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**THE LEGAL PROTECTION OF  
UNACCOMPANIED FOREIGN MI-  
NORS THROUGH THE INTERNA-  
TIONAL CONVENTION ON THE  
RIGHTS OF THE CHILD**

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## **THE LEGAL PROTECTION OF UNACCOMPANIED FOREIGN MINORS IN THE INTERNATIONAL LEGAL SYSTEM**

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### **1. International Contest**

The figure of the foreigner envisages a specific treatment within general international law. Looking through the juridical discipline of the foreigner one may identify a changeable picture of the history of law that points out a fundamental ambivalence, which contains on one hand, hostility towards the idea and the concept of "foreigner", justifying legal parameters that legitimise different treatments between citizens and foreigners. On the other hand, by virtue of the principle of substantial equality, we find the proclamation of a core of fundamental rights, and precisely on the recognition of these fundamental rights, we will now focus our attention.

The protection of human rights has become a fundamental principle of the United Nations, enshrined in all declarations concerning human rights. This protection at the international level, guarantees a core of inalienable rights for the whole human race without any difference in citizenship, in compliance with the principle of non-discrimination and humanitarian demands. Human rights must be recognised to each individual, regardless of the State of origin and of the regularity of the stay and through the incorporation of the rights recognised to foreigners in the matter of protection of human rights, a significant step has been taken towards the protection of the rights of migrants.

Although the subject of immigration falls within the discipline of the protection of human rights, and therefore above all at the conventional level, the international order aims to guarantee the respect of the rights of the foreigner: every State

therefore maintains its sovereignty in the question of the criteria of admission and removal of foreigners from their national territory. Countries have maintained a strong decision-making power for the regulation of migration flows. However, State power does not have an absolute discretion: in the regulation of migratory flows, the international law on human rights provides significant limits that are raised to norms of general international law. The States, in fact, in order not to violate the international principle of non-discrimination, cannot arbitrarily reject foreigners because they possess a specific nationality or for reasons based on sex, religion, etc. Likewise, under the 1951 Geneva Convention on the Status of Refugees, the ratifying states would be banned from collective expulsions, torture and inhuman or degrading treatment, as well as guaranteeing the respect of the principle of *non-refoulement*, expressed in Article 31 thereof:

*“The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”<sup>1</sup>*

Within the discipline concerning the recognition of human rights, the Universal Declaration of human rights has of course a fundamental importance; according the Declaration, “*all human beings are born free and equal in dignity and rights*”<sup>2</sup>, and it also underlines in article 2 the non-discrimination principle according to which:

*“Everyone is entitled to all the rights and freedoms set forth in this Declaration, 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. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.”<sup>3</sup>*

After the aforementioned conception of human being, the norms regulating the behaviour within the social groups to which he belongs, and with the rest of the social groups with which he relates, have also developed, and in the same way, over the years the International Treaties focused on the issue of minors, evolving progressively and adopting norms based on the recognition of their fundamental rights, so

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<sup>1</sup> Article 31 of the 1951 Geneva Convention relating to the Status of Refugees

<sup>2</sup> Article 1 of the Universal Declaration of Human Rights, 1948

<sup>3</sup> Article 2 of the Universal Declaration of Human Rights, 1948

from time to time, a regulation that is increasingly considered to comply with the legal protection of the child, has been realized.

Already in our Constitutional Charter some relevant principles concerning different sectors emerge, but we do not find all the provisions that explicitly refer to the position of the child and that comprehend the entire issue requested to guarantee the child's protection. Therefore, it is obvious that, among the sources connected to the protection of the rights of the child, numerous international documents are also found.

Precisely the reflection on the dramatic living conditions of minors during the conflict, which began at the end of World War I, contributed to start considering the protection of the child in its specificity as a subject in formation, leading to the elaboration of a statute of the child's rights, which is the one contained in the 1924 UN Geneva Declaration, in which for the first time, the right of the minor to enjoy a psychophysical and spiritual growth has been recognised and which had a systematic character and gathered the rights of the child.

In 1948 the issue continued to be articulated and the children's rights were implicitly included in the Universal Declaration of Human Rights, although later it came to the conclusion that the particular needs of children had to be stated and protected in a more specific way and possibly within a Charter of Rights dedicated to minors.

Specifically dedicated to the protection of children's rights, is the Declaration of the Rights of the Child unanimously approved by the UN Assembly in 1959, which enunciations, as it is stated in the preamble, establish real rights which must be recognised to every child without any distinction and each child is entitled to receive particular protection so as to develop himself in a healthy and normal way physically, intellectually, morally, spiritually; he will have the right to the name or a nationality, will benefit of social security, and will have the right to housing and to receive the necessary medical care.

He also has the right to receive love in the family environment, to a proper education system, and to develop properly his faculties.

In particular, although not legally binding, it affirms for the first time the principle of the best interest of the child, which will then be referred to by numerous other international sources, especially as we shall see later, by the 1989 New York Convention.

These statements, contained in the Declaration have no legal value and are therefore, as we already said, not legally binding for States, but the authority of the source, and the solemnity of the enunciation, are able to underline anyway their specific importance.

Within the legal protection of children, it can be considered as the pre-legal foundation of every civil order.

Even if the rules or principles therefore established do not have the strength to repeal the norm of a juridical order when they're possibly in contrast with them, they can at least constitute an indication or an hermeneutical criterion where the norm is ambiguous and may give rise to different interpretations.

The rules or principles therein contained, recognise the need to guarantee the appropriate respect of the rights of the child, but the need of a document that could guarantee the protection of the child in a much broader and complete sense, was also very strong; in 1979, when the international year of the child was proclaimed, the UN assembly decided to set up a working group drawing up an "International Convention on the Rights of the Child".

