

I. Access to fair procedures for migrant children including the right to be heard and to participate in proceedings

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I. Introduction: Right to be heard

Children are the holders of rights and have the right to be heard in every decision that affects them. The right to be heard is key to a child's access to her/his rights and to fair procedures so that decisions can be made in her/his best interests. The right to be heard is considered to be among the four principles central to respecting children's rights under the CRC. These guiding principles include:

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

These principles are all to be applied to migrant children.

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

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

The state's obligation to respect and protect a child's right to be heard means that a child is to be given the opportunity and means to present his or her views and have those views given due weight when decisions are being made which will affect the child. The views of children should be taken into account in all decisions concerning them, even when the child is not able to express their views verbally.

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

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

International law

Convention on the Rights of the Child

Article 12

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

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

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to be heard

1. Article 12 of the Convention on the Rights of the Child (the Convention) is a unique provision in a human rights treaty; it addresses the legal and social status of children, who, on the one hand lack the full autonomy of adults but, on the other, are subjects of rights. Paragraph 1 assures, to every child 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 age and maturity. Paragraph 2 states, in particular, that the child shall be afforded the right to be heard in any judicial or administrative proceedings affecting him or her.

2. The right of all children to be heard and taken seriously constitutes one of the fundamental values of the Convention. The Committee on the Rights of the Child (the Committee) has identified article 12 as one of the four general principles of the Convention, the others being the right to non-discrimination, the right to life and development, and the primary consideration of the child's best interests, which highlights the fact that this article establishes not only a right in itself, but should also be considered in the interpretation and implementation of all other rights.

(...)

21. The Committee emphasizes that article 12 imposes no age limit on the right of the child to express her or his views, and discourages States parties from introducing age limits either in law or in practice which would restrict the child's right to be heard in all matters affecting her or him. In this respect, the Committee underlines the following:

– First... full implementation of article 12 requires recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preferences;

– Second, it is not necessary that the child has comprehensive knowledge of all aspects of the matter affecting her or him, but that she or he has sufficient understanding to be capable of appropriately forming her or his own views on the matter;

– Third, States parties are also under the obligation to ensure the implementation of this right for children experiencing difficulties in making their views heard. For instance, children with disabilities should be equipped with, and enabled to use, any mode of communication necessary to facilitate the expression of their views. Efforts must also be made to recognize the right to expression of views for minority, indigenous and migrant children and other children who do not speak the majority language;

– Lastly, States parties must be aware of the potential negative consequences of an inconsiderate practice of this right, particularly in cases involving very young children, or in instances where the child has been a victim of a criminal offence, sexual abuse, violence, or other forms of mistreatment. States parties must undertake all necessary measures to ensure that the right to be heard is exercised ensuring full protection of the child.

34. A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms.

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

44. Judges should respect the right of children to be heard in all matters that affect them or at least to be heard when they are deemed to have a sufficient understanding of the matters in question. Means used for this purpose should be adapted to the child's level of understanding and ability to communicate and take into account the circumstances of the case. Children should be consulted on the manner in which they wish to be heard.

45. Due weight should be given to the child's views and opinion in accordance with his or her age and maturity.

46. The right to be heard is a right of the child, not a duty of the child.

47. A child should not be precluded from being heard solely on the basis of age. Whenever a child takes the initiative to be heard in a case that affects him or her, the judge should not, unless it is in the child's best interests, refuse to hear the child and should listen to his or her views and opinion on matters concerning him or her in the case.

48. Children should be provided with all necessary information on how effectively to use the right to be heard. However, it should be explained to them that their right to be heard and to have their views taken into consideration may not necessarily determine the final decision.

49. Judgments and court rulings affecting children should be duly reasoned and explained to them in language that children can understand, particularly those decisions in which the child's views and opinions have not been followed.

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

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

UN Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, UN Doc. CRC/GC/2005/6, (1 September 2005), paras 71-72

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

72. The interviews should be conducted by representatives of the refugee determination authority who will take into account the special situation of

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

UN Committee on the Rights of the Child, [General Comment No. 14](#) on the right of the child to have his or her best interests taken as a primary consideration (art.3, para.1 of the CRC), UN Doc. CRC/C/GC/14, (29 May 2013) paras 43-45

43. Assessment of a child's best interests must include respect for the child's right to express his or her views freely and due weight given to said views in all matters affecting the child. This is clearly set out in the Committee's general comment No. 12 which also highlights the inextricable links between articles 3, paragraph 1, and 12. The two articles have complementary roles: the first aims to realize the child's best interests, and the second provides the methodology for hearing the views of the child or children and their inclusion in all matters affecting the child, including the assessment of his or her best interests. Article 3, paragraph 1, cannot be correctly applied if the requirements of article 12 are not met. Similarly, article 3, paragraph 1, reinforces the functionality of article 12, by facilitating the essential role of children in all decisions affecting their lives.

44. The evolving capacities of the child (art. 5) must be taken into consideration when the child's best interests and right to be heard are at stake. The Committee has already established that the more the child knows, has experienced and understands, the more the parent, legal guardian or other persons legally responsible for him or her have to transform direction and guidance into reminders and advice, and later to an exchange on an equal footing. Similarly, as the child matures, his or her views shall have increasing weight in the assessment of his or her best interests. Babies and very young children have the same rights as all children to have their best interests assessed, even if they cannot express their views or represent themselves in the same way as older children. States must ensure appropriate arrangements, including representation, when appropriate, for the assessment of their best interests; the same applies for children who are not able or willing to express a view.

45. The Committee recalls that article 12, paragraph 2, of the Convention provides for the right of the child to be heard, either directly or through a representative, in any judicial or administrative proceeding affecting him or her (...).

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

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

analysis of the child's opinion.

***Sahin v. Germany*, Grand Chamber of the ECtHR, Application No. 30943/96, (8 July 2003)**

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

EU law

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

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

EU Charter on Fundamental Rights

Article 24 The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

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

Article 11

Return of the child

(...)

