



FACULTY OF LAW

Lund University

Marina Vannelli

# Unaccompanied Children's Right to Legal Assistance in Asylum Proceedings

*An overview of the universal and regional systems of human rights protection in  
Europe and the Americas*

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Supervisor: Alejandro Fuentes

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# Summary

*The situation of unaccompanied asylum-seeking children is nowadays a global issue affecting an important number of children all over the world. Nevertheless, the special needs and vulnerabilities of this group of children have not yet been effectively assessed. In fact, unaccompanied minors constitute the most vulnerable group among all asylum seekers and face human rights' violations continuously when -for instance- they are not treated with dignity, do not receive sufficient information and are subject to different forms of violence and abuse as a consequence of States' lack of adequate protection.*

*Among their procedural safeguards, the right to legal representation is a fundamental right strictly related to the realisation of other rights contained in the UN Convention on the Rights of the Child. In light of this, the purpose of this thesis is to assess the legal foundations for unaccompanied children's right to legal assistance under International Law and examine the current legal framework regarding representation in asylum procedures under the regional systems of human rights protection in Europe and in the Americas.*

*Accordingly, the aim of this thesis is to examine whether regional legal systems offer sufficient protection to unaccompanied minors by centring the analysis on the right to be assisted by a legal representative and therefore, establish if these systems have failed to provide unaccompanied children with adequate access to justice. In order to reach this aim, both regional legal frameworks are critically reviewed while assessing the quality of regional standards in relation to universal standards. In addition, while analysing both regional systems, special emphasis is made on the identification of where the potentials for positive transformations lie and on the possible gaps in the existing legal regime.*

*The thesis takes a thorough look at the international and regional treaties, jurisprudence from the European Court of Human Rights and Inter-American Court of Human Rights, legal doctrine, regional policies and reports from human rights' organisations.*

*The conclusions drawn under this paper through a critical analysis of the existing legal frameworks are significant for addressing the current problems that unaccompanied children face in terms of protection of human rights. In addition, this thesis highlights the fundamental role that regional systems play in the protection of human rights and the necessity of establishing specific regional*

*standards with regards to legal assistance in asylum procedures. Also, the labour of human rights' advocates and the need of complete data in relation to this vulnerable group is discussed.*

**Key words:** Unaccompanied children, asylum-seeking child, procedural guarantees, legal representation, asylum procedures, best interest principle, human rights.

## Riassunto

*La situazione dei minori stranieri non accompagnati in cerca di asilo è una problematica globale molto attuale che colpisce un numero elevato di bambini in tutto il mondo. I minori non accompagnati costituiscono il gruppo più vulnerabile tra tutti i migranti, e subiscono violazioni dei diritti umani più fondamentali sia durante il viaggio, alla ricerca di un futuro migliore, sia durante il processo di asilo, quando non sono accolti dignitosamente; non ricevono informazioni sui propri diritti e rischiano violenza e soprusi per la mancanza di una protezione statale efficace.*

*Tra le loro garanzie procedurali, il diritto ad essere assistiti da un rappresentante legale durante il processo di asilo è un diritto fondamentale strettamente connesso alla realizzazione di altri diritti contenuti nella Convenzione delle Nazioni Unite sui Diritti dell'Infanzia. Alla luce di quanto detto, la tesi che segue si propone di analizzare e paragonare l'attuale quadro giuridico sulla rappresentazione legale dei minori stranieri non accompagnati richiedenti asilo, nell'ambito del sistema universale delle Nazioni Unite e dei sistemi regionali, in Europa e nelle Americhe, partendo dal contesto internazionale, per poi continuare un percorso di approfondimento delle norme regionali che regolano la situazione dei minori non accompagnati nei due continenti.*

*Questo documento si propone, dunque, di esaminare attentamente i trattati internazionali e regionali, la giurisprudenza della Corte Europea dei Diritti dell'Uomo e della Corte Interamericana dei Diritti Umani, le diverse politiche a livello regionale, articoli tratti dalle riviste specializzate e documenti delle organizzazioni dei diritti umani sulla situazione dei minori non accompagnati in Europa e nelle Americhe, con l'obiettivo di valutare la conformità degli standard di protezione a livello regionale con le norme del sistema universale delle Nazioni Unite. Attraverso l'analisi giuridica, questa tesi ripercorre con approfondimento i quadri giuridici regionali e internazionale alla ricerca di possibili risoluzioni che aiutino a migliorare la situazione dei minori non accompagnati in cerca di asilo, con il proposito di ridirezionare l'attenzione globale sulle problematiche attuali riguardo alla rappresentazione dei bambini non accompagnati e valutando in modo critico le buone pratiche che migliorerebbero la loro rappresentazione legale nelle procedure di asilo.*

*Le conclusioni tratte dal presente documento sono indirizzate alla ricerca di un sistema efficace per la protezione dei bambini e dei loro diritti, con l'obiettivo di sviluppare i principi legali, già contenuti nella teoria, ma dai quali non si arriva ad una reale fruizione degli stessi.*

## Resumen

*La situación de desprotección y peligro en la que se encuentran una gran cantidad de menores no acompañados en busca de asilo constituye actualmente una problemática mundial. Los niños no acompañados conforman el grupo más vulnerable entre los migrantes y sufren continuamente violaciones a sus derechos humanos más fundamentales cuando, por ejemplo, son detenidos en las fronteras, no reciben tutela jurídica adecuada, ni obtienen el acceso oportuno a la información sobre sus derechos durante el proceso de asilo. Este panorama expone a los niños a diversas formas de violencia que tienen como causa la falta de protección estatal efectiva.*

*Entre las garantías procesales más importantes está reconocido el derecho a ser asistido por un representante legal durante el proceso de asilo. Se trata de un derecho fundamental intrínsecamente relacionado con el ejercicio de otros derechos contenidos en la Convención de los Derechos del Niño. De este modo, esta tesis se propone analizar y efectuar un estudio comparado de, por un lado, el régimen legal contemporáneo que regula la asistencia legal de los menores en el ámbito del sistema universal de protección de la Organización de las Naciones Unidas y, por otro lado, de los sistemas regionales en Europa y en las Américas. Se buscará determinar si las normas regionales respetan los estándares de protección internacional, o si por el contrario ofrecen una protección insuficiente.*

*Otro objetivo de la investigación será el de dirigir la atención global hacia la cuestión de la representación legal de los menores no acompañados y, de esta manera, evaluar en forma crítica las buenas prácticas que mejorarían dicha representación en los procedimientos de asilo.*

*Para llegar al objetivo deseado, este estudio se propone examinar minuciosamente tratados internacionales y regionales, la jurisprudencia de la Corte Europea de Derechos Humanos y de la Corte Inter-Americana de Derechos Humanos, las diversas políticas regionales, la doctrina jurídica e informes de organizaciones de derechos humanos sobre la situación específica que atraviesan estos menores durante los procesos de asilo.*

# Preface

*« [...] sono venuti i miei fratelli prima di me, poi anche i miei cugini sono partiti [...] anche in Francia o Spagna [...] i miei compagni anche altri sono partiti [...] non si parla di queste cose [...] sono cose gravi, cioè mentre si gioca non si parla di queste cose qui. »<sup>1</sup>*  
(Isam, 16).

I feel deeply for the suffering of all those children that travel across different countries in the quest for a better life. The torments and misfortunes that these minors go through are many, both during their journey and also during the process of applying for asylum. In fact, even if the independent immigration of children is not an absolute recent phenomenon- as it has been present all over the world in the last decade- many countries are still not offering special protection and adequate assistance to unaccompanied children who apply for asylum. As a result, these children are left in a situation of extreme vulnerability, far away from home, with no family or resources and no knowledge of the language, culture and law of the new country. While witnessing these issues, a desire to fight for children's rights developed in me.

There are so many things I learned during the process of writing this thesis and I deeply desire that this paper will inspire readers working on children's rights and refugee law by stressing out on the importance of adequate representation for unaccompanied asylum-seeking children.

This thesis is conceived with the help of many persons. I would like to extend my gratitude to all those who supported me during the research and writing of this paper and send my appreciation to my supervisor, Dr. Alejandro Fuentes who has guided me during the thesis process with his knowledge and valuable advice. I would like to heartily thank my family, specially my parents and my lovely sister for all their love and confidence during this process. I would also like to thank my aunt and my uncle for all their help and support since my very first day in Sweden. Many thanks as well to Mauro and Danika for their immense support in every single moment of doing this research.

Lund, May 2017.

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<sup>1</sup> Giovannetti, Monia, *Storie minori - Percorsi di accoglienza e di esclusione dei minori stranieri non accompagnati*, Centro Servizi Volontariato Toscana, Quaderno n. 36, July 2007, p. 152.

## **Abbreviations**

CoE	Council of Europe
CRC	Committee on the Rights of the Child
ECHR	European Convention on Human Rights
ECRE	European Council on Refugees and Exiles
ECtHR	European Court on Human Rights
ELENA	European Legal Network on Asylum
EU	European Union
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
IACHR	Inter-American Commission on Human Rights
IACrHR	Inter-American Court of Human Rights

# CHAPTER ONE

## Introduction

*« There is no trust more sacred than the one the world holds with children. There is no duty more important than ensuring that their rights are respected, that their welfare is protected, that their lives are free from fear and want and that they grow up in peace. »<sup>2</sup>*

### 1.1 Contextual background: Child protection still a challenge

It is beyond any doubt that unaccompanied children require special assistance and protection during all stages of the asylum procedure. In this sense, an adequate representation is an indispensable component for the wellbeing of these children that have experienced many traumatic situations. Further, legal representation is strictly connected with the realisation of other rights contained in the UN Convention on the Rights of the Child.<sup>3</sup> Also, as it will be argued below, without a proper representation, it is highly unlikely that unaccompanied children will be able to defend themselves adequately, prove their claims and avoid unjustified removal and deportations that can result, for instance, in a violation of the best interest principle and the right to family unity.

Even if there is no comprehensive data related to this group of children,<sup>4</sup> the number of unaccompanied children seeking asylum in Europe and in the Americas has been growing continuously in the last decade.<sup>5</sup> Since 2010, an increasing number of unaccompanied children has arrived in the European Union,<sup>6</sup> mostly from Syria, Afghanistan, Iraq and Eritrea and the majority of them being boys aged between 13

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<sup>2</sup> Annan, Kofi A. Seventh Secretary-General of the United Nations (January 1997 -December 2006) in "Foreword" to *The State of the World's Children 2000*, UNICEF.

<sup>3</sup> UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, Vol. 1577, p. 3.

<sup>4</sup> See Bhabha, J. & Young, W., *Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines* [hereinafter Bhabha et al., 1999], *International Journal of Refugee Law*, Vol. 11 (1999), p. 85.

<sup>5</sup> See for a general overview on this matter: Inter-American Commission on Human Rights, *Refugees and Migrants in the United States: Families and Unaccompanied Children*, 24 July 2015, OAS/Ser. L/V/II 155, Doc 16 and IOM/UNICEF, *Data Brief: Migration of Children to Europe*, 30 November 2015. See also Europe Refugee Emergency, *Briefing Note on Unaccompanied and Separated Children*, Report from UNHCR, 9 October 2015 and UNICEF, *A child is a child. Protecting children on the move from violence, abuse and exploitation*, May 2017.

<sup>6</sup> See O' Donnell R. & Kanics J., *Separated and unaccompanied children in the EU*, *Forced Migration Review. Destination: Europe*, Vol. 51, January 2016.

and 17 years old.<sup>7</sup> In addition, during 2015 the number of asylum applications of unaccompanied children in Member States of the European Union has quadrupled the numbers of previous years.<sup>8</sup> On the other hand, in the Americas, the United States has also experienced an exponential increase in the numbers of unaccompanied children arriving at its southern borders since 2011,<sup>9</sup> principally from El Salvador, Guatemala, Honduras and Mexico.<sup>10</sup> Nevertheless, it is important to notice that despite of the growing number of applications received every year in both continents, the special needs and vulnerabilities of this group of children have not yet been effectively assessed.

In this context, the UN General Assembly has highlighted that in many States asylum procedures do not respect the standards of protection and due process established in the Convention of the Rights of the Child and other international human rights treaties.<sup>11</sup> In fact, the Committee on the Rights of the Child (hereinafter referred to also as the Committee) has likewise identified several protection gaps in relation to the treatment of unaccompanied children in the context of immigration.<sup>12</sup> In light of this, it has expressed concern in relation to many issues regarding the exercise of unaccompanied children's right to legal representation worldwide by mentioning, for example, the lack of access to an adequate system of legal advice and children's automatic denial of entry or detention at the borders.<sup>13</sup>

Further, it is important to bear in mind while assessing children's representation that asylum proceedings and the kind of legal assistance provided by States varies around the world depending on domestic procedural rules. For instance, while some countries provide unaccompanied minors with two representatives (a legal guardian and a lawyer), others include the appointment of legal advisors once the preliminary

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<sup>7</sup> See Europe Refugee Emergency, *Briefing note on Unaccompanied and separated children*, 13 June 2016.

<sup>8</sup> Around 88.300 unaccompanied child migrants applied for asylum in Member States of the European Union in 2015. This amount quadruples the number of applications received in previous years with approximately 11.000 to 13.000 applications from 2008 till 2013 and 23.000 applications in 2014. See Eurostat, *Almost 90000 unaccompanied minors among asylum seekers registered in EU in 2015*, News Release 87/2016, 2 May 2016.

<sup>9</sup> See UNHCR, *Children on the Run: Unaccompanied children leaving Central America and Mexico and the need for International Protection*, 13 March 2014, p.4.

<sup>10</sup> See IACHR, *Refugees and Migrants in the United States: Families and Unaccompanied Children*, 2015, *supra* note 5, para. 109.

<sup>11</sup> See UN General Assembly, *Status of the Convention on the Rights of the Child: report of the Secretary-General*, 27 September 2016, A/71/413, para. 30.

<sup>12</sup> See United Nations Committee on the Rights of the Child, *General Comment No. 6, Treatment of unaccompanied and separated children outside their country of origin* [hereinafter CRC General Comment N° 6], 2005, para. 3.

<sup>13</sup> *Ibid.*

processing takes place.<sup>14</sup> Also, in many States asylum proceedings include exceptions to the exercise of this right and delays in the appointment of representatives.<sup>15</sup> Nevertheless, despite the different regulations at the local levels, it will be important to highlight that States are bound not only by domestic law but also by universal and regional standards and should, therefore, respect these standards at all times. In this context, taking into consideration the critical situation that characterizes nowadays legal representation of this vulnerable group, this paper analyses the extent of the current standards of protection in order to make possible the identification of potential ambiguities and gaps in the existing legal framework that would lead to an improvement in the exercise of this right.

Recent research has shown in Europe, for example, many negative aspects in relation to the exercise of this right by asylum seekers and specifically by unaccompanied children.<sup>16</sup> Accordingly, in many States legal assistance is not provided for unaccompanied children in every stage of the asylum procedure,<sup>17</sup> or legal advice is limited at the moment of the submission of asylum applications.<sup>18</sup> Also, in several European countries asylum procedures are characterized by the slow appointment of representatives,<sup>19</sup> and legal assistance is not usually offered by legal advisors qualified on child issues.<sup>20</sup>

Additionally, with regards to assistance within the different stages of the asylum procedure (such as during the age assessment, personal interviews and appeals), many deficiencies in relation to representation can also be mentioned among European States. In this context, it has been highlighted that representatives are seldom present during the first instance interview or during the age determination process.<sup>21</sup> Also, the participation of legal advisors through questions and comments during interviews is limited.<sup>22</sup> Concern has also well been raised in relation to

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<sup>14</sup> See King, Shani M., *Alone and Unrepresented: a call to congress to provide counsel for unaccompanied minors* [hereinafter King, 2013], Harvard Journal on Legislation (2013), Vol. 50, pp. 367-368.

<sup>15</sup> *Ibid.*

<sup>16</sup> See e.g. European Union: European Agency for Fundamental Rights, *Separated asylum-seeking children in European Union Member States: comparative report*, December 2010.

<sup>17</sup> See European Council on Refugees and Exiles, *Right to Justice: Quality Legal Assistance for Unaccompanied Children- Comparative Report* [hereinafter ECRE, 2014], July 2014, p.4.

<sup>18</sup> See European Council on Refugees and Exiles, *ECRE/ELENA Survey on Legal Aid for Asylum Seekers in Europe* [hereinafter ECRE/ ELENA, 2010], October 2010, p. 35.

<sup>19</sup> See Council of Europe: Parliamentary Assembly, *Harmonizing the protection of unaccompanied minors in Europe*, 26 September 2016, Doc. 14142, para. 50.

<sup>20</sup> See ECRE, 2014, *supra* note 17, p.4.

<sup>21</sup> See ECRE/ELENA, 2010, *supra* note 18, pp. 37, 60.

<sup>22</sup> *Ibid.*, p. 37.

procedures at the borders or transit zones regarding the lack of information and obstacles related to legal representation.<sup>23</sup> Further, the ineffective exercise of this right has also been noticed when asylum seekers are held in detention in relation to the legal assistant's access to detention centres and the effectiveness of the level of communication between the applicant and the legal advisor.<sup>24</sup>

In the Americas, the Inter-American Commission of Human Rights (hereinafter referred to also as the Inter-American Commission or the Commission) has also expressed great concern in relation to the treatment of unaccompanied children in the region. It has highlighted many issues, for instance, while referring to the situation of unaccompanied children in the United States, and made special emphasis on their lack of legal representation in asylum proceedings.<sup>25</sup> In fact, the Commission has noticed that the amount of lawyers willing to act as representatives of this group of children for free or for a little cost in this country is relatively low.<sup>26</sup> In this regard, even if several efforts have been made in order to accomplish children's necessities through organisations and pro bono legal advice, concern regarding the amount of children left without representation in immigration proceedings is still high as the majority of children are affected by the lack of legal assistance.<sup>27</sup>

In addition, it has been stressed how the situation of this vulnerable group becomes even more critical with the frequent use of expedited removals and automatic detention for children who enter the territory of the United States without legal status.<sup>28</sup> Further, the situation of unaccompanied asylum-seeking children in Canada has also caught the attention of scholars regarding several legal aid inadequacies which lead to the lack of involvement of legal assistants in children's asylum claims.<sup>29</sup>

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<sup>23</sup> *Ibid.*, p. 46.

<sup>24</sup> *Ibid.*, pp. 47-52.

<sup>25</sup> See IACHR, *Refugees and Migrants in the United States: Families and Unaccompanied Children*, *supra* note 5, para. 211.

<sup>26</sup> *Ibid.*

<sup>27</sup> See O'Neill Mary et al., *Forgotten Children of Immigration and Family Law: How The Absence of Legal Aid Affects Children in the United States* [hereinafter O'Neill et al., 2015], *Family Court Review* (2015), Vol. 53, Issue 4, p. 684.

<sup>28</sup> See e.g. Pastrana, Megan S., *In search of refuge: The United States' domestic and international obligations to protect unaccompanied immigrant children* [hereinafter Pastrana, 2016], *Indiana International & Comparative Law Review*, Vol. 26, Issue 2 (2016), p. 253. See also O'Neill et al., 2015, *supra* note 27, p. 681.

<sup>29</sup> See Bhabha, Jacqueline, *Minors or Aliens: Inconsistent State Intervention and Separated Child Asylum-Seekers* [hereinafter Bhabha, 2001], *European Journal of Migration and Law*, Vol. 3, Issue 3 and 4 (2001), p. 300.

In light of the above, the aim of this thesis is to examine whether the current regional legal systems in the Americas and in Europe offer sufficient protection to unaccompanied minors by centring the analysis on the right to be assisted by a legal representative and therefore, establish if these systems have failed to provide unaccompanied children with adequate access to justice through effective representation. In order to reach this aim, both regional legal frameworks will be critically reviewed while assessing the quality of regional standards in relation to universal standards. In addition, while analysing both regional systems, special emphasis will be made on the possible gaps in the applicable legal regime and in the identification of where the potentials for positive transformations lie.

## **1.2 Methodology**

This thesis analyses unaccompanied children's right to legal representation under the universal and regional systems of human rights protection in Europe and in the Americas. Accordingly, a critical and comparative method will be employed in this paper in order to establish which are the existing standards of protection and what transformations could lead to a higher and more effective level of protection.