The text was approved by the assembly on November 20, 1989 and subsequently ratified and enforced by Italy with law May 27, 1991 n. 176.

The Convention on the Rights of the Child is a real statute of the child's rights, which states precisely which are the rights recognised in the most different spheres, without any ambiguity and uncertainty, without any kind of discrimination.

Still, despite the 1989 Convention on the Right of the Child can be considered as the more relevant document within the protection of the rights of the child, able to underline the importance of the recognition of the child's rights, in the "Charter of Fundamental Rights of the European Union", proclaimed in Nice in 2000 and confirmed by the Lisbon Treaty, the fundamental values of human dignity, freedom, equality and solidarity are also placed at the base, specifying that the person is placed at the centre of his action, and refers children's rights within article 24, according to which: *"Children shall have the right to such protection and care as it 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"*.

Therefore, with the Charter of Nice, the concept of the child introduced internationally by the New York Convention is also protected in the European Union dimension. <sup>4</sup>

## 2. The Convention on the Rights of the Child, 1989

*"Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity"*<sup>5</sup>

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<sup>4</sup> Art. 24, "Charter of Fundamental Rights of the European Union"

<sup>5</sup> Preamble of the 1989 New York Convention on the Rights of the Child

The Convention on the Rights of the Child (hereafter, CRC or the Convention) is the foremost international legal instrument established to protect and support children's rights worldwide and it realized a transition from the previous recognition and protection of the interests of the child, to the protection of the specific rights of the child. This Convention has therefore strengthened the situation of a category that until then was considered weak, placing particular emphasis on the child as holder of rights; it consists of 54 articles referring to children's rights and to the methods that should be applied to guarantee them protection and appropriate assistance.

At a general level, the 1989 Convention recognises to all children, without any kind of discrimination, the main social and economic rights and the right to receive protection from possible abuse, and / or exploitation.

The fundamental characteristic of the Convention of the Rights of the Child, compared to the previously issued documents, is due to the fact that it doesn't only protect the child as a vulnerable subject, but recognises him as an active subject who has the specific right to freely express his personal opinion on any matter in which his own interest emerges.

For the protection specifically provided for unaccompanied foreign minors within the discipline of the Convention on the Rights of the Child of 1989, article 22 of the same has a fundamental importance, recognising that

*“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 the 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”;*

So in addition to those that can be considered as generic protection mechanisms, the article refers to the rules that have to be applied also towards refugee children.

States parties are called upon to take appropriate measures so that a child who wants to obtain refugee status can receive the necessary protection and humanitarian assistance, both in the presence and in the absence of parents, accompanied or unaccompanied.

This article also underlines the importance of the States Parties to

*“provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organisations or non-governmental organisations 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 the information necessary to guarantee the reunification with his or her family.”*

Very important, the fact that being the protection of unaccompanied foreign minors internationally recognised by the Convention on the Rights of the Child in 1989, each State should collaborate with the United Nations and other international organisation, to guarantee adequate protection and help to unaccompanied minors, considering the best and first interest of the minors that should be protected, such as the reunion with their family of origin, and will also be able to impose a sanction against those States who won't protect the unaccompanied minor's interests. Obligations deriving from the Convention towards unaccompanied and separated children apply to all branches of government (executive, legislative and judicial). They include the obligation to establish national legislation and administrative structures.

Such legal obligations are both negative and positive in nature, requiring States not only to refrain from measures infringing on such children's rights, but also to take measures to ensure the enjoyment of these rights without discrimination.<sup>6</sup>

This need to guarantee the appropriate protection to unaccompanied foreign minors has been felt by the main international organisations, leading to the issuing of numerous soft law instruments, always considering the main importance accorded to the Convention on the Rights of the Child, from which laws on the protection of the child can no longer be adopted when in any way in contrast with the fundamental principles recognised by it, as established by Article 51 of the Convention on the Rights of the Child: “*A reservation incompatible with the object and purpose of the present Convention shall not be permitted*”, it is the task of the signatory states to harmonise their national laws with the Convention.

We can therefore deduce that, although there are numerous international sources that in some way regulate the protection of minors from the legal point of view, sometimes because they specifically refer to them, sometimes through the principles therein established and that only secondly are directed to the regulation of the legal protection of minors, within the international legal frame dedicated to unaccompanied foreign minors, the Convention on the Rights of the Child has a greater importance.

For this reason, we analyse the principles introduced by it and which are considered as an important reference point for the resolution of questions relating to unaccompanied foreign minors.

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<sup>6</sup> General comment No 6 (2005) “Treatment of unaccompanied and separated children outside their country of origin”



Given therefore the importance of the Convention, and the fact that as we have already said it is the task of the signatory States to harmonise their national laws with the Convention, according to the following norms and principles issued by the same, concerning unaccompanied foreign minors:

- Any discrimination based on the child's national, ethnic or social origin is prohibited (art. 2)
- In all decisions relating to children, “*the best interest of the child shall be a primary consideration*” (art. 3)
- A child can be separated from his parents against his will only if it is considered to be in his best interest (art. 9)
- Each question, presented to guarantee the family's reunification of the child, must be considered with a positive spirit and with humanity (art. 10)
- The States Parties adopt all legislative, administrative, social and educational measures to protect the child against all forms of violence, outrage (art. 19)
- Children have the right to obtain the highest possible standard of medical care, social protection and education (art. 28, 29)

But still, the Convention has moreover established a Committee, with the precise task of monitoring compliance with the Convention itself by the Contracting States, as established in article 43 of the same. This Committee is not a Court and therefore its functions do not include issuing judgments or drafting reports, the only function recognised is receiving and evaluating those reports that the Contracting States are obliged to send periodically, regarding compliance with the Convention in their domestic systems and then elaborates general comments.