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

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

62. In that regard, it must first be observed that it is clear from Article 24 of that charter and from Article 42(2)(a) of Regulation No 2201/2003 that those provisions refer not to the hearing of the child per se, but to the child's having the opportunity to be heard.

63. First, it is a requirement of Article 24(1) of the Charter that children should be able to express their views freely and that the views expressed should be taken into consideration on matters which concern the children, solely 'in accordance with their age and maturity', and of Article 24(2) of the Charter that, in all actions relating to children, account be taken of the best interests of the child, since those interests may then justify a decision not to hear the child. Secondly, it is a requirement of Article 42(2)(a) of the regulation that the child be given the opportunity to be heard 'unless a hearing was considered inappropriate having regard to his or her age or degree of maturity'.

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

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

66. In other words, whilst it is not a requirement of Article 24 of the Charter of Fundamental Rights and Article 42(2)(a) of Regulation No 2201/2003 that the court of the Member State of origin obtain the views of the child in every case by means of a hearing, and that that court thus retains a degree of discretion, the fact remains

that, where that court decides to hear the child, those provisions require the court to take all measures which are appropriate to the arrangement of such a hearing, having regard to the child's best interests and the circumstances of each individual case, in order to ensure the effectiveness of those provisions, and to offer to the child a genuine and effective opportunity to express his or her views.

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II. Right to a fair hearing and access to court

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

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

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

In the cases of both *T. v. the United Kingdom* and *V. v. the United Kingdom*, the court ruled that criminal proceedings must be adapted to children's needs. The defendants T and V (both 10 years old) were charged with murder of a two-year-old. The boys were subject to a public hearing for 3 weeks, in an adult court. The trial was preceded and accompanied by massive national and international publicity. On occasion, attempts were made to attack the vehicles bringing them to court. A child aged 11 would likely find the highly formal setting of the courtroom intimidating, whether involved as a witness or a defendant. The children suffered from post-traumatic effects of the hearing.

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

International law

International Covenant on Civil and Political Rights (ICCPR)

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children. (...)

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the

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interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

Convention on the Rights of the Child (CRC)

Article 40

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that: (...)

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees: (...)

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

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

Article 6 Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
(...)

3. Everyone charged with a criminal offence has the following minimum rights:
(...)

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

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

D. Child-friendly justice during judicial proceedings

1. Access to court and to the judicial process

34. As bearers of rights, children should have recourse to remedies to effectively exercise their rights or act upon violations of their rights. The domestic law should facilitate where appropriate the possibility of access to court for children who have sufficient understanding of their rights and of the use of remedies to protect these

rights, based on adequately given legal advice.

35. Any obstacles to access to court, such as the cost of the proceedings or the lack of legal counsel, should be removed.

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

V. v. The United Kingdom, Grand Chamber of the ECtHR, Application No. 24888/94 (16 December 1999)

88. The Court notes that the applicant's trial took place over three weeks in public in the Crown Court. Special measures were taken in view of the applicant's young age and to promote his understanding of the proceedings: for example, he had the trial procedure explained to him and was taken to see the courtroom in advance, and the hearing times were shortened so as not to tire the defendants excessively. Nonetheless, the formality and ritual of the Crown Court must at times have seemed incomprehensible and intimidating for a child of eleven, and there is evidence that certain of the modifications to the courtroom, in particular the raised dock which was designed to enable the defendants to see what was going on, had the effect of increasing the applicant's sense of discomfort during the trial, since he felt exposed to the scrutiny of the press and public. The trial generated extremely high levels of press and public interest, both inside and outside the courtroom, to the extent that the judge in his summing-up referred to the problems caused to witnesses by the blaze of publicity and asked the jury to take this into account when assessing their evidence (...).

89. There is considerable psychiatric evidence relating to the applicant's ability to participate in the proceedings. Thus, Dr Susan Bailey gave evidence during the trial in November 1993 that on each occasion when she had seen the applicant prior to the trial he had cried inconsolably and had not been able to talk about the circumstances of the offence in any useful way (...). Dr Bentovim similarly found in his report of September 1993 that the applicant was suffering from post-traumatic effects and found it very difficult and distressing to think or talk about the events in question, making it impossible to ascertain many aspects (...). Subsequent to the trial, in January 1995, the applicant told Dr Bentovim that he had been terrified of being looked at in court and had frequently found himself worrying what people were thinking about him. He had not been able to pay attention to the proceedings and had spent time counting in his head or making shapes with his shoes. Dr Bentovim considered that, in view of V.'s immaturity, it was "very doubtful" that he understood the situation and was able to give informed instruction to his lawyers (...). The report of Dr Bailey dated November 1997 also described the applicant's attempts to distract himself during the trial, his inability to listen to what was said and the distress caused to him by the public nature of the proceedings (...).

90. In such circumstances the Court does not consider that it was sufficient for the purposes of Article 6 § 1 that the applicant was represented by skilled and experienced lawyers. This case is different from that of Stanford (...), where the Court found no violation arising from the fact that the accused could not hear some of the evidence given at trial, in view of the fact that his counsel, who could hear all

that was said and was able to take his client's instructions at all times, chose for tactical reasons not to request that the accused be seated closer to the witnesses. Here, although the applicant's legal representatives were seated, as the Government put it, "within whispering distance", it is highly unlikely that the applicant would have felt sufficiently uninhibited, in the tense courtroom and under public scrutiny, to have consulted with them during the trial or, indeed, that, given his immaturity and his disturbed emotional state, he would have been capable outside the courtroom of cooperating with his lawyers and giving them information for the purposes of his defence.

91. In conclusion, the Court considers that the applicant was unable to participate effectively in the criminal proceedings against him and was, in consequence, denied a fair hearing in breach of Article 6 § 1.