As far as the methodology is concerned, this thesis includes a comparative approach of the different systems of protection through a review of available literature such as legal journals, the examination of relevant universal and regional treaties, as well as related commentaries from UN Committees, Inter-American Commission on Human Rights, jurisprudence from regional courts, comparative reports from European agencies and reports from UN agencies and human rights' organisations. A critical analysis of the legislative texts, jurisprudence, legal doctrine, policies and reports will be as well necessary while dealing with the research questions of this thesis.

Further, while going through universal and regional treaties, academic writings and jurisprudence, the fundamental pillar of this paper will be the *principle of systemic interpretation*. In applying this method of interpretation, different provisions will be interpreted as part of a coherent system of law, "as part of a whole, whose meaning and scope must be established in function of the juridical system to which they

belong”.<sup>30</sup> In this regard, it would be important to stress that this principle “points to a need to take into account the normative environment more widely”,<sup>31</sup> and therefore, interpretation must take into consideration the entire system of international human rights law.

Accordingly, the first step in this research was to establish the content of the right to legal assistance under the universal system and determine the applicable principles which regulate this right. The authoritative guidance provided by the Committee on the Rights of the Child and by the UN High Commissioner for Refugees (hereinafter referred to also as UNHCR) were of special relevance while identifying the current universal standards.

When moving on to the regional systems, the different instruments, recommendations, judgments and resolutions related to unaccompanied children were analysed separately under the Council of Europe, European Union and Inter-American System. The level of protection in terms of legal representation in each of these systems was examined and compared to the protection given in relation to universal standards.

Finally, once having established and assessed the current standards of protection at both universal and regional levels, recommendations that could increase the protection of unaccompanied children were developed.

### **1.3 Aims and research questions**

The examination of the existing legal standards at the universal and regional level regarding the legal assistance of this vulnerable group aims to demonstrate that unaccompanied children are legally and legitimately entitled to legal representation during asylum procedures even if in reality many States fail to provide the effective exercise of this right. Asylum proceedings are nowadays complex, involving both international and domestic law and the possibilities for unaccompanied children of

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<sup>30</sup> Cf. *Case of Gonzalez et al. (“Cotton Field”) v. Mexico*, 16 November 2009, IACrHR, Preliminary Objection, Merits, Reparations and Costs, Series C No. 205, para. 43.

<sup>31</sup> Cf. Koskenniemi, Martti, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission*, A/CN.4/L.682 (International Law Commission, Geneva, 1 May- 9 June and 3 July- 11 August 2006), p. 209, para. 415.

presenting their claims successfully without assistance are if none, relatively low. To this regard, the existing standards of protection developed in relation to this right will be analysed both in the global and regional systems in Europe and in the Americas and the level of recognition and compliance of regional standards to the global system will be as well critically examined.

The present thesis is premised on the claim that unaccompanied children cannot be guaranteed effective access to justice and special protection without the appointment of a legal representative. As introduced above, this thesis seeks therefore to examine the content of this right under both universal and regional systems and draw conclusions regarding the level of protection, ambiguities, possible gaps in the law and possible developments, which will facilitate the exercise of this right.

### *1.3.1 Research questions*

- What are the existing standards of protection in terms of legal representation for unaccompanied children under the universal and regional systems? Do regional systems offer sufficient protection in relation to universal standards?
- Which developments will lead to an effective exercise of unaccompanied children's right to legal representation under the regional systems?

## **1.4 Scope and delimitations**

Unaccompanied children cross international borders for a wide variety of reasons, which may as well overlap.<sup>32</sup> Some of these may include- among many others- persecution, armed conflicts, poverty, exploitation, search of better opportunities, family reunion and trafficking.<sup>33</sup> In addition, children may have left their home countries directly by their own or may have been lost or separated from their relatives during the journey.<sup>34</sup>

Further, unaccompanied minors may face as well many issues upon arrival such as sexual exploitation, abuse, prolonged detention, child labour, discrimination, no

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<sup>32</sup> See e.g. Bhabha, Jacqueline, *Independent Children, Inconsistent Adults: International Child Migration and the Legal Framework* [hereinafter Bhabha, 2008], Innocenti Discussion Paper No. IDP 2008-02, Florence: UNICEF Innocenti Research Centre, p. 2.

<sup>33</sup> See e.g. UNHCR, *Safe & Sound: What States can do to ensure respect for the best interests of unaccompanied and separated Children in Europe*, October 2014, p.7.

<sup>34</sup> *Ibid.*

access to adequate age assessment, registration or legal advice.<sup>35</sup> Additionally, in many cases, children do not identify themselves to authorities upon arrival or disappear from authorities shortly after their registration, increasing in this way the possibilities of trafficking, sexual and economic exploitation.<sup>36</sup> However, it is important to notice that regardless of the reasons for which these children migrate and independently of their immigration status, unaccompanied minors have special needs and vulnerabilities and are entitled to special protection.<sup>37</sup>

Among the different protection issues strictly related to this group of children, I specifically chose to analyse, as already mentioned, unaccompanied children's right to legal assistance during asylum procedures. In consequence, this thesis will refer to unaccompanied children in the context of asylum proceedings, including therefore those children that have crossed international borders and are outside their country of nationality or habitual residence without their relatives or a responsible adult.

In light of the above, I wish to analyse the level of protection offered by the Council of Europe, European Union and the Inter- American system, by seeking an understanding of the legal existent framework for the protection of asylum- seeking children at the regional level in comparison with the standards of protection under the universal system. I would not expand, due to the limited space, to the protection given by individual States under the domestic legal regime, further procedural guarantees other than the right to legal assistance or further specific issues which affect this group of children. I have chosen this special right as I consider that representation is strictly connected with the realisation of other fundamental rights and therefore, if this right is adequately protected and children have a legal representative who truly engages in their claims, the situation of the unaccompanied child during the procedure will be much more tolerable and beneficial. Moreover, the issue on how different regions deal with the right to legal counselling of unaccompanied children seeking asylum through the analysis of different legal regimes, remains mainly unstudied.<sup>38</sup>

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<sup>35</sup> See CRC General Comment N° 6, *supra* note 12, para. 3.

<sup>36</sup> See ECRE, 2014, *supra* note 17, p. 12.

<sup>37</sup> See UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, 1997, para. 1.2.

<sup>38</sup> See Abass A. & Ippolito F. (eds.), *Regional Approaches to the Protection of Asylum Seekers. An International Legal Perspective*, Routledge, 2016. According to these scholars: "While existing literature makes valuable contributions to our understanding of the asylum crisis, the issue of how different regions of the world deal with this crisis through regulatory frameworks remains grossly unstudied". Cf. *Ibid.*, p.2.

In addition, the importance of this right has been highlighted by many international bodies and several UN treaty bodies have expressed concern regarding unaccompanied children's lack of representation during asylum procedures.<sup>39</sup> It is important to bear in mind that when unaccompanied children present an asylum claim, they have already been through many traumatic situations, are not only afraid and alone, but also far away from their families and home. Under this context, they have to face a complicated procedure, which requires research, evidence, participation in personal interviews and their encounter with many actors such as officials, social assistants and judicial authorities.<sup>40</sup> As asylum proceedings are highly complex procedures, legal representation is fundamental and cannot be ignored. To this regard, the right to legal assistance during asylum procedures is paramount for the wellbeing of these children and absolutely necessary to ensure that other procedural guarantees are effectively guaranteed.

## 1.5 Structure

As introduced above, this thesis looks into the universal and regional systems of protection in Europe and in the Americas, trying to define the extent of the right to legal representation in each system and draw conclusions regarding the level of protection and improvement of the exercise of this right.

Chapter 2 provides an analysis of the universal system of protection especially in relation to the Convention on the Rights of the Child. Also, special emphasis will be placed on the labour of the Committee on the Rights of the Child and UNHCR which have tailored to a great extent the content of this right.

Chapter 3 provides an examination of the regional systems, starting by the assessment of European standards and proceeding then with Inter-American standards. It looks through different conventions, regulations, resolutions,

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<sup>39</sup> See e.g. CRC, General Comment No.6, *supra* note 12. See also UN General Assembly, Status of the Convention on the Rights of the Child: report of the Secretary-General, 27 September 2016, A/71/413.

<sup>40</sup> See e.g. King, 2013, *supra* note 14. According to this academic writer: "Realistically, an unaccompanied minor is unlikely to be able to argue his or her case without legal counsel, since immigration proceedings involve intricate international and domestic laws, adversarial proceedings, and direct and cross-examinations of factual witnesses as well as experts". Cf. *Ibid.*, p. 366.

recommendations and judgements at the regional level while interpreting the extent of this right under these systems.

Chapter 4 attempts a synthesis of findings based on the level of compliance of regional norms with universal standards and examines as well the quality of the different standards in each level. It further discusses possible recommendations and alternatives to expand the protection of unaccompanied children.

## 1.6 Definitions

The term *children* will be applied in line with Articles 1 and 2 of the Convention on the Rights of the Child encompassing “all persons under the age of 18 within the jurisdiction of a State party, without discrimination of any kind”.<sup>41</sup>

*Unaccompanied children* is used in this paper in the context of the Convention on the Rights of the Child and UN High Commissioner for Refugee Guidelines as “children 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”.<sup>42</sup> The term unaccompanied children or unaccompanied minors will be used interchangeably.

In addition, for the purpose of this paper, the term *asylum seeker* refers to “a person who has sought the recognition of refugee status and whose petition is pending determination”.<sup>43</sup>

Further, with regards to *legal assistant*, *legal representative* or *legal advisor*, all these terms will be applied as synonyms. In this sense, they will be used as defined by UN High Commissioner for Refugees in the Guidelines on International Protection: Child Asylum Claims under Articles 1(A) 2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees as “a lawyer or

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<sup>41</sup> Cf. United Nations 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 primary consideration (article 3 para.1)* [hereinafter CRC General Comment N° 14], 2013, para. 21.

<sup>42</sup> Cf. UNHCR, *Refugee Children: Guidelines on Protection and Care*, 1994, p. 52. See also UNHCR *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, 1997, p.1.

<sup>43</sup> Cf. *Rights and Guarantees of Children in the Context of Migration and /or in Need of International Protection*, 19 August 2014, IACrHR, Advisory Opinion OC- 21/14, Series A No. 21, para. 49.

other person qualified to provide legal assistance to, and inform, the child in the asylum proceedings and in relation to contacts with the authorities on legal matters”.<sup>44</sup> Legal representation, legal counselling, legal aid and legal assistance will be also used interchangeably.

Finally, some clarifications are necessary in relation to the term guardian and its difference with regards to the role of legal representative applied in this paper. While the term *guardian* refers to an independent person who is in charge of the child’s best interest and general wellbeing,<sup>45</sup> this thesis will only focus on legal representatives and legal representation, i.e. on the *legal assistance* provided by legal advisors only in legal matters during the asylum procedure.

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<sup>44</sup> Cf. UNHCR, Guidelines on International Protection: Child Asylum Claims under Articles 1(A) 2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, p. 26, (footnote 135).

<sup>45</sup> *Ibid.*

## CHAPTER TWO

### Relevant International Standards

*«Legal aid is an essential element of a fair, humane and efficient system of administration of justice that is based on the rule of law. It is a foundation for the enjoyment of other rights, including the right to a fair trial and the right to an effective remedy, a precondition to exercising such rights and an important safeguard that ensures fundamental fairness and public trust in the administration of justice.»<sup>46</sup>*

In order to fulfil the purpose of this thesis, this chapter will assess the current legal framework regarding unaccompanied children's right to legal representation under the universal system of human rights' protection in pursuance of determining the content of this right and the corresponding States' obligations under the UN system. It is important to notice that the universal standards are not only contained in human rights treaties but also, that many of them develop through the different comments and recommendations from UN treaty bodies.<sup>47</sup> In this regard, this chapter aims at presenting the specific framework at the universal level while looking through human rights treaties as well as related commentaries.

To begin with, the Universal Declaration of Human Rights,<sup>48</sup> the International Covenant on Civil and Political Rights<sup>49</sup> and the International Covenant on Economic, Social and Cultural Rights,<sup>50</sup> establish a wide array of human rights applicable to everybody, including therefore, unaccompanied children regardless of their nationality or legal status.<sup>51</sup> All these instruments contain the fundamental principle of non-discrimination,<sup>52</sup> and children's entitlement to special measures of protection, care and assistance.<sup>53</sup> In addition, the Declaration on the Rights of the Child<sup>54</sup> recognizes as well the principle of non-discrimination, special protection and

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<sup>46</sup> Knaul, Gabriela, UN General Assembly Report of the Special Rapporteur on the Independence of judges and lawyers, 2013 in ECRE, 2014, *supra* note 17.

<sup>47</sup> See King, 2013, *supra* note 14, p. 344.

<sup>48</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

<sup>49</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

<sup>50</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

<sup>51</sup> See Bhabha, 2008, *supra* note 32, p. 3.

<sup>52</sup> See UDHR, ICCPR, ICESCR, Article 2.

<sup>53</sup> See UDHR (Article 25), ICCPR (Article 24), ICESCR (Article 10).

<sup>54</sup> UN General Assembly, *Declaration on the Rights of the Child*, 20 November 1959, A/RES 1386 (XIV).

the child's best interest.<sup>55</sup>

Further, it is important to highlight that the principle of *non-refoulement* and the right to access to justice require procedural guarantees for asylum seekers, being the right to legal representation a fundamental safeguard during asylum procedures.<sup>56</sup> In this regard, the International Covenant on Civil and Political Rights specifically mentions that immigrants shall have legal representation in deportation proceedings under Article 13.<sup>57</sup> Further, the 1951 Convention relating to the Status of Refugees,<sup>58</sup> obliges States to ensure free access to courts and legal assistance for refugees and stateless persons.<sup>59</sup> Nevertheless, it is worth to take into consideration that this provision has been interpreted as establishing guarantees for refugees that have their habitual residence in the contracting States.<sup>60</sup> Additionally and perhaps even more importantly in connection with the aim of this thesis, is the fact that this Convention is silent regarding children seeking asylum.<sup>61</sup>

## 2.1 The Convention on the Rights of the Child

When it comes to children's rights under the universal system, the Convention on the Rights of the Child includes the most comprehensive standards of protection, being as well the most widely ratified treaty, with only the United States not yet being a party to this instrument. Additionally, this Convention has no general derogation clause, which authorizes States to suspend the exercise of particular rights

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<sup>55</sup> *Ibid.*, Principles 1 - 2.

<sup>56</sup> See ECRE/ELENA, 2010, *supra* note 18, p. 12.

<sup>57</sup> ICCPR, Article 13 reads as follows: "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

<sup>58</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

<sup>59</sup> *Ibid.*, Article 16 states: "1. A refugee shall have free access to the courts of law on the territory of all Contracting States. 2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from *cautio judicatum solvi*. 3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence."

<sup>60</sup> See ECRE/ELENA, 2010, *supra* note 18, p. 12.

<sup>61</sup> See Söderbergh Carl, *International Law and Children as Asylum-seekers*, in *The asylum-seeking Child in Europe*, Andersson et al. (eds.), Centre for European Research, Göteborg University (CERGU), 2005, p. 12.

in periods of emergency.<sup>62</sup> However, it is worth mentioning that many States have made reservations and declarations, mostly regarding the treatment of non-national children, refugee children and the extent of the application of Article 22.<sup>63</sup>

It is crucial to start the analysis of the protection given to unaccompanied asylum-seeking children under this Convention by referring to the obligation of States Parties to respect and ensure the rights contained in this instrument to “each child within their jurisdiction”.<sup>64</sup> To this regard, the enjoyment of the set of rights established in the Convention is not limited to children who are nationals of a State, but are instead available to all children, including therefore asylum-seeking children.<sup>65</sup>

Additionally, the Convention on the Rights of the Child is based on the recognition that children are entitled to special care and assistance.<sup>66</sup> Unaccompanied children are expressly mentioned in Article 20 which includes their entitlement to special protection and assistance,<sup>67</sup> and specifically in relation to asylum procedures, Article 22 mentions States’ obligations to take measures and ensure that all children seeking asylum, whether unaccompanied or accompanied, 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”.<sup>68</sup>

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<sup>62</sup> See Goodwin- Gill G.S., *Unaccompanied refugee minors. The role and place of international law in the pursuit of durable solutions* [hereinafter Goodwin- Gill, 1995], *The International Journal of Children’s Rights*, Vol. 3 (1995), p. 411.

<sup>63</sup> See Biewirth, Christoph, *The protection of refugee and asylum-seeking children, the Convention on the Rights of the Child and the work of the Committee on the Rights of the Child* [hereinafter Biewirth, 2005], *Refugees Survey Quarterly*, 24 (2005), p.99.

<sup>64</sup> Cf. UN Convention on the Rights of the Child, Article 2 (1).

<sup>65</sup> See CRC General Comment No. 6, *supra* note 12. As the Committee on the Rights of the Child stressed: “...State obligations under the Convention apply within the borders of a State, including with respect to those children who come under the State’s jurisdiction while attempting to enter the country’s territory. Therefore, the enjoyment of rights stipulated in the Convention are not limited to children who are citizens of a State party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children - including asylum-seeking, refugee and migrant children - irrespective of their nationality, immigration status or statelessness.” Cf. *Ibid.*, para. 12.

<sup>66</sup> See UN Convention on the Rights of the Child, Preamble.

<sup>67</sup> *Ibid.*, Article 20 (1) states: “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>68</sup> Cf. *Ibid.*, Article 22 (1). The complete provision reads as follows: “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 nongovernmental 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

Further, it would be important to mention that the right to be assisted by a legal representative is included under Article 37 paragraph (d) in the specific case of deprivation of liberty and in Article 40 paragraph 2 (b) (3) in the context of criminal procedures. Nevertheless, even if the Convention remains silence in relation to the application of this right in other proceedings -such as during asylum- the right to legal representation in different procedures than those mentioned in Article 37 and Article 40, can be inferred from Article 3 where children have the right to have their best interest as primary consideration in all actions concerning them.<sup>69</sup> In other words, as it will be argued below, the right to legal representation in asylum proceedings should be encompassed under the general classification of “all actions concerning children” contained in Article 3.<sup>70</sup>

### *2.1.1 Fundamental principles*

After having looked through the central provisions of the Convention, especially in relation to States’ obligations towards asylum-seeking children, it seems appropriate to continue with the actual analysis of children’s right to legal assistance under this Convention.

Accordingly, a number of core principles enshrined in this Convention are fundamental while analysing children’s right to legal representation: the principle of non-discrimination (Article 2), the best interest of the child (Article 3) and the child’s right to participation (Article 12). In this regard, special attention is given in this section to these main principles as the appointment of a legal advisor provides procedural protection for asylum-seeking children, which is strictly related, for example, to the best interests of the child and the right to be heard.

In fact, these principles are fully applicable to States Parties of the Convention and should in consequence guide the treatment of asylum-seeking children at all times.<sup>71</sup>

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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>69</sup> See Boeles, Pieter, *Fair Immigration Proceedings in Europe* [hereinafter Boeles, 1997], Kluwer Law International, 1997, p. 185.

<sup>70</sup> *Ibid.*

<sup>71</sup> See Biewirth, 2005, *supra* note 63, p. 101.

In addition, in the interpretation and application of the fundamental principles, States need to comply with the guidance provided by the Committee on the Rights of the Child through its general comments. It is noteworthy here to bear in mind that the commentaries of the Committee regarding the interpretation and extent of these principles are of high importance as they include further guidelines regarding their effective application in relation to the specific rights enshrined in the Convention, as in the case of the right to legal assistance.

Below the focus will be given to the fundamental principles and their application in relation to immigration procedures and the right to legal representation.

Principle of non-discrimination:<sup>72</sup> The Committee on the Rights of the Child has offered guidance in relation to this principle specifically in its General Comment No. 6. In this regard, the Committee has expressed that this principle “applies in respect to all dealings with separated and unaccompanied children”<sup>73</sup> and prohibits any discrimination based on the status of the child as unaccompanied, separated, migrant, refugee or asylum seeker.<sup>74</sup>

With regards in particular to immigration proceedings, this principle indicates that children seeking asylum shall have access to a fair process of determination for their application and the implementation of protective measures.<sup>75</sup> Additionally, States are complied under this principle to provide for the necessities of unaccompanied minors to the same extent that those of native children are being satisfied,<sup>76</sup> and it is forbidden for States, for example, to provide different treatments to asylum-seeking children from different countries of origin.<sup>77</sup> However, it is important to highlight that this principle does not forbid distinction among asylum-seeking children based

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<sup>72</sup> UN Convention on the Rights of the Child, Article 2 reads as follows: “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.”