*“For the purpose of examining the progress made by States Parties in achieving the realisation of the obligations undertaken in the present Convention, a Committee on the Rights of the Child shall be established and shall carry out the functions hereinafter provided”.<sup>7</sup>*

Through the Committee’s monitoring efforts, a clear guidance to States on the obligations deriving from the Convention, with regard to this particular vulnerable group of children, shall be provided and in this way it can be considered as the controlling body on the Convention on the Rights of the child, also by managing an interpretative function of the Convention.

### **3. “The Triangle of Rights”: Non-discrimination, the Right of the Child to express His or Her Views Freely and the Principle of the Best Interests of the Child**

As we have already said, the text is composed by 54 articles, all related to the protection of the child and the recognition of their rights, but we will focus our attention on three of the main rights recognised by it, as underlying the entire CRC: these three rights are so important and so interrelated that it is helpful to think of them as a "triangle of rights". The three rights of the triangle reinforce each other to reach the main objective, such as "the survival and development" of children as established by article 6<sup>8</sup>.

The triangle of rights is composed by the non- discrimination principle established by article 2, the right of the child to freely express his or her views contained in article 12 of the same, and the most important one, the principle of the best interest of the child, within article 3, which expresses one of the fundamental values of the Convention even if it’s not new, since, considering the topic of children, it was already enshrined in the 1959 Declaration of the Rights of the Child,<sup>9</sup> and whose notable importance, is also found in the Italian discipline on unaccompanied foreign minors. Although even in that case the jurisprudence and the legislator, considering the principle of the best interests of the minor, invoke the well-known article 3 of the United Nations Convention on the Rights of the Child, this principle did not

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<sup>7</sup> Art. 43 1989 Convention on the Rights of the Child.

<sup>8</sup> UNHCR- United Nations High Commissioner for Refugees (1994): *“Refugee Children: guidelines on protection and care”* <https://www.unhcr.org/3b84c6c67.pdf>  
Right to life, art. 6: States Parties recognise that every child has the inherent right to life and shall ensure to the maximum extent possible the survival and development of the child.

<sup>9</sup> General Comment No 14 (2013) “on the right of the child to have his or her best interest taken as a primary consideration (art. 3 paragraph 1)”

enter within the Italian legal context with the 1989 Convention, but already in the validity of the 1865 Civil Code and the original text of 1942, the criterion of the minor's interest was used as a guiding principle, for example in those decisions concerning the custody of the child in case of legal separation between parents.<sup>10</sup>

It is therefore a principle that we will discuss in detail, starting from the Convention on the Rights of the Child, but whose importance derives above all from the fact that it has been recalled from a plurality of sources, both national and international ones.

#### 4. The principle of non-discrimination

Article 2 of the CRC sets up a non-discrimination obligation on the state party. As a consequence, unaccompanied children are entitled to all rights foreseen at the CRC with no possible exclusion, as established by the Convention:

*“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.”*

Each children, including asylum-seeking, refugee and migrant children, should have the right to receive protection and the enjoyment of rights stipulated in the Convention which is not limited to children who are citizens of a State party, but must be guaranteed to each children, without making any difference concerning their nationality, immigration status or when they are stateless<sup>11</sup>so, these State obligations cannot be arbitrarily and unilaterally curtailed, and according to the interpretation of the Committee on the Rights of the Child, this principle should embrace all children within the territory of a State party including those attempting to enter the territory.

What the principle of non-discrimination, articulated in two paragraphs, therefore aims to guarantee to foreign unaccompanied or separated children, is that they can enjoy and hold the rights recognised to minors, without any kind of discrimination and according to what was stated in the second paragraph, whereas instead, within the society the principle of non-discrimination is not guaranteed, measures should also be taken to protect the child from such behaviour, *“to address possible*

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<sup>10</sup> Joelle Long “Il ruolo del principio del superiore interesse del minore nella disciplina dell’immigrazione”, in *Minori Giustizia* 2006, n. 1, p. 251

<sup>11</sup> General comment No 6 (2005) “Treatment of unaccompanied and separated children outside their country of origin”, paragraph 12

*misperceptions and stigmatisation of unaccompanied or separated children within the society*".<sup>12</sup>

This obligation could be negative and positive in nature: State parties should avoid any action susceptible to hinder unaccompanied children's entitlement to the rights of the Convention and promote measures to facilitate their enjoyment of these rights.<sup>13</sup>

## 5. The child's right to express his or her views freely

Article 12 of the Convention on the rights of the child, establishes the right of the child to freely express his view:

*"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.*

*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.*

"

This principle is necessary to guarantee and allow to each children a well-informed expression of his views and wishes, so it is imperative that such children are entitled to receive all the relevant information concerning their entitlement, available services, and the communications concerning the asylum process and family tracing. However, the text does not provide any information on how and to what extent the child's views have to be taken into consideration when making a decision that concerns him, considering his maturity that refers to the ability to understand and assess the implications of a particular matter, and must therefore be considered when determining the individual capacity of a child.<sup>14</sup>

A 1994 United Nations High Commissioner for Refugees' document (UNHCR- United Nations High Commissioner for Refugees (1994)) sets up three different age ranges with different capacities to make a decision relating their future. According to this source, unaccompanied refugee children over the age of 16 are