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III. Appointment of guardian

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

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

The guardian is in addition to but not to substitute for a lawyer

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

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

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

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

International law

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

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

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

33. States are required to create the underlying legal framework and to take necessary measures to secure proper representation of an unaccompanied or separated child's best interests. Therefore, States should appoint a guardian or adviser as soon as the unaccompanied or separated child is identified and maintain such guardianship arrangements until the child has either reached the age of majority or has permanently left the territory and/or jurisdiction of the State, in compliance

with the Convention and other international obligations. The guardian should be consulted and informed regarding all actions taken in relation to the child. The guardian should have the authority to be present in all planning and decision-making processes, including immigration and appeal hearings, care arrangements and all efforts to search for a durable solution. The guardian or adviser should have the necessary expertise in the field of childcare, so as to ensure that the interests of the child are safeguarded and that the child's legal, social, health, psychological, material and educational needs are appropriately covered by, inter alia, the guardian acting as a link between the child and existing specialist agencies/individuals who provide the continuum of care required by the child. Agencies or individuals whose interests could potentially be in conflict with those of the child's should not be eligible for guardianship. For example, non-related adults whose primary relationship to the child is that of an employer should be excluded from a guardianship role.

69. An asylum-seeking child should be represented by an adult who is familiar with the child's background and who is competent and able to represent his or her best interests (see section V (b), "Appointment of a guardian or adviser or legal representative"). The unaccompanied or separated child should also, in all cases, be given access, free of charge, to a qualified legal representative, including where the application for refugee status is processed under the normal procedures for adults.

EU law

COUNCIL DIRECTIVE 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted
(EU Qualification Directive)

Article 31

1. As soon as possible after the granting of international protection Member States shall take the necessary measures to ensure the representation of unaccompanied minors by a legal guardian or, where necessary, by an organisation responsible for the care and well-being of minors, or by any other appropriate representation including that based on legislation or court order.
2. Member States shall ensure that the minor's needs are duly met in the implementation of this Directive by the appointed guardian or representative. The appropriate authorities shall make regular assessments.
3. Member States shall ensure that unaccompanied minors are placed either:
 - a) with adult relatives; or
 - b) with a foster family; or
 - c) in centres specialised in accommodation for minors; or
 - d) in other accommodation suitable for minors.

In this context, the views of the child shall be taken into account in accordance with his or her age and degree of maturity.

4. As far as possible, siblings shall be kept together, taking into account the best interests of the minor concerned and, in particular, his or her age and degree of maturity. Changes of residence of unaccompanied minors shall be limited to a minimum.
5. If an unaccompanied minor is granted international protection and the tracing of

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his or her family members has not already started, Member States shall start tracing them as soon as possible after the granting of international protection, whilst protecting the minor's best interests. If the tracing has already started, Member States shall continue the tracing process where appropriate. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis.

6. Those working with unaccompanied minors shall have had and continue to receive appropriate training concerning their needs.

The Asylum procedures Directive (Art 2(n)) and Reception Conditions Directive (Art 2(j)) provide for a definition of a legal representative as follows:

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

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

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

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

IV. Public hearing

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

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

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

International law

International Covenant on Civil and Political Rights (ICCPR)

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

Convention on the Rights of the Child (CRC)

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 40

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that: (...)

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees: (...)

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

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

Article 6 Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a **fair and public hearing** within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be **pronounced publicly** but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

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

28. All trials in criminal matters or related to a suit at law must in principle be conducted orally and publicly. The publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large. Courts must make information regarding the time and venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, inter alia, the potential interest in the case and the duration of the oral hearing. The requirement of a public hearing does not necessarily apply to all appellate proceedings which may take place on the basis of written presentations or to pre-trial decisions made by prosecutors and other public authorities.

29. Article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in

special circumstances where publicity would be prejudicial to the interests of justice. Apart from such exceptional circumstances, a hearing must be open to the general public, including members of the media, and must not, for instance, be limited to a particular category of persons. Even in cases in which the public is excluded from the trial, the judgment, including the essential findings, evidence and legal reasoning must be made public, except where the interest of juvenile persons otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children.

B. and P. v United Kingdom, ECtHR, Application Nos. 36337/97 and 35974/97, (24 April 2001)

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

38. The proceedings which the present applicants wished to take place in public concerned the residence of each man’s son following the parents’ divorce or separation. The Court considers that such proceedings are prime examples of cases where the exclusion of the press and public may be justified in order to protect the privacy of the child and parties and to avoid prejudicing the interests of justice. To enable the deciding judge to gain as full and accurate a picture as possible of the advantages and disadvantages of the various residence and contact options open to the child, it is essential that the parents and other witnesses feel able to express themselves candidly on highly personal issues without fear of public curiosity or comment.

47. The Court notes that anyone who can establish an interest may consult or obtain a copy of the full text of the orders and/or judgments of first-instance courts in child residence cases, and that the judgments of the Court of Appeal and of first-instance courts in cases of special interest are routinely published, thereby enabling the public to study the manner in which the courts generally approach such cases and the principles applied in deciding them. It is noteworthy in this respect that the first applicant, despite his desire to share information about his son with the child’s grandparents, never made any application either for the grandparents to be present in the county court or for leave to disclose the residence judgment to them.

48. Having regard to the nature of the proceedings and the form of publicity applied by the national law, the Court considers that a literal interpretation of the terms of Article 6 § 1 concerning the pronouncement of judgments would not only be unnecessary for the purposes of public scrutiny but might even frustrate the primary aim of Article 6 § 1, which is to secure a fair hearing (see, mutatis mutandis, Sutter, cited above, p. 14, § 34).

49. The Court thus concludes that the Convention did not require making available to the general public the residence judgments in the present cases, and that there has been no violation of Article 6 § 1 in this respect.

