach of Article 6§1

## **2. Appointment of a guardian**

Guardians play an important role in different life situations of children that are unaccompanied or separated from their families or cannot avail themselves in the protection of their parents/caregivers.

Each unaccompanied or separated child should have a guardian appointed as soon as possible. States are required to make sure there is necessary underlying legal framework for that. Guardians shall



have had and continue to receive appropriate professional training.

The guardian is in addition to, but does not substitute the figure of a lawyer.

**The guardian plays a central role in ensuring access to legal assistance for unaccompanied children or in supporting the child in finding an advisor.**

**The guardian** is considered to be an independent person who safeguards the child's best interests and general well-being, and to this effect complements the limited legal capacity of the child, when necessary, in the same way that parents do.

The guardian differs from a qualified lawyer or other legal professional who provides legal assistance, speaks on behalf of the child and legally represents him or her in written statements and in person before administrative and judicial authorities in criminal, migration or other legal proceedings as provided for in national law.

**Fundamental Rights Agency, Guardianship for children deprived of parental care, A Handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking, 2014**

*EU law*

**Committee on the Rights of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, 2005, para 21, 33, 69**

21. Subsequent steps, such as the appointment of a competent guardian as expeditiously as possible, serves as a key procedural safeguard to ensure respect for the best interests of an unaccompanied or separated child. Therefore, such a child should only be referred to asylum or other procedures after the appointment of a guardian. In cases where separated or unaccompanied children are referred to asylum procedures or other administrative or judicial proceedings, they should also be provided with a legal representative in addition to a guardian.

**Appointment of a guardian or adviser and legal representative (arts. 18(2) and 20(1))**

33. States are required to create the underlying legal framework and to take necessary measures to secure proper representation of an unaccompanied or separated child's best interests. Therefore, States should appoint a guardian or adviser as soon as the unaccompanied or separated child is identified and maintain such guardianship arrangements until the child has either reached the age of majority or has permanently left the territory and/or jurisdiction of the State, in compliance with the Convention and other international obligations. The guardian should be consulted and informed regarding all actions taken in relation to the child. The guardian should have the authority to be present in all planning and decision-making processes, including immigration and appeal hearings, care arrangements and all efforts to search for a durable solution. The guardian or adviser should have the necessary expertise in the field of childcare, so as to ensure that the interests of the child are safeguarded and that the child's legal, social, health, psychological, material and educational needs are appropriately covered by, inter alia, the guardian acting as a link between the child and existing specialist agencies/individuals who provide the continuum of care required by the child. Agencies or individuals whose interests could potentially be in conflict with those of the child's should not be eligible for guardianship. For example, non-related adults whose primary relationship to the child is that of an employer should be excluded from a guardianship role.
69. An asylum-seeking child should be represented by an adult who is familiar with the child's background and who is competent and able to represent his or her best interests (see section V (b), "Appointment of a guardian or adviser or legal representative"). The unaccompanied or separated child should also, in all cases, be given access, free of charge, to a qualified legal representative, including where the application for refugee status is processed under the normal procedures for adults.

**Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return\***

17. More specifically, and in particular in the context of best interest assessments and within best

interest determination procedures, children should be guaranteed the right to:

- (...)(i) For unaccompanied and separated children, have appointed a competent guardian, as expeditiously as possible, who serves as a key procedural safeguard to ensure respect for their best interests;

Recently in *R. K. v. Spain* (below), the Committee on the Rights of the Child held that the failure to appoint a legal guardian to an alleged minor during the age assessment procedure was a violation of the best interest of the child principle and the right to express his/her views since the child requested a legal guardian.

**CRC, *R.K. v. Spain*, CRC/C/82/D/27/2017, 18 September 2019**

- 9.8 The Committee also takes note of the author's claim that he was not assigned a guardian or representative to defend his interests as a possible unaccompanied child migrant before or during the age assessment procedure, which led to a decree stating that he was an adult being issued. The Committee recalls that States parties should appoint a qualified legal representative and, if need be, an interpreter, for all young persons claiming to be minors, as soon as possible on arrival and free of charge. The Committee is of the view that to provide a representative for such persons during the age assessment process is an essential guarantee of respect for their best interests and their right to be heard. Failure to do so amounts to a violation of articles 3 and 12 of the Convention, as the age assessment process is the starting point for its application. The failure to provide timely representation can result in a substantial injustice.

*EU law*

**Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast Qualification Directive).**

**Article 31 Unaccompanied Minors**

1. As soon as possible after the granting of international protection Member States shall take the necessary measures to ensure the representation of unaccompanied minors by a legal guardian or, where necessary, by an organisation responsible for the care and well-being of minors, or by any other appropriate representation including that based on legislation or court order.
2. Member States shall ensure that the minor's needs are duly met in the implementation of this Directive by the appointed guardian or representative. The appropriate authorities shall make regular assessments.

**The Asylum Procedures Directive (Art 2(n)) and Reception Conditions Directive (Recast Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection) (Art 2(j)) provide for a definition of a legal representative as follows:**

A person or an organisation appointed by the competent bodies in order to assist and represent an unaccompanied minor in procedures provided for in this Directive with a view to ensuring the best interests of the child and exercising legal capacity for the minor where necessary. Where an organisation is appointed as a representative, it shall designate a person responsible for carrying out the duties of representative in respect of the unaccompanied minor, in accordance with this Directive.

**Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims and replacing Council Framework Decision 2002/629/JHA (EU Anti Trafficking Directive)**

**Article 15 Protection of child victims of trafficking in human beings in criminal investigations and proceedings**

1. Member States shall take the necessary measures to ensure that in criminal investigations and proceedings, in accordance with the role of victims in the relevant justice system, competent authorities appoint a representative for a child victim of trafficking in human beings where, by national law, the holders of parental responsibility are precluded from representing the child as a result of a conflict of interest between them and the child victim.

### 3. Public hearing

In principle, everyone should be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law and judgments shall be pronounced publicly, in order to secure transparency. This is part of the right to be heard principle.

The best interests of the child must always be of primary consideration. Courts have the power to exclude all or part of the public for specific reasons, especially in view of the rights of the child to privacy and the principle of best interest of the child.

Even in cases in which the public is excluded from the trial, the judgment, including the essential findings, evidence and legal reasoning must be made public, except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

#### International law

Article 14 ICCPR and Article 6 ECHR provide for a general right to fair trial in international law (see more details in Module I.).

#### Convention on the Rights of the Child (CRC), 1989

##### Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

##### Article 40

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that: [...]
  - (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees: [...]
  - (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians.

#### UN Human Rights Committee General Comment no. 32, on Article 14 of the ICCPR, Right to equality before courts and tribunals and to fair trial, UN Doc. CCPR/C/GC/32, 23 August 2007

29. Article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice. Apart from such exceptional circumstances, a hearing must be open to the general public, including members of the media, and must not, for instance, be limited to a particular category of persons. Even in cases in which the public is excluded from the trial, the judgment, including the essential findings, evidence and legal reasoning must be made public, except where the interest of juvenile persons otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children.

#### B. and P. v. United Kingdom, ECtHR, Application Nos. 36337/97 and 35974/97, Judgment of 24 April 2001

37. The requirement to hold a public hearing is subject to exceptions. This is apparent from the text of Article 6 § 1 itself, which contains the proviso that "the press and public may be excluded from all or part of the trial ... where the interests of juveniles or the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special

circumstances where publicity would prejudice the interests of justice". [...]

47. The Court notes that anyone who can establish an interest may consult or obtain a copy of the full text of the orders and/or judgments of first-instance courts in child residence cases, and that the judgments of the Court of Appeal and of first-instance courts in cases of special interest are routinely published, thereby enabling the public to study the manner in which the courts generally approach such cases and the principles applied in deciding them.
48. Having regard to the nature of the proceedings and the form of publicity applied by the national law, the Court considers that a literal interpretation of the terms of Article 6 § 1 concerning the pronouncement of judgments would not only be unnecessary for the purposes of public scrutiny but might even frustrate the primary aim of Article 6 § 1, which is to secure a fair hearing (see, *mutatis mutandis*, Sutter, cited above, p. 14, § 34).
49. The Court thus concludes that the Convention did not require making available to the general public the residence judgments in the present cases, and that there has been no violation of Article 6 § 1 in this respect.

#### 4. Legal assistance and representation

Lawyers play a crucial role in ensuring respect, protection and access to rights of all persons, even more so in cases of children. Availability of legal assistance often determines whether or not a person can access to the relevant proceedings or participate in them in a meaningful way.