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<sup>12</sup> General comment No 6 (2005) "Treatment of unaccompanied and separated children outside their country of origin", paragraph 18

<sup>13</sup> "The legal status of unaccompanied children within international, European and national frameworks, protective standards vs restrictive implementation", Pucafreu Project, p. 10  
Committee on the Rights of the Child (2005): "General Comment n° 6 on the treatment of unaccompanied and separated children outside their country of origin" paragraph 13

<sup>14</sup> General comment No 12 (2009) "The right of the child to be heard" paragraph 30

generally mature enough to make their own decisions. Those over the age of nine or ten (and younger than 16) might be able to make reasonable choices if they receive adequate information, always depending on their degree of maturity. Finally, and despite the fact that they should always have the opportunity to express their views, children below nine or ten years of age appear not be sufficiently mature to make independent decisions.<sup>15</sup>

As children age and mature they have greater participation in decision-making. Three forms of participation of the children in the decision-making process are:

- *Information input*: when primary school children draw, the activity can be just recreation and self-expression. But it can also be participation, provided that adults use the pictures as a source of information about the children's thoughts and feelings.

- *Dialogue Children*: have opinions and can discuss them with adults, according to the child's age and maturity, then the children are participating in the process to reach the decision, according to the CRC.

- *Decision-making*: at an older age, young people can make some of their own decisions, even if sometimes these choices are usually subject to the parents approval, the right of adolescents to decide what is in their own best interests shows that when children increase in age and maturity they also have more control in their life with the right to freely express themselves.

It is of fundamental importance therefore, to guarantee that every child participates in the decisions to be reached and that he can receive all the necessary information provided in compliance with his maturity level, and the General Comment also determines that “*as participation is dependent on reliable communication, where necessary, interpreters should be made available at all stages of the procedure.*”<sup>16</sup>

The second section of article 12 also provides for unaccompanied children the right to be heard directly or, thanks to an adequate representation, in all judicial and administrative proceedings that concern him.

Expressing views is a choice for the child, not an obligation and the States parties have to ensure that the child receives all necessary information and advice to make a decision in favour of her or his best interests.<sup>17</sup>

We can therefore consider the principle and right of the child to be heard and to be able to participate where the decisions to be reached are related to him, complementary to the principle of the superior interest of the child, which states that in

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<sup>15</sup> UNHCR- United Nations High Commissioner for Refugees (1994): “*Refugee Children: guidelines on protection and care*” <https://www.unhcr.org/3b84c6c67.pdf>

<sup>16</sup> General comment No 6 (2005) “Treatment of unaccompanied and separated children outside their country of origin”, paragraph 25

<sup>17</sup> General comment No 12 (2009) “The right of the child to be heard” paragraph 16

all actions concerning children, the principle of the best interest of the child must be a primary consideration.

It is so a principle interdependent with article 3; article 3 establishes the objective of achieving the best interests of the child and article 12 provides the methodology used to reach the goal of hearing the child<sup>18</sup>. In fact, there can be no correct application of article 3 if the components of article 12 are not respected. How would it otherwise be possible to establish which is the correct interpretation of the best interest of the child?

## 6 The Principle of the Best Interest of the Child: How to Determine the Best Interest of the Child?

The last but not less important right recognised as part of the triangle of rights established by the Convention on the Rights of the Child is the principle of the best interest of the child, established by Article 3, according to which “*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.*”

It’s not very easy to identify a linear and coherent concept of the “best interest of the child” because of a superficial and chaotic legal framework. It is although very important to understand what we mean when talking about the assessment of the child’s “best interest”, who will be able in the specific case to identify and underline the best interest of the child?

*“The judicial assessment of the minor’s interest must be carried out concretely, considering first of all his present and future global needs in order to enrich the minor’s personality, both in the familiar and the socio-economic context and therefore to guarantee important benefits of widening the affective, social and the economic sphere of the child.”*<sup>19</sup>

The term “best interests of the child” broadly describes the well-being of a child<sup>20</sup> and the concept of the child's best interests aim is to ensure both the full and effective enjoyment of the rights recognised in the Convention and the holistic development of the child and the principle is formally incorporated in all the declarations and international conventions dedicated to the child, since it is considered the “juridical base” of all decisions concerning children. There is no hierarchy of rights

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<sup>18</sup> General comment No 12 (2009) “The right of the child to be heard” paragraph 74

<sup>19</sup> Cassazione Civ. sez. I, 20 febbraio 1998, n. 1856

C.A. Moro “Diritti del minore e nozione di interesse” in Cittadini in crescita n. 2-3/2000, pag. 12

<sup>20</sup> UNHCR “Guidelines on Determining the Best Interests of the Child”, Provisional release, 2018

in the Convention; all the rights provided for therein are in the “child's best interests” and no right could be compromised by a negative interpretation of the child's best interests.<sup>21</sup>

The child's best interests is a threefold concept:

1. **A substantive right:** The child has the right to have his or her best interests taken as primary consideration when, in order to reach a decision concerning the child, different interests are being considered.

2. **A fundamental, interpretative legal principle:** When a legal provision is open to more than one interpretation, the interpretation that realises more effectively the child’s best interests should be chosen.

3. **A rule of procedure:** Whenever a decision that will affect a child, an identified group of children or children in general has to be made, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child, so determining the child’s best interests requires procedural guarantees.<sup>22</sup>

The expression "best interests of the child" was formulated for the first time in the 1959 United Nations Declaration on the Rights of the Child,<sup>23</sup> where the principle was enshrined in Article 2 which established, in the English version that "the best interest of the child should be considered paramount" therefore it had to be a decisive consideration in any question concerning children.