Moser v. Austria (Application no. 12643/02), 21 September 2006

97. (...) The present case concerns the transfer of custody of the first applicant's son to a public institution, namely the Youth Welfare Office, thus, opposing an individual to the State. The Court considers that in this sphere, the reasons for excluding a case from public scrutiny must be subject to careful examination. This was not the position in the present case, since the law was silent on the issue and the courts simply followed a long-established practice to hold hearings in camera without considering the special features of the case

102. It is not disputed that none of the courts' decisions was pronounced publicly. Therefore, it remains to be examined whether publicity was sufficiently ensured by other means...

103. The Court finds that in the present case, in which dispensing with a public hearing was not justified in the circumstances, the ... means of rendering the decisions public, namely giving persons who establish a legal interest in the case access to the file and publishing decisions of special interest, mostly of the appellate courts or the Supreme Court, did not suffice to comply with the requirements of Article 6 § 1.

104. Consequently there has been a violation of Article 6 on account of the failure to pronounce the courts' decisions publicly.

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V. Legal assistance and representation

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

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

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

The European Court on Human Rights found that questioning a 15-year-old without his lawyer and the state's failure to give the lawyer access to his client during the early stages of proceedings violated the boy's right to a fair hearing; because of his age, it would not have been reasonable to expect the boy to know of his right to seek legal counsel or understand the consequences of failing to do so (ECtHR *Panovits v Cyprus* (4268/04), (2008) §84; *Salduz v Turkey* (36391/02), European Court Grand Chamber (2008) §§60, 63). The Court also found that the "manifest failure" of a child's lawyer to represent him properly, coupled with factors such as the child's age and the seriousness of the charges, should have led the trial court to consider that the applicant urgently required adequate legal representation (*Güveç v Turkey* (70337/01), European Court (2009) §131.)

International standards

CRC

Article 37

States Parties shall ensure that: (...)

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

Article 40

(...)

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

(...)

(b) Every child alleged as or accused of having infringed the penal law has at least the

following guarantees:

(...)

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

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

Article 6 Right to a fair trial (...)

3. Everyone charged with a criminal offence has the following minimum rights: (...)

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

UN Human Rights Committee General Comment no. 32, on Article 14 of the ICCPR, Right to equality before courts and tribunals and to fair trial, UN Doc. CCPR/C/GC/32 (2007), para 10

10. The availability or absence of **legal assistance** often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way. While article 14 explicitly addresses the guarantee of **legal assistance in criminal proceedings** in paragraph 3 (d), States are encouraged to **provide free legal aid in other cases**, for individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so. For instance, where a person sentenced to death seeks available constitutional review of irregularities in a criminal trial but does not have sufficient means to meet the costs of legal assistance in order to pursue such remedy, the State is obliged to provide legal assistance in accordance with article 14, paragraph 1, in conjunction with the right to an effective remedy as enshrined in article 2, paragraph 3 of the Covenant .

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

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

Report of the UN Special Rapporteur on the independence of judges and lawyers, Legal aid, UN Doc. A/HRC/23/43 (9 April 2013)

3...."Legal aid is an essential element of a fair, humane and efficient system of

Fostering Access to Immigrant Children's Rights (FAIR Project)

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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.”

20. Legal aid is an essential component of a fair and efficient justice system founded on the rule of law. It is also a right in itself and an essential precondition for the exercise and enjoyment of a number of human rights, including the right to a fair trial and the right to an effective remedy. Access to legal advice and assistance is also an important safeguard that helps to ensure fairness and public trust in the administration of justice.

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

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

Report of the Special Rapporteur on the independence of judges and lawyers, [Protecting children’s rights in the justice system](#), 1 April 2015

Child-friendly legal aid

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

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

37. In its general comment No. 10, the Committee on the Rights of the Child further explained that, when preparing his/her defence, a child in conflict with the law must be guaranteed free and appropriate legal and other appropriate assistance. Indeed, by virtue of their age, dependent status and economic circumstances most children are unable to pay for legal aid. The Special Rapporteur considers that given this reality, "children must have access to free legal assistance in criminal and in civil proceedings and administrative fees must be waived".

38. As noted in a 2011 study, "the provision of timely, competent, and developmentally appropriate legal assistance directly advances a child's right to a fair, just, and participatory legal process. Child-friendly legal aid also has the potential to promote children's substantive rights". In this respect, lawyers have a professional responsibility towards children and should therefore acquire the special skills to be able to take into account the unique attributes and needs of child clients and effectively deliver child-friendly legal aid.

The Council of Europe Guidelines on Human Rights Protection in the Context of Accelerated Asylum Procedures, 1 July 2009

IV. Procedural guarantees

1. When accelerated asylum procedures are applied, asylum seekers should enjoy the following minimum procedural guarantees: (...) (f) the **right to access legal advice and assistance**, it being understood that legal aid should be provided according to national law;

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

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

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

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

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

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

34. In all legal aid decisions affecting children, the best interests of the child should be the primary consideration.

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

Guideline 1. Provision of legal aid

41. Whenever States apply a means test to determine eligibility for legal aid, they should ensure that: (...)

(c) Persons urgently requiring legal aid at police stations, detention centres or courts should be provided preliminary legal aid while their eligibility is being determined. Children are always exempted from the means test;

Guideline 6. Legal aid at the post-trial stage

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

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

52. States should take applicable and appropriate measures to ensure the right of women to access legal aid, including: (...)

(b) Taking active steps to ensure that, where possible, female lawyers are available to represent female defendants, accused and victims;

Committee on the Rights of the Child, [General Comment No. 10 on Children's rights in juvenile justice](#), UN Doc. CRC/C/GC/10, (25 April 2007), paras 49-50

Legal or other appropriate assistance (art. 40 (2) (b) (ii))

49. The child must be guaranteed legal or other appropriate assistance in the preparation and presentation of his/her defence. CRC does require that the child be provided with assistance, which is not necessarily under all circumstances legal but it must be appropriate. It is left to the discretion of States parties to determine how this assistance is provided but it should be free of charge. The Committee recommends the State parties provide as much as possible for adequate trained legal assistance, such as expert lawyers or paralegal professionals. Other appropriate assistance is possible (e.g. social worker), but that person must have sufficient knowledge and understanding of the various legal aspects of the process of juvenile justice and must be trained to work with children in conflict with the law.