A lawyer representing a child explains the child her or his rights, the procedures, and ensures that their views are heard and taken due account of. Therefore, lawyers need to be specifically trained on child's rights and on working with children.

Children should have access to legal aid so that they can access legal assistance at no cost. The best interests of the child should be a primary consideration in all legal aid decisions affecting children. Children who are detained should be given legal aid. The legal assistance afforded to children should be accessible, age-appropriate, multidisciplinary, effective and responsive to the specific legal and social needs of children.<sup>12</sup> States should take active steps wherever possible to ensure that female lawyers are available to represent girls.

In the context of criminal proceedings, the European Court on Human Rights found that questioning a 15-year-old without his lawyer and the state's failure to give the lawyer access to his client during the early stages of proceedings violated the boy's right to a fair hearing; because of his age, it would not have been reasonable to expect the boy to know of his right to seek legal counsel or understand the consequences of failing to do so (ECtHR, *Panovits v. Cyprus* (4268/04, 11 December 2008) para. 84; ECtHR, *Salduz v. Turkey* (36391/02, 27 November 2008) paras. 60 and 63. The Court also found that the "manifest failure" of a child's lawyer to represent him properly, coupled with factors such as the child's age and the seriousness of the charges, should have led the trial court to consider that the applicant urgently required adequate legal representation (ECtHR, *Güveç v. Turkey* (70337/01, 20 January 2009) para. 131). In *Blokhin v. Russia* (47152/06, 23 March 2016), the Court held that access to a lawyer is particularly important considering the vulnerability of children and their level of maturity and intellectual and emotional capacities. It considered that these vulnerabilities "can only be properly compensated for" by the assistance of a lawyer (para. 198).

#### International law

##### Convention on the Rights of the Child (CRC), 1989

###### Article 37

States Parties shall ensure that: [...](d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

###### Article 40

[...]2. ...States Parties shall, in particular, ensure that:[...]  
(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees: [...]

<sup>12</sup> For more information on child-specific standards relating to detention, cfr. Module II on Access to Justice for Migrants in Detention

- (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

### **European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 1950**

#### **Article 6 Right to a fair trial**

[...] 3. Everyone charged with a criminal offence has the following minimum rights:

- [...] (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

### **UN Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration, 2013**

96. The child will need appropriate legal representation when his or her best interests are to be formally assessed and determined by courts and equivalent bodies.. In particular, in cases where a child is referred to an administrative or judicial procedure involving the determination of his or her best interests, he or she should be provided with a legal representative, in addition to a guardian or representative of his or her views, when there is a potential conflict between the parties in the decision.

### **Report of the UN High Commissioner for Human Rights on Access to justice for children, (A/HRC/25/35), 16 December 2013**

40. As children are usually at a disadvantage in engaging with the legal system, whether as a result of inexperience or lack of resources to secure advice and representation, they need access to free or subsidized legal and other appropriate assistance to effectively engage with the legal system. Without such assistance, children will largely be unable to access complex legal systems that are generally designed for adults. Free and effective legal assistance is particularly important for children deprived of their liberty.

### **HRC, Report of the Special Rapporteur on the independence of judges and lawyers – Protecting children’s rights in the justice system, A/HRC/29/26 (and corrigendum A/HRC/29/26/Corr.1), 1 April 2015**

#### **Child-friendly legal aid**

35. The right to access justice is inextricably **connected to the right to legal assistance**. As highlighted in previous reports, the purpose of legal aid is “to contribute to the elimination of obstacles and barriers that impair or restrict access to justice by providing assistance to people who would otherwise be unable to afford legal representation and access to the court system” [...]. Accordingly, the Special Rapporteur has advocated **for a definition of legal aid that is as broad as possible**, including “not only the right to free legal assistance in criminal proceedings, as defined in article 14 (3) (d) of the International Covenant on Civil and Political Rights, but also the provision of effective legal assistance in any judicial or extrajudicial procedure aimed at determining rights and obligations”(ibid). A broad definition and application of legal aid is all the more important when dealing with children and children’s rights.

36. As already noted by the Special Rapporteur, legal systems can be immensely confusing and difficult, if not impossible, to navigate for children, especially without the help of a legal professional. “Legal assistance provides children with the means to understand legal proceedings, to defend their rights and to make their voices heard” [...]. The right of children to have access to legal assistance is recognized in a number of international instruments, including the Convention on the Rights of the Child (in particular, in articles 12 and 40), and the Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.

37. In its general comment No. 10, the Committee on the Rights of the Child further explained that, when preparing his/her defence, a child in conflict with the law must be guaranteed free and appropriate legal and other appropriate assistance. Indeed, by virtue of their age, dependent status and economic circumstances most children are unable to pay for legal aid. The Special Rapporteur considers that given this reality, "children must have access to free legal assistance in criminal and in civil proceedings and administrative fees must be waived".
38. As noted in a 2011 study, "the provision of timely, competent, and developmentally appropriate legal assistance directly advances a child's right to a fair, just, and participatory legal process. Child-friendly legal aid also has the potential to promote children's substantive rights". In this respect, lawyers have a professional responsibility towards children and should therefore acquire the special skills to be able to take into account the unique attributes and needs of child clients and effectively deliver child-friendly legal aid.

**Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return**

16. Children should be able to bring complaints before courts, administrative tribunals or other bodies at lower levels that are easily accessible to them, e.g., in child protection and youth institutions, schools and national human rights institutions, and should be able to receive advice and representation in a child-friendly manner by professionals with specialized knowledge of children and migration issues when their rights have been violated. States should ensure standardized policies to guide authorities in offering free, quality legal advice and representation for migrant, asylum-seeking and refugee children, including equal access for unaccompanied and separated children in local authority care and undocumented children.
17. More specifically, and in particular in the context of best interest assessments and within best interest determination procedures, children should be guaranteed the right to:  
(...)  
(f) Be assisted by an attorney trained and/or experienced in representing children at all stages of the proceedings and communicate freely with the representative, and have access to free legal aid;

**CRC, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, UN Doc. CRC/GC/2005/6, 1 September 2005**

36. In cases where children are involved in asylum procedures or administrative or judicial proceedings, they should, in addition to the appointment of a guardian, be provided with legal representation.

**PACE, Resolution 1810 (2011): Unaccompanied children in Europe: issues of arrival, stay and return, Doc. 12539**

- 5.8 [...] All unaccompanied children in asylum proceedings must be represented by a lawyer in addition to a guardian, provided free of charge by the state and be able to challenge before a court decisions regarding their protection claims.

**United Nations, Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, June 2013**

*Principle 11. Legal aid in the best interests of the child*

34. In all legal aid decisions affecting children, the best interests of the child should be the primary consideration.
35. Legal aid provided to children should be prioritized, in the best interests of the child, and be accessible, age-appropriate, multidisciplinary, effective and responsive to the specific legal and social needs of children.



*Guideline 1. Provision of legal aid*

41. Whenever States apply a means test to determine eligibility for legal aid, they should ensure that: [...]
- (c) Persons urgently requiring legal aid at police stations, detention centres or courts should be provided preliminary legal aid while their eligibility is being determined. Children are always exempted from the means test;

*Guideline 6. Legal aid at the post-trial stage*

46. States should ensure that imprisoned persons and children deprived of their liberty have access to legal aid. Where legal aid is not available, States shall ensure that such persons are held in prison in conformity with the law.

*Guideline 9. Implementation of the right of women to access legal aid*

52. States should take applicable and appropriate measures to ensure the right of women to access legal aid, including: [...]
- (b) Taking active steps to ensure that, where possible, female lawyers are available to represent female defendants, accused and victims.

**UN Committee on the Rights of the Child, General Comment No. 24 on children's rights in the child justice system, UN Doc. CRC/C/GC/24, 18 September 2019**

49. States should ensure that the child is guaranteed legal or other appropriate assistance from the outset of the proceedings, in the preparation and presentation of the defence, and until all appeals and/or reviews are exhausted. The Committee requests States parties to withdraw any reservation made in respect of article 40 (2) (b) (ii).
50. The Committee remains concerned that many children face criminal charges before judicial, administrative or other public authorities, and are deprived of liberty, without having the benefit of legal representation. The Committee notes that in article 14 (3) (d) of the International Covenant on Civil and Political Rights, the right to legal representation is a minimum guarantee in the criminal justice system for all persons, and this should equally apply to children. While the article allows the person to defend himself or herself in person, in any case where the interests of justice so require the person is to be assigned legal assistance.
51. In the light of the above, the Committee is concerned that children are provided less protection than international law guarantees for adults. The Committee recommends that States provide effective legal representation, free of charge, for all children who are facing criminal charges before judicial, administrative or other public authorities. Child justice systems should not permit children to waive legal representation unless the decision to waive is made voluntarily and under impartial judicial supervision.
52. If children are diverted to programmes or are in a system that does not result in convictions, criminal records or deprivation of liberty, "other appropriate assistance" by well-trained officers may be an acceptable form of assistance, although States that can provide legal representation for children during all processes should do so, in accordance with article 41. Where other appropriate assistance is permissible, the person providing the assistance is required to have sufficient knowledge of the legal aspects of the child justice process and receive appropriate training.