The expression was then resumed and modified in 1979 as soon as the work for the drafting of the Convention on the Rights of the Child began, and several proposals regarding the expression to be used within the Convention to emphasise the importance of principle of the best interest of the child were presented.

The first proposal was presented by Poland, that considered the best interest of the child as the “paramount consideration”, but the proposal was immediately criticised by several States and replaced by the expression "a primary consideration".

The best interest of the child therefore requires a balance between several considerations, equally important and on the basis of which between the different interests of the child, only the one that is considered having the primary importance

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<sup>21</sup> General Comment No 14 (2013) “on the right of the child to have his or her best interest taken as a primary consideration”, p 3

<sup>22</sup> General Comment No 14 (2013) “on the right of the child to have his or her best interest taken as a primary consideration”, p 4

<sup>23</sup> Focarelli C. “La Convenzione di New York sui diritti del fanciullo e il concetto di “best interest of the child” in Rivista di diritto internazionale 2010, pag. 986

will prevail on the others.<sup>24</sup>

All the international instruments which aim to protect child, are based on the principle of the best interest of the child that has been formally sanctioned in all the Conventions. Just think about the fact that it is not only found in Article 3 paragraph 1 of the 1989 Convention, but Article 24 in paragraph 2 of the Charter of Fundamental Rights of the European Union also refers to it since *“In all actions relating children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration.”*

If it is true that within the 1989 Convention on the Rights of the Child, the principle of the best interests of the child finds its basis in Article 3, it is also stated in seven other provisions of the Convention, in relation to matters considered more specific such as:

- **Art. 9 paragraph 1** *“States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child’s place of residence.”*
- **Art. 9 paragraph 3** *“States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.”*
- **Art 18** *“States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.”*
- **Art. 20 paragraph 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 protection and assistance provided by the State.*  
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<sup>24</sup> Focarelli C. “La Convenzione di New York sui diritti del fanciullo e il concetto di “best interest of the child” in Rivista di diritto internazionale 2010, p. 986



- **Art. 21** “States Parties that recognise and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration “

- **Art 37 (c)** “Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;”

- **Art. 40 paragraph 2 (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; “

Surely therefore the superior interest of the child is one of the central principles of the Convention which has the value of a general parameter, not only within the Convention on the Rights of the Child but also in the state legislations and jurisprudence.

The best interest of the minor is a mobile evaluation criterion that imposes on the public administration to decide in each case following the best interest of the child and adopting the more favourable solution for the minor whether there are different solutions.<sup>25</sup>

To understand the wide recognition of this principle even within the Italian legal system we can recall that, as we have already said, it was not introduced in Italy by the 1989 Convention on the rights of the child, but during the validity of the civil code of 1865 and in the original text of 1942, the principle of the best interest of the

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<sup>25</sup> Lorenzo Miazzi “Il minore è straniero ma il suo interesse non cambia”, in *Minori Giustizia* 2015 n. 3, pag. 106

child was used when it was necessary to reach any decision concerning the custody of the child on the matter of legal separation between parents.<sup>26</sup>

Therefore this principle is based on the recognition of greater rights and adequate substantial and procedural guarantees to the minor and moreover, it is a fundamental guiding principle that the interpreter must use in analysing the individual cases in order to reach the most suitable decision to protect the minor and guarantee his rights, considering his or her interests.

In the field of immigration, it was possible to refer to the principle of best interest of the child thanks to the sentence of the Constitutional Court 199/1986, in the matter of international adoption<sup>27</sup>, which stated that the principles recognised generally to minors must also be recognised to abandoned foreign minors, and a few years later the Constitutional Court also established that Italian minors and foreign minors are equal and should therefore receive the same protection and are holders of the same rights *“which also entails the right to form his own personality within the family of origin.”*<sup>28</sup>

The widest extension on the application of the principle of best interest of the child was obtained thanks to the Regulation 295/2003 in which the Constitutional Court confirmed that the subject of foreign minors is part of the subject related to family unity and also the Regulation 347/2005, recalls what had already been stated by the Constitutional Court in 1986, that the protection rules which are valid for the Italian minor have to be valid also for foreign minors.

But what is the concrete content of the principle of the best interest of the child? Which will be the correct interpretation of the child’s best interest?

The international instruments dedicated to the minor do not define the principle of the best interests of the child, and thus leave to the discretion of the interpreter the task of filling the contents of the child’s best interest concept that is flexible and adaptable.<sup>29</sup> It should be adjusted and defined on individual basis, according to the specific situation of the child or children concerned, and considering their

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<sup>26</sup> Long J. “Il ruolo del principio del superiore interesse del minore nella disciplina dell’immigrazione” in *Minori Giustizia* 2006 n. 1, p 251

From there on, every decision concerning the separation or divorce of the parents, when deciding where the child was going to live, and which of the two parents was going to take care of him, considered the best interest of the child.

<sup>27</sup> Corte Costituzionale 199/1986: principle of “favor minoris” applied not only to children of Italian citizenship, but is also considered applicable to foreign minors.

<sup>28</sup> Corte Costituzionale 536/1989;

<sup>29</sup> General Comment No 14 (2013) “on the right of the child to have his or her best interest taken as a primary consideration”

personal context, situation and needs.