50. As required by article 14 (3) (b) of ICCPR, the child and his/her assistant must

have adequate time and facilities for the preparation of his/her defence. Communications between the child and his/her assistance, either in writing or orally, should take place under such conditions that the confidentiality of such communications is fully respected in accordance with the guarantee provided for in article 40 (2) (b) (vii) of CRC, and the right of the child to be protected against interference with his/her privacy and correspondence (art. 16 of CRC). A number of States parties have made reservations regarding this guarantee (art. 40 (2) (b) (ii) of CRC), apparently assuming that it requires exclusively the provision of legal assistance and therefore by a lawyer. That is not the case and such reservations can and should be withdrawn.

***Quaranta v. Switzerland*, ECtHR, Application No. 12744/87, 24 May 1991**

32. In order to determine whether the "interests of justice" required that the applicant receive free legal assistance, the Court will have regard to various criteria. (...).

33. In the first place, consideration should be given to the seriousness of the offence of which Mr Quaranta was accused and the severity of the sentence which he risked. (...)

34. An additional factor is the complexity of the case. (...)

35. Such questions, which are complicated in themselves, were even more so for Mr Quaranta on account of his personal situation: a young adult of foreign origin from an underprivileged background, he had no real occupational training and had a long criminal record. He had taken drugs since 1975, almost daily since 1983, and, at the material time, was living with his family on social security benefit.

36. In the circumstances of the case, his appearance in person before the investigating judge, and then before the Criminal Court, without the assistance of a lawyer, did not therefore enable him to present his case in an adequate manner.

***Salduz v Turkey*, ECtHR, Application no. 36391/02, (27 November 2008)**

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

light of the applicant's statement to the police.

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

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

Panovits v. Cyprus, ECtHR, Application No. 4268/04, (11 December 2008)

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

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

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

Güveç v Turkey, ECtHR, Application No. 70337/01, 20 January 2009

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

EU law

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 ([EU Asylum Procedures Directive](#))

Article 20 Free legal assistance and representation in appeals procedures

1. Member States shall ensure that free legal assistance and representation is granted on request in the appeals procedures provided for in Chapter V. It shall include, at least, the preparation of the required procedural documents and participation in the hearing before a court or tribunal of first instance on behalf of the applicant.
2. Member States may also provide free legal assistance and/or representation in the procedures at first instance provided for in Chapter III [*Procedures at first instance, Subsequent applications, Border procedures*]. In such cases, Article 19 shall not apply.
3. Member States may provide that free legal assistance and representation not be granted where the applicant's appeal is considered by a court or tribunal or other competent authority to have no tangible prospect of success.

Where a decision not to grant free legal assistance and representation pursuant to this paragraph is taken by an authority which is not a court or tribunal, Member States shall ensure that the applicant has the right to an effective remedy before a court or tribunal against that decision.

In the application of this paragraph, Member States shall ensure that legal assistance and representation is not arbitrarily restricted and that the applicant's effective access to justice is not hindered.

4. Free legal assistance and representation shall be subject to the conditions laid down in Article 21.

Article 22 Right to legal assistance and representation at all stages of the procedure

1. Applicants shall be given the opportunity to consult, at their own cost, in an effective manner a legal adviser or other counsellor, admitted or permitted as such under national law, on matters relating to their applications for international protection, at all stages of the procedure, including following a negative decision.

Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection ([EU Reception Conditions Directive](#))

Article 26

2. In cases of an appeal or a review before a judicial authority referred to in paragraph 1, Member States shall ensure that free legal assistance and representation is made available on request in so far as such aid is necessary to ensure effective access to justice. This shall include, at least, the preparation of the required procedural documents and participation in the hearing before the judicial authorities on behalf of the applicant. Free legal assistance and representation shall be provided by suitably qualified persons, as admitted or permitted under national law, whose interests do not conflict or could not potentially conflict with those of the applicant.

3. Member States may also provide that free legal assistance and representation are granted:

(a) only to those who lack sufficient resources; and/or

(b) only through the services provided by legal advisers or other counsellors specifically designated by national law to assist and represent applicants.

Member States may provide that free legal assistance and representation not be made available if the appeal or review is considered by a competent authority to have no tangible prospect of success. In such a case, Member States shall ensure that legal assistance and representation is not arbitrarily restricted and that the applicant's effective access to justice is not hindered.

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

Article 26 Notification of a transfer decision

1. Where the requested Member State accepts to take charge of or to take back an applicant or other person as referred to in Article 18(1)(c) or (d), the requesting Member State shall notify the person concerned of the decision to transfer him or her to the Member State responsible and, where applicable, of not examining his or her application for international protection. If a legal advisor or other counsellor is

representing the person concerned, Member States may choose to notify the decision to such legal advisor or counsellor instead of to the person concerned and, where applicable, communicate the decision to the person concerned.

2. The decision referred to in paragraph 1 shall contain information on the legal remedies available, including on the right to apply for suspensive effect, where applicable, and on the time limits applicable for seeking such remedies and for carrying out the transfer, and shall, if necessary, contain information on the place where, and the date on which, the person concerned should appear, if that person is travelling to the Member State responsible by his or her own means. Member States shall ensure that information on persons or entities that may provide legal assistance to the person concerned is communicated to the person concerned together with the decision referred to in paragraph 1, when that information has not been already communicated.

3. When the person concerned is not assisted or represented by a legal advisor or other counsellor, Member States shall inform him or her of the main elements of the decision, which shall always include information on the legal remedies available and the time limits applicable for seeking such remedies, in a language that the person concerned understands or is reasonably supposed to understand.