<sup>73</sup> Cf. CRC General Comment No. 6, *supra* note 12, para 18.

<sup>74</sup> *Ibid.*

<sup>75</sup> See Gorlick Brian, *Human rights and refugees: enhancing protection through international human rights law* [hereinafter Gorlick, 2000], Nordic Journal of International Law, May 2000, Vol. 69, Issue 2, p. 166.

<sup>76</sup> See Maloney, Sarah, Transatlantic Workshop on “Unaccompanied/ Separated Children: Comparative Policies and Practices in North America and Europe”, held at Georgetown University, 18-19 June, 2001 [hereinafter Maloney, 2002], Journal of Refugee Studies, Vol. 15, No. 1, 2002, p. 105.

<sup>77</sup> See Bierwirth, 2005, *supra* note 63, p. 102.

on different protection needs, related for instance to the age of the children, health, persecution or trauma.<sup>78</sup>

Best interest principle:<sup>79</sup> this fundamental principle includes children's right to have their best interest examined and taken into account as primary consideration in all decisions and actions involving them.<sup>80</sup> In fact, the Convention does not provide an exact definition of this principle, as the child's best interest shall depend on specific circumstances regarding each child including -among many important factors- the child's age, level of maturity and whether the child is unaccompanied or accompanied.<sup>81</sup> Further, the best interest of the child is strictly related to the well-being of the child and its individual circumstances. Therefore, the application and interpretation of such principle must correspond with the Convention, other international treaties and the further guidance of the Committee.<sup>82</sup>

Additionally, and even more importantly in connection with the aim of this thesis, is the application of this principle strictly in relation to asylum-seeking children. In this context, it would be important to stress that this principle requires the complete protection of children in the country of asylum.<sup>83</sup> Further, in the specific case of unaccompanied children, special attention is required from States while determining their best interest.<sup>84</sup>

In fact, the Committee has required States under its General Comment No. 14, to guarantee a major level of protection and specific procedures in decisions that will have a great impact on children, and has expressly included asylum and immigration proceedings as part of such decisions.<sup>85</sup> Also, the Committee has clearly highlighted the vulnerable situation of children seeking asylum as an important aspect that should be taken into account while determining the best interest of the child.<sup>86</sup>

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<sup>78</sup> *Ibid.*

<sup>79</sup> UN Convention on the Rights of the Child, Article 3 (1) states: "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."

<sup>80</sup> See CRC General Comment No. 14, *supra* note 41, para. 17.

<sup>81</sup> See King, 2013, *supra* note 14, p. 349.

<sup>82</sup> UNHCR, Guidelines on Determining the Best Interests of the Child, May 2008, para. 1.1.

<sup>83</sup> See Gorlick, 2000, *supra* note 75, p. 166.

<sup>84</sup> See UNHCR, Guidelines on Determining the Best Interests of the Child, May 2008, para. 3.1.

<sup>85</sup> See CRC General Comment No. 14, *supra* note 41, para. 20. Accordingly, in the understanding of the Committee: "... the scope of decisions made by administrative authorities at all levels is very broad, covering decisions concerning education, care, health, the environment, living conditions, protection, asylum, immigration, access to nationality, among others". (Emphasis added). *Cf. Ibid.*, para. 30.

<sup>86</sup> *Ibid.*, para. 75.

It is also important to notice that the relation between this principle and children's right to legal representation has been emphasised as well by the Committee. In fact, according to the Committee: "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".<sup>87</sup> Consequently, the Committee has as well included representation among the specific arrangements that States should ensure when the best interest of the child is being assessed.<sup>88</sup>

Right of the child to express his or her views freely:<sup>89</sup> The Committee has stated that the right to be heard in any judicial and administrative proceeding includes unaccompanied children and asylum-seeking children,<sup>90</sup> and additionally that children have the right to express their views in every aspect of asylum procedures.<sup>91</sup> Furthermore, the Committee has also mentioned that in matters related to legal representation, the views of unaccompanied children shall be taken into consideration<sup>92</sup> and it has required States to guarantee proper arrangements, including representation, when the child is not able or is not willing to express his or her wishes.<sup>93</sup> Finally, under the light of this principle, States are required to consider that children have the capability to make decisions related to themselves and the right to have those decisions observed.<sup>94</sup>

In light of the aforementioned, one can notice that the words of the Committee have contributed to offer further explanation regarding the content of the fundamental principles and its application in relation to the different rights contained in the Convention, including- as stated earlier- the right to legal assistance.

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<sup>87</sup> Cf. *Ibid.*, para. 96.

<sup>88</sup> *Ibid.*, para. 44.

<sup>89</sup> UN Convention on the Rights of the Child, Article 12 establishes that: "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."

<sup>90</sup> See United Nations Committee on the Rights of the Child, *General Comment No. 12, The Right of the Child to be Heard* [hereinafter CRC General Comment No.12], 2009, para. 32.

<sup>91</sup> *Ibid.*, para. 123.

<sup>92</sup> See CRC General Comment No. 6, *supra* note 12, para. 25.

<sup>93</sup> See CRC General Comment No. 14, *supra* note 41, para. 44.

<sup>94</sup> See Bhabha, 2001, *supra* note 29, pp. 298-299.

Accordingly, in order to deliver an effective judicial protection, the former principles should guide every stage of the asylum procedures when children are involved. The wording of the Committee regarding the fundamental principles has paved the way towards a more effective protection of asylum-seeking children. In this sense, legal advisors should take into consideration the best interest of the child at all times while representing the child and respect the child's opinion and wishes during the entire procedure. Additionally, the principle of non-discrimination is as well of high relevance at the moment of designation of representatives, as differences cannot be made based, for example, on the country of origin of the children.

Finally, as already mentioned above, it is important to bear in mind that the Committee on the Rights of the Child has provided States with further guidance regarding the interpretation and implementation of the Convention, referring both to the fundamental principles and to specific rights. With regards to the right to legal assistance during asylum procedures, the Committee has developed specific standards of protection and regulated the application of this right. A continuation, the specific aspects of this right as elaborated by the Committee will be identified.

### *2.1.2 Children's right to legal representation in the views of the Committee on the Rights of the Child*

The Committee has stated, in relation to unaccompanied asylum-seeking children's right to legal assistance, that States are under the obligation to take all necessary measures to ensure adequate representation of the child's best interests.<sup>95</sup> It is important to note that the Committee has explicitly acknowledged that in asylum cases, children should in addition to the appointment of a guardian, be appointed a legal representative.<sup>96</sup> Therefore, even if there is no provision in the Convention on the Rights of the Child that expressly guarantees the right to legal assistance of unaccompanied children during asylum proceedings, the entitlement of this right is clear under the comments of the Committee.

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<sup>95</sup> See CRC General Comment No. 14, *supra* note 41, para. 44.

<sup>96</sup> For the Committee on the Rights of the Child: "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." Cf. CRC General Comment No. 6, *supra* note 12, para. 36.

In fact, the Committee has repeatedly referred to the right of unaccompanied children to legal representation in immigration procedures in several of its general comments and has developed further standards of protection while providing specific guidance that States should follow in the implementation of this right. In this sense, the Committee has stated that:

- All unaccompanied asylum-seeking children should be provided with access to free and qualified legal representation, even in cases where the procedure is followed under the same procedures as adults.<sup>97</sup>
- Children should always be informed of arrangements in relation with their legal representation and their opinions should be considered.<sup>98</sup>
- Legal representation is crucial in cases where the child is deprived of his or her liberty during the asylum procedure. To this regard, unaccompanied children in detention “shall be provided with prompt and free access to legal and other appropriate assistance, including the assignment of a legal representative”.<sup>99</sup> Further, children under detention should be guaranteed regular contact with their legal advisor.<sup>100</sup>
- Legal representatives should be specially trained in relation to the needs and rights of children including as fundamental aspects of their training programmes: the principles of the Convention, information regarding the country of origin of unaccompanied children, interview techniques, psychology and intercultural communication.<sup>101</sup>
- Training programmes for legal representatives should be continued on a regular basis.<sup>102</sup>
- Legal advisors should be familiar with the child’s background and be competent enough to represent the best interest of the child concerned.<sup>103</sup>
- Children’s representatives are obliged to express adequately the views of the child.<sup>104</sup>
- Representatives should have complete understanding of every aspect of the decision-making procedure.<sup>105</sup>

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<sup>97</sup> *Ibid.*, para. 69.

<sup>98</sup> *Ibid.*, para. 37.

<sup>99</sup> *Cf. Ibid.*, para. 63.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*, paras. 95-96.

<sup>102</sup> *Ibid.*, para. 97.

<sup>103</sup> *Ibid.*, para. 69.

<sup>104</sup> See CRC General Comment No. 14, *supra* note 41, para. 90.

<sup>105</sup> See CRC General Comment No. 12, *supra* note 90, para. 36.

· Legal advisors should have experience in working with children and represent only the interests of the child and not the interests of other persons or institutions.<sup>106</sup>

Additionally, the Committee has also referred to protection issues suffered by asylum-seeking children during the examination of States' periodic reports.<sup>107</sup> The Committee has recommended Panama,<sup>108</sup> for example, to appoint legal representatives for unaccompanied children and has expressed concern regarding the training of representatives in Finland<sup>109</sup> by recommending the State to adequate resources for their training. For instance, in the case of Canada,<sup>110</sup> the Committee has expressed in its concluding observations that the fundamental principles of non-discrimination, best interest of the child and the right of the child to freely express his or her views were not always respected by administrative authorities while dealing with children in immigration contexts. Further, it has recommended Portugal<sup>111</sup> to take appropriate measures to improve the situation of unaccompanied children and it has required Poland<sup>112</sup> to address the situation of unaccompanied minors and of children waiting for deportation once they have been refused their asylum claims.

It is worth considering, however, that even if the conclusions and recommendations of the Committee are not as binding as legal instruments, they constitute nevertheless important legal standards to measure compliance with the provisions of the Convention.<sup>113</sup> In fact, according to the International Court of Justice, “an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation”.<sup>114</sup>

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<sup>106</sup> *Ibid.* paras. 36 - 37.

<sup>107</sup> See Gorlick, 2000, *supra* note 75, pp. 166-170.

<sup>108</sup> Biewirth, 2005, *supra* note 63, p. 104 and footnote 63. See CRC/15/Add.68, 24 January 1997, para. 34.

<sup>109</sup> *Ibid.*, p. 103 and footnote 71. See CRC/C/15/Add.132, 16 October 2000, para. 51.

<sup>110</sup> Gorlick, 2000, *supra* note 75, p. 169. See CRC/C/15/Add.37.

<sup>111</sup> *Ibid.* See CRC/C/3/Add.30.

<sup>112</sup> *Ibid.* See CRC/C/8/Add.11 and HRI/CORE/1/Add.25.

<sup>113</sup> As Gorlick clearly expressed: “Although the conclusions and recommendations of the Committee may not be readily apparent as binding legal decisions, they can be used as standards against which compliance with the treaty provisions can be measured. This in turn can lead to incorporation of the Convention rights into domestic law and practice, thereby making these ‘children’s rights’ more readily enforceable and justiciable.” Cf. Gorlick, 2000, *supra* note 75, p. 170.

<sup>114</sup> Cf. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, Notwithstanding Security Council Resolution 276 (1970), 21 June 1971, ICJ, Advisory Opinion, I.C.J., Reports 1971, para. 53. See also, *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, 14 July 1989, IACrHR, Advisory Opinion OC-10/89, Series A No. 10, para. 37

## 2.2 UN High Commissioner for Refugees

References to other UN treaty bodies and organisms are unavoidable in the analysis of the current international standards of protection for unaccompanied children seeking asylum. In this context, the labour of the UN High Commissioner for Refugees is fundamental in the context of this thesis as many of its documents refer to the core principles contained in the Convention of the Rights of the Child and to asylum-seeking children's right to legal assistance.

While analysing the work of UNHCR, one should bear in mind that UNHCR is in charge of providing international protection to refugees under the guidance of United Nations and also of seeking permanent solutions with governments to the problems faced by refugees.<sup>115</sup> In this sense, UNHCR centres special attention in a number of aspects of asylum proceedings and the special protection of unaccompanied children, including -among the most important- guardianship, legal representation, child-sensitive reception and the exclusion of accelerated procedures when children are seeking asylum.<sup>116</sup>

In several occasions, UNHCR has expressly acknowledged that all asylum seekers have right to legal representation during immigration procedures. Indeed, according to UNHCR: "At all stages of the procedure, including at the admissibility stage, asylum-seekers should receive guidance and advice on the procedure and have access to legal counsel".<sup>117</sup>

Moreover, as it will be highlighted below, UNHCR Guidelines have contributed to the development of children's rights in the asylum process. To this regard, UNHCR Refugee Children Guidelines on Protection and Care (1994), UNHCR Guidelines on Policies and Procedures in dealing with Unaccompanied Minors Seeking Asylum (1997) and UNHCR Guidelines on International Protection: Child Asylum Claims under Articles 1(A) 2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees (2009) should also be taken into consideration as all these

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<sup>115</sup> See Goodwin- Gill, 1995, *supra* note 62, p. 407.

<sup>116</sup> See Floor, Kirsti, *European States and the Asylum-seeking Child. An Overview*, in *The asylum-seeking Child in Europe*, Andersson et al. (eds.), Centre for European Research, Göteborg University (CERGU), 2005.

<sup>117</sup> Cf. UNHCR, *Global Consultations on International Protection, Asylum Processes (Fair and Efficient Asylum Procedures)*, EC/GC/01/12, 31 May 2001, para. 50 (g).

instruments have provided further standards of protection in relation to the right to legal representation.

In light of the above, it would be important to stress that UNHCR has highlighted that legal representation and advice is a fundamental procedural safeguard in cases with relevant impact on the child's future.<sup>118</sup> Also, it has as well expressly mentioned that when children are the principal applicants in asylum procedures, they are entitled to a legal representative.<sup>119</sup> In this context, UNHCR has stressed through its Guidelines that:

- Unaccompanied children should be appointed a legal representative immediately upon arrival.<sup>120</sup>
- During asylum procedures, all unaccompanied children should have access to a "qualified legal representative".<sup>121</sup> This rule applies as well for children between sixteen and eighteen years old even if their claims are processed under the same procedures than for adults.<sup>122</sup>
- The legal representative of the child shall be properly trained and offer support to the child through the entire asylum procedure.<sup>123</sup>
- Child's representatives shall make sure that all the important aspects of the claim are presented.<sup>124</sup>
- Child's representatives should be familiar with his or her background and protect the child's interests.<sup>125</sup>
- Representatives shall advocate for decisions that respect the child's best interest and ensure that the interests of the child are completely safeguarded.<sup>126</sup>

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<sup>118</sup> See UNHCR, *Safe & Sound: What States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, October 2014, p. 21.

<sup>119</sup> See UNHCR Guidelines on International Protection: Child Asylum Claims under Articles 1 (A) 2 and 1 (F) of the 1951 Convention and /or 1967 Protocol relating the Status of Refugees, 2009, para. 69.

<sup>120</sup> See UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, 1997, para. 4.2.

<sup>121</sup> Cf. *Ibid.*, para. 8.3.

<sup>122</sup> *Ibid.*

<sup>123</sup> See UNHCR, *Guidelines on International Protection: Child Asylum Claims under Articles 1 (A) 2 and 1 (F) of the 1951 Convention and /or 1967 Protocol relating the Status of Refugees*, 2009, para. 69.

<sup>124</sup> *Ibid.*, para. 8.

<sup>125</sup> See UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, 1997, para. 8.3.

<sup>126</sup> See UNHCR, *Guidelines on Protection and care*, 1994, pp. 43- 44.

## 2.3 Human Rights Council

The Human Rights Council has also acknowledged in several occasions, the situation of extreme vulnerability faced by unaccompanied children. In light of this, it has requested States to work together through regional cooperation and to respect the procedural guarantees and provisions contained in the Convention of the Rights of the Child, specially the best interest principle and the principle of non-discrimination.<sup>127</sup> Further, the Human Rights Council has repeatedly referred to the right to legal assistance by requiring States to provide child-friendly consular assistance “including legal assistance”.<sup>128</sup>

In addition, under the request of the Human Rights Council, the Advisory Committee has referred to the global issue of unaccompanied children and has identified this group of minors as the most vulnerable among all migrants.<sup>129</sup> It has also highlighted that many rights under the Convention on the Rights of the Child such as the right to special protective measures, the best interest of children and the principle of non-discrimination are often violated.<sup>130</sup> Additionally, and perhaps even more importantly in connection with the aim of this paper, it has recognized the right of unaccompanied children to have a legal assistance if they apply for asylum.<sup>131</sup>

## 2.4 Additional documents

Special Rapporteurs on the Human Rights of Migrants have also acknowledged the relevance of unaccompanied children’s legal representation. For instance, the Former UN Special Rapporteur on Migrant’s Rights, Mr. Jorge Bustamante, recognized that unaccompanied children’s high vulnerability exposes them to human rights violations at every stage of asylum procedures and required States to provide

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<sup>127</sup> See Human Rights Council, Unaccompanied migrant children and adolescents and human rights, A/HRC/29/L24, 1 July 2015, pp. 2-3.

<sup>128</sup> Cf. *Ibid.*, p.2.

<sup>129</sup> See Human Rights Council, Global issue of unaccompanied migrant children and adolescents and human rights, Progress report of the Human Rights Council Advisory Committee, A/HRC/33/53, 16 August 2016, para. 34.

<sup>130</sup> *Ibid.*, para. 56.

<sup>131</sup> See Human Rights Council, Draft final report on the research-based study on the global issue of unaccompanied migrant children and adolescents and human rights, A/HRC/AC/18/CRP.2, 13 February 2017, para. 26.

procedural guarantees for these minors such as access to a guardian, legal representative, free legal assistance and an interpreter.<sup>132</sup>

Additionally, the current UN Special Rapporteur on Migrant's Rights, Mr. Francois Crepeau, has identified several issues regarding unaccompanied children's protection during asylum and has recognized that training and capacity building of legal representatives, guardians, interpreters and border officials, is a fundamental measure to improve the protection of unaccompanied minors.<sup>133</sup> In this sense, this training should be focused on international law, interview methods, psychology and intercultural communication, among many other aspects.<sup>134</sup> Further, he has underlined as well that it is necessary for States to include a "child's rights based approach" to migration into national law in order to guarantee the full respect of the best interest principle, the accomplishment of several procedural guarantees such as the right to a legal representative and free legal aid and the compliance of States' obligations under the Convention on the Rights of the Child.<sup>135</sup>

Likewise, the General Assembly has also repeatedly referred to unaccompanied children's rights during asylum proceedings and highlighted that international law obliges States to promote and respect the human rights of all migrants including unaccompanied children.<sup>136</sup> In addition, and even more importantly, it required States to respect human rights treaties in order to provide child-friendly consular assistance and legal assistance.<sup>137</sup> Further, the General Assembly has underlined as well that States shall take appropriate measures to ensure the effectiveness of the rights contained in the Convention on the Rights of the Child, safeguard the human rights of children and provide assistance such as access to medical, psychosocial and legal assistance.<sup>138</sup> Also, it has stressed the importance of regional or bilateral cooperation in relation to migration and the protection of human rights of migrant children.<sup>139</sup> To this regard, it required States to ensure the protection of human rights

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<sup>132</sup> See Special Rapporteur on the Human Rights of Migrants, *Report on the Human Rights of Migrants*, U.N. Human Rights Council, U.N. Doc. A/HRC/11/7 (May 14, 2009) (by Jorge Bustamante) in King, 2013, *supra* note 14, pp. 350-351.

<sup>133</sup> See Crepeau, Francois, Discussion on the issue of unaccompanied minors, Statement, 10 August 2015, UN Human Rights Advisory Committee, p. 5.

<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid.*, p.7.

<sup>136</sup> See UN General Assembly, Migrant children and adolescents: resolution, 11 February 2015, A/RES/69/187, p. 3.

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.*, p. 4.