Since the child's best interest principle is established by an international treaty and the interpreter has to find the right meaning, it will have to be interpreted according to what established by articles 31-33 of the 1969 Vienna Convention on the Law of Treaties following the interpretative criteria which are:

- *“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”*
- *“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.”*
- *“When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.”*

The difficulties encountered in interpreting the notion of the child's best interest made necessary to follow this hermeneutical process and all this can be easily deduced by the fact that when interpreting a treaty we consider the different official languages that have been used, and the different language versions, and analysing the enunciations of the child's best interest principle in the English text and in the French one, comparing the two texts we can notice that there is not a perfect correspondence between the two texts, and indeed we may instead notice an obvious divergence.<sup>30</sup>

In the English text the plural "interests" and the expression "a primary consideration" are used, while in the French text the singular "intérêt" and the expression "une considération primordiale" are used. The French text is much clearer than the particularly ambiguous English one, so following the definition of pre-eminent interest of the child given by the French text, it will be easier to identify this interest since only one interest has to be taken into consideration without it having to be counterbalanced with other considerations or with the child's different interests.<sup>31</sup>

The “best interests of the child” is a right, a principle and a rule of procedure

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<sup>30</sup> Focarelli C. “La Convenzione di New York sui diritti del fanciullo e il concetto di “best interest of the child” in Rivista di diritto internazionale 2010 No 4, pag. 987

<sup>31</sup> Focarelli C., ivi

based on the assessment of all the different elements of a child's or children's interests in a specific situation. Assessing the child's best interests is a unique activity that should be undertaken in each individual case, in the light of the specific circumstances of each child or group of children.

These circumstances relate to the individual characteristics of the child or children concerned, and the Committee considered it useful to draw up a non-exhaustive and non-hierarchical list of elements<sup>32</sup> that could be included in a best-interests assessment by any decision-maker when having to determine a child's best interest, in order to provide a guidance for the State or decision maker in regulating specific areas affecting children:

- (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

The most important thing to bear in mind when assessing and determining the best interest of the child is that the full and effective enjoyment of the rights recognised in the Convention should be ensured to the child, to guarantee his holistic development, and all laws must be evaluated and examined from the child's point of view<sup>33</sup>.

The principle of the child's best interest reminds us, on the basis of the distinction in identifying the rules to be applied to them, which is based on the contrast between two opposite legislations, the one for minors known as a favourable legislation based on the principles of minor's protection and support because of their vulnerability, and the unfavourable legislation established for foreigners, born as a public safety law and based on the principles of control and defence<sup>34</sup>. Foreign children, especially when unaccompanied, must first be treated as minors and then as migrants

Despite the fact that the principle of the best interest of the child has been the

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<sup>32</sup> General Comment No 14 (2013) "on the right of the child to have his or her best interest taken as a primary consideration", p 17

<sup>33</sup> Geraldine Van Bueren, "The International Law on the Rights of the Child" in *Fordham International Law Journal*, Volume 19, Issue 2, 1995

<sup>34</sup> Lorenzo Miazzi, "La tutela dei minori stranieri nel quadro normativo e costituzionale", in *Minori Giustizia* 2006 No 4, p. 155

subject of extensive consideration in academic and operational circles, there was limited guidance available on how to operationalise the best interest principle in particular in situations of forced displacement.

In order to operationalise the best interest principle, UNHCR began drafting global guidelines for the determination of the best interest of the child, since 2004 when there has been a provisional version of Guidelines on Determining the Best Interest of the child.

One of the key priorities of UNHCR is to protect and promote the rights of all children falling under its mandate so, in order to reach this, UNHCR and its partners must support the strengthening or establishment of comprehensive child protection systems, creating and using mechanisms that can identify the best interests of the child.

Depending on the impact on the child of the action to be taken, mechanisms may range from an assessment of which option is in the best interest of the child and which does not require any formality.

A best interests assessment (BIA) is essential before any action affecting an individual child of concern to UNHCR is taken, unless a BID is needed, that differently is a formal process with strict procedural safeguards, established to reach decisions of great magnitude.<sup>35</sup>

The United Nations Committee on the Rights of the Child stresses that: *the ultimate aim in addressing the fate of unaccompanied or separated children is to identify a durable solution that addresses all their protection needs, takes into account the child's view and, wherever possible, leads to overcoming the situation of a child being unaccompanied or separated.*<sup>36</sup>

Such efforts should be initiated and implemented in a timely manner without delay. The United Nations High Commissioner for Refugees (UNHCR) proposes that a durable solution should be identified for a separated child within two years.<sup>37</sup>

The process of identifying a durable solution usually starts with family tracing and a comprehensive assessment that will form the basis of a formal best interests determination (BID). This is an essential step in identifying and securing a durable solution for a separated child.

UNHCR revised in 2018 the “Guidelines on determining the best interest of the child, only with a provisional release, which represents the operationalisation of UNHCR’s commitment to the protection of children of concern, and to ensure that

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<sup>35</sup> UNHCR “Guidelines on Determining the Best Interests of the Child”, May 2008

<sup>36</sup> UNESCO “unaccompanied and separated children’s migration in Europe”, p. 14 General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin (CRC/GC/2005/6, 1 September 2005), paragraph 79.

<sup>37</sup> UNHCR “Guidelines on Determining the Best Interests of the Child”, 2008

a child's best interest is the primary consideration in decisions about what actions are in an individual child's best interests.<sup>38</sup>

According to the guidelines, a BID (Best interest determination) should be undertaken as early as possible in the displacement cycle to identify the most appropriate durable solution for an unaccompanied or separated refugee child.<sup>39</sup>

UNHCR (2007) proposes that a report and assessment should be carried out by a specialist in child protection, community services or child welfare and presented to this multidisciplinary panel, which should consider each child on a case-by-case basis and determine his or her best interest.