**Salduz v. Turkey, ECtHR, Application no. 36391/02, Judgment of 27 November 2008**

The applicant, who was 17 years old, was taken into police custody on suspicion of having participated in an illegal demonstration in support of the Workers' Party of Kurdistan (PKK). He was interrogated by the police in the absence of a lawyer. He admitted his participation in the demonstration. He had denied his involvement later when brought before the public prosecutor and the investigating judge, claiming that his earlier statement had been made under duress. The applicant was appointed a lawyer after he had been remanded in custody. At the trial, he denied the content of his statement to the police. His five co-defendants who had testified against him during the pre-trial investigation retracted their statements at the trial. The court however found the applicant guilty relying on his statement made in police custody. Other evidence before domestic courts was inconclusive, but it was interpreted in light of the applicant's statement to the police.

60. Finally, the Court notes that one of the specific elements of the instant case was the applicant's age. Having regard to a significant number of relevant international law materials concerning legal assistance to minors in police custody (see paragraphs 32-36 above), the Court stresses the fundamental importance of providing access to a lawyer where the person in custody is a minor.

63. In view of the above, the Court concludes that there has been a violation of Article 6§3(c) of the Convention in conjunction with Article 6§1 in the present case.

#### **ECtHR, *Blokhin v. Russia*, Application no. 47152/06, 14 November 2013**

160. In view of the particular vulnerability of children and taking into account their level of maturity and intellectual and emotional capacities, the Court stresses in particular the fundamental importance of providing access to a lawyer where the person in custody is a minor. (...)

166. The Court finds it established that, once at the police station, the applicant was not provided with any opportunity to contact his family or to obtain legal assistance. Given his very young age, the Court does not doubt that he felt vulnerable and intimidated when facing the police officers alone. In the Court's opinion, the circumstances surrounding the interview were psychologically coercive and conducive to breaking down any resolve the applicant might have had to remain silent. Having regard to these considerations, the Court considers that the applicant, as a matter of procedural fairness, should have been given access to a lawyer as a counterweight to the intimidating atmosphere capable of sapping his will and making him confess to the police officers questioning him. (...)

169. The Court concludes from the above-mentioned factors that the absence of legal assistance during the applicant's interview by the police irremediably prejudiced his defence rights and undermined the fairness of the proceedings as a whole.

#### **Panovits v. Cyprus, ECtHR, Application no. 4268/04, Judgment of 11 December 2008**

67. The Court notes that the applicant was 17 years old at the material time. In its case-law on Article 6 the Court has held that when criminal charges are brought against a child, it is essential that he be dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings [...]. The right of an accused minor to effective participation in his or her criminal trial requires that he be dealt with due regard to his vulnerability and capacities from the first stages of his involvement in a criminal investigation and, in particular, during any questioning by the police. The authorities must take steps to reduce as far as possible his feelings of intimidation and inhibition (see, *mutatis mutandis*, *T. v. the United Kingdom*, cited above, § 85)... and ensure that the accused minor has a broad understanding of the nature of the investigation, of what is at stake for him or her, including the significance of any penalty which may be imposed as well as of his rights of defence and, in particular, of his right to remain silent [...]. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said by the arresting officer and during his questioning by the police.

68. [...] The Court considers that given the vulnerability of an accused minor and the imbalance of power to which he is subjected by the very nature of criminal proceedings, a waiver by him or on his behalf of an important right under Article 6 can only be accepted where it is expressed in an unequivocal manner after the authorities have taken all reasonable steps to ensure that he or she is fully aware of his rights of defence and can appreciate, as far as possible, the consequence of his conduct. [...]

84. Turning to the facts of the present case, the Court repeats its findings of a violation of the applicant's rights of defence at the pre-trial stage of the proceedings due to the fact that, whilst being a minor, his questioning had taken place in the absence of his guardian and without him being sufficiently informed of his right to receive legal representation or of his right to remain silent. The Court notes that the applicant's confession obtained in the above circumstances constituted a decisive element of the prosecution's case against him that substantially inhibited the prospects of his defence at trial and which was not remedied by the subsequent proceedings.



**Güveç v. Turkey, ECtHR, Application no. 70337/01, Judgment of 20 January 2009**

131. In the present case the lawyer representing the applicant had not been appointed under the legal aid scheme. Nevertheless, the Court considers that the applicant's young age, the seriousness of the offences with which he was charged, the seemingly contradictory allegations levelled against him by the police and a prosecution witness [...], the manifest failure of his lawyer to represent him properly and, finally, his many absences from the hearings, should have led the trial court to consider that the applicant urgently required adequate legal representation. Indeed, an accused is entitled to have a lawyer assigned by the court of its own motion "when the interests of justice so require" [...].

*EU law*

European Law provides general access to legal assistance and representation at different levels in addition to the special directive related to children in the justice system.

1. The [Asylum Procedures Directive](#) (art. 20) guarantees free legal assistance and representation in appeal procedures against an asylum decision. There should be enough time for the representant/counsellor to review and prepare the case.
2. The [EU Reception Conditions Directive](#) (art. 26) ensures free legal assistance and representation for appeal procedures if it is necessary to ensure effective access to justice
3. The [EU Dublin Regulation](#)<sup>13</sup> (art. 27) provides that legal assistance should be granted on request if the person cannot afford representation and assistance fees.

In addition, the EU adopted specific safeguards for children who are suspects or accused persons in criminal proceedings including the right to assistance by a lawyer.

See: Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 [on procedural safeguards for children who are suspects or accused persons in criminal proceedings](#)

**5. Access to information (before, during and after the judicial proceeding)**

Ensuring that migrant children are aware of, have access to information about their rights and know how to claim them in order to obtain a remedy for alleged violations are key elements of every State's duty to ensure respect and protection of children's rights. Information should be age-appropriate and adapted to the needs of children. It should be presented in ways (formats, manners and language(s)) that children understand. The right to translation is an important element of the right to information.

Children have a right to information on their rights and procedures in status determination proceedings, civil and criminal proceedings.

In addition, information about the rights of children and remedies should be made available to parents and other persons acting as legal representatives of children.

*International law*

**Convention on the Rights of the Child (CRC) 1989**

**Article 40**

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that: [...]
- (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees: [...]
- (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

<sup>13</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person

## **European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 1950**

### **Article 6 Right to a fair trial**

[...] 3. Everyone charged with a criminal offence has the following minimum rights:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; [...].

### **Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return**

17. More specifically, and in particular in the context of best interest assessments and within best interest determination procedures, children should be guaranteed the right to:

- (...)(b) Be notified of the existence of a proceeding and of the decision adopted in the context of the immigration and asylum proceedings, its implications and possibilities for appeal;
- (j) Be fully informed throughout the entire procedure, together with their guardian and legal adviser, including information on their rights and all relevant information that could affect them.

### **UN Committee on the Rights of the Child, General Comment No. 24 on children's rights in the child justice system, UN Doc. CRC/C/GC/24, 18 September 2019**

- 47. Every child has the right to be informed promptly and directly (or where appropriate through his or her parent or guardian) of the charges brought against him or her. Promptly means as soon as possible after the first contact of the child with the justice system. (...)
- 48. Authorities should ensure that the child understands the charges, options and processes. Providing the child with an official document is insufficient and an oral explanation is necessary. Although children should be assisted in understanding any document by a parent or appropriate adult, authorities should not leave the explanation of the charges to such persons.

### **PACE Resolution 1810 (2011): Unaccompanied children in Europe: issues of arrival, stay and return**

- 5.3. No child should be denied access to the territory or be summarily turned back at the borders of a member state. Immediate referral to assistance and care should be arranged by specialised services with a view to identifying if the migrant is a minor, ascertaining his or her individual circumstances and protection needs and ultimately identifying a durable solution in the child's best interest;
- 5.6. Legal, social and psychological assistance should be provided without delay to unaccompanied children. Children should be informed immediately upon arrival or interception, individually and in a language and form that they can understand, about their right to protection and assistance, including their right to seek asylum or other forms of international protection, and the necessary procedures and their implications;
- 5.7. All interviews with an unaccompanied child concerning his or her personal details and background should be conducted individually by specialised and well-trained staff and in the presence of the child's guardian; [...]
- 5.14. Family reunification possibilities should be extended beyond the country of origin and approached from a humanitarian perspective exploring wider family links in the host country and third countries, guided by the principle of the child's best interest. The Dublin II Regulation should only be applied to unaccompanied children if transfer to a third country is in the child's best interests;

*EU law*

**EU Asylum Procedures Directive, 2013/32/EU, 2013**

**Article 25**

[...]