<sup>139</sup> *Ibid.*

under immigration procedures emphasising that these procedures should be sensitive to the especial needs of children.<sup>140</sup>

Equally, the Human Rights Committee has also acknowledged several protection issues affecting unaccompanied children during asylum procedures under the examination of States' reports.<sup>141</sup> In fact, it has raised concern in relation to Greece for example, while referring to the situation of unaccompanied children in this country,<sup>142</sup> and it has also required Spain to guarantee free legal assistance to each unaccompanied child.<sup>143</sup> The Human Rights Committee has as well required Slovenia to establish specific procedures to address the needs of unaccompanied children and to ensure their best interest in immigration procedures.<sup>144</sup> Also, regarding the United Kingdom, the Human Rights Committee highlighted that effective legal representation was not available for asylum seekers, undermining their right to challenge decisions regarding their status.<sup>145</sup> It is worth noting here that even if these last examples include soft law documents, they constitute a useful tool for human rights and children's rights defenders in order to influence the behaviour of regional institutions and States in the absence of binding instruments.<sup>146</sup>

## 2.5 Concluding remarks

Concluding the examination done under this chapter regarding unaccompanied children's right to legal assistance in the UN system, one can notice that legal representation is recognized beyond any doubt under the global system and, even most importantly, that the best interest principle compiles States to provide all unaccompanied minors who apply for asylum with a legal advisor. Moreover, even if this right might not be expressly contained in the Convention on the Rights of the

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<sup>140</sup> See UN General Assembly, Status of the Convention on the Rights of the Child: report of the Secretary-General, 27 September 2016, A/71/413, para. 24.

<sup>141</sup> See Gorlick, 2000, *supra* note 75, pp. 172- 174.

<sup>142</sup> See HRC, Report of the UN Human Rights Committee Volume I: Eighty-second session (18 October- 5 November 2004), Eighty-third session (14 March- 1 April 2005), Eighty- fourth session (11- 29 July 2005), 2005, A/60/40 (Vol.I), p.64.

<sup>143</sup> King, 2013, *supra* note 14, p. 350. See U.N. Human Rights Committee, Concluding Observations: Spain, U.N. Doc. CCPR/C/ESP/CO/5, Jan. 5, 2009.

<sup>144</sup> See HRC, Report of the UN Human Rights Committee Volume I: Eighty-second session (18 October- 5 November 2004), Eighty-third session (14 March- 1 April 2005), Eighty- fourth session (11- 29 July 2005), 2005, A/60/40 (Vol.I), p. 77.

<sup>145</sup> Gorlick, 2000, *supra* note 75, p. 173. See CCPR/C/95/Add.3.

<sup>146</sup> See Shelton Dinah, *Commitment and compliance: the role of non-binding norms in the international legal system*, Oxford University Press, 2013. According to this author: "Soft law is a device that can be deliberately used by non-state actors to influence state behavior when there is little prospect of successfully concluding a treaty." Cf. *Ibid.*, p. 31.

Child for the specific context of immigration proceedings, it is important to bear in mind that the Committee on the Rights of the Child and several UN bodies have acknowledged in several occasions the right to legal assistance in asylum proceedings and guided States towards its effective implementation.

Further, while examining the global standards of protection in relation to children's rights, it would be possible to stress that the Convention on the Rights of the Child is clearly the binding instrument which offers the highest level of protection. In addition, as it has been critically analysed in this chapter, the labour of the Committee has contributed greatly to the extension of the scope of many specific rights for children, including as well unaccompanied children's right to legal representation in asylum procedures. In fact, the Committee has made important efforts to clarify both the content of the fundamental principles enshrined in the Convention and the extent of the right to legal assistance.

However, it could be argued that the applicability of some of the principles contained in the Convention on the Rights of the Child, such as the best interest principle for example, can create problems regarding the difficulty of its implementation and the lack of consensus among the international community in relation to its definition. In this regard, one should bear in mind that the Committee seeks to offer clear guidance on the content of these principles during immigration contexts that States should always take into account. It is important to highlight that further clarifications regarding the content of universal principles should be included in regional instruments.

The aforementioned lead us to conclude that unaccompanied children are undoubtedly entitled to legal assistance during asylum procedures under the global system. In fact, States are not only required to comply with the provisions of the Convention on the Rights of the Child but shall also take into consideration the specific explanations and further standards given by the Committee and other UN bodies. Accordingly, due regard should be paid by States to these guidelines while implementing the right to legal assistance of unaccompanied minors. Also, even if universal standards might not regulate specific details attaining legal representation, they clearly refer to the most fundamental aspects of legal aid including the necessity to provide the unaccompanied child with legal assistance upon arrival and relevant aspects of representatives' training.

Consequently, it is noteworthy here that even if the UN binding legal framework is not yet as expansive as the situation of these minors requires by including, for instance, express mention of this right under binding norms, the further standards developed by treaty bodies provide a complementary body of standards that increases children's protection while developing a comprehensive protective approach.<sup>147</sup>

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<sup>147</sup> See Gorlick, 2000, *supra* note 75, p. 170.

## CHAPTER THREE

### Regional Standards

*« Io ci credevo  
ad un mondo fratello,  
alla vita...  
Mi dissero “vai”  
questa sarà  
la tua battaglia,  
combattila  
anche per noi,  
tu andrai per mare,  
non temere il mare  
di cui siamo figli  
anche se  
nati fra due sponde! »<sup>148</sup>*

Both Europe and the Americas have received an increasing amount of unaccompanied asylum-seeking children in the last years and have made efforts to address the situation of this group through different policies, instruments and judgments where the treatment of these minors has been considered. This chapter will analyse the regional systems in both continents, while examining the applicable law under the Council of Europe, European Union and Inter-American system.<sup>149</sup> In pursuance of analysing the level of protection of regional standards and their compliance with universal standards, the principles of the global system analysed under the previous chapter will be taken into consideration in order to determine if regional systems respect, reduce or expand the standards of protection established at the international level.

In light of the above, it would be important to stress before starting with the analysis at the regional level, that every legal regime related to the determination of children's asylum claims shall consider the provisions of international human rights

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<sup>148</sup> *Mi dissero “vai”* by Grazia Maria Pallescchia.

<sup>149</sup> See for further readings regarding these three regional systems- among others- Hart W. James, *The European Human Rights System*, 102 Law Libr. J. 533, 2010; Costello Cathryn, *The Human Rights of Migrants and Refugees in European Law*, Oxford University Press, 2016; Medina Quiroga C., *The Inter-American System for the Protection of Human Rights*, in *International Protection of Human Rights: A Textbook*, Krause C. & Scheinin M. (eds.), Åbo Akademi University Institute for Human Rights, 2009, pp. 475-501, and Goldman R. K., *History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights*, 31 Human Rights Quarterly, 2009, pp. 856-887.

instruments.<sup>150</sup> Consequently, while analysing the protection at the regional level, general regional treaties should be taken into consideration in conjunction with international human rights treaties such as the international bill of human rights. Additionally, special attention should be given to the provisions of the Convention on the Rights of the Child regarding the protection of children as asylum seekers examined on the previous chapter.<sup>151</sup>

### **3.1 General overview of the situation of unaccompanied children in Europe**

As stated earlier,<sup>152</sup> the number of unaccompanied children seeking asylum in Europe has increased significantly in recent years, including overall unaccompanied minors from Afghanistan, Iraq and African countries.<sup>153</sup> In this context, the growing amount of unaccompanied minors arriving or moving internally in Europe constitutes undoubtedly important challenges for all European States.<sup>154</sup> Therefore, it would be important to highlight that even if some States are more affected than others by the arrivals of unaccompanied children, all European States are experiencing this phenomenon.<sup>155</sup>

Further, children take extremely dangerous routes in order to reach Europe and suffer continuous human rights' violations in their journey such as sexual abuse, exploitation, violence, trafficking and mistreatment from smugglers.<sup>156</sup> In light of

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<sup>150</sup> As Bhabha stressed: "Any framework for the adjudication of children's rights asylum claims must consider the provisions of international human rights instruments. These instruments have become increasingly important in interpreting the obligations of states toward their citizens and, by extension, the obligations of host states toward individuals seeking asylum." Cf. Bhabha et al., 1999, *supra* note 4, p. 93.

<sup>151</sup> *Ibid.*

<sup>152</sup> See Chapter I, Section I.

<sup>153</sup> See European Union: European Commission, *Communication from the Commission to the European Parliament and the Council. Action Plan on Unaccompanied Minors (2010-2014)* [hereinafter EU Action Plan on Unaccompanied Minors (2010-2014)], 6 May 2010, COM (2010) 213/3, para.1.

<sup>154</sup> See UNHCR, *Safe & Sound: What States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, October 2014, p.7. See for an overview of the situation of refugee and migrant children in Europe: Council of Europe, Committee of Ministers, *Thematic Report on migrant and refugee children Prepared by the Special Representative of the Secretary General on migration and refugees*, SG/Inf (2017) 13, 10 March 2017.

<sup>155</sup> See EU Action Plan on Unaccompanied Minors (2010-2014), *supra* note 153, para.1. See also among others- Ferrara, Pietro et al., *The "Invisible Children": Uncertain Future of Unaccompanied Minor Migrants in Europe*, Journal of Pediatrics, Vol. 169, Issue 1, 2016 and Feijen Liv, *The Challenges of Ensuring Protection to Unaccompanied and Separated Children in Composite Flows in Europe*, Refugee Survey Quarterly, Vol. 27, No. 4, 2009.

<sup>156</sup> See the Children, *European Refugee Crisis: Programme and Advocacy Report*, 28 February 2017, p. 1.

this, it is of high importance that European States offer protection to these children immediately upon arrival. However, the actual reality is far from the expected, as the lack of protection, inadequate information and prolonged detention shows the failure of many European States towards unaccompanied children.<sup>157</sup>

Lastly, the reasons behind child immigration in Europe are several and include persecution, human trafficking, family reunification, the search for better opportunities, escape from wars and conflicts, poverty, natural disasters and discrimination.<sup>158</sup> In this context, Sweden, Germany and the United Kingdom are the main receiving States of unaccompanied children, where the majority are male teenagers from Afghanistan, Somalia, Syria and Eritrea.<sup>159</sup>

### 3.2 Council of Europe

Bearing in mind that all European States have ratified the Convention on the Rights of the Child, one should remember during the examination of regional instruments at this level that the implementation of the Council of Europe framework takes place within the universal standards analysed in the previous chapter.<sup>160</sup>

To begin with, many binding instruments under the Council of Europe<sup>161</sup> legal framework contain the fundamental principles of the best interest of the child, non-discrimination and right of the child to express his or her views and to be consulted on all matters that affect them.<sup>162</sup> Additionally, the Parliamentary Assembly has as well made reference to these principles in many non-binding documents. To this regard, it has expressed that the best interest principle must be a primary consideration in all actions regarding children, independently of the child's

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<sup>157</sup> *Ibid.*

<sup>158</sup> See e.g. ECRE, 2014, *supra* note 17, p.17. See also EU Action Plan on Unaccompanied Minors (2010-2014), *supra* note 153, para.1.

<sup>159</sup> See ECRE, 2014, *supra* note 17, p.18.

<sup>160</sup> *Ibid.*, p.11.

<sup>161</sup> See for further readings regarding the Council of Europe system-among others- Tănăsescu, Tudor, *The Council of Europe and its mechanisms for Protecting and Guaranteeing Human Rights*, Agora International Journal of Juridical Sciences, Issue 2, 2016, pp. 23-33 and Hammarberg Thomas, *Council of Europe as an Instrument for Human Rights- Seminar at Utrecht University, 13 March, 2014*, Netherlands Quarterly of Human Rights, June 2014, Vol. 32 Issue 2, pp. 214-219.

<sup>162</sup> See e.g. ECHR (Article 14), Council of Europe Convention on Action against Trafficking in Human Beings (Articles 3, 10, 28), European Convention on the Exercise of Children's Rights (Preamble, Articles 1, 3, 6, 10).

migration status,<sup>163</sup> and it has required States to ensure that unaccompanied children are heard in immigration proceedings.<sup>164</sup>

Special emphasis has been made to these principles also under the Guidelines on Child-Friendly Justice, where States are required to guarantee effective implementation of the principle of best interest of the child in all matters affecting children,<sup>165</sup> secure that children's rights are guaranteed without discrimination,<sup>166</sup> and respect the right of the children to be heard and express their views.<sup>167</sup> Furthermore, all professionals working in contact with children under judicial procedures (which includes as well legal representatives) shall be adequately trained in order to assess the best interest of the child in all type of proceedings.<sup>168</sup>

### *3.2.1 Unaccompanied children's right to legal assistance under the Council of Europe legal framework*

Children's right to legal representation is contained in several instruments under the Council of Europe framework, such as the European Social Charter,<sup>169</sup> which contains the right of children to legal protection in Article 17.<sup>170</sup> Additionally, the European Convention on the Exercise of Children's Rights<sup>171</sup> includes the right of children to be informed and to express their views in judicial procedures,<sup>172</sup> and the right to apply for the appointment of a representative in judicial proceedings.<sup>173</sup>

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<sup>163</sup> See Council of Europe, Parliamentary Assembly, Resolution 1810, Unaccompanied children in Europe: issues of arrival, stay and return, 21 March 2011, para. 5.2.

<sup>164</sup> See Council of Europe, Parliamentary Assembly, Recommendation 1703 (2005) Protection and assistance for separated children seeking asylum, 28 April 2005, Rec 1703 (2005), para. 9.2.e.

<sup>165</sup> See Council of Europe, Committee of Ministers, Guidelines on Child-Friendly Justice, 17 November 2010, p. 18.

<sup>166</sup> *Ibid.*, p. 19.

<sup>167</sup> *Ibid.*, p. 28.

<sup>168</sup> *Ibid.*, p. 34.

<sup>169</sup> Council of Europe, *European Social Charter* (Revised), 3 May 1996, ETS 163.

<sup>170</sup> *Ibid.*, Article 17 establishes that: "(...) the Parties undertake, either directly or in co-operation with public and private organizations, to take all appropriate and necessary measures designed: (...) 1.c. to provide protection and special aid from the state for children and young persons temporarily or definitively deprived of their family's support".

<sup>171</sup> Council of Europe, *European Convention on the Exercise of Children's Rights*, 25 January 1996, ETS 160.

<sup>172</sup> *Ibid.*, Article 3 refers to the right of the child to be informed and to express his or her views in proceedings. This provision reads as follows: "A child considered by internal law as having sufficient understanding, in the case of proceedings before a judicial authority affecting him or her, shall be granted, and shall be entitled to request, the following rights:(a) to receive all relevant information; (b) to be consulted and express his or her views; (c) to be informed of the possible consequences of compliance with these views and the possible consequences of any decision."

<sup>173</sup> *Ibid.*, Article 4-which refers to the right to apply for the appointment of a special representative-states: "1. Subject to Article 9, the child shall have the right to apply, in person or through other persons or bodies, for a special representative in proceedings before a judicial authority affecting the child where

Furthermore, the roles of representatives are also described under Article 10, establishing that legal advisors should provide information and explanations to the child and present his or her views during the proceeding.<sup>174</sup> It is worth mentioning nevertheless that this Convention has not yet been ratified by many Member States of the Council of Europe, and consequently, only a few States are bound by its terms.<sup>175</sup>

With regards in particular to unaccompanied children, this group is expressly mentioned in the Council of Europe Convention on Action Against Trafficking in Human Beings<sup>176</sup> under Article 10 paragraph (4) which expresses that as soon as an unaccompanied minor is identified as a victim of trafficking, States must provide representation “by a legal guardian, organisation or authority which shall act in the best interests of that child”.<sup>177</sup>

In addition, the Council of Europe has adopted several non-binding instruments in relation to children’s procedural safeguards. In reference to child-friendly justice, it has established that minors are entitled to free legal aid,<sup>178</sup> and that children’s legal representatives should be trained in children’s rights and children’s specific issues.<sup>179</sup> Also, they should receive continuous instruction and be able to communicate with

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internal law precludes the holders of parental responsibilities from representing the child as a result of a conflict of interest with the latter.2. States are free to limit the right in”.

<sup>174</sup> *Ibid.* Article 10 states: “1. In the case of proceedings before a judicial authority affecting a child the representative shall, unless this would be manifestly contrary to the best interests of the child: (a) provide all relevant information to the child, if the child is considered by internal law as having sufficient understanding; (b) provide explanations to the child if the child is considered by internal law as having sufficient understanding, concerning the possible consequences of compliance with his or her views and the possible consequences of any action by the representative;(c) determine the views of the child and present these views to the judicial authority.”

<sup>175</sup> The Convention has been ratified by twenty States: Albania, Austria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Italy, Latvia, Malta, Montenegro, Poland, Portugal, Slovenia, Spain, The Former Yugoslav Republic of Macedonia, Turkey and Ukraine.

For the current status of ratifications see: <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/160/signatures>.

<sup>176</sup> Council of Europe, Convention on Action Against Trafficking in Human Beings, 16 May 2005, CETS 197. The Convention entered into force 1 February 2008 and has been ratified by 47 States: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxemburg, Malta, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Republic of Moldova, Romania, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, The Former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom and Belarus.

For the current status of ratifications see: <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/197/signatures>.

<sup>177</sup> Cf. Council of Europe, Convention on Action Against Trafficking in Human Beings, Article 10 (4) (a).

<sup>178</sup> See Council of Europe, Committee of Ministers, Guidelines on Child-Friendly Justice, 17 November 2010, p. 27.

<sup>179</sup> *Ibid.*

children in a way they can easily understand each other.<sup>180</sup> After judicial proceedings, it is further required for the legal representative to explain the final decision to the child in a comprehensible way for the minor and to communicate possible future measures such as appeals or complaint mechanisms.<sup>181</sup>

Strictly in relation to asylum procedures and unaccompanied children, further standards of protection can be found among the Council's recommendations to Member States where it has recognized explicitly the right to legal assistance for asylum seekers. In this regard, States are encouraged to amend their domestic legislation and remove possible obstacles in relation to legal representation of unaccompanied children so that legal advisors are appointed "as a matter of urgency and not later than two weeks of their presence coming to the knowledge of the authorities".<sup>182</sup> In other words, legal assistance should be provided with no delay to unaccompanied children,<sup>183</sup> and, even more importantly, unaccompanied children in asylum proceedings "must be represented by a lawyer in addition to a guardian, provided free of charge by the state".<sup>184</sup>

Additionally, the Parliamentary Assembly has also recommended States to establish a system which ensures constant availability of "independent legal advice and representation" in relation to migration proceedings at seaports and coastal zones.<sup>185</sup> Furthermore, it has advised States as well to monitor the quality of such representation.<sup>186</sup>

In relation to asylum seekers in detention, the Parliamentary Assembly has additionally highlighted the necessity of legal representation by establishing that asylum seekers who are detained shall be offered "effective access to legal advice, assistance and representation of a sufficient quality" and this representation shall be free of charge.<sup>187</sup> Moreover, in the context of accelerated asylum procedures, the

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<sup>180</sup> *Ibid.*

<sup>181</sup> *Ibid.*, p. 31.

<sup>182</sup> *Cf.* Council of Europe: Parliamentary Assembly, Recommendation 1703 (2005) Protection and assistance for separated children seeking asylum, 28 April 2005, Rec 1703 (2005), para. 9 (d).

<sup>183</sup> Council of Europe, Parliamentary Assembly, Resolution 1810, Unaccompanied children in Europe: issues of arrival, stay and return, 2011, para. 5 (6).

<sup>184</sup> *Cf. Ibid.*, para. 5 (8).

<sup>185</sup> *See* Council of Europe, Parliamentary Assembly, Recommendation 1645, Access to assistance and protection for asylum-seekers at European seaports and coastal areas, 2004, para. 10 (3) (c).

<sup>186</sup> *Ibid.*

<sup>187</sup> *Cf.* Council of Europe, Parliamentary Assembly, Resolution 1707, Detention of asylum seekers and irregular migrants in Europe, 2010, para. 9 (2) (9).

Parliamentary Assembly has also recognized the right to legal assistance by recommending States to ensure all asylum seekers: “the possibility of free legal aid at the first instance hearing and throughout the appeal process”.<sup>188</sup>

### 3.2.2 European Court of Human Rights

All States in the Council of Europe are parties to the European Convention on Human Rights<sup>189</sup> (hereinafter referred to also as the European Convention) and are required to admit the jurisdiction of the European Court of Human Rights (hereinafter referred to also as the European Court or the Court).<sup>190</sup>

The right to legal assistance contained in Article 6<sup>191</sup> of the European Convention ensures as well a fair hearing and access to justice.<sup>192</sup> The Court has an extensive jurisprudence in relation to the right to free legal assistance and it has held in several cases that Article 6 establishes a positive obligation upon States to guarantee free legal assistance if representation is necessary based on the complexity of the case, the ability of the applicant to represent his or her interests and the gravity on what it is involved for the applicant.<sup>193</sup> In this regard, the Court has taken in consideration, for example, in *Airey v. Ireland*<sup>194</sup> the specific position of the applicant, who could not afford legal representation and was part of a marital dispute which entailed emotive nature and complicated law.<sup>195</sup> In fact, the Court has also referred to the complexity of the case by expressing that Article 6 “may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to Court either because legal representation is rendered

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<sup>188</sup> Cf. Council of Europe, Parliamentary Assembly, Resolution 1471, Accelerated Asylum Procedures in Council of Europe Member States, 2005, para. 8 (11).