A best interests assessment (BIA) is essential before any action affecting an individual child of concern to UNHCR is taken, unless a BID is needed and differently. The best interests assessment is a continuous process that has particular relevance for unaccompanied and separated children. It starts from the moment of their identification, and continues throughout the displacement cycle until a durable or long-term solution is implemented.

The CRC suggests that higher safeguards are required in some circumstances, as specific procedural guarantees are provided for decisions on the separation from parents (Art. 9) and for adoption decisions (Art. 21).

Best Interests Determination is required in situations where a decision is likely to have far reaching implications for the child. It is therefore crucial that the process is based on standards and procedural safeguards that include the child's meaningful participation, especially in the presence of the following three conditions, identified as those situations in which a formal BID by UNHCR is required for children of concern to UNHCR:

- a) To identify durable solutions for unaccompanied and separated refugee or IDP children;
- b) To decide on temporary care arrangements for unaccompanied and separated children in particularly complex situations;
- c) To decide on the separation of a child from his or her parents against their will;

Certainly the fact that even the High Commissioner for Refugees has questioned the importance of the principle of the best interest of the child, so as to establish the cases in which, for the determination of the best interests of the child, a more formal procedure that must be used to guarantee the fullest possible protection of the child's best interest and the adoption of decisions that have a durable solution.

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<sup>38</sup> UNHCR "Guidelines on Determining the Best Interests of the Child", Provisional release, 2018

<sup>39</sup> UNHCR "Guidelines on Determining the Best Interests of the Child", 2008

All this underlines and makes us understand how, the whole system of protection established for foreign minors, even unaccompanied, revolves around the principle of the superior interest of the child.

Each State party must respect and implement the right of the child to have his or her best interest assessed and taken as a primary consideration and is under the obligation to take all necessary, deliberate and concrete measures for the full implementation of this right.<sup>40</sup>

## **7. General Comment n. 6: “Treatment of unaccompanied and separated Children outside their Country of Origin”**

As we know, the Convention has moreover established a Committee, whose precise task is to monitor that each State party applies correctly the Convention on the Rights of the child, and to monitor the progress achieved in the realisation of children’s rights (art. 43).<sup>41</sup>

The Committee is not a Court and cannot issue judgements or draft reports, it can only receive and evaluate those reports that the Contracting States are obliged to send periodically, regarding compliance with the Convention in their domestic systems and then elaborates general comments.<sup>42</sup>

The Committee on the rights of the child is the controlling body of the Convention on the rights of the child and in 2005 the Committee adopted a general comment<sup>43</sup> that first of was able to specify the needs of unaccompanied minors, considered as particularly vulnerable subjects and persons. Although is not binding, it has a particular importance, and the issuing of it is motivated by the Committee’s observation of an increasing number of children in such situations and also to be able to outline the challenges faced by the States in ensuring that such children are

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<sup>40</sup> General Comment No 14 (2013) “on the right of the child to have his or her best interest taken as a primary consideration”, p 5

<sup>41</sup> Art. 43 New York Convention on the Right of the Child, 1989: “*The Committee shall consist of eighteen experts of high moral standing and recognised competence in the field covered by this Convention. 1/ The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems.*”

<sup>42</sup> Focarelli C. “La Convenzione di New York sui diritti del fanciullo e il concetto di “Best interest of the child”, in *Rivista di diritto internazionale* 2010, p. 982

<sup>43</sup> The core instrument that up until now has analysed in-depth the situation of unaccompanied children outside their country of origin is the General Comment n°6 (2005) of the Committee on the Rights of the Child.

able to access and enjoy their rights.

The general comment adopts a holistic approach to the question of the proper treatment of unaccompanied and separated children and although the evaluation is not binding, it still manages to play a fundamental interpretative function of the Convention.

Reviewing all the rights recognised to the generality of minors by the New York Convention, the Committee extends them specifically to unaccompanied and separated foreign minors, according to the definitions given by the General Comment No 6 (2005) “Treatment of unaccompanied and separated children outside their country of origin”:

- “*Unaccompanied children*” (also called unaccompanied minors) are children, as defined in article 1 of the Convention, 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.
- “*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 caregiver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members.<sup>44</sup>

This general comment applies to unaccompanied and separated children who find themselves outside their country of nationality (consistent with article 7) or, if stateless, outside their country of habitual residence.<sup>45</sup>

In the previous paragraphs we have already identified the triangle of fundamental rights recognised to children: the principle of non-discrimination (art. 2), the principle of the best interest of the child (art. 3), and the right to express his or her views freely (art. 12), which together with Article 6 of the Convention<sup>46</sup>, are the most important rights to be protected and recognised even to unaccompanied and separated foreign minors.

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<sup>44</sup> General comment No 6 (2005) “Treatment of unaccompanied and separated children outside their country of origin”, para. 7 and 8.

<sup>45</sup> General comment No 6 (2005) “Treatment of unaccompanied and separated children outside their country of origin”, para. 5

<sup>46</sup> Art. 6 New York Convention on the right of the child 1989:

*“States Parties recognise that every child has the inherent right to life.*

*States Parties shall ensure to the maximum extent possible the survival and development of the child.”*



In affording proper treatment of unaccompanied or separated children, States must fully respect *non-refoulement*<sup>47</sup> obligations deriving from international human rights, humanitarian and refugee law and, in particular, must respect obligations codified in article 33 of the 1951 Refugee Convention<sup>48</sup>. 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<sup>49</sup>, therefore surely to guarantee the respect of the principle of *non-refoulement* the States will have to guarantee the respect of what established by the articles 6 and 37 of the Convention on the rights of the child.