4. Unaccompanied minors and their representatives shall be provided, free of charge, with legal and procedural information as referred to in Article 19 also in the procedures for the withdrawal of international protection provided for in Chapter IV.

**Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, (Right to information Directive)**

**Article 3 Right to information about rights**

1. Member States shall ensure that suspects or accused persons are provided promptly with information concerning at least the following procedural rights, as they apply under national law, in order to allow for those rights to be exercised effectively:
  - (a) the right of access to a lawyer;
  - (b) any entitlement to free legal advice and the conditions for obtaining such advice;
  - (c) the right to be informed of the accusation, in accordance with Article 6;
  - (d) the right to interpretation and translation;
  - (e) the right to remain silent.
2. Member States shall ensure that the information provided for under paragraph 1 shall be given orally or in writing, in simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons.

**Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, (EU Directive on rights of the child in criminal proceedings)**

**Article 4 Right to information**

1. Member States shall ensure that when children are made aware that they are suspects or accused persons in criminal proceedings, they are informed promptly about their rights in accordance with Directive 2012/13/EU and about general aspects of the conduct of the proceedings.

Member States shall also ensure that children are informed about the rights set out in this Directive. That information shall be provided as follows:

- (a) promptly when children are made aware that they are suspects or accused persons, in respect of:
  - (i) the right to have the holder of parental responsibility informed, as provided for in Article 5;
  - (ii) the right to be assisted by a lawyer, as provided for in Article 6;
  - (iii) the right to protection of privacy, as provided for in Article 14;
  - (iv) the right to be accompanied by the holder of parental responsibility during stages of the proceedings other than court hearings, as provided for in Article 15(4);
  - (v) the right to legal aid, as provided for in Article 18;
- (b) at the earliest appropriate stage in the proceedings, in respect of:
  - (i) the right to an individual assessment, as provided for in Article 7;
  - (ii) the right to a medical examination, including the right to medical assistance, as provided for in Article 8;
  - (iii) the right to limitation of deprivation of liberty and to the use of alternative measures, including the right to periodic review of detention, as provided for in Articles 10 and 11;
  - (iv) the right to be accompanied by the holder of parental responsibility during court hearings, as provided for in Article 15(1);
  - (v) the right to appear in person at trial, as provided for in Article 16;
  - (vi) the right to effective remedies, as provided for in Article 19;
- (c) upon deprivation of liberty in respect of the right to specific treatment during deprivation

of liberty, as provided for in Article 12.

2. Member States shall ensure that the information referred to in paragraph 1 is given in writing, orally, or both, in simple and accessible language, and that the information given is noted, using the recording procedure in accordance with national law.
3. Where children are provided with a Letter of Rights pursuant to Directive 2012/13/EU, Member States shall ensure that such a Letter includes a reference to their rights under this Directive.

## 6. Confidentiality and information sharing

Children have a right to privacy in judicial proceedings. This right to privacy includes confidentiality of conversations with her/his lawyer/legal representative, to have hearings behind closed doors, to have their identity confidential and secure during public hearings and to have their files and records kept confidential from any third party.

### Convention on the Rights of the Child, 1989

#### Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.

#### Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
  - (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
    - (vii) To have his or her privacy fully respected at all stages of the proceedings.

### Committee on the Rights of the Child, General Comment No. 24 (2019) on children's rights in the child justice system

53. As required under article 14 (3) (b) of the International Covenant on Civil and Political Rights, there is to be adequate time and facilities for the preparation of the defence. Under the Convention on the Rights of the Child, the confidentiality of communications between the child and his or her legal representative or other assistant is to be guaranteed (art. 40 (2) (b) (vii)), and the child's right of protection against interference with his or her privacy and correspondence is to be respected (art. 16).

#### Full respect of privacy (arts. 16 and 40 (2) (b) (vii))

66. The right of a child to have his or her privacy fully respected during all stages of the proceedings, set out in article 40 (2) (b) (vii), should be read with articles 16 and 40 (1).
67. States parties should respect the rule that child justice hearings are to be conducted behind closed doors. Exceptions should be very limited and clearly stated in the law. If the verdict and/or sentence is pronounced in public at a court session, the identity of the child should not be revealed. Furthermore, the right to privacy also means that the court files and records of children should be kept strictly confidential and closed to third parties except for those directly involved in the investigation and adjudication of, and the ruling on, the case.

68. Case-law reports relating to children should be anonymous, and such reports placed online should adhere to this rule.

**Report of the UN High Commissioner for Human Rights on [Access to justice for children \(A/HRC/25/35\)](#), 16 December 2013**

59. States must also ensure that the views of children, including children from the youngest age, even when they may be unable to express themselves verbally, are given due consideration. Moreover, in order to avoid (re-)victimization of children participating in judicial processes, States should make sure that their privacy and confidentiality are safeguarded at all times. States also must ensure that children are protected from all forms of violence when coming into contact with the justice system.

**UN Committee on the Rights of the Child, [General Comment No. 24 on children's rights in the child justice system](#), UN Doc. CRC/C/GC/24, 18 September 2019**

53. As required under article 14 (3) (b) of the International Covenant on Civil and Political Rights, there is to be adequate time and facilities for the preparation of the defence. Under the Convention on the Rights of the Child, the confidentiality of communications between the child and his or her legal representative or other assistant is to be guaranteed (art. 40 (2) (b) (vii)), and the child's right of protection against interference with his or her privacy and correspondence is to be respected (art. 16).

*EU law*

**Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings ([EU Directive on rights of the child in criminal proceedings](#))**

5. Member States shall respect the confidentiality of communication between children and their lawyer in the exercise of the right to be assisted by a lawyer provided for under this Directive. Such communication shall include meetings, correspondence, telephone conversations and other forms of communication permitted under national law.

**EU Fundamental Rights Agency, [Child-friendly justice Perspectives and experiences of children involved in judicial proceedings as victims, witnesses or parties in nine EU Member States \(2017\)](#)**

**FRA Opinion 24**

EU Member States and, as appropriate, the EU must ensure that appropriate legislation and measures protect the identity and privacy of children involved in court proceedings – for example, by excluding the public from the court room or using live video links or pre-recorded testimony in hearings. Steps need to be taken to ensure that children's personal data remain strictly confidential and are kept from the media and the general public. Recordings need to be safely stored and children's identities protected online, in all areas of law and independent of the child's role in proceedings. Personal data should only be accessed and transferred when absolutely necessary, and always take the child's best interests and opinions into account.

## 7. Right to interpretation

Ensuring accurate interpretation is key to the fairness of proceedings and the effective delivery of legal assistance in legal proceedings, including asylum and migration procedures, in cases in which individuals, such as asylum seekers or witnesses, do not speak or understand the language used by officials, including in the proceedings of the host country.

It is important that interpretation is not only available to children who do not speak the language during meetings with the authorities but also for meetings between the child and their legal advisor and their guardian.

Building trust and effectively informing the child is crucial for legal advisors to be able to provide quality assistance. This is significantly challenging if they cannot interact through an interpreter. Insufficient qualifications, skills or disrespectful attitude of an interpreter, can undermine the quality of legal assistance provided and the respect for the child's rights. Interpreters need to receive specific training and have experience working with children.

### *International law*

#### **International Covenant on Civil and Political Rights (ICCPR) 1966**

##### **Article 14**

[...] 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: [...]

- (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

#### **Convention on the Rights of the Child (CRC) 1989**

##### **Article 40**

[...] 2. ...States Parties shall, in particular, ensure that:

- (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees: [...]
- (vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

#### **UN Committee on the Rights of the Child, General Comment No. 24 on children's rights in the child justice system, UN Doc. CRC/C/GC/24, 18 September 2019**

64. A child who cannot understand or speak the language used in the child justice system has the right to the free assistance of an interpreter at all stages of the process. Such interpreters should be trained to work with children.

65. States parties should provide adequate and effective assistance by well-trained professionals to children who experience communication barriers.