<sup>189</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5.

<sup>190</sup> See Guild, Elspeth, *The Asylum Seeker’s Right to Free Legal Assistance and /or Representation in EU law* [hereinafter Guild, 2015], in *Issues in International Migration Law*, Plender, Richard (ed.), Brill Nijhoff, 2015, pp. 279-280. See for further readings regarding the European Court of Human Rights-among others-Visan, Oana M., *Jurisdictional Mechanism of the Council of Europe-The European Court of Human Rights*, *Revista de Drept Public*, Vol. 2012, Supplement Issue (2012), pp. 101-110.

<sup>191</sup> ECHR, Article 6 establishes that: “(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”.

<sup>192</sup> See Borland Emma, *Fair enough? The UK’s Reluctance to Find Article 6 ECHR Engaged in Asylum Disputes and the Transformative Potential of EU Law* [hereinafter Borland, 2015] in *Seeking Asylum in the European Union: Selected Protection Issues Raised by the Second Phase of the Common Asylum System*, Bauoloz et al. (eds.), Brill Nijhoff, 2015, p. 33.

<sup>193</sup> *Ibid.*

<sup>194</sup> *Airey v. Ireland*, Judgment of 9 October 1979, ECtHR, Application No. 6289/73.

<sup>195</sup> *Ibid.*, para.24.

compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case”.<sup>196</sup> Further, in *P, C and S v. United Kingdom*,<sup>197</sup> the Court has as well found a violation of Article 6 based on the lack of free legal aid in relation to the complexity of the proceedings and the emotional involvements of the applicants. Indeed, in the views of this regional tribunal: “Failure to provide an applicant with the assistance of a lawyer may breach this provision (article 6.1) where such assistance is indispensable for effective access to court, either because legal representation is rendered compulsory (...) or by reason of the complexity of the procedure or the type of case”.<sup>198</sup>

Nevertheless, despite this positive jurisprudence regarding the right to be assisted by a legal representative, the Court has so far refused to accept that the rights contained under Article 6 are applicable to immigration and asylum procedures.<sup>199</sup> Accordingly, the Court has supported this argument by referring to the application of Protocol 7 instead where procedural guarantees are provided in cases of expulsion of aliens.<sup>200</sup> In this sense, the Court has claimed in *Maaouia v. France*<sup>201</sup> that the provisions of the Convention should be read in the context of the entire Convention system and concluded therefore that the special measures contained in Protocol 7 show how States did not intend to provide to aliens the protection guaranteed by Article 6.<sup>202</sup>

In the aforementioned case of *Maaouia v. France*, the Court examined for the first time the applicability of Article 6 to expulsion proceedings.<sup>203</sup> Even if the right to representation in this thesis is examined under asylum procedures and not regarding expulsion procedures, it is nevertheless worth to mention the decision of the Court in this case as it refers to the application of Article 6 in an immigration context in general and not only regarding expulsions. In fact, according to the Court: “decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant’s civil rights or obligations or of a criminal charge against him, within

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<sup>196</sup> *Cf. Ibid.*, para. 26.

<sup>197</sup> *P.C and S. v. United Kingdom*, Judgment of 16 July 2002, ECtHR, Application No. 56547/00.

<sup>198</sup> *Cf. Ibid.*, para. 89.

<sup>199</sup> *See Guild*, 2015, *supra* note 190, p. 280.

<sup>200</sup> *Ibid.*

<sup>201</sup> *Maaouia v. France*, Judgment of 5 October 2000, ECtHR, Application No. 39652/98.

<sup>202</sup> *Ibid.*, paras. 36- 37.

<sup>203</sup> *See Borland*, 2015, *supra* note 192, p.43.

the meaning of article 6(1) of the ECHR”.<sup>204</sup> This decision has as well been confirmed in *SS v. United Kingdom*<sup>205</sup> where the Court repeated its reasoning regarding the application of Article 6.<sup>206</sup>

Notwithstanding this negative position of the European Court regarding the application of Article 6 in immigration proceedings, it is noteworthy to consider as well other pronouncements of this regional tribunal regarding the application of Article 13-right to an effective remedy- in immigration proceedings.<sup>207</sup> In this context, the Court has acknowledged that several procedural obstacles such as lack of representation can result in a violation of Article 13. To this regard, the Court has identified in the case of *Adboklhani and Kariminia v. Turkey*<sup>208</sup> a violation of said provision in the context of asylum procedures based on- but not exclusively- the lack of legal assistance of the applicant during detention.<sup>209</sup>

Further, in *MSS v. Belgium and Greece*,<sup>210</sup> the Court identified several deficiencies in the access to the first instance of the asylum proceedings in Greece, among which it highlighted “the lack of legal aid effectively depriving the asylum seekers of legal counsel”.<sup>211</sup> Also, in *Hirsi Jamaa and Others v. Italy*,<sup>212</sup> the Court mentioned that while preventing irregular migrants to disembark in Italy, Italian authorities did not provide any type of identification procedure and there was no interpreter or legal advisors among the personnel on the military ships.<sup>213</sup>

In fact, it would be important to notice how this last jurisprudence shows that even if the Court has expressly denied the application of Article 6 and the recognition of the entitlement of the right to legal representation under this provision in asylum procedures, it has also acknowledged the lack of representation as a predominant factor while analysing the right to a fair remedy. These last decisions show concern from the European Court regarding the necessity of free legal assistance and the lack

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<sup>204</sup> *Cf. Maaouia v. France*, para. 40.

<sup>205</sup> *SS v. United Kingdom*, Judgment of 24 January 2012, ECtHR, Application No. 12096/10.

<sup>206</sup> *Ibid.*, para. 85.

<sup>207</sup> ECHR, Article 13 states: “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

<sup>208</sup> *Abdolkhani and Kariminia v. Turkey*, Judgment of 22 September 2009, ECtHR, Application No. 30471/08.

<sup>209</sup> *Ibid.*, paras. 114-115.

<sup>210</sup> *M.S.S. v. Belgium and Greece*, Judgment of 21 January 2011, ECtHR, Application No. 30696/09.

<sup>211</sup> *Cf. Ibid.*, para. 301.

<sup>212</sup> *Hirsi Jamaa and Others v. Italy*, Judgment of 23 February 2012, ECtHR, Application No. 27765/09.

<sup>213</sup> *Ibid.*, paras. 185, 202.

of access to legal representation during asylum procedures, especially when asylum seekers are held in detention.<sup>214</sup>

Lastly, the Court has referred specifically to unaccompanied children's representation in *Mubilanzalila Mayeka and Kaniki Mitunga v. Belgium*,<sup>215</sup> where an unaccompanied five-year old child was not assigned any representative while held in detention in the same conditions as adults for two months.<sup>216</sup> The fact that the Court prioritized in its reasoning the guarantees enshrined in the European Convention and adopted consequently a human rights approach to an immigration case, makes this decision remarkable and different from previous judgments.<sup>217</sup> In this sense, the Court specially acknowledged the lack of adequate legal representation by expressing that: "No measures were taken to ensure that she received proper counselling and educational assistance from qualified personnel specially mandated for that purpose".<sup>218</sup> In this case the Court found a violation of Article 3 of the European Convention, as a consequence of the great suffering of the child caused by the lack of protection by the Belgian authorities.<sup>219</sup>

### 3.2.3 Concluding remarks

Overall, the analysis of the applicable legal framework under the Council of Europe system shows clear differences between the standards of protection enshrined in binding norms and those established through documents and recommendations from the Parliamentary Assembly. In this regard, it is important to notice that the universal principles have been incorporated to many binding instruments under this regime but there is no specific provision in regional instruments regarding legal representation of asylum-seeking children. In addition, the only instrument specifically orientated towards the protection of children's rights - the European Convention on the Exercise of Children's Rights - has only been ratified by a few number of States.

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<sup>214</sup> See Guild, 2015, *supra* note 190, p. 280.

<sup>215</sup> *Mubilanzalila Mayeka and Kaniki Mitunga v. Belgium*, Judgment of 12 October 2006, ECtHR, Application No. 13178/03.

<sup>216</sup> *Ibid.*, para. 50.

<sup>217</sup> For the commentaries that this case has generated among scholars, see – among others- Dembour, Marie-Bénédicte, *When Humans become Migrants. Study of the European Court of Human Rights with an Inter-American Counterpoint* [hereinafter Dembour, 2015], Oxford University Press, 2015, p.387 et seq.

<sup>218</sup> Cf. *Mubilanzalila Mayeka and Kaniki Mitunga v. Belgium*, para 50.

<sup>219</sup> *Ibid.*, paras. 58-59. See also Papademetriou, Theresa, *European Union: Status of Unaccompanied Children Arriving at the EU borders*, The Law Library Congress, 2014, p. 16.

Nevertheless, despite of the lack of binding standards of protection regarding legal representation of asylum seekers at this level, it is worth to take into consideration the labour of the Parliamentary Assembly where child- friendly justice standards in judicial proceedings have been established including as well the right of unaccompanied children to legal assistance.<sup>220</sup> Hopefully these developments will be part in the near future of binding regulations. Additionally, a Council of Europe action plan focusing on unaccompanied children and setting clear guidelines regarding specific areas of protection such as legal representation will definitely improve the situation of these children.

### 3.3 European Union

The European Union contains a body of law which regulates the procedural aspects of the asylum procedures, where directives, resolutions and recommendations seek to address many aspects related to immigration such as the situation of unaccompanied children, reception of asylum seekers, asylum proceedings and conditions for detention.<sup>221</sup> Additionally, as stated earlier, all Member States have ratified the Convention of the Rights of the Child, and are complied simultaneously by universal standards.

#### 3.3.1 Unaccompanied children's right to legal assistance under EU law

Under the Charter of Fundamental Rights of the European Union,<sup>222</sup> Article 18 includes the right to asylum,<sup>223</sup> and Article 24 includes the best interest of the child principle and the right of the child to express his or her views freely.<sup>224</sup> Further,

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<sup>220</sup> See e.g. Council of Europe: Parliamentary Assembly, Recommendation 1703 (2005) Protection and assistance for separated children seeking asylum, 28 April 2005, Rec 1703 (2005). See also Council of Europe, Parliamentary Assembly, Resolution 1810, Unaccompanied children in Europe: issues of arrival, stay and return, 2011 and Council of Europe, Parliamentary Assembly, Recommendation 1645, Access to assistance and protection for asylum-seekers at European seaports and coastal areas, 2004.

<sup>221</sup> See Guild, 2015, *supra* note 190, p. 262 and King, 2013, *supra* note 14, p. 357. For an in deep study in this matter see- among others- Cherubini Francesco, *Asylum law in the European Union*, Routledge, 2015.

<sup>222</sup> European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02.

<sup>223</sup> *Ibid.*, Article 18 states: "The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community".

<sup>224</sup> *Ibid.*, Article 24 establishes that: "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...."

Article 47 refers to the right to an effective remedy and to a fair trial. In fact, this provision includes explicitly the right to legal aid: “Everyone shall have the possibility of being advised, defended and represented”. Further, this Article establishes as well that legal aid should be provided “for those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice”.

Regarding to asylum procedures, under the Common European Asylum System (CEAS) many directives have been issued with the objective of setting standards of protection for the processing of asylum claims.<sup>225</sup> Among these instruments, it is worth mentioning the Procedure Directive (2005/85/EC),<sup>226</sup> Antitrafficking Directive (2011/36/EU),<sup>227</sup> Recast Qualification Directive (2011/95/EU),<sup>228</sup> Recast Reception Conditions Directive (2013/33/EU)<sup>229</sup> and Recast Asylum Procedures Directive (2013/32/EU)<sup>230</sup>. In fact, it will be important to highlight that all these Directives include the best interest of the child as a primary consideration in immigration procedures.<sup>231</sup>

To begin with, the *Procedures Directive* establishes minimum standards that all Member States should apply in asylum proceedings, remaining States of course free to establish higher standards at the national level but under any circumstance lower standards.<sup>232</sup> The right to legal assistance and representation is contained in Article 15 where asylum seekers are entitled to consult legal advisors at their own cost,<sup>233</sup> and free legal aid is guaranteed only in the appeal stage after the asylum application is refused.<sup>234</sup> In addition, this provision includes a number of limitations to this

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<sup>225</sup> See Borland, 2015, *supra* note 192, p. 35.

<sup>226</sup> EU: Council of the European Union, Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status.

<sup>227</sup> EU: Council of the European Union, Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combatting trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

<sup>228</sup> EU: Council of the European Union, 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 of refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).

<sup>229</sup> EU: Council of the European Union, Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).

<sup>230</sup> EU: Council of the European Union, 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).

<sup>231</sup> See e.g. Directive 2005/85/EC, *supra* note 226, (Preamble 14, article 17.6), Directive 2011/36/EU, *supra* note 227, (Preamble 8, 22, 23, Articles 13,16), Directive 2011/95/EU, *supra* note 228, (Preamble 18,38, Article 20).

<sup>232</sup> See Guild, 2015, *supra* note 190, p. 268.

<sup>233</sup> See *Procedures Directive*, *supra* note 227, Article 15 (1).

<sup>234</sup> *Ibid.*, Article 15 (2).

right,<sup>235</sup> by for example granting States the possibility not to provide for legal assistance under the merits test or to offer free assistance only to those applicants who lack sufficient resources. As this directive does not clarify adequately what is the extent of sufficient resources in order to be entitled to free legal aid, this restriction can result in different interpretations at the national level,<sup>236</sup> and in consequence, in an arbitrary restriction of the right to legal assistance.<sup>237</sup> Something similar could occur with the lack of clarification regarding the merits test which can lead to limitations in the exercise of this fundamental right affecting as well the right to access to justice.<sup>238</sup>

Consequently, the restrictions contained under this provision to the right to legal assistance generate an obvious number of issues in relation to the effective exercise of this right. Is this Article consistent with the universal standards previously analysed where all asylum seekers, and especially unaccompanied minors, are recognized the right to be represented by a legal advisor from the very beginning of the asylum procedure? If all EU States are complied by the universal system to recognize that asylum seekers are entitled to legal assistance, is it consistent to guarantee this right at the initial stages of the procedure only to those who can afford such assistance? Additionally, is it enough only to guarantee legal assistance under the appeal stage?

Further, under Article 16 it is established that legal advisors shall have access to the information contained under the applicant's file,<sup>239</sup> and access to closed areas including detention centres and transit zones in order to meet with asylum seekers.<sup>240</sup> However, in relation to the personal interviews, this provision allows the possibility to proceed with personal interviews even if the legal assistant is not present.<sup>241</sup>

Additionally, and even more important in the context of this thesis, is Article 17 where unaccompanied children are specifically mentioned. In fact, under this provision, States are obliged to appoint a representative for these group of minors as soon as possible. Nevertheless, States may also refrain from appointing a

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<sup>235</sup> *Ibid.*, Article 15 (3).

<sup>236</sup> See ECRE/ ELENA, 2010, *supra* note 18, p. 27.

<sup>237</sup> See Guild, 2015, *supra* note 190, p.270.

<sup>238</sup> See ECRE/ ELENA, 2010, *supra* note 18, p. 30.

<sup>239</sup> See *Procedures Directive*, *supra* note 226 , Article 16 (1).

<sup>240</sup> *Ibid.*, Article 16 (2).

<sup>241</sup> *Ibid.*, Article 16 (3).

representative in a number of situations such as when the minor is likely to reach the age of maturity,<sup>242</sup> when he or she can avail himself free of charge of a legal advisor,<sup>243</sup> or when the minor is married or has been married.<sup>244</sup> These limitations have been highly questioned, specially the third one as the fact whether the unaccompanied child is married or not, does not influence the level of maturity of the minor and could as well be related to fear of persecution.<sup>245</sup> Additionally, these restrictions lower the protection guaranteed at the universal level, as under the global regime children are entitled to a legal representative even when their applications are processed in the same way as adults and States are required to provide representation to minors immediately upon arrival.<sup>246</sup> Consequently, under this directive, the standards of protection are lower while providing for representation “as soon as possible”- a term that could easily be manipulated by States- and additionally as stated above, the number of restrictions contained under several provisions can affect the adequate exercise of this right.

The *Recast Asylum Procedures Directive* makes a number of modifications in relation to the right to legal assistance. Under this new directive, States are required to provide legal and procedural information free of charge referring to the specific circumstances of the applicant at first instance.<sup>247</sup> In addition, free legal assistance has to be provided at appeal stages, upon the applicant’s request.<sup>248</sup> Also, as in the previous directive, legal representatives should have access to the information in the applicant’s file and should be able to enter detention facilities and transit zones in order to meet the applicant.<sup>249</sup>

Unaccompanied children are expressly mentioned in this directive. To this regard, under Article 25, unaccompanied minors should be provided with a legal representative as soon as possible. Once again, the same term “as soon as possible”

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<sup>242</sup> *Ibid.*, Article 17 (2) (a).

<sup>243</sup> *Ibid.*, Article 17 (2) (b).

<sup>244</sup> *Ibid.*, Article 17 (2) (c).

<sup>245</sup> See ECRE/ ELENA, 2010, *supra* note 18, pp. 62-63.

<sup>246</sup> See above, Sections 2.1 and 2.2. See also CRC General Comment No. 6, *supra* note 12, para. 69 and UNHCR, Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, 1997, para. 4.2.

<sup>247</sup> *Recast Asylum Procedures Directive*, *supra* note 230, Article 19 (1).

<sup>248</sup> *Ibid.*, Article 20 (1).

<sup>249</sup> *Ibid.*, Article 23(1)- (2). Further, Article 2 (n) states: “representative means a person or an organization 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.”

appears under EU law lowering the universal standards as “upon arrival” offers undoubtedly a higher level of protection than “as soon as possible”. In fact, as stated earlier, States can interpret the phrase “as soon as possible” in different ways considering different circumstances and/or excuses to retard the appointment of representatives. In this sense, Article 25 establishes the following:

- The representative shall perform his or her duties in accordance with the best interest of the child and shall be specifically trained in light of this principle.
- The representative shall explain the child how to prepare for the personal interview and inform about possible consequences of such interview.
- The representative shall be present during the personal interview of the minor and be able to intervene with questions and suggestions.
- Both the unaccompanied child and the representatives shall be provided by the State with procedural and legal information free of charge.

Also, the *Anti-Trafficking Directive* requires States to assure assistance, support measures in conjunction with durable solutions based on the best interest of the child and the appointment of a guardian and/or representative when necessary for unaccompanied children victims of trafficking.<sup>250</sup> Equally, the *Recast Qualification Directive*, also mentions under Article 20 that Member States should take into account the special situation of unaccompanied children and the principle of the best interest of the child as a primary consideration.

Further, the *Recast Reception Directive*, refers to asylum seekers right to legal representation under different circumstances. Accordingly, the right to legal representation during detention is mentioned under Article 9. This provision acknowledges, for instance, applicants’ right to be informed regarding the possibility to request free legal aid,<sup>251</sup> and the obligation of States to ensure free legal assistance in cases of judicial review of the detention order.<sup>252</sup> Additionally, it includes restrictions to the provision of free legal representation such as the lack of sufficient resources.<sup>253</sup> In reference to accommodation, Article 18 includes States’ obligation to ensure that legal assistants have communication with the applicants in the accommodation centres,<sup>254</sup> and access to these premises in order to assist the asylum

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<sup>250</sup> *Antitrafficking Directive*, *supra* note 227, Article 16.

<sup>251</sup> *Recast Reception Directive*, *supra* note 229, Article 9 (4).

<sup>252</sup> *Ibid.*, Article 9 (6).

<sup>253</sup> *Ibid.*, Article 9 (7).