Article 27(6)

6. Member States shall ensure that legal assistance is granted on request free of charge where the person concerned cannot afford the costs involved. Member States may provide that, as regards fees and other costs, the treatment of applicants shall not be more favourable than the treatment generally accorded to their nationals in matters pertaining to legal assistance.

Without arbitrarily restricting access to legal assistance, Member States may provide that free legal assistance and representation not be granted where the appeal or review is considered by the competent authority or a court or tribunal to have no tangible prospect of success.

Where a decision not to grant free legal assistance and representation pursuant to this paragraph is taken by an authority other than a court or tribunal, Member States shall provide the right to an effective remedy before a court or tribunal to challenge that decision.

In complying with the requirements set out in this paragraph, Member States shall ensure that legal assistance and representation is not arbitrarily restricted and that the applicant's effective access to justice is not hindered.

Legal assistance shall include at least the preparation of the required procedural documents and representation before a court or tribunal and may be restricted to legal advisors or counsellors specifically designated by national law to provide assistance and representation. Procedures for access to legal assistance shall be laid down in national law.

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

Article 6 Assistance by a lawyer

1. Children who are suspects or accused persons in criminal proceedings have the right of access to a lawyer in accordance with Directive 2013/48/EU. Nothing in this Directive, in particular in this Article, shall affect that right.

2. Member States shall ensure that children are assisted by a lawyer in accordance with this Article in order to allow them to exercise the rights of the defence effectively.

3. Member States shall ensure that children are assisted by a lawyer without undue delay once they are made aware that they are suspects or accused persons. In any event, children shall be assisted by a lawyer from whichever of the following points in time is the earliest:

(a) before they are questioned by the police or by another law enforcement or judicial authority;

(b) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with point (c) of paragraph 4;

(c) without undue delay after deprivation of liberty;

(d) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court.

4. Assistance by a lawyer shall include the following:

(a) Member States shall ensure that children have the right to meet in private and communicate with the lawyer representing them, including prior to questioning by the police or by another law enforcement or judicial authority;

(b) Member States shall ensure that children are assisted by a lawyer when they are questioned, and that the lawyer is able to participate effectively during questioning. Such participation shall be conducted in accordance with procedures under national law, provided that such procedures do not prejudice the effective exercise or essence of the right concerned. Where a lawyer participates during questioning, the fact that such participation has taken place shall be noted using the recording procedure under national law;

(c) Member States shall ensure that children are, as a minimum, assisted by a lawyer during the following investigative or evidence-gathering acts, where those acts are provided for under national law and if the suspect or accused person is required or permitted to attend the act concerned:

- (i) identity parades;
- (ii) confrontations;
- (iii) reconstructions of the scene of a crime.

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

6. Provided that this complies with the right to a fair trial, Member States may derogate from paragraph 3 where assistance by a lawyer is not proportionate in the light of the circumstances of the case, taking into account the seriousness of the alleged criminal offence, the complexity of the case and the measures that could be taken in respect of such an offence, it being understood that the child's best interests shall always be a primary consideration.

In any event, Member States shall ensure that children are assisted by a lawyer:

- (a) when they are brought before a competent court or judge in order to decide on detention at any stage of the proceedings within the scope of this Directive; and
- (b) during detention.

Member States shall also ensure that deprivation of liberty is not imposed as a criminal sentence, unless the child has been assisted by a lawyer in such a way as to allow the child to exercise the rights of the defence effectively and, in any event, during the trial hearings before a court.

7. Where the child is to be assisted by a lawyer in accordance with this Article but no lawyer is present, the competent authorities shall postpone the questioning of the child, or other investigative or evidence-gathering acts provided for in point (c) of paragraph 4, for a reasonable period of time in order to allow for the arrival of the lawyer or, where the child has not nominated a lawyer, to arrange a lawyer for the child.

8. In exceptional circumstances, and only at the pre-trial stage, Member States may temporarily derogate from the application of the rights provided for in paragraph 3 to the extent justified in the light of the particular circumstances of the case, on the basis of one of the following compelling reasons:

- (a) where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;
- (b) where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings in relation to a serious criminal offence.

Member States shall ensure that the competent authorities, when applying this paragraph, shall take the child's best interests into account.

A decision to proceed to questioning in the absence of the lawyer under this

paragraph may be taken only on a case-by-case basis, either by a judicial authority, or by another competent authority on condition that the decision can be submitted to judicial review.

Article 18 Right to legal aid

Member States shall ensure that national law in relation to legal aid guarantees the effective exercise of the right to be assisted by a lawyer pursuant to Article 6.

A small number of States provide legal aid to children automatically where a particular type of legal action is covered by the legal aid system. Belgium has exceptionally strong and clear rules automatically exempting a child from paying all costs related to judicial proceedings, including legal fees. Typically, though, eligibility criteria relating to the financial status of applicants will limit the coverage of free legal aid. It is common for these rules to take into account the financial position of a child's parents, provisions that may prevent children from wealthier families that do not support their legal action from approaching the courts. Lithuania and Luxembourg have both sidestepped this barrier by excluding a child's parents' income from the decision on whether to grant legal aid to a child, while Finland only considers parental income where the parents are assisting the child in bringing the case.

CRIN: [Rights, Remedies and Representation: A global report on access to justice for children, p. 29](#)

VI. Access to information

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

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

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

International law

Parliamentary Assembly of the Council of Europe [Resolution 1810 \(2011\)](#): Unaccompanied children in Europe: issues of arrival, stay and return,

5.3. no child should be denied access to the territory or be summarily turned back at the borders of a member state. Immediate referral to assistance and care should be arranged by specialised services with a view to identifying if the migrant is a minor, ascertaining his or her individual circumstances and protection needs and ultimately identifying a durable solution in the child's best interest;

5.6. legal, social and psychological assistance should be provided without delay to unaccompanied children. Children should be informed immediately upon arrival or interception, individually and in a language and form that they can understand, about their right to protection and assistance, including their right to seek asylum or other forms of international protection, and the necessary procedures and their implications;

5.7. all interviews with an unaccompanied child concerning his or her personal details and background should be conducted individually by specialised and well-trained staff and in the presence of the child's guardian; (...)