#### **European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 1950**

##### **Article 6(3)(e)**

3. Everyone charged with a criminal offence has the following minimum rights:  
[...]

- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

## **8. The reasonable time requirement**

Trials must be within reasonable time in a range of proceedings affecting the child – including but not only custody, status and criminal matters. The passing of time is not perceived in the same way by children and adults. Delays in or prolonged decision-making have particularly adverse effects on children. Procedures regarding or impacting children should be therefore prioritized and completed in the shortest time possible.

Child custody cases must be dealt with speedily. All the more so where the passage of time may have



irreversible consequences for the parent-child relationship. Cases concerning parental responsibility and contact rights call for particular expedition.

The principle of the best interests of the child and the right to development as well as the right to be heard and fair proceedings are closely connected to the reasonable time requirement.

The reasonable time is being considered in the light of the complexity of the case and the impact lengthy proceedings might have on the rights of the child. For instance as ruled in *Paulsen-Medalen and Svensson v. Sweden* by the ECtHR (16817/90, 19 February 1998), restrictions on access between a parent and a child taken into public care and the serious and irreversible consequences which taking into care may have on his or her enjoyment of the right to respect for family life require the authorities to act with exceptional diligence in ensuring progress of the proceedings.

### International law

#### **Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration, 2013**

93. The passing of time is not perceived in the same way by children and adults. Delays in or prolonged decision-making have particularly adverse effects on children as they evolve. It is therefore advisable that procedures or processes regarding or impacting children be prioritized and completed in the shortest time possible.

#### **Committee on the Rights of the Child, General Comment No. 24 (2019) on children's rights in the child justice system**

##### **Decisions without delay and with the involvement of parents or guardians (art. 40 (2) (b) (iii))**

54. The Committee reiterates that the time between the commission of the offence and the conclusion of proceedings should be as short as possible. The longer this period, the more likely it is that the response loses its desired outcome.

55. The Committee recommends that States parties set and implement time limits for the period between the commission of the offence and the completion of the police investigation, the decision of the prosecutor (or other competent body) to institute charges, and the final decision by the court or other judicial body. These time limits should be much shorter than those set for adults, but should still allow legal safeguards to be fully respected. Similar speedy time limits should apply to diversion measures.

#### **Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return\***

17. More specifically, and in particular in the context of best interest assessments and within best interest determination procedures, children should be guaranteed the right to:

(g) Have the application and procedures involving children be treated as a priority, while ensuring ample time to prepare for proceedings and that all due process guarantees are preserved;

#### **Hokkanen v. Finland, ECtHR, Application no. 19823/92, Judgment of 23 September 1994**

72. Although it is essential that custody cases be dealt with speedily, the Court sees no reason to criticise the District Court for having suspended the proceedings twice in order to obtain expert opinions on the issue before it.

As regards the six months' delay the difficulties which the social welfare authorities encountered as a result of the grandparents' refusal to allow Sini to be subjected to investigation and to take part in related interviews must not be overlooked (see paragraph 24 above). Irrespective of whether there were sufficient reasons for suspending the hearing for as long as six months, it has to be noted that the overall length of the proceedings was approximately eighteen months. In itself this is not excessive for proceedings comprising three judicial levels.

Having regard to the particular circumstances of the case, the Court, like the Commission, finds that the length of the second custody proceedings did not exceed a "reasonable time" and that there was thus no violation of Article 6 para. 1 of the Convention.

**Niederböster v. Germany, ECtHR, Application no. 39547/98, Judgment of 27 February 2003**

39. The Court reiterates that the reasonableness of the length of proceedings is to be determined with reference to the criteria laid down in the Court's case-law, in particular the complexity of the case, and the conduct of the parties and of the authorities. On the latter point, what is at stake for the applicant in the litigation has to be taken into account. It is thus essential that custody cases be dealt with speedily [...].

**Paulsen-Medalen and Svensson v. Sweden, ECtHR, Application no. 16817/90, Judgment of 19 February 1998**

39. According to the Court's case-law, the reasonableness of the length of proceedings is to be assessed, in particular, in the light of the complexity of the case and the conduct of the applicant and that of the relevant authorities. In cases concerning restrictions on access between a parent and a child taken into public care, the nature of the interests at stake for the applicant and the serious and irreversible consequences which the taking into care may have on his or her enjoyment of the right to respect for family life require the authorities to act with exceptional diligence in ensuring progress of the proceedings [...].

**Laino v. Italy, ECtHR, Application no. 33158/96, Judgment of 18 February 1999**

22. [...] As to the conduct of the authorities dealing with the case, the Court considers that, having regard to what was at stake for the applicant (judicial separation and determination of the arrangements for custody of the children and access rights), the domestic courts failed to act with the special diligence required by Article 6 § 1 of the Convention in such cases (see the Maciariello and Paulsen-Medalen and Svensson judgments cited above, pp. 10 and 142, §§ 18 and 39, respectively). The various periods of inactivity attributable to the State, in particular the ones from 25 November 1993 to 15 December 1994 and from the latter date to 10 July 1997, failed to satisfy the "reasonable time" requirement.

Having regard also to the total duration of the proceedings, the Court concludes that there has been a violation of Article 6§1

## 9. The rights of child victims of crime

One of the guiding principles of the Convention on the Rights of the Child is that every child must be protected from all forms of violence. The [Convention's](#) Preamble states that the "child (...) should grow up in a family environment, in an atmosphere of happiness, love and understanding." The Convention protects the child from all forms of violence, which may be multiple and from varying sources, including the State and its agents. It requires the State to reintegrate children who have been victims and, above all, to give them the right to be heard in the proceedings.

Article 1 of the ECHR obliges States to secure the human rights of those within their jurisdiction. This obligation, read together with other provisions – such as article 2 (the right to life) and article 3 (the prohibition of torture and inhuman and degrading treatment) – requires States to take measures to ensure that individuals rights are not violated, including by private individuals or entities. For example, States must take measures to provide effective protection, particularly for children and other vulnerable persons from ill-treatment by private actors and must take reasonable steps prevent ill-treatment by private actors of which they have or ought to have knowledge. These steps include the criminalization of harmful conduct and the effective and non-discriminatory enforcement of the criminal law.

States have positive obligations to exercise due diligence to prevent and investigate acts of private actors which impair the enjoyment of rights. States must take particular measures when they know or ought to have known of a threat of harm to a victim.

States must also ensure protection of individuals who have fallen victim to crime and their rights

including in the course of criminal investigations and prosecutions against those who are suspected of committing the crime and provide avenues for them to seek compensation and other forms of assistance as victims of crime.

Victims of crimes have a right to respect for their rights including in the course of authorities' action against perpetrators and to compensation.

Victims must be given practical support to enable them to access justice. This includes providing victim support, raising victims' awareness of their rights, and sufficient training of law enforcement personnel. The CJEU has addressed cases involving the Framework Decision on the standing of victims: in criminal proceedings against Maria Pupino (CJEU, C-105/03, Criminal proceedings against Maria Pupino, 16 June 2005), Mrs Pupino, a nursery school teacher, was charged with inflicting serious injuries on her pupils. Article 8 of the Framework Decision contained specific protections for "vulnerable" victims. A preliminary reference on the provision's application was made to the CJEU. The CJEU held that young children allegedly mistreated by their teacher are "vulnerable" victims within the meaning of the Framework Decision. Therefore, they were entitled to the specific protection provided by it. The national court had to interpret national law "so far as possible, in the light of the wording and purpose of the Framework Decision".

### *International law*

#### **Convention on the Rights of the Child (CRC) 1989**

##### **Article 19**

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

#### **Committee on the Rights of the Child, General Comment No. 12: The right of the child to be heard, UN Doc. CRC/C/GC/12, 20 July 2009**

62. The child victim and child witness of a crime must be given an opportunity to fully exercise her or his right to freely express her or his view in accordance with United Nations Economic and Social Council resolution 2005/20, "Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime"<sup>14</sup>.
63. In particular, this means that every effort has to be made to ensure that a child victim or/and witness is consulted on the relevant matters with regard to involvement in the case under scrutiny, and enabled to express freely, and in her or his own manner, views and concerns regarding her or his involvement in the judicial process.
64. The right of the child victim and witness is also linked to the right to be informed about issues such as availability of health, psychological and social services, the role of a child victim and/or witness, the ways in which "questioning" is conducted, existing support mechanisms in place for the child when submitting a complaint and participating in investigations and court proceedings, the specific places and times of hearings, the availability of protective measures, the possibilities of receiving reparation, and the provisions for appeal.

#### **Committee on the Rights of the Child, General Comment No. 13 (2011) on the right to freedom from all forms of violence**

- 3.b) A child rights-based approach to child caregiving and protection requires a paradigm shift towards respecting and promoting the human dignity and the physical and psychological integrity of children as rights-bearing individuals rather than perceiving them primarily as "victims";
- (...)