<sup>254</sup> *Ibid.*, Article 18 (2) (b).

seekers.<sup>255</sup> In addition, unaccompanied children's right to legal representation during asylum procedures is expressly mentioned under Article 24 paragraph (1) with the same wording as Article 25 paragraph (a) of the Recast Asylum Procedures Directive. Further, Article 26 includes the right to legal representation in appeals where States are obliged to ensure free legal representation upon request.<sup>256</sup> However, once again restrictions such as the lack of sufficient resources are also included.<sup>257</sup>

The only instrument under the EU framework that is dedicated specifically to unaccompanied children is the *Council Resolution on unaccompanied minors who are nationals of third countries*.<sup>258</sup> However, it would be important to highlight that this resolution has non-binding force,<sup>259</sup> and additionally, the protective standards contained under its provisions are not sufficient and relatively low.<sup>260</sup>

In this context, this resolution recognized that unaccompanied minors are entitled to necessary protection and basic care,<sup>261</sup> and in relation to representation, it has established that unaccompanied minors need the assistance of a legal guardian, adult representative or institution in order to apply for asylum.<sup>262</sup> In addition, during all interviews of the procedure, unaccompanied minors shall be accompanied by the legal guardian, adult representative, institution or legal advisor.<sup>263</sup> In this sense, this resolution acknowledges in a broad manner unaccompanied children's necessity to be represented but the specific aspects of representation are left to the discretion of Member States at the domestic level.<sup>264</sup>

Lastly, it is worth mentioning the *EU Action Plan on Unaccompanied Minors (2010-2014)*, where the European Commission highlighted how EU legislation does not include the appointment of a representative for unaccompanied minors from the

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<sup>255</sup> *Ibid.*, Article 18 (2) (c).

<sup>256</sup> *Ibid.*, Article 26 (2).

<sup>257</sup> *Ibid.*, Article 26 (3).

<sup>258</sup> Council resolution of 26 June 1997 on unaccompanied minors who are nationals of third countries (97/C 221 /03).

<sup>259</sup> See Farrugia Ruth et al., *The international protection of unaccompanied and separated migrant and asylum-seeking children in Europe* [hereinafter Farrugia et al., 2010], in *Migrating Alone: Unaccompanied and Separated Children's Migration to Europe*, Kanics Jyothi et al. (eds.), UNESCO, 2010, p. 43.

<sup>260</sup> *Ibid.*, p. 44.

<sup>261</sup> See Council resolution of 26 June 1997 on unaccompanied minors who are nationals of third countries (97/C 221 /03), Article 3 (2).

<sup>262</sup> *Ibid.*, Article 4 (1).

<sup>263</sup> *Ibid.*, Article 4 (5) (a).

<sup>264</sup> See Farrugia et al., 2010, *supra* note 259, p.45.

moment they are detected by authorities as representation is only guaranteed for asylum applicants.<sup>265</sup>

### 3.3.2 Concluding remarks

The analysis of the EU legal framework shows that EU policies and legislation cover many aspects of children's rights during asylum proceedings and that important progress has been made in the applicable legal framework for the protection of children in migration.<sup>266</sup> Nevertheless, with regards to legal representation of unaccompanied children, even if EU law contains some general standards regarding legal assistance- such as Article 25 of the Recast Asylum Procedure Directive- States have an important margin of interpretation, and many aspects of representation are therefore decided at the national level.<sup>267</sup> In this context, specific and coordinated actions and a comprehensive legal framework regarding unaccompanied children and representation are needed. In addition, while the Action Plan on Unaccompanied Children (2010-2014) has raised awareness regarding the situation of this vulnerable group, a new EU Action Plan on Unaccompanied Children is needed in order to adequately address the present challenges and improvements needed for the protection of unaccompanied children.

## 3.4 General overview of the situation of unaccompanied minors in the Americas

The migration of children constitutes a current regional phenomenon in the Americas affecting children in their countries of origin, transit and destination.<sup>268</sup> In this context, Honduras, Guatemala and El Salvador (as sending countries), Mexico (as both transit and destination country) and the United States (principal country of destination in the region for unaccompanied minors) are the most affected States by the intensity and quantity of child migration.<sup>269</sup> In fact, even if the crisis affecting

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<sup>265</sup> See *EU Action Plan on Unaccompanied Minors (2010-2014)*, *supra* note 153, para. 4 (1).

<sup>266</sup> See for an in deep study in this matter: European Union: European Commission, Communication from the Commission to the European Parliament and the Council- The protection of children in migration, COM (2017) 211 final, 12 April 2017.

<sup>267</sup> See ECRE, 2014, *supra* note 17, p.17.

<sup>268</sup> In connection with this topic see IACHR, *Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System*, 31 December 2015, OEA/ Ser.L/V/II, Doc. 46/15.

<sup>269</sup> See Centre for Gender & Refugee Studies, *Childhood and Migration in Central and North America: Causes, Policies, Practices and Challenges*, February 2015, pp. 46, 30.

children in the move in the Americas was originated a few decades ago, it has expanded dramatically in recent years and children are nowadays affected by continuous violations in many of their fundamental rights including access to justice and the right to be heard.<sup>270</sup>

Among the children affected by migration in this region, specific categories of minors can be distinguished including: unaccompanied children who travel alone, children travelling with their families, children who remain in their country of origin but whose parents have travelled to other countries, children who are born in countries of destination but whose parents have an irregular migration status and children who return to their country of origin.<sup>271</sup>

Between the many causes that trigger children's mobility in this region, the Inter-American Commission has included the search for a better life, family reunification, persecution, violence, exploitation, abuse and abandonment, natural disasters and human trafficking.<sup>272</sup> In fact, the Commission has made special emphasis on the violence caused by organised crime (such as drug trafficking and gangs) in Mexico and Central America as one of the fundamental causes for immigration in the Americas.<sup>273</sup>

The United States is the main country of destination in the region, followed by Canada.<sup>274</sup> On the other hand, Mexico constitutes the most travelled migration country worldwide as hundreds of irregular migrants, including an important amount of unaccompanied children, travel through Mexico towards the United States.<sup>275</sup> In addition, the situation of most of the children arriving at the United States is of extreme vulnerability as many have suffered abuse, violence, human trafficking, and poverty or seek to reunite with family members.<sup>276</sup> This situation is as well worsen when children face immigration proceedings without speaking to a legal advisor not even once.<sup>277</sup>

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<sup>270</sup> *Ibid.*, pp. 33-34.

<sup>271</sup> *Ibid.*, p.31.

<sup>272</sup> See IACHR, *Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System*, 2015, *supra* note 268, para. 26.

<sup>273</sup> *Ibid.*, para. 45.

<sup>274</sup> *Ibid.*, para. 35

<sup>275</sup> *Ibid.*, para. 36.

<sup>276</sup> See King, 2013, *supra* note 14, p. 334

<sup>277</sup> *Ibid.*, p. 335.

In fact, the Commission has raised concern in relation to the laws and practices of many countries in the region highlighting the use of automatic detention without any previous individual analysis and deportation.<sup>278</sup> Additionally, asylum procedures in the region have been characterized by not considering the fundamental principles of non-discrimination, best interest of the child and children's right to be heard through for example, the rejection of asylum seekers at the borders, obstacles to family reunification, detention and deportation of parents.<sup>279</sup>

### 3.5 Inter-American Human Rights System

The Inter-American System is based on the American Declaration of the Rights and Duties of Man,<sup>280</sup> and the American Convention on Human Rights.<sup>281</sup> Additionally, the Inter-American Commission and the Inter-American Court of Human Rights (hereinafter referred to also as the Inter-American Court or the Court) are the organs in charge of the protection of human rights.

In relation to children's rights, apart from the American Declaration and American Convention, the thematic reports of the Inter-American Commission referring to the situation of unaccompanied children in the region and the advisory opinion of the Inter-American Court regarding the Rights and Guarantees of Children in the context of migration and/ or in need of international protection,<sup>282</sup> are fundamental in the analysis of unaccompanied children's right to legal assistance. In fact, the importance of this advisory opinion has been emphasised by the Human Rights Council. Accordingly, in the understanding of the Human Rights Council, this advisory opinion constitutes a "regional achievement that provides novel guidelines that define and expand the scope of the rights and interests of migrant children".<sup>283</sup> Additionally, the Human Rights Council highlighted the way in which the Court

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<sup>278</sup> See IACHR, *Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System*, 2015, *supra* note 268, paras. 48-49.

<sup>279</sup> Centre for Gender & Refugee Studies, *Childhood and Migration in Central and North America: Causes, Policies, Practices and Challenges*, February 2015, pp. 34-35.

<sup>280</sup> Inter-American Commission on Human Rights, *American Declaration of the Rights and Duties of Man*, 2 May 1948.

<sup>281</sup> Organization of American States, *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica (B-32), 22 January 1969.

<sup>282</sup> See *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, Advisory Opinion OC- 21/14, *supra* note 43.

<sup>283</sup> Cf. Human Rights Council, Global issue of unaccompanied migrant children and adolescents and human rights. Progress report of the Human Rights Council Advisory Committee, A/HRC/33/53, 16 August 2016, para. 85.

referred to the importance of the best interest principle in every measure under immigration proceedings.<sup>284</sup>

### 3.5.1 *Human Rights instruments in the Americas*

Under the *American Declaration*, all Member States of the Organization of American States, are obliged to guarantee human rights to every person under their jurisdiction, independently of nationality or migratory status. Additionally, this obligation includes the right to due process and access to justice.<sup>285</sup> Accordingly, Article II contains the principle of non-discrimination, Article XXVII establishes the right of asylum and Article XXVI contains the right to due process.

In fact, the Inter-American Commission has repeatedly referred to these provisions in the context of immigration. For instance, in relation to the principle of non-discrimination, the Commission has stressed that all immigration policies should respect the human rights of all persons<sup>286</sup> and States should ensure that domestic law, practices, policies, and the conduct of officials does not result in discrimination.<sup>287</sup> Additionally, while referring to the application of the right to due process, the Commission has expressed that minimum procedural guarantees, including the right to be assisted by a legal counsel, should be applicable during immigration proceedings.<sup>288</sup>

Further, while interpreting the legal status of the American Declaration, the Commission has argued that this instrument constitutes a source of legal obligations for all Member States of the Organization of American States, including as well those States that are not part of the American Convention.<sup>289</sup> This opinion has been as well reinforced by the Inter-American Court. Indeed, in the wording of this regional tribunal, in order: “to determine the legal status of the American Declaration it is appropriate to look to the Inter-American system of today in the light of the

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<sup>284</sup> As the Human Rights Council has stressed: “...the opinion highlights the principle of the primacy of childhood over immigration policy and, in that regard, the principle of upholding the best interests of the child in all measures adopted under immigration proceedings.” *Cf. Ibid.*

<sup>285</sup> See American Declaration (Article II). See also IACHR, *Refugees and Migrants in the United States: Families and Unaccompanied Children*, 2015, *supra* note 5, para. 39.

<sup>286</sup> IACHR, *Refugees and Migrants in the United States: Families and Unaccompanied Children*, 2015, *supra* note 5, para. 44.

<sup>287</sup> *Ibid.*, para. 45.

<sup>288</sup> *Ibid.*, paras. 84-85.

<sup>289</sup> *Ibid.*, para. 40.

evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which that instrument was believed to have had in 1948”.<sup>290</sup> The Inter-American Court concluded therefore that even if the Declaration is not a treaty, this does not mean by any circumstance that it lacks legal effect.<sup>291</sup>

Nevertheless, it would be important to stress that not all States share these arguments. For instance, the United States has expressed in several occasions a contrary view on this matter by claiming that the Declaration is only a recommendation to the American States and that consequently, creates no legally binding obligations upon States.<sup>292</sup>

Lastly, in relation to the interpretation of the rights and obligations contained under this instrument, the Commission has expressed as well that the provisions of the American Declaration should be interpreted in relation to the developments of international human rights law.<sup>293</sup> To this regard, strictly in relation to the rights of the child, the Commission has mentioned that the interpretation and application of the American Declaration shall include the principle of the best interest of the child contained in other international and Inter-American treaties.<sup>294</sup> Therefore, in the understanding of the Inter-American Commission, the provisions of the American Convention should be taken into consideration as an authoritative source while analysing the protection given to asylum- seeking children, specially Article 19 which establishes the right of children to special protection.<sup>295</sup>

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<sup>290</sup> Cf. *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, *supra* note 114, para. 37. See also paras. 35–47.

<sup>291</sup> *Ibid.*, para. 47.

<sup>292</sup> See *Martinez Villareal v. United States*, 10 October 2002, IACHR, Case 11753, Report No. 52/02, para. 92. See also: IACHR, *Refugees and Migrants in the United States: Families and Unaccompanied Children*, 2015, *supra* note 5, para. 33.

<sup>293</sup> See IACHR, *Refugees and Migrants in the United States: Families and Unaccompanied Children*, 2015, *supra* note 5, paras. 46–47.

<sup>294</sup> *Ibid.*, para. 46.

<sup>295</sup> *Ibid.*, paras. 47–48. American Convention on Human Rights, Article 19 reads as follows: “Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state”.

It would be important to incorporate at this point of the analysis, the second instrumental pillar of the Inter-American System: the *American Convention on Human Rights*.

Consequently, under Article 1 paragraph (1), States Parties are under the obligation to respect and ensure human rights to all persons subject to its jurisdiction without any discrimination. In other words, States are obliged under this provision to respect human rights regardless of the person's nationality, residency or migratory status.<sup>296</sup> In this sense, according to the Court, this Article compels States to guarantee the effective exercise and enjoyment of rights to all individuals. Additionally and strictly in relation to children, States are compelled under this provision in combination with Article 19 to adopt the necessary positive measures to ensure that children are protected against mistreatment.<sup>297</sup>

It is important to highlight that the relation between regional law and international law, relevant for the analysis done under this paper, is established as well in this instrument. To this regard, the Convention expressly refers to norms of international law in several provisions. Its preamble includes the importance of other international instruments in the interpretation and application of the Convention and Article 29 (paragraph d) prescribes the obligation of interpreting the Convention in line with the American Declaration and other international acts of the same nature. Further, the Inter-American Court has also stated in connection to immigration that, it may interpret the Convention in light with other treaties and special norms of international refugee law "applicable to situations concerning the determination of refugee status in a way that is complementary to the provisions of the Convention".<sup>298</sup>

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<sup>296</sup> See *Rights and Guarantees of Children in the Context of Migration and /or in Need of International Protection*, Advisory Opinion OC- 21/14, *supra* note 43, para. 62.

<sup>297</sup> See *Juridical Condition and Human Rights of the Child*, IACrtHR, Advisory Opinion OC- 17/02, 28 August 2002, Series A. No. 17, para. 87.

<sup>298</sup> Cf. *Pacheco Tineo Family v. Plurinational State of Bolivia*, 25 November 2013, IACrtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 272, para 143. As I will elaborate in the next section, the Court has recurred in its recent jurisprudence, to a systemic and evolutive interpretation of the American Convention in light of human rights treaties that integrate the *corpus juris* of international human rights law. In this sense, the Court has examined the content and scope of Article 19 under the entire system for the protection of children's rights and has recognized the existence of an international *corpus juris* for the protection of children's rights. See – among others- *Case of the "Street Children" (Villagran-Morales et al.) v. Guatemala*, 19 November 1999, IACrtHR, Merits, Series C No. 32, para. 194, *Juridical Conditions and Human Rights of the Child*, Advisory Opinion OC- 17/02, *supra* note 297, para. 24, *Case of the Gomez-Paquiyaury Brothers v. Peru*, 8 July 2004, IACrtHR, Merits, Reparations and Costs, Series C No. 110, para.166 and *Forneron and daughter v. Argentina*, 27 April 2012, IACrtHR, Merits, Reparations and Costs, Series C No. 242, para. 44.

With regards to legal representation, the right to legal assistance is contained specifically in Article 8 paragraph 2 (d) in relation to criminal proceedings. The Court has however extended this right to other proceedings, establishing that the right to due process enshrined in Article 8, refers to a number of requirements that should be complied at every procedural stage in order to “ensure that the individual is able to defend rights adequately in relation to any decision of the State, taken by a public authority, whether administrative, legislative, or judicial that may affect them”.<sup>299</sup> Further, and even more importantly, the Inter-American Court has expressed that the complete range of guarantees of fair trial enshrined under such Article, extends as well to immigration procedures and applies to everyone, regardless of their age or migratory status.<sup>300</sup>

In addition, the right to seek and be granted asylum is contained in Article 22 paragraph (7). According to the Court, this Article shall be read in conjunction with Articles 8 (right to a fair trial) and 25 (right to judicial protection), ensuring that each individual who applies for asylum “shall be heard by the State to which he applies, with due guarantees and in the corresponding proceedings”.<sup>301</sup>

Strictly in relation to children’s rights, the most important provision is Article 19 which guarantees the right of every child to “measures of protection required by his condition as a minor on the part of this family, society and the state”. Through this provision, which is as well non-derogable,<sup>302</sup> the Convention guarantees a preferential treatment towards children as they are entitled to special protection from the State.<sup>303</sup> The Court has as well acknowledged the relation between the principle of non-discrimination, Article 8 and Article 19 by expressing that due process guarantees shall be provided to all and shall be correlated with special rights contained in Article 19.<sup>304</sup>

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<sup>299</sup> Cf. *Pacheco Tineo Family v. Plurinational State of Bolivia*, para. 130. According to the Court: “any act or omission of the State organs during an administrative, punitive or jurisdictional proceeding, must respect due process of law”. Cf. *Ibid.*

<sup>300</sup> See *Rights and Guarantees of Children in the Context of Migration and /or in Need of International Protection*, *supra* note 43, paras. 111-113.

<sup>301</sup> Cf. IACtHR, *Pacheco Tineo Family v. Plurinational State of Bolivia*, para. 154.

<sup>302</sup> In accordance with Article 27 (2), American Convention on Human Rights.

<sup>303</sup> See *Rights and Guarantees of Children in the Context of Migration and /or in Need of International Protection*, Advisory Opinion OC- 21/14, *supra* note 45, para. 66.

<sup>304</sup> *Ibid.*, para. 114.

Further, the Court has recognized in its jurisprudence, that through Article 19, States are obliged to “respect and ensure the rights recognized to children in other applicable international instruments” including expressly Articles 12 and 22 of the Convention on the Rights of the Child which are fundamental when children are seeking asylum.<sup>305</sup> In fact, the Court has found that in cases related to children’s rights, the Convention on the Rights of the Child was the most suitable instrument for the interpretation of Article 19.

Additionally, the Court has expressly recognized that both the American Declaration and American Convention are part of a *corpus juris* on protection of children which should be used to interpret the content and scope of States’ obligations under Article 19.<sup>306</sup> It would be important to stress that the Court has repeatedly referred to the *corpus juris* of international law in its case-law, explaining that: “The corpus juris of international human rights law comprises a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations). Its dynamic evolution has had a positive impact on international law in affirming and building up the latter’s faculty for regulating relations between States and the human beings within their respective jurisdictions. This Court, therefore, must adopt the proper approach to consider this question in the context of the evolution of the fundamental rights of the human person in contemporary international law”.<sup>307</sup>

Accordingly, in the eyes of this regional tribunal, the *corpus juris*<sup>308</sup> for the protection of children’s rights, results from the evolution of international human

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<sup>305</sup> Cf. *Pacheco Tineo Family v. Plurinational State of Bolivia*, para. 219.

<sup>306</sup> See *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC- 17/02, *supra* note 297, para. 24. See also IACHR, Special Rapporteurship on the Rights of the Child, The Rights of the Child in the Inter-American Human Rights System, OEA/Ser.L/V/II.133, Doc. 32, 29 October 2008, paras. 39-40.

<sup>307</sup> Cf. *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, 1 October 1999, IACrHR, Advisory Opinion OC-16/99, Series A No. 16, para. 115. See *Juridical Condition and Rights of the Undocumented Migrants*, 17 September 2003, IACrHR, Advisory Opinion OC 18/03, Series A No. 18, para. 120 and *Yakye Axa Indigenous Community v. Paraguay*, 17 June 2005, IACrHR, Merits, Reparations and Costs, Series C No. 172, para. 128. See also *Rights and Guarantees of Children in the Context of Migration and /or in Need of International Protection*, Advisory Opinion OC- 21/14, *supra* note 43. The Court has referred in this Advisory Opinion to the *corpus juris* as: “a series of rules expressly recognized in international treaties or established in international customary law as evidence of a general practice accepted as law, as well as of the general principles of law and of a series of general norms or soft law, that serve as guidelines for the interpretation of the former, because they provide greater precision to the basic contents of the treaties.” Cf. *Ibid.*, para. 60.