According to what is stated in Article 38<sup>50</sup> of the Convention, the foreign child must not participate in armed conflicts and should not be returned to states where there is a real risk of underage recruitment; This also applies to former child soldiers who have defected from their units and who require protection against re-recruitment.

Of course States parties must protect the confidentiality of information received in relation to an unaccompanied or separated child, consistent with the obligation to protect the child's rights, including the right to privacy, therefore *"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."*<sup>51</sup>

States must not therefore use the acquired information for other and different purposes than those for which they were legitimately acquired.

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<sup>47</sup> The non refoulement principle gives an essential protection measure under international human rights, refugee, humanitarian and customary law. It prohibits States from transferring or removing individuals from their jurisdiction or effective control when there are substantial grounds for believing that the person would be at risk of irreparable harm upon return, including persecution, torture, ill treatment or other serious human rights violations.

<sup>48</sup> Art 33" Status of Refugees" prohibition of expulsion or return ("refoulement")

*" 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*

*2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country. "*

<sup>49</sup> Return to the country of origin is not an option if it would lead to a "reasonable risk"

that such return would result in the violation of fundamental human rights of the child, and in particular, if the principle of non-refoulement applies.

<sup>50</sup> Art. 38 New York Convention on the right of the child, 1989 *"States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child."*

<sup>51</sup> Art. 16 New York Convention on the Right of the Child, 1989

Furthermore, always respecting the principle of the best interests of the child, there are other provisions applicable to unaccompanied foreign minors that meet specific protection needs.

Applying article 37 of the Convention and the principle of the best interests of the child, unaccompanied or separated children should not, as a general rule, be detained since detention cannot be justified on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof: *“No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;”*<sup>52</sup>

First, within the respect of the principle of the best interest of the child, the identification of the unaccompanied foreign minor will be a priority, according to the second paragraph of article 8 of the Convention on the Rights of the Child, *“Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.”*<sup>53</sup>

Once he has been identified, the research of the belonging family of the minor, will certainly also be a priority, and must begin as soon as possible, as established by the second paragraph of article 22 *“For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent inter-governmental organisations or non-governmental organisations 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”.*<sup>54</sup>

The member states shall collaborate to trace the family to which the minor belongs, and when both parents can't be found, the child must be given the same protection accorded to any other child deprived of his family environment.

In this case, when deprived of his or her family environment, every child will have the right to receive “special protection” and assistance from the State and every State should provide the appointment of a guardian<sup>55</sup> as soon as the unaccompanied foreign minor has been identified, and should also maintain such guardianship

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<sup>52</sup> Art 37 (b) Convention on the Right of the Child, 1989

<sup>53</sup> Art. 8, New York Convention on the Right of the Child of 1989

<sup>54</sup> Art. 22 para 2 New York Convention on the Right of the Child, 1989

<sup>55</sup> Art. 18 Convention on the Right of the Child *“States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.”*

arrangements until the child has either reached the age of majority or has permanently left the territory and/or jurisdiction of the State:

*“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 protection and assistance provided by the State.”<sup>56</sup>*

States should also guarantee all children the right to education and in particular access to education without any kind of discrimination *“States Parties recognise the right of the child to education”* and they should guarantee this right *“progressively and on the basis of equal opportunity”*.<sup>57</sup>

Every unaccompanied and separated child, shall have full access to education, without discrimination in the country that they have entered in line with articles 28, 29 (1) (c), 30 and 32 of the Convention and the general principles developed by the Committee. All unaccompanied and separated children have the right to maintain their cultural identity and values, including the maintenance and development of their native language.<sup>58</sup>

Finally, the Committee emphasises the situation of illegality and exploitation in which children, and especially minor women, may come to find themselves, especially considering sexual exploitation. Articles 34 to 36 of the Convention, ensure that unaccompanied and separated children are shielded from trafficking, and from sexual and other forms of exploitation, abuse and violence<sup>59</sup>: *“States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse.”<sup>60</sup>*

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<sup>56</sup> Art. 20 para 1, New York Convention on the Right of the Child, 1989

<sup>57</sup> Art. 28 New York Convention on the Right of the Child, 1989

<sup>58</sup> Art. 30 New York Convention on the Right of the Child, 1989 *“In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.”*

<sup>59</sup> The fate of unaccompanied minors (UAMs), who are the most vulnerable, due to their being minors, foreigners, not accompanied by parental figures, away from their roots and forced to envisage their future in a country of which they do not even know the language. The acronym UAMs encompasses a phenomenon of large and increasing numbers. These numbers are even more disturbing given the many risks run by these children, who are exposed to crimes such as trafficking or smuggling.

<sup>60</sup> Art. 34 New York Convention on the Right of the Child, 1989: *“States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:*

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;*
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;*
- (c) The exploitative use of children in pornographic performances and materials.”*

To make the protection recognised by the Convention on the Rights of the Child to the Child even more extensive and general, Article 36 intervenes according to which, *“States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child’s welfare “.*

Surely, in order to be able to identify a system of guarantees, adequate for unaccompanied foreign minors, we must rely on the data and information acquired, especially considering the number of unaccompanied child arrivals, even if this data is insufficient for a detailed analysis of the implementation of the rights of such children, and the development of a detailed and integrated system of data collection on unaccompanied and separated children is a prerequisite for the development of effective policies to guarantee the implementation of the rights of such children.<sup>61</sup>

Even if it only contains guidelines, and not real obligations, the General Comment n. 6 must represent for the Contracting States the reference model to be inspired by for the predisposition of an appropriate reception system for unaccompanied minors.

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<sup>61</sup> General comment No 6 (2005) “Treatment of unaccompanied and separated children outside their country of origin”, para. 99