5. **States' obligations and the responsibilities of family and other actors.**

References to "States parties" relate to the obligations of States parties to assume their responsibilities towards children not only at the national level, but also at the provincial and municipal levels. These special obligations are due diligence and the obligation to prevent violence or violations of human rights, the obligation to protect child victims and witnesses from human rights violations, the obligation to investigate and to punish those responsible, and the obligation to provide access to redress human rights violations. States parties, furthermore, shall ensure that all persons who, within the context of their work, are responsible for the prevention of, protection from, and reaction to violence and in the justice systems are addressing the needs and respecting the rights of children.

(...)

49. **Reporting**<sup>15</sup>. The Committee strongly recommends that all States parties develop safe, well-publicized, confidential and accessible support mechanisms for children, their representatives and others to report violence against children, including through the use of 24-hour toll-free hotlines and other ICTs.

(...)

51. **Investigation**. Investigation of instances of violence, whether reported by the child, a representative or an external party, must be undertaken by qualified professionals who have received role-specific and comprehensive training, and require a child rights-based and child-sensitive approach. Extreme care must be taken to avoid subjecting the child to further harm through the process of the investigation. Towards this end, all parties are obliged to invite and give due weight to the child's views.

(...)

52. **Treatment**. "Treatment" is one of the many services needed to "promote physical and psychological recovery and social reintegration" for children who have experienced violence, and must take place "in an environment which fosters the health, self-respect and dignity of the child" (art. 39). A full range of services, including family group conferencing and other similar practices, should be made available. Services and treatment for perpetrators of violence, especially child perpetrators, are also needed. (...) Interventions must be supportive and not in any way punitive.

54. **Judicial involvement**<sup>16</sup>. At all times and in all cases, due process must be respected. In particular, the protection and the further development of the child and his or her best interests (and the best interests of other children where there is a risk of a perpetrator reoffending) must form the primary purpose of decision-making, with regard given to the least intrusive intervention as warranted by the circumstances. (...) Furthermore, the Committee recommends the respect of the following guarantees: (...)

(b) Child victims of violence should be treated in a child-friendly and sensitive manner throughout the justice process, taking into account their personal situation, needs, age, gender, disability and level of maturity and fully respecting their physical, mental and moral integrity;

(d) In all proceedings involving children victims of violence, the celerity principle must be applied, while respecting the rule of law.

**UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000 (Palermo Protocol)**

**Article 6 Assistance to and protection of victims of trafficking in persons**

1. In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential.
2. Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:

<sup>14</sup> United Nations Economic and Social Council [Resolution 2005/20](https://www.un.org/ruleoflaw/files/UNGuidelinesChildVictimsWitnesses.pdf), 25 May 2005, in particular arts. 8, 19 and 20. Available at: <https://www.un.org/ruleoflaw/files/UNGuidelinesChildVictimsWitnesses.pdf>

<sup>15</sup> See also the [Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime](#), ECOSOC Resolution 2005/20, 2005.

- (a) Information on relevant court and administrative proceedings;
- (b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence

### **Council of Europe Convention on Action against Trafficking in Human Beings, 2005**

#### **Article 15 – Compensation and legal redress**

1. Each Party shall ensure that victims have access, as from their first contact with the competent authorities, to information on relevant judicial and administrative proceedings in a language which they can understand.
2. Each Party shall provide, in its internal law, for the right to legal assistance and to free legal aid for victims under the conditions provided by its internal law.
3. Each Party shall provide, in its internal law, for the right of victims to compensation from the perpetrators.
4. Each Party shall adopt such legislative or other measures as may be necessary to guarantee compensation for victims in accordance with the conditions under its internal law, for instance through the establishment of a fund for victim compensation or measures or programmes aimed at social assistance and social integration of victims, which could be funded by the assets resulting from the application of measures provided in Article 23.

### **Convention on Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention) 2007**

#### **Article 14 – Assistance to victims**

1. Each Party shall take the necessary legislative or other measures to assist victims, in the short and long term, in their physical and psychosocial recovery. Measures taken pursuant to this paragraph shall take due account of the child's views, needs and concerns.
2. Each Party shall take measures, under the conditions provided for by its internal law, to cooperate with non-governmental organisations, other relevant organisations or other elements of civil society engaged in assistance to victims.
3. When the parents or persons who have care of the child are involved in his or her sexual exploitation or sexual abuse, the intervention procedures taken in application of Article 11, paragraph 1, shall include:
  - the possibility of removing the alleged perpetrator;
  - the possibility of removing the victim from his or her family environment. The conditions and duration of such removal shall be determined in accordance with the best interests of the child.
4. Each Party shall take the necessary legislative or other measures to ensure that the persons who are close to the victim may benefit, where appropriate, from therapeutic assistance, notably emergency psychological care.

### **ECtHR, C.A.S. and C.S. v. Romania, Application no. 26692/05, 20 March 2012**

81. Concerning notably the weight attached to the victim's reaction, the Court considers that the authorities were not mindful of the particular vulnerability of young people and the special psychological factors involved in cases concerning violent sexual abuse of minors, particularities which could have explained the victim's hesitations both in reporting the abuse and in his descriptions of the facts (...).
82. The Court points out that the obligations incurred by the State under Articles 3 and 8 of the Convention in cases such as this require that the best interests of the child be respected. The

<sup>16</sup> See also: Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice, adopted on 17 November 2010, op. cit.; Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (ibid).; and General Assembly [resolution 65/213 on human rights in the administration of justice](#), A/RES/65/213, 1 April 2011.

right to human dignity and psychological integrity requires particular attention where a child is the victim of violence (see, *mutatis mutandis*, *Pretty v. the United Kingdom*, no. 2346/02, § 65, ECHR 2002 III). The Court regrets that the first applicant was never offered counselling and was not accompanied by a qualified psychologist during the proceedings or afterwards. The only mention of such support is from the school counsellor, who suggested that it would be better if the family moved away. Bearing in mind the positive obligations that the Respondent State has assumed under the various international instruments protecting the rights of child, this cannot be considered to constitute an adequate measure for "recovery and reintegration".

83. The failure to adequately respond to the allegations of child abuse in this case raises doubts as to the effectiveness of the system put in place by the State in accordance with its international obligations and leaves the criminal proceedings in the case devoid of meaning.

**P. and S. v. Poland, ECtHR, Application no. 57375/08, Judgment of 30 October 2012**

165. The Court has been particularly struck by the fact that the authorities decided to institute criminal investigation on charges of unlawful intercourse against the first applicant who, according to the prosecutor's certificate and the forensic findings referred to above should have been considered to be a victim of sexual abuse.
166. On the whole, the Court considers that no proper regard was had to the first applicant's vulnerability and young age and her own views and feelings.
167. In the examination of the present complaint it is necessary for the Court to assess the first applicant's situation as a whole, having regard in particular to the cumulative effects of the circumstances on the applicant's situation. (...) the approach of the authorities was marred by procrastination, confusion and lack of proper and objective counselling and information [...]. Likewise, the fact that the first applicant was separated from her mother and deprived of liberty in breach of the requirements of Article 5 § 1 of the Convention must be taken into consideration.
168. The Court concludes, having regard to the circumstances of the case seen as a whole, that the first applicant was treated by the authorities in a deplorable manner and that her suffering reached the minimum threshold of severity under Article 3 of the Convention.
169. The Court concludes that there has therefore been a breach of that provision.

**Z and Others v. the United Kingdom, ECtHR, No. 29392/95, Judgment of 10 May 2001**

73. (...) These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge [...].
74. (...) The Court acknowledges the difficult and sensitive decisions facing social services and the important countervailing principle of respecting and preserving family life. The present case, however, leaves no doubt as to the failure of the system to protect these applicant children from serious, long-term neglect and abuse.
75. Accordingly, there has been a violation of Article 3 of the Convention.

*EU law*

**Directive 2011/36/EU (EU Anti Trafficking Directive), 2011**

**Article 13 General provisions on assistance, support and protection measures for child victims of trafficking in human beings**

1. Child victims of trafficking in human beings shall be provided with assistance, support and protection. In the application of this Directive the child's best interests shall be a primary consideration.
2. Member States shall ensure that, where the age of a person subject to trafficking in human beings is uncertain and there are reasons to believe that the person is a child, that person is presumed to be a child in order to receive immediate access to assistance, support and protection in accordance with Articles 14 and 15.