<sup>308</sup> For an in deep study in this matter, see- among others- Trindade Cançado A.A, *International Law for Humankind: Towards a New Jus Gentium*, The Hague Academy of International Law, Vol.8, Martinus Nijhoff, Second Revised Edition, 2013 and Nolan A. & Kilkelly U., *Children’s Rights under Regional Human Rights Law- A Tale of Harmonization?*, in *Towards Convergence in International*

rights law in subjects related to children and, as a consequence, the legal framework concerning the protection of children's rights is not only centred on the American Convention but also on other international norms.<sup>309</sup> According to the Commission: "The Court has applied this conceptual development to expand the legal framework governing the human rights of children and to strengthen the protection offered in the regional system".<sup>310</sup>

Bearing these general considerations in mind, below the focus will be given to the way in which this regional tribunal has interpreted the rights and guarantees of children both under its advisory and contentious jurisdiction, strictly in relation to asylum proceedings and legal assistance.

### 3.5.2 *Inter-American Court*

The Inter-American Court has developed an important jurisprudence related to migrants' rights, asylum seekers and States' obligations in relation to children's rights.<sup>311</sup>

To begin with, under the *Pachecho Tineo v. Bolivia*,<sup>312</sup> the Inter-American Court recognized a set of fundamental procedural guarantees that States should observe in immigration proceedings,<sup>313</sup> including the possibility of requesting and receiving legal assistance, involving free public services -when applicable- and translation, interpretation and consular assistance.<sup>314</sup>

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Human Rights Law. Approaches of Regional and International Systems, Buckley et al. (eds.), Brill Nijhoff 2016, Series: Nottingham studies on Human Rights, Vol 5, pp. 269-322.

<sup>309</sup> It is important to note that the Court has amplified the *corpus juris* of children's rights not only to the Convention on the Rights of the Child but also, to other international human rights instruments such as the Declarations on the Rights of the Child of 1924 and 1959, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985 Beijing Rules), the Standard Minimum Rules for Non-Custodial Measures (1990 Tokyo Rules), and the United Nations Guidelines for the Prevention of Juvenile Delinquency (1990 Riyadh guidelines). See IACHR, Special Rapporteurship on the Rights of the Child, The Rights of the Child in the Inter-American Human Rights System, *supra* note 306, para. 41 et seq.

<sup>310</sup> *Cf. Ibid.*, para. 53.

<sup>311</sup> See for further readings regarding the Inter-American Court of Human Rights-among others- Pasqualucci J. M., *The Practice and Procedure of the Inter-American Court of Human Rights*, Cambridge University Press, 2003 and Feria Tinta Monica, *The Landmark Rulings of the Inter-American Court of Human Rights on the Rights of the Child. Protection the Most Vulnerable at the Edge*, Martinus Nijhoff, Leiden, 2008.

<sup>312</sup> *Pachecho Tineo Family v. Plurinational State of Bolivia*, 25 November 2013, IACrHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 272.

<sup>313</sup> *Ibid.*, paras. 128-160

<sup>314</sup> *Ibid.*, para. 133.

The Court has also mentioned the right to legal assistance in immigration proceedings in the case of *Velez Loor v. Panama*,<sup>315</sup> where the use of detention as immigration policy was analysed. The Court highlighted in this case that the applicant was not assisted by an attorney chosen by him or provided by the State during detention,<sup>316</sup> and made special emphasis on the importance of legal assistance for immigrants in detention in relation to their vulnerability and lack of knowledge towards the legal system.<sup>317</sup> In the wording of the Court: “legal aid must be provided by a legal professional in order to satisfy the requirements of procedural representation”.<sup>318</sup> Further, the Court referred to the assistance offered by non-governmental organizations expressing that such aid does not substitute “the State’s obligation to offer free legal counsel”.<sup>319</sup> Lastly, the Court highlighted as well that in immigration proceedings, “free legal representation becomes an imperative for the interests of justice”.<sup>320</sup>

With regards in particular with the rights of the child in the context of immigration, the Inter-American Court has referred to the fundamental principles contained under the Convention on the Rights of the Child in the previous mentioned case of *Pacheco Tineo v. Bolivia*, where the Court expressed that these principles should guide the substantial and procedural aspect of asylum procedures.<sup>321</sup> Further, the Court expressly mentioned that when children are involved in asylum procedures, the best interest principle should prevail in decisions that affect them directly or indirectly.<sup>322</sup> According to the words of the Court, this fundamental principle “is based on the dignity of the human being, on the inherent characteristics of children, and on the need to foster their development, expanding their potential to the full. In this regard, it is necessary to weigh not only the requirement of special measures, but also the particular characteristics of the situation in which the child finds himself or herself”.<sup>323</sup> Further, the Court has also mentioned the importance of children’s right to express their opinions in asylum proceedings.<sup>324</sup>

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<sup>315</sup> See notably for a comprehensive analysis of the main findings of the case: G. de Leon, *Contributions and Challenges for the Inter-American Court of Human Rights for the Protection of Migrants’ Rights: The Case of Velez Loor v. Panama*, Inter-American and European Human Rights Journal, 2, 2014.

<sup>316</sup> See, *Velez Loor v. Panama*, 23 November 2010, IACrHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 218, para. 130.

<sup>317</sup> *Ibid.*, para. 132.

<sup>318</sup> *Cf. Ibid.*

<sup>319</sup> *Cf. Ibid.*, para. 137.

<sup>320</sup> *Cf. Ibid.*, para. 146.

<sup>321</sup> See IACrHR, *Pacheco Tineo Family v. Plurinational State of Bolivia*, para. 224.

<sup>322</sup> *Ibid.*, para. 179.

<sup>323</sup> *Cf. Ibid.*, para. 218.

<sup>324</sup> *Ibid.*, para. 223.

In addition to these contentious cases, references to the advisory opinions of the Court referring to migrants' rights are unavoidable. In this regard, the Inter-American Court has as well expressed through its advisory jurisdiction that the guiding principles contained in the Convention on the Rights of the Child should be implemented in every system of protection of children's rights.<sup>325</sup> Consequently, the Court has referred to immigration proceedings, while expressing that priority must be given to the "assessment, determination, consideration and protection of the best interest of the child"<sup>326</sup> and to the obligation to respect the right of the child to be heard.<sup>327</sup> The Court has established a relationship between these two fundamental principles that should govern the role of children in every decision affecting them.<sup>328</sup>

In addition, the Court has ordered States to guarantee basic procedural guarantees in order to protect the best interests of the child during the initial stages of the asylum procedure.<sup>329</sup> Among these procedural guarantees, the Court expressly mentioned the right to be assisted by a legal representative and to communicate freely with said representative.<sup>330</sup> According to the Court's words: "States have the obligation to ensure to any child involved in immigration proceedings the right to legal counsel by the offer of free State legal representation services".<sup>331</sup> Additionally, representatives should receive special training and access to legal representation should be provided both while submitting the asylum application and during its processing.<sup>332</sup>

Lastly, the Court has also referred to children's right to legal assistance when children are detained in the context of immigration procedures. In this regard, States should offer "prompt and free access to a legal representative".<sup>333</sup>

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<sup>325</sup> See *Rights and Guarantees of Children in the Context of Migration and /or in Need of International Protection*, Advisory Opinion OC- 21/14, *supra* note 43, para. 69.

<sup>326</sup> *Cf. Ibid.*, para.70.

<sup>327</sup> *Ibid.*

<sup>328</sup> See IACrHR, *Pacheco Tineo Family v. Plurinational State of Bolivia*, para. 220.

<sup>329</sup> See *Rights and Guarantees of Children in the Context of Migration and /or in Need of International Protection*, Advisory Opinion OC- 21/14, *supra* note 43, para. 85.

<sup>330</sup> *Ibid.*, paras. 129-131.

<sup>331</sup> *Cf. Ibid.*, para. 130.

<sup>332</sup> *Ibid.*, para. 251. In fact, according to the Court: "(the) type of legal assistance must be specialized, as regards both the rights of the migrant, and specifically, as regards age, in order to guarantee true access to justice to the child migrant and to ensure that the child's best interest prevails in every decision that concerns the child". *Cf. Ibid.*, para. 131.

<sup>333</sup> *Cf. Ibid.*, para. 204.

### 3.5.3 Concluding remarks

Through the examination of the Inter-American system, one can notice that -as in the case of the Council of Europe critically analysed above- the right to legal assistance of asylum seekers and specifically of unaccompanied children in seek of asylum, is not expressly contained under any legal instrument. Nevertheless, both the Inter-American Commission and the Inter-American Court have contributed to the establishment of several protection standards in regards to the application and interpretation of this right and guided States towards its effective representation. To this regard, the advisory opinions and case law of the Inter-American Court are clear examples of how this Court applies international human rights instruments to support its arguments and includes progressive interpretations of legal instruments.<sup>334</sup> The Court has broaden the content of children's rights- including the right to be assisted by a legal representative during immigration proceedings- considering not only regional instruments but also all other instruments that could be considered an integrative part of the *corpus juris* of international human rights law. Indeed, it would be possible to conclude that the expansive interpretation made by this regional tribunal of Article 19, shows the awareness of the Court in relation to the protection and challenges faced by children in this region. In this context, while the main instruments of this regional system mention briefly children's rights, the Court has made several references to the entire *corpus juris* of international human rights law in order to pave the way towards a more effective protection of children in the Americas.

In fact, both the Court and the Commission have called for the implementation of international human rights standards at the regional level and expressly recognized the entitlement of the right to legal assistance during all stages of the asylum procedure. The Court has highlighted the importance of the protective principles contained in the Convention on the Rights of the Child and required States to apply jointly regional and universal instruments.<sup>335</sup>

The analysis of both the contentious and advisory jurisdictions of the Inter-American Court demonstrates how this Court has gone much further than the European Court

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<sup>334</sup> See Dembour, 2015, *supra* note 217, p. 384.

<sup>335</sup> See King, 2013, *supra* note 14, p. 353.

in the recognition of asylum -seeking children's right to legal assistance, not only through the explicit recognition of this right but also by establishing specific obligations upon States, precise requirements regarding its effective exercise and the continuous mention and inclusion of the universal principles in relation to the protection of this right.

## CHAPTER FOUR

### Synthesis of Findings

*«Pero el horrible tren ha ido parando  
en tantas estaciones diferentes,  
que ella no sabe con exactitud ni cómo se llamaban,  
ni los sitios,  
ni las épocas.*

(...)

*Y ha viajado noches y días,  
sí, muchos días,  
y muchas noches.  
Siempre parando en estaciones diferentes,  
siempre con una ansia turbia, de bajar ella también, de quedarse ella también,  
ay,  
para siempre partir de nuevo con el alma desgarrada,  
para siempre dormir de nuevo en trayectos inacabables»<sup>336</sup>*

This final chapter attempts a synthesis of findings based on earlier analysis and examines the level of compliance of regional norms with universal standards. It further includes possible recommendations to expand the protection of unaccompanied children and the final conclusions of this research.

#### **4.1 Overview of the right to legal assistance under the universal and regional systems**

The above analysis of the universal and regional systems in Europe and in the Americas appears to show how the current situation of unaccompanied children seeking asylum in both continents, characterized by a lack of adequate protection regarding legal assistance, is reflected in the absence of binding provisions and the ambiguity of protective standards at regional levels.

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<sup>336</sup> *Mujer con alcuza* by Dámaso Alonso.

#### 4.1.2 Universal system

The universal system is by far the regime that offers the higher level of protection, not only through the fundamental principles enshrined in the Convention of the Rights of the Child but also through the work of the UNHCR and the Committee on the Rights of the Child that have tailored to a great extent the content of this right. To this regard, as stated earlier,<sup>337</sup> even if unaccompanied asylum-seeking children's right to legal representation is not contained explicitly in any binding instrument at this level, international bodies have recognized the entitlement of this right.

Accordingly, the Committee of the Rights of the Child and UNHCR have made several efforts to protect and guarantee the effective exercise of this right through its express recognition and development of its extend in several documents. In light of the above, the Committee has explicitly recognized unaccompanied children's right to free and qualified legal aid during asylum procedures,<sup>338</sup> and UNHCR has required States to appoint a legal assistant for unaccompanied children immediately upon arrival.<sup>339</sup> Further, UNHCR has recognized that asylum seekers should receive legal counsel during all stages of the procedure, including as well during the admissibility stages.<sup>340</sup> In addition, as the force of the Convention can be restricted by the important discretion left on States with regards to the implementation of children's rights,<sup>341</sup> the labour of the Committee and UNHCR are of fundamental relevance in defining the interpretation and implementation of this treaty.

However, the inclusion of this right in binding instruments and not only in guidelines and recommendations, is highly necessary and recommended. The lack of inclusion of children in the Convention Relating the Status of Refugees and the absence of a specific provision regarding procedural guarantees in asylum procedures in the

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<sup>337</sup> See above, Sections 2.1 and 2.2.

<sup>338</sup> See CRC General Comment No. 6, *supra* note 12, para. 69.

<sup>339</sup> See UNHCR, Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, 1997, para. 4.2

<sup>340</sup> See UNHCR, Global Consultations on International Protection, Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12, 31 May 2001, para. 50 (g).

<sup>341</sup> In fact, Bhabha affirmed that: "Though the convention's force is limited by the fact that it allows states considerable latitude and discretion in formulating mechanisms for implementation, it nevertheless plays a critical normative role in establishing agreed benchmarks for the treatment of children." Cf. Bhabha, 2001, *supra* note 29, p. 298.

Convention on the Rights of the Child, leaves a gap in the protection of children that regional systems have not been able to fully complete. And even if the treaty bodies and UN agencies have worked hard in order to fill this gap, advocates of children's rights need as well binding standards in order to demand- in a more effective way- an adequate protection from States at the national level.

Following the same line of thought, one can conclude that even if the Convention on the Rights of the Child is applicable to all children, including therefore asylum-seeking children and unaccompanied children, special protection through specific provisions referring to immigration proceedings is needed at this level.<sup>342</sup> This necessity can as well be seen in the actual absence of a convention dealing with asylum-seeking children in general and specifically with unaccompanied children.<sup>343</sup> Therefore, the lack of specific provisions and the absence of a special protocol to the Convention on children and immigration has left an important gap in the protection of this vulnerable group.<sup>344</sup>

Nevertheless, as mentioned at the beginning of this section, this should not underestimate the protection given under the Convention on the Rights of the Child. In fact, the fundamental principles and many of its provisions- such as Article 20 for example- offer a comprehensive level of protection<sup>345</sup> which is reinforced by the labour of other UN bodies and agencies. In other words, the principles contained in this Convention constitute fundamental standards that every State shall take into consideration while assessing children's rights.

Additionally, the Convention includes both negative and positive obligations for States.<sup>346</sup> In this regard, under this instrument, States should refrain from measures that can affect children's rights and implement procedures that guarantee the effective enjoyment of rights without discrimination, making special emphasis on the implementation of measures orientated towards the protection of every child and the respect of their special necessities.<sup>347</sup>

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<sup>342</sup> See Farrugia et al., 2010, *supra* note 260, pp. 33-34.

<sup>343</sup> See Kanics Jyothi et al. (eds.), *Migrating Alone: Unaccompanied and Separated Children's Migration to Europe* [hereinafter Kanics et al., 2010], UNESCO, 2010, p.xiii.

<sup>344</sup> See Bhabha Jacqueline, *More than Their Share of Sorrows: International Migration Law and the Rights of Children* [hereinafter Bhabha, 2003], *Immigration and Nationality Law Review*, Vol. 24, 2003, p. 269.

<sup>345</sup> See Farrugia Ruth et al., 2010, *supra* note 259, p. 34.

<sup>346</sup> *Ibid.*

<sup>347</sup> *Ibid.*

#### 4.1.1 Regional Systems

At the regional level, human rights' systems have been created to strengthen and protect human rights in conformity with the universal system and the universal standards of protection.<sup>348</sup> In this context, regional systems are of high importance for the effective protection of human rights and should cooperate with United Nations to protect unaccompanied children. In light of the above, it is noteworthy to take into consideration that, through the reinforcement of universal standards, regional frameworks should improve and increase the universal level of protection,<sup>349</sup> but should not, under any circumstance, offer a lower protection than the one children are already entitled under the global regime.

In relation to the treatment of unaccompanied children seeking asylum, the analysis of regional standards shows that this has definitely not been the case as none of the existing binding instruments in Europe and in the Americas has solved the lack of regulation regarding unaccompanied children's right to legal representation and the global standards remain therefore the higher protective standards for children.

##### · **European legal framework**

The only binding instruments at this regional level containing the right to legal representation of unaccompanied children in asylum procedures are the EU directives in relation to some specific procedures but, in a quite general way. In this context, under EU law, standards regarding representation are minimum and contain several limitations that interfere with the proper exercise of this right. This legal framework offers, therefore, limited protection towards children seeking asylum and does not adequately address the vulnerabilities of this group. Additionally, as many aspects related to immigration and asylum at the EU level are left to the competence of States at the domestic level, reality shows that policies and regulations regarding asylum and treatment of unaccompanied children differ among European States. In consequence, while some governments make special emphasis on child protection,

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<sup>348</sup> See Janku, Martin, *Universal and Regional Conventions for Human Rights Protection: Co-existence and/or Confrontation* [hereinafter Janku, 2010], Days of Law, 1ed. Brno: Masaryk University, 2010, p.2.

<sup>349</sup> See Shelton Dinah. L., *Regional Protection of Human Rights*, [hereinafter Shelton, 2010], Oxford University Press, 2010, p. 111.

others do not provide children even with their basic rights.<sup>350</sup> Also, there is no common understanding under the Member States of the EU in relation to the duties and powers of legal representatives.<sup>351</sup> As a result, a child's representative in some States refers to a legal guardian while in others it corresponds to a lawyer who is in charge of the child's representation in courts.<sup>352</sup> It is noteworthy here to remember that regardless of the terminology used at the domestic level or under EU law, universal standards require States to provide unaccompanied children who apply for asylum with both a legal guardian and a legal representative.<sup>353</sup> To this regard, even if the regional level is characterized by the generality of its standards and even if States can determine many aspects of the asylum procedure at the national level, all European States are still complied by the universal norms and should adequate their domestic regulations to universal standards.

In short, the European Union needs therefore to ensure that future directives apply the best interest principle in order to gain durable solutions, update and give legal force to the 1997 Council Resolution on Unaccompanied Minors who are Nationals of Third countries and seek policy harmonization among Member States.<sup>354</sup> Also, putting in place a new action plan on unaccompanied children will contribute to the establishment of a comprehensive approach regarding the treatment of unaccompanied minors in European States and will definitely ensure the effective protection of this vulnerable group with clear guidelines and standards.

In addition, regional European standards lack as well clear definitions regarding the universal principles enshrined in the Convention on the Rights of the Child. For instance, EU instruments mention the best interest principle in many directives but there is no further reference in relation to its content or implementation.<sup>355</sup> To this regard, it remains a challenge for States how to translate the fundamental principles

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<sup>350</sup> See Kanic J. & Senovilla Hernandez D., *Protected or merely tolerated? Models of reception and regularization of unaccompanied and separated children in Europe*, in Kanics et. al, *supra* note 343, 2010, p.3.

<sup>351</sup> See ECRE/ ELENA, 2010, *supra* note 18, p. 61.

<sup>352</sup> See ECRE, 2014, *supra* note 17, p.7.

<sup>353</sup> See CRC General Comment No.6, *supra* note 12, para.36.

<sup>354</sup> See Smith Terry, *European Refugee Law and its Impact on Children*, in *The Asylum-seeking Child in Europe*, Andersson et al. (eds.), Centre for European Research, Göteborg University (CERGU), 2005, p.46.

<sup>355</sup> See e.g. Directive 2013/32/EU, *supra* note 230, Article 25 (1) (a) where it is established that the representatives of unaccompanied minors shall perform their duties in accordance with the principle of the bests interests of the child, but no further guidance or clarification is expressed regarding the meaning of this duty.

from the universal system into operative guidelines.<sup>356</sup> In addition, as stated above, States enjoy an important margin of appreciation regarding immigration and asylum under EU law,<sup>357</sup> which includes as well the way of implementing the right to legal assistance. The lack of clear standards and guidelines in this context does not contribute to improve the vulnerable situation of these minors.