5.14. family reunification possibilities should be extended beyond the country of origin and approached from a humanitarian perspective exploring wider family links in the host country and third countries, guided by the principle of the child's best interest. The Dublin II Regulation should only be applied to unaccompanied children if transfer to a third country is in the child's best interests;

[Twenty Guidelines on Forced Return](#), Committee of Ministers, Council of Europe

Guideline 4. Notification of the removal order

1. The removal order should be addressed in writing to the individual concerned either

directly or through his/her authorised representative. If necessary, the addressee should be provided with an explanation of the order in a language he/she understands. The removal order shall indicate:

- the legal and factual grounds on which it is based;
- the remedies available, whether or not they have a suspensive effect, and the deadlines within which such remedies can be exercised.

2. Moreover, the authorities of the host state are encouraged to indicate:

- the bodies from whom further information may be obtained concerning the execution of the removal order;
- the consequences of non-compliance with the removal order.

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

Article 6 Right to a fair trial

(...)

3. Everyone **charged with a criminal offence** has the following minimum rights:
(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (...)

Convention on the Rights of the Child (CRC)

Article 40

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that: (...)

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees: (...)

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

EU law

EU Asylum Procedures Directive

Article 12

Guarantees for applicants

1. With respect to the procedures provided for in Chapter III, Member

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States shall ensure that all applicants enjoy the following guarantees:

(a) they shall be informed in a language which they understand or are reasonably supposed to understand of the procedure to be followed and of their rights and obligations during the procedure and the possible consequences of not complying with their obligations and not cooperating with the authorities. They shall be informed of the time-frame, the means at their disposal for fulfilling the obligation to submit the elements as referred to in Article 4 of Directive 2011/95/EU, as well as of the consequences of an explicit or implicit withdrawal of the application. That information shall be given in time to enable them to exercise the rights guaranteed in this Directive and to comply with the obligations described in Article 13; (...)

Article 19

Provision of legal and procedural information free of charge in procedures at first instance

1. In the procedures at first instance provided for in Chapter III, Member States shall ensure that, on request, applicants are provided with legal and procedural information free of charge, including, at least, information on the procedure in the light of the applicant's particular circumstances. In the event of a negative decision on an application at first instance, Member States shall also, on request, provide applicants with information — in addition to that given in accordance with Article 11(2) and Article 12(1)(f) — in order to clarify the reasons for such decision and explain how it can be challenged.

2. The provision of legal and procedural information free of charge shall be subject to the conditions laid down in Article 21.

Article 25

(...)

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

Right to information Directive 2012/13/EU

Article 3 Right to information about rights

1. Member States shall ensure that suspects or accused persons are provided promptly with information concerning at least the following procedural rights, as they apply under national law, in order to allow for those rights to be exercised effectively:

- (a) the right of access to a lawyer;
- (b) any entitlement to free legal advice and the conditions for obtaining such advice;
- (c) the right to be informed of the accusation, in accordance with Article 6;
- (d) the right to interpretation and translation;
- (e) the right to remain silent.

2. Member States shall ensure that the information provided for under paragraph 1 shall be given orally or in writing, in simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons.

Directive on rights of the child in criminal proceedings

Article 4 Right to information

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

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

(a) promptly when children are made aware that they are suspects or accused persons, in respect of:

(i) the right to have the holder of parental responsibility informed, as provided for in Article 5;

(ii) the right to be assisted by a lawyer, as provided for in Article 6;

(iii) the right to protection of privacy, as provided for in Article 14;

(iv) the right to be accompanied by the holder of parental responsibility during stages of the proceedings other than court hearings, as provided for in Article 15(4);

(v) the right to legal aid, as provided for in Article 18;

(b) at the earliest appropriate stage in the proceedings, in respect of:

(i) the right to an individual assessment, as provided for in Article 7;

(ii) the right to a medical examination, including the right to medical assistance, as provided for in Article 8;

(iii) the right to limitation of deprivation of liberty and to the use of alternative measures, including the right to periodic review of detention, as provided for in Articles 10 and 11;

(iv) the right to be accompanied by the holder of parental responsibility during court hearings, as provided for in Article 15(1);

(v) the right to appear in person at trial, as provided for in Article 16;

(vi) the right to effective remedies, as provided for in Article 19;

(c) upon deprivation of liberty in respect of the right to specific treatment during deprivation of liberty, as provided for in Article 12.

Member States shall ensure that the information referred to in paragraph 1 is given in writing, orally, or both, in simple and accessible language, and that the information given is noted, using the recording procedure in accordance with national law.

Where children are provided with a Letter of Rights pursuant to Directive 2012/13/EU, Member States shall ensure that such a Letter includes a reference to their rights under this Directive.

VII. Expulsion procedures

Especially during expulsion procedures, the right to be heard of a child, best interest of the child and the right to a fair procedure should be ensured. Child migrants who risk expulsion have the right to be heard in the context of expulsion procedures. The right to be heard should not be restricted to those who are considered to be lawfully in the territory but should apply to all child migrants.

International law

International Covenant on Civil and Political Rights (ICCPR)

Article 13

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.

Protocol 7 to the ECHR

Article 1 Procedural safeguards relating to expulsion of aliens

1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
 - a) to submit reasons against his expulsion,
 - b) to have his case reviewed, and
 - c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.
2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

EU law

Directive 2008/115/EC (16 December 2008), on common standards and procedures in Member States for returning illegally staying third- country nationals (EU [Return Directive](#))

Article 13 Remedies

(...)