#### Article 14 Assistance and support to child victims

1. Member States shall take the necessary measures to ensure that the specific actions to assist and support child victims of trafficking in human beings, in the short and long term, in their physical and psycho-social recovery, are undertaken following an individual assessment of the special circumstances of each particular child victim, taking due account of the child's views, needs and concerns with a view to finding a durable solution for the child. Within a reasonable time, Member States shall provide access to education for child victims and the children of victims who are given assistance and support in accordance with Article 11, in accordance with their national law.
2. Member States shall appoint a guardian or a representative for a child victim of trafficking in human beings from the moment the child is identified by the authorities where, by national law, the holders of parental responsibility are, as a result of a conflict of interest between them and the child victim, precluded from ensuring the child's best interest and/or from representing the child.
3. Member States shall take measures, where appropriate and possible, to provide assistance and support to the family of a child victim of trafficking in human beings when the family is in the territory of the Member States. In particular, Member States shall, where appropriate and possible, apply Article 4 of Framework Decision 2001/220/JHA to the family.
4. This Article shall apply without prejudice to Article 11.

For more information see:

- Economic and Social Council Guidelines on justice in matters involving child victims and witnesses of crime, E/CN.15/2005/L.2/Rev.1, 25 May 2005  
<https://www.un.org/ruleoflaw/files/UNGuidelinesChildVictimsWitnesses.pdf>
- UNODC, UNICEF, Handbook for Professionals and Policymakers on justice in matters involving child victims and witnesses of crime  
[https://www.unodc.org/pdf/criminal\\_justice/Handbook\\_for\\_Professionals\\_and\\_Policymakers\\_on\\_Justice\\_in\\_Matters\\_Involving\\_Child\\_Victims\\_and\\_Witnesses\\_of\\_Crime.pdf](https://www.unodc.org/pdf/criminal_justice/Handbook_for_Professionals_and_Policymakers_on_Justice_in_Matters_Involving_Child_Victims_and_Witnesses_of_Crime.pdf)
- UNICEF, Save the children: Every child's right to be heard, 2011  
[http://www.unicef.org/french/adolescence/files/Every\\_Childs\\_Right\\_to\\_be\\_Heard.pdf](http://www.unicef.org/french/adolescence/files/Every_Childs_Right_to_be_Heard.pdf)
- UNICEF, Child and Youth Participation Resource Guide, 2006  
<https://sdgs.un.org/publications/unicef-child-and-youth-participation-resource-guide-17415>
- Council of Europe guidelines on child-friendly justice  
<http://www.coe.int/en/web/children/child-friendly-justice>
- FRA, Handbook on European law relating to the rights of the child, 2015  
<http://fra.europa.eu/en/publication/2015/handbook-european-law-child-rights>
- Amnesty International, *Fair Trial Manual*, Second edition, 2014

## IV. Birth registration

Human Rights treaties enshrine the right of all persons to registration immediately after birth, and the right to a name and a nationality after birth (Art 7 CRC, Art 24(2) ICCPR, Art 18 Convention on the Rights of Persons with Disabilities (CRPD)). The right of children to take legal action or invoke administrative proceedings to protect their rights differs in various countries.

Although States enjoy a level of discretion with respect to the measures used to register children, such measures must be effective and consistent with the CRC, most notably the prohibition against discrimination under article 2. States are not only prohibited from discriminating against children with respect to their birth registration in contravention of article 2, but are also required to take special measures to ensure vulnerable groups of children are registered.<sup>17</sup>

Apart from ensuring the existence of the child under law, birth registration provides the foundation for safeguarding children's rights, including children's access to justice. Registration is particularly important for refugee and asylum-seeking children who become separated from their parents, and a register of births can facilitate reunification. Children of undocumented migrants are at a high risk of remaining unregistered, as parents may not register children for fear of deportation or other sanctions, such as forced signing of voluntary return declarations. In such cases, children are at a higher risk of becoming stateless and parents must be encouraged to register births so that the child's right to nationality is given effect.<sup>18</sup>

### Convention on the Rights of the Child (CRC) 1989

#### Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

### UN Convention on the Rights of People with Disabilities (CRPD) 2006

#### Article 18 (2)

Children with disabilities shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by their parents.

### International Covenant on Civil and Political Rights (ICCPR) 1996

#### Article 24(2)

Every child shall be registered immediately after birth and shall have a name.

<sup>17</sup> According to the CRC recommendations to States, this category includes, but is not limited to: children affected by armed conflict and internally displaced children, illegal residents, non-nationals and refugees, nomads, minority groups, children born out of wedlock, children belonging to indigenous groups and children living in remote and rural areas, stateless children, children with disabilities, children born to parents with a disability, and children of imprisoned parents.

<sup>18</sup> John Tobin and Florence Seow, "Article 7: The rights of birth registration, a name, nationality and to know and be cared for by parents", in *The UN Convention on the Rights of the Child A Commentary* (p. 517-550). Oxford Commentaries on International Law (2019), p. 384-450, and p. 393 more specifically.

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**Article 7**

20. The lack of birth registration may have many negative impacts on the enjoyment of children's rights, such as child marriage, trafficking, forced recruitment and child labour. Birth registrations may also help to achieve convictions against those who have abused a child. Unregistered children are at particular risk of becoming stateless when born to parents who are in an irregular migration situation, due to barriers to acquiring nationality in the country of origin of the parents as well as to accessing birth registration and nationality at the place of their birth.
21. The Committees urge States parties to take all necessary measures to ensure that all children are immediately registered at birth and issued birth certificates, irrespective of their migration status or that of their parents. Legal and practical obstacles to birth registration should be removed, including by prohibiting data sharing between health providers or civil servants responsible for registration with immigration enforcement authorities; and not requiring parents to produce documentation regarding their migration status. Measures should also be taken to facilitate late registration of birth and to avoid financial penalties for late registration. Children who have not been registered should be ensured equal access to health care, protection, education and other social services.
22. Should a child's identity documents have been procured irregularly on his or her behalf and the child requests the restoration of his or her identity documents, States parties are encouraged to adopt flexible measures in the best interests of the child, specifically by issuing corrected documents and avoiding prosecution where falsification has been committed.

## V. Child-friendly communication

### 1. Practical aspects

Lawyers and judges should:

- a) Be mindful of the interpreter;
- b) Be aware of the time, as stress and fatigue can impact the child's ability to participate;
- c) Explain to the child that it is all right if they don't know the answer to a question;
- d) Employ child-sensitive questioning, with careful attention to language and tone;
- e) Recognize that children will not be able to present testimony with the same precision as adults; and
- f) Ensure that there are as few people in the court as possible.<sup>19</sup>

#### Courtroom orientation

The courtroom is typically an unfamiliar place for children. Many family and juvenile court experts recommend allowing children to visit an empty courtroom prior to their scheduled hearing. Under the supervision of court personnel, the children should be permitted to explore the courtroom, sit in all the locations (including, especially, the judge's bench and the witness stand), and to practice answering simple questions in preparation for testimony. To the extent that resources permit, court administrators should be receptive to requests by legal representatives or custodians for unaccompanied migrant children to visit our courts prior to the initial hearing. Additionally, they should be open to other ways to familiarize unaccompanied migrant children with court operations.<sup>20</sup>

<sup>19</sup> US Department of Justice, Office of the Chief Immigration Judge, "[Interim Operating Policies and Procedures Memorandum 04-07: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children](#)," in Child Clients are Different: Best Practices for Representing Unaccompanied Minors. American Bar Association (ABA) Center for Continuing Legal Education (CLE), 2004.

<sup>20</sup> Ibid.

## 2. How to communicate with a child client

*Children with experience with the judicial process have expressed their opinions on helpful and unhelpful characteristics of a lawyer in a study<sup>21</sup> carried out in 1996 in the US as follows:*

### Helpful characteristics in an interviewer/attorney:

- a) Taking the time to develop a relationship with the client;
- b) Listening to the child for as long as necessary and being comfortable with periods of silence. Good communication will enhance the child's trust in the lawyer. It is therefore important to communicate in an adapted way, taking into account the child's needs and capacities from the very first moment of meeting. The child's first impression of their lawyer will usually determine their entire relationship. It is thus essential to adapt language and address things differently to children. Lawyers must always keep in mind that each child will have different individual needs.
- c) Respecting the client's individuality;
- d) Awareness that some child clients may view an attorney as an adult who can protect them rather than simply as a lawyer; and
- e) Awareness that in the case of neglect or abuse, some youth may be more concerned with their attorneys protecting them from future neglect or abuse than with having them keep this information confidential.