Nevertheless, under the Council of Europe system, the labour of the Parliamentary Assembly has been of high importance in relation to unaccompanied children's rights and needs as it has recognized this right and developed recommendations and standards in different immigration contexts. In fact, the Parliamentary Assembly has recognized that unaccompanied children should be represented by a lawyer in addition to a guardian provided free of charge and with no delay by States.<sup>358</sup> Additionally, the Parliamentary Assembly has referred to the importance of monitoring mechanisms regarding legal representation in asylum proceedings at seaports and coastal zones,<sup>359</sup> and has highlighted the importance of ensuring legal representation during detention and accelerated procedures.<sup>360</sup> However, these standards are contained in non-binding instruments. Therefore, it is noteworthy here to emphasise once again the current necessity of unaccompanied children to receive specific protection through binding instruments including clear provisions related to their vulnerabilities and needs.

#### · **Inter-American system**

In the Americas, States may be obliged by the American Declaration, American Convention or both instruments, but once again, none of these instruments includes the right to legal assistance of asylum-seeking children. Additionally, there is no system on common standards regarding asylum and immigration as in the European Union where standards of protection have been established through the Common European Asylum System. Nevertheless, both the Inter- American Commission and the Inter-American Court have expressly recognized the existence of asylum

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<sup>356</sup> See Maloney, 2002, *supra* note 76, p.106.

<sup>357</sup> See *above*, Section 3.3.

<sup>358</sup> See Council of Europe, Parliamentary Assembly, Resolution 1810, Unaccompanied children in Europe: issues of arrival, stay and return, 2011, para. 5 (8).

<sup>359</sup> See Council of Europe, Parliamentary Assembly, Recommendation 1645, Access to assistance and protection for asylum-seekers at European seaports and coastal areas, 2004, para. 10 (3) (c).

<sup>360</sup> See Council of Europe, Parliamentary Assembly, Resolution 1707, Detention of asylum seekers and irregular migrants in Europe, 2010, para. 9 (2) (9). See also Council of Europe, Parliamentary Assembly, Resolution 1471, Accelerated Asylum Procedures in Council of Europe Member States, 2005, para. 8 (11).

seekers' right to legal representation and required States to provide legal assistance to all unaccompanied children. Additionally, as mentioned before, all States in America have ratified the Convention on the Rights of the Child with the exception of the United States, which has only signed the Treaty.<sup>361</sup> So, as in the European context, States must comply with both universal and Inter-American standards.<sup>362</sup>

Further, it would be important to highlight that the role of regional courts is of high importance in the protection of human rights. Regional courts often have to interpret and apply the universal standards and cite universal principles contained in regional instruments.<sup>363</sup> To this regard, in relation to unaccompanied children's right to legal representation, both the Inter-American Court and the Inter-American Commission have recognized this right and referred to universal standards regarding its implementation and States' obligations. As seen before,<sup>364</sup> the Inter-American Court has gone much further than the European Court. Both regional tribunals have analysed disputes in immigration contexts, but as seen under this thesis, the European Court did not examine deeply the content of legal representation in immigration proceedings and denied the application of Article 6 ECHR to asylum procedures. Instead, the commitment of the Inter-American Court needs to be highlighted as it has referred to this right both under its advisory and contentious jurisdiction, and it has required States in several occasions to comply with universal standards.

## **4.2 Recommendations to increase protection**

The lack of clear standards at the regional level is directly translated to the national levels where unaccompanied children are not offered proper protection and where policies in many States are contrary to the Convention on the Rights of the Child and the best interest principle.<sup>365</sup> Reality shows, therefore, an important discrepancy between children's rights at the universal level and the effective protection they receive while applying for asylum.<sup>366</sup> For instance, in the case of many European

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<sup>361</sup> The United States signed the Convention on the Rights on the Child on the 16th February 1995.

<sup>362</sup> For instance, the Court has referred to States' obligation to comply universal standards in its Advisory Opinion on the Rights and Guarantees of Children in the Context of Migration. *See supra* note 43.

<sup>363</sup> *See* Shelton, 2010, *supra* note 349 p. 115.

<sup>364</sup> *See* above, Sections 3.2.2 and 3.5.3.

<sup>365</sup> *See* Bhabha, 2003, *supra* note 344, p. 267.

<sup>366</sup> *See* Kanics, et. al. 2010, *supra* note 343, p. XIII.

States it is not common for unaccompanied children to be assisted by a lawyer from the moment they submit their application,<sup>367</sup> and there is limited monitoring on the quality of legal representation.<sup>368</sup> Consequently, many of the common practices around States regarding representation of unaccompanied children are therefore in violation of universal standards.

Among scholars, Bhabha argues for instance, that public policy in the field of asylum-seeking children is tailored by ambivalence, an unresolved ambivalence by which, on the one hand, States are complied by law to guarantee fundamental rights to all children irrespectively of their migratory status,<sup>369</sup> but at the same time, on the other hand, suspicion builds practical obstacles to the enjoyment of these rights.<sup>370</sup> In order to improve protection, States need to understand that recognizing asylum-seeking children with special protection and guarantees, such as adequate representation during every stage of the procedure, is not and does not mean, that every child seeking asylum should be granted automatically permanent protection and authorisation to stay.<sup>371</sup> It means on the contrary, that a child-centre perspective is needed in order to guarantee a proper assessment of children's applications taking into account the fundamental principles and rights enshrined in the Convention on the Rights of the Child and the specific needs, vulnerabilities, special care and protection that every child is entitled to.<sup>372</sup> It is noteworthy here to mention as well the opinion of the Former President of the Inter-American Court, Cançado Trindade, who expressed that in relation to immigration, the application of legal norms of protection requires an important change of mentality.<sup>373</sup> In light of this, the recognition that all migrants, regardless of their juridical status, have the right to enjoy all fundamental human rights, should be the starting point.<sup>374</sup>

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<sup>367</sup> See ECRE, 2014, *supra* note 17, p. 58.

<sup>368</sup> *Ibid.*, p. 92.

<sup>369</sup> See Bhabha, Jacqueline, *Child Migration and Human Rights in a Global Age* [hereinafter Bhabha, 2014], Princeton University Press, 2014, p. 11.

<sup>370</sup> See Bhabha, Jacqueline, *Demography and Rights: Women, Children and Access to Asylum* [hereinafter Bhabha, 2004], *International Journal of Refugee Law* (2004), Vol. 16, Issue 2, p. 238. See also Bhabha, 2014.

<sup>371</sup> Bhabha, Jacqueline, *Not a Sack of Potatoes: Moving and Removing Children across the Borders* [hereinafter Bhabha, 2005], *Boston University Public Interest Law Journal*, Vol. 15, Issue 2 (2005), p. 212.

<sup>372</sup> *Ibid.*

<sup>373</sup> See Trindade Cançado Antonio A., *Uprootedness and the protection of migrants in the International Law of Human Rights*, *Revista Brasileira de Política Internacional*, Vol. 51, Issue 1 (2008), p. 150.

<sup>374</sup> *Ibid.*

Taking into consideration the many aspects of the right to legal representation and the lack of specific standards at the regional level, it is inevitable to ask oneself what could be done in order to protect unaccompanied children during asylum procedures in terms of legal representation and how to translate universal standards and guidelines into the effective enjoyment of this right. The answer to this vital question is obviously not an easy one and many considerations should be taken into account while seeking a way to transfer the protective principles into effective guarantees for unaccompanied children.

#### *4.2.1 Necessity of clear standards in binding instruments*

Firstly, as this group of children have special vulnerabilities, are in an extremely difficult situation and have usually neither resources nor knowledge of the language or the law regarding asylum procedures,<sup>375</sup> regional systems need to include clear standards of protection regarding legal assistance and the effective application of this right. Consequently, legal certainty regarding the content of the right to legal representation is highly needed as this right is contained in a wide array of international and regional instruments including directives, recommendations, resolutions and guidelines.

Accordingly, the creation of international instruments is therefore probably the easiest first step in translating the universal principles in theory to their realisation in practice.<sup>376</sup> Even if States decide many aspects of the asylum procedures at the national level, regional instruments entirely designed for asylum-seeking children or with specific provisions addressing unaccompanied children's rights should be adopted. Indeed, specific binding guidelines regarding the implementation of the right to legal assistance are needed at the regional levels. To this regard, while leaving States with discretion to decide the specific aspects of the organisation, functioning and composition of both legal representation and the asylum procedure, regional instruments with clear standards related to the implementation and interpretation of the extent of this right will guide States' practice towards effective policies and real protection of unaccompanied children. Some of these regional standards should include provisions referring to:

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<sup>375</sup> See ECRE/ELENA, 2010, *supra* note 18, p.34.

<sup>376</sup> See Bhabha, Jacqueline, *Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights* [hereinafter Bhabha, 2009], Human Rights Quarterly, Vol. 31, Issue 2 (2009) p. 425.

A) *Procedural standards*

· The immediate appointment of a legal representative upon arrival. It is indispensable that unaccompanied children receive legal assistance at the initial stages before submitting the asylum application as their lack of knowledge can lead to the omission of aspects which are fundamental in the assessment of their application.<sup>377</sup> The right of asylum-seeking children and specially of unaccompanied children to receive adequate legal assistance during asylum proceedings, should be guaranteed before, during and after the asylum procedures.<sup>378</sup>

As mentioned previously,<sup>379</sup> UNHCR has established that unaccompanied children should be appointed a legal representative immediately upon arrival,<sup>380</sup> but this fundamental requirement is not included in any regional instrument with binding force. Only EU directives mention that legal representation for unaccompanied children should be guaranteed as soon as possible, but this leaves the possibility for different interpretations among Member States.

· Unaccompanied children should be entitled to free legal aid. It should be explicitly mentioned under regional instruments that unaccompanied children's access to legal assistance cannot be subject to conditions such as merits test or the presumption of economic resources as in the case of adult's applications.<sup>381</sup> Unaccompanied children should be provided with free legal assistance automatically.<sup>382</sup>

· The fundamental requirements that legal assistance should fulfil in every stage of the procedure. The type of legal representation might differ in the different stages of the proceedings, but unaccompanied children should be assisted by a legal representative during the entire procedure regardless if the proceedings are administrative, quasi-judicial or judicial. Regional instruments should clarify that persons qualified in law shall represent children in every stage of the procedure. The specific requirements regarding the qualifications of representatives in each stage

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<sup>377</sup> See ECRE/ELENA, 2010, *supra* note 18, p. 34.

<sup>378</sup> See Petrušić N., *Child-Friendly Aid in Civil Court Proceedings: International Standards and the circumstances in the Republic of Serbia*, Law and Politics, Vol. 14, Issue 3 (2016), p. 401.

<sup>379</sup> See above, Section 2.2.

<sup>380</sup> See UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, 1997, para. 4(2).

<sup>381</sup> See ECRE/ELENA, 2010, *supra* note 18, p. 64.

<sup>382</sup> *Ibid.*

might vary according to the procedures at national level and requirements might be for instance lower at the initial stages and higher at the appeals but specialization in law should be mandatory during the entire procedure.

- Characteristics of the representation during different procedures (including for instance, border procedures, Dublin procedures in the EU context or accelerated procedures). Effective access to justice might be infringed in some specific proceedings such as in the case of border procedures and accelerated procedures, which demand a mayor necessity for legal representation.<sup>383</sup> Regional instruments should clarify that legal assistance should be always compulsory in all type of procedures.

- Mandatory presence of the legal representatives in every interview and specially during the age assessment.<sup>384</sup> Regional instruments should include provisions regarding procedural guarantees during personal interviews such as the right to be accompanied by their legal advisor. To this regard, interviews should be postponed if representatives are not present and legal assistants should be allowed to intervene with questions and comments.<sup>385</sup>

- The specific differentiation between the roles of legal guardians and legal advisors. Unaccompanied children should be appointed both a legal guardian and a legal representative.<sup>386</sup> The appointment of a guardian should under any circumstance replace the representation of a legal advisor as this last representation is essential for children who apply for asylum.<sup>387</sup>

#### *B) Capacity building actions*

- Details regarding the relation of the representatives with the unaccompanied minor. Legal representatives should create a relationship of trust with the child and dedicate time to meeting the asylum-seeking child.<sup>388</sup> Additionally, it is important that the

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<sup>383</sup> *Ibid.*, p. 42.

<sup>384</sup> *Ibid.*, p. 63.

<sup>385</sup> *Ibid.*, pp. 37-39.

<sup>386</sup> *Ibid.*, p. 62.

<sup>387</sup> As Bhabha rightly points out: “The appointment of a guardian to assist in meeting the best interests of the child is in no way meant to replace legal counsel. The role of counsel is particularly crucial for a child claiming asylum. Most children lack the experience and sophistication to grasp the complexity and personal implications of an asylum application.” *Cf.* Bhabha et al. 1999, *supra* note 4, p.118.

<sup>388</sup> *See* ECRE, 2014, *supra* note 17, p.70.

legal representative keeps the child informed during the entire proceeding, and assures the child's participation.<sup>389</sup>

· Special training of legal advisors and frequency of such training. In order to guarantee an effective representation, specific qualifications for legal advisors of unaccompanied children should be required. Therefore, they should not only be specialized in asylum law but also in children's law.<sup>390</sup> As the Committee on the Rights of the Child has expressed, regional standards should require States to include special training related to the needs of this specific group.<sup>391</sup>

### *C) Monitoring mechanisms*

· Monitoring of their work and complaint mechanisms for children in cases where representation is not adequate. Regional instruments should require States to establish monitoring mechanisms in charge of controlling the labour of legal advisors. Bearing in mind the importance of the rights of the child that could be affected during the procedure and especially considering that inadequate representation can lead to injustice, the relevance of these mechanisms cannot be denied.<sup>392</sup>

As seen under the previous sections,<sup>393</sup> none of these aspects are established at the regional level, where this right has been barely mentioned in legal instruments. Regional instruments need to specify the content of the right to legal representation and offer clear guidance regarding its implementation so that unaccompanied minors are offered effective protection and their asylum claims are analysed correctly. Deficiencies in legal representation can have dreadful consequences on these minors, not only at the emotional level but also by being denied asylum when they are legally entitled to it. Regional systems should therefore, establish common standards regarding legal representation as the effective exercise of this right is central to the realisation of many other rights during asylum procedures.

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<sup>389</sup> *Ibid.*, pp. 73, 76.

<sup>390</sup> *Ibid.*, p. 79.

<sup>391</sup> See CRC General Comment No. 6, *supra* note 12, para. 96.

<sup>392</sup> See ECRE/ELENA, 2010, *supra* note 18, pp. 64-65.

<sup>393</sup> See above, Chapter III.

At this point of the analysis it is necessary to reflect if more specific regional instruments addressing the issues of unaccompanied children would be sufficient to generate positive steps towards effective protection. It might be the case that human rights treaties will not be enough in order to solve the key question on how to transfer principles from theory to practice<sup>394</sup> or it can even happen that States might not reach an agreement regarding the creation of regional instruments including harmonized standards of legal representation. It could even happen that once the agreements are conceived, these instruments do not reach an important number of ratifications or States do not commit to those standards at the national level.

It is worth taking into consideration as well that scholars' opinions differ regarding the positive impact and enforcement of treaties in practice.<sup>395</sup> While some consider that the benefits of international conventions are relatively low, others argue that the ratification of international instruments is crucial for the enforcement of rights.<sup>396</sup> Following this positive argument, States' practice after the ratification of the Convention of the Rights of the Child has shown that commitments to treaties can have evident positive consequences.<sup>397</sup> In addition, children's advocates and judges require conventions and clear standards in order to stimulate discussion, policy developments and effective protection of unaccompanied children while facing asylum procedures.

#### *4.2.2 Further recommendations*

Secondly, continuing with the analysis, an important aspect that affects the proper examination of the actual situation of these minors during asylum procedures is the fact that the existing data in many States is not complete or different States collect different types of information.<sup>398</sup> In this sense, information regarding asylum applications by age and gender are generally incomplete as only a few number of States gather statistics based on these categories and even a smaller number of States includes distinction between accompanied and unaccompanied children.<sup>399</sup> This lack of uniform information prevents the complete analysis of the current deficiencies

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<sup>394</sup> See Bhabha, 2014, *supra* note 369, p 8.

<sup>395</sup> *Ibid.*, p. 260.

<sup>396</sup> *Ibid.*

<sup>397</sup> *Ibid.*

<sup>398</sup> See ECRE, 2014, *supra* note 17, p. 21.

<sup>399</sup> See Bhabha, 2004, *supra* note 370, p. 232.

regarding legal representation.<sup>400</sup> In order to concentrate on the specific issues that affect this vulnerable group and generate policies designated to improve the most problematic aspects regarding representation of unaccompanied children, specific information is needed. Accordingly, regional instruments should include clear rules regarding the collection of statistics so that the global situation of unaccompanied minors in terms of legal representation can be properly addressed and durable solutions can be obtained.

A third and fundamental aspect to improve protection, is the role of civil society, human rights' organisations and children's rights defenders, which have a duty to generate discussion regarding the issues related to the protection of asylum-seeking children.<sup>401</sup> Activism and pressure at the national and regional level need to situate children at the centre of migration policies.<sup>402</sup> The mistreatment and suffering of unaccompanied children in both continents should not be ignored or hidden. In this context, advocates of children's rights should generate discussion in order to adjust regional standards to the requirements of the universal system where children are guaranteed a major level of protection. Institutions at the regional level, organisations, experts, academics and human rights' defenders need to focus and address the issues related to unaccompanied children while applying for asylum in a coherent and uniform way in order to obtain effective protection. In this sense, international organisations can play an important role in the enforcement and implementation of the recommendations and guidelines of treaty bodies.<sup>403</sup>

### 4.3 Conclusions

The position of children as relevant right holders under international law has been gaining continuous and increasing importance over the last decades. As a result, the protection of children's rights has greatly improved and many issues related to the protection and treatment of asylum-seeking children have been addressed both under the universal and regional levels. In addition, the increasing amount of unaccompanied children among asylum seekers and the great suffering of this vulnerable group has situated them in the centre of many discussions at the

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<sup>400</sup> See CRC General Comment No. 6, *supra* note 12, para.98.

<sup>401</sup> See Bhabha, 2009, *supra* note 376, p. 451.

<sup>402</sup> See Bhabha, 2003, *supra* note 344, p. 274.

<sup>403</sup> See Gorlick, 2000, *supra* note 75, p. 170.

international arena. In light of this, even if many aspects related to asylum-seeking children have not yet been included in legal instruments, UN treaty bodies and institutions have orientated important efforts to complete the lack of specificity in current international standards.

The Committee on the Rights of the Child and UNHCR have provided specific guidelines towards the interpretation and applicability of fundamental safeguards that children should be guaranteed during asylum proceedings, including among those, the requirements for adequate legal assistance. This authoritative guidance shows how the international community is concerned with the treatment given to unaccompanied children in the context of immigration. However, specific standards regarding representation of this vulnerable group are still needed in binding documents at both international and regional levels. The continuous sufferings of this vulnerable group confirm that general standards of protection at the regional levels have not been enough and that legal certainty needs to be achieved if the present ambiguities and gaps in the protection of unaccompanied children want to be solved. What this thesis mainly proposes is therefore the adoption of specific regional standards regarding legal assistance through a comprehensive system for protecting unaccompanied asylum-seeking children. This suggestion attempts to solve the lack of specific provisions and avoid the adoption at the national levels of policies that contradict universal standards of protection. Regional institutions and children's rights advocates are called to urge general discussion in order to achieve a comprehensive system of protection as the role that regional systems play in the protection of human rights of asylum seekers has been and, is undoubtedly to continue to be fundamental.

Furthermore, the right of unaccompanied children to legal representation should not be undermined with arguments regarding lack of resources, lack of legal basis or lack of necessity of legal advisors when children are already provided with a legal guardian. The denial of legal assistance leaves these children on their own under a complex legal procedure in a foreign country where many of their fundamental rights are at stake and violates the best interest principle which supports the appointment of legal representatives for every unaccompanied child. Statistics show that legal representation increases the possibility of children to receive asylum while improving the chances of receiving a fair outcome and avoiding unjust deportations

or removals.<sup>404</sup> Why should these children that have already faced uncountable difficult situations continue to experience lack of protection while going through such a complex and important procedure with no representation?

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<sup>404</sup>See King, 2013, *supra* note 14, pp. 345, 350.

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It is worth mentioning that there is no specific book on the issue of legal representation of unaccompanied children.

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