### Unhelpful characteristics in an interviewer/attorney:

- a) Being continuously absent or rushed;
- b) Maintaining a manner that is unfriendly and uncaring and does not promote trust; and
- c) Using a narrow interview technique that does not contextualize a child's experience take into account other considerations affecting the child.
- d) Explain that it is OK for the child to say 'I don't know' or 'I don't remember' rather than feeling obliged to come up with an answer.

### Child-friendly communication – useful tips:

1. Have a kind, reassuring and friendly tone
2. Use simple language (avoid technical terms and jargon that children are unlikely to understand) and change language according to the age and maturity of the child
3. Ask one question at a time
4. Use short sentences and simple vocabulary
5. Use drawings, photos, images
6. Recognise that it may be necessary to speak 'through' a supporter
7. Allow children to have time to respond
8. Wear less formal clothing
9. Monitor the child's participation and suggest breaks with additional breaks if the child is distressed or tired
10. Avoid leading questions (for example, do not ask "Do you understand"?) as children are often suggestible and compliant, it may invite the child to automatically answer "Yes"
11. Avoid using questions that involve comparative judgements as children may find these difficult or have different perceptions (i.e. big, small, fast, slow)
12. Be sensitive to language that the child may find difficult to say (i.e. sexual language, or language about body parts)
13. Be cautious around sensitive topics, e.g. traumatic experiences, information about their parents – do not make assumptions

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<sup>21</sup> Chaplan, Janet A., "Youth Perspectives on Lawyers' Ethics: A Report on Seven Interviews." *Fordham Law Review* 64(1763), March 1996. The author of the study is a member of the American Bar Association Section of Litigation Task Force on Children, and has previously served as a law guardian at Lawyers For Children, Inc. In this study she explored the participation of disempowered clients in justice processes in light of legal ethics and as part of the study conducted a number of interviews with children that can give a concrete picture of how they perceived their contact with their lawyer.

14. Do not use aggressive, confrontational or degrading language
15. Do not repeat the same question over and over again – it could confuse the child
16. Avoid multiple clauses within sentences
17. Avoid multiple questions within questions, leading questions, and double negatives<sup>22</sup>
18. Actively listen to what the child has to say, without trying to over-interpret his words
19. Hear what the child has to say, even if it is not directly related to the alleged facts or the offence
20. Understand that vocabulary used by children is often different or has different meanings than words to adults
21. Generally, choose face-to-face meetings rather than phone calls or virtual communication
22. Establish clear rules on when the child can contact the lawyer and expect an answer. Although these methods are more effective than the sending of a letter, it can result in the child contacting the lawyer at any time and expecting an immediate answer. Find tools to explain to every child the information that they need to know and tailor the information to each child's level of maturity and capacities

#### Listening: methods to use to show we are listening

1. Non-verbal: nodding, facial expression, eye contact, overall body language. Try to establish and maintain appropriate eye-contact (smile, nod, use non-verbal cues etc.). This demonstrates unconditional positive regard, facilitates openness in the speaker and helps the child to focus and to listen
2. Verbal: positive sounds (mm, aha, etc.), tone of voice, open and closed questions, paraphrasing, summarising, reflecting back.
  - Repeat back the statements made by the child, by saying, for example, "you said xxxx, by that did you mean yyyy?". This is very important because it enables the child to stop and think about the factual content of what they have said and enables the lawyer to verify if the child has understood correctly
  - Summarize what the child says. This is a key skill in bringing structure to the interview. The lawyer can use this tool to confirm the child's understanding of the case, bring together different aspects raised by the child into a coherent sentence and then either explore further what the child has already introduced or move the interview on to a new topic.

#### Alternative communication methods

1. Signs and Symbols
2. Makaton signs and symbols (internationally recognised hand signs) [www.makaton.org](http://www.makaton.org)
3. Picture Communication Systems: <http://www.pecs-unitedkingdom.com>

#### Creative communication tool-kits

1. Children may be asked to choose role plays, such as people, buttons or stones to represent themselves, family members, pets, professionals. The child may be asked who is important to them using, how near or far they want people and other children to be, to re-enact past or current events etc.
2. Children may often communicate through play materials things they can't or don't want to express verbally. Children might draw family and school pictures, make models, make feelings masks.
3. Puppets and/or a soft toy can be used to talk to a small child about what they think or feel. Children may also use these themselves to re-enact events or explain current feelings. Finally, play objects can help to distract a child and make the child feel at ease.
4. Stories, rhymes and poems: children can either use paper or pens to create their own stories, involving for example, what he or she want a new foster carer to know about them? They may write poems, rhymes about their sentiments. They may be given story books on specific subjects

<sup>22</sup> Coram Children's Legal Centre, London, "Unlocking Children's Rights: Strengthening the capacity of professionals in the EU to fulfil the rights of vulnerable children" materials available at: <https://coraminternational.org/unlocking-childrens-rights/>

when explaining things to young children, about war, migration, death, foster-care etc.

5. Visual aids: cards with pictures of home, school, special events (birthday, holidays) happy, sad, angry faces to express feelings
6. IT equipment: children and young people can use tablets and computers to create their own information to present to professionals about issues that affect them.

When the child does not understand or speak the language of the proceedings, the lawyer needs to:

- a) Ensure that the competent authorities have arranged for an interpreter to facilitate communication;
- b) Ensure that the competent authorities have provided the translation of the most relevant documents of the case-file;
- c) Make sure an interpreter is present when the child is interviewed, also by the lawyer directly.

### Factors for child-friendly environment

#### Physical environment

1. The room is well-ventilated and comfortable
2. The room has colourful drawings and posters
3. Seats are the appropriate size
4. The child is allowed to sit with the person he/she wishes to
5. The environment is safe
6. The room is private

#### Provisions

1. The child is given information leaflets
2. The child is given the chance to ask questions
3. Food and refreshments are provided

#### Support and involvement

1. Child is accompanied by helpful parent
2. Child has a supportive adult helping him/her
3. Adults are dressed in smart casual clothing
4. Communication is child-sensitive

#### Logistics

1. Child is informed about the meeting, and location
2. The child is given transportation to the meeting
3. The meeting takes place during appropriate hours, with ample breaks
4. Waiting is minimised
5. The child's contact with hostile others is strictly limited or prevented<sup>23</sup>

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<sup>23</sup> Angela O'Connell, Child Law Clinic, School of Law, University College Cork, Ireland, Training FAIR project Bulgaria January 21-22 2017. Emma Hurley, PhD Candidate, School of Applied Psychology, University College Cork, Ireland (Developmental psychology – teen development materials).



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17. More specifically, and in particular in the context of best interest assessments and within best interest determination procedures, children should be guaranteed the right to:
- (...)
- (c) Have the immigration proceedings conducted by a specialized official or judge, and any interviews carried out in person by professionals trained in communicating with children.

**Relation with the child and trust building: Good practices (ECRE)<sup>24</sup>**

In Spain, an NGO legal advisor noted that he adapts the length of the meeting and their content to the mood and situation of the child. He tries to arrange several meetings if it is necessary to build trust and provide information. Other NGO legal advisors noted that they try to adapt the meetings to the maturity level of the child.

A legal advisor interviewed in the UK noted that a good advisor would try to meet the child up to five times to finalize a statement, allowing time to build a rapport and establish trust with the child. Legal advisors stated they try to limit meetings to two hours for children. An advisor also mentioned that it is considered good practice for a barrister to meet the child and discuss the case with them in preparation for an appeal's hearing. Yet the advisor added that this does not happen often in practice.

In Linz, Austria, a first meeting is usually held with the child around two weeks after their arrival in the youth care facility where the task of the legal advisor and the asylum procedure are discussed. The main goal of the first meeting is to establish a rapport with the child and build trust. The children are provided the contact details of their legal advisors and encouraged to contact the advisors at any time, within office hours. Appointments are arranged flexibly, sometimes for the following day if necessary. Similarly, in Vienna, unaccompanied children can request additional meetings with their legal advisor to prepare for the interview with the Asylum Agency. Legal advisors interviewed all stated that they adapt the meetings and their method of communication to the individual child they are representing.

One legal advisor specialised in unaccompanied children cases, in Belgium, mentioned that in an asylum procedure she would meet the child four to six times if the case goes to the appeal stage but she would also arrange extra meetings if necessary in relation to an age assessment, new information or in case of changes to the situation of the child.

**For more information see:** DCI-Belgium, [Practical Guide for Lawyers: how to defend a child in conflict with the law?](#), 2018

<sup>24</sup> ECRE, [Right to Justice: Quality Legal Assistance for Unaccompanied Children](#), Comparative Report, September 2014, p 72



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