3. The third-country national concerned shall have the possibility to obtain legal advice, representation and, where necessary, linguistic assistance.
4. Member States shall ensure that the necessary legal assistance and/or

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representation is granted on request free of charge in accordance with relevant national legislation or rules regarding legal aid, and may provide that such free legal assistance and/or representation is subject to conditions as set out in Article 15(3) to (6) of Directive 2005/85/EC.

VIII. Right to interpretation

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

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

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

International law

International Covenant on Civil and Political Rights (ICCPR)

Article 14

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

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

Convention on the Rights of the Child

Article 40

...

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

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees: (...)

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

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

Article 6(3)(e)

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

...

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

CCPR, General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial

13. ... The principle of equality between parties [, ... i]n exceptional cases, it ... might require that the free **assistance of an interpreter** be provided where otherwise an indigent party could not participate in the proceedings on equal terms or witnesses produced by it be examined.

32. ... In cases of an indigent defendant, communication with counsel might only be assured if a free interpreter is provided during the pre-trial and trial phase. ...

40. The right to have the free assistance of an interpreter if the accused cannot understand or speak the language used in court as provided for by article 14, paragraph 3 (f) enshrines another aspect of the principles of fairness and equality of arms in criminal proceedings. This right arises at all stages of the oral proceedings. It applies to aliens as well as to nationals. However, accused persons whose mother tongue differs from the official court language are, in principle, not entitled to the free assistance of an interpreter if they know the official language sufficiently to defend themselves effectively.

EU law

EU Asylum Procedures Directive

Article 8

Information and counselling in detention facilities and at border crossing points

1. Where there are indications that third-country nationals or stateless persons held in detention facilities or present at border crossing points, including transit zones, at external borders, may wish to make an application for international protection, Member States shall provide them with information on the possibility to do so. In those detention facilities and crossing points,

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Member States shall make arrangements for interpretation to the extent necessary to facilitate access to the asylum procedure.

(...)

Article 12 Guarantees for applicants

1. With respect to the procedures provided for in Chapter III, Member States shall ensure that all applicants enjoy the following guarantees: (...)

(b) they shall receive the services of an interpreter for submitting their case to the competent authorities whenever necessary. Member States shall consider it necessary to provide those services at least when the applicant is to be interviewed as referred to in Articles 14 to 17 and 34 and appropriate communication cannot be ensured without such services. In that case and in other cases where the competent authorities call upon the applicant, those services shall be paid for out of public funds;

Article 15 Requirements for a personal interview

(...) 3. Member States shall take appropriate steps to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner. To that end, Member States shall: (...)

(c) select an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview. The communication shall take place in the language preferred by the applicant unless there is another language which he or she understands and in which he or she is able to communicate clearly. Wherever possible, Member States shall provide an interpreter of the same sex if the applicant so requests, unless the determining authority has reasons to believe that such a request is based on grounds which are not related to difficulties on the part of the applicant to present the grounds of his or her application in a comprehensive manner;

Regulation 604/2013 ([Dublin III Regulation](#))

Article 5 (4)

4. The personal interview shall be conducted in a language that the applicant understands or is reasonably supposed to understand and in which he or she is able to communicate. Where necessary, Member States shall have recourse to an interpreter who is able to ensure appropriate communication between the applicant and the person conducting the personal interview.

Right to interpretation and translation [Directive 2010/64/EU](#)

Article 2 - Right to interpretation

1. Member States shall ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any

necessary interim hearings.

(...)

Article 3 - Right to translation of essential documents

1. Member States shall ensure that suspected or accused persons who do not understand the language of the criminal proceedings concerned are, within a reasonable period of time, provided with a written translation of all documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings.
2. Essential documents shall include any decision depriving a person of his liberty, any charge or indictment, and any judgment.
3. The competent authorities shall, in any given case, decide whether any other document is essential. Suspected or accused persons or their legal counsel may submit a reasoned request to that effect.

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IX. The reasonable time requirement

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

Child custody cases must be dealt with speedily. All the more so where the passage of time may have irreversible consequences for the parent-child relationship. Cases concerning parental responsibility and contact rights call for particular expedition.

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

The reasonable time is being considered in the light of the complexity of the case and the impact lengthy proceedings might have on the rights of the child. For instance as ruled in *Paulsen-Medalen and Svensson v. Sweden in case of restrictions on access between a parent and a child taken into public care*, and the serious and irreversible consequences which the taking into care that might have had on the child's enjoyment of the right to respect for family life.

International standards

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

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

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

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

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

Having regard to the particular circumstances of the case, the Court, like the Commission, finds that the length of the second custody proceedings did not exceed

a "reasonable time" and that there was thus no violation of Article 6 para. 1 (art. 6-1) of the Convention.

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

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

***Paulsen-Medalen and Svensson v. Sweden*, ECtHR, 19 February 1998**

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

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

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

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

***Souza Ribeiro v. France*, ECtHR, Application no. 22689/07, 13 December**

2012

95. While the urgent proceedings could in theory have been an opportunity for the court to examine the applicant's arguments and, if necessary, to stay the execution of the removal order, any possibility of that actually happening was extinguished because of the excessively short time between his application to the court and the execution of the removal order. In fact, the urgent-applications judge was powerless to do anything but declare the application devoid of purpose. So the applicant was deported solely on the basis of the decision of the administrative authority.

Consequently, in the circumstances of the present case the Court considers that the haste with which the removal order was executed had the effect of rendering the available remedies ineffective in practice and therefore inaccessible. While the Court is aware of the importance of swift access to a remedy, speed should not go so far as to constitute an obstacle or unjustified hindrance to making use of it, or take priority over its practical effectiveness.

X. Due process in expulsion proceedings or when entering a country

International human rights law affords limited procedural protection to migrants entering a country: in particular, the right to a fair hearing is unlikely to apply to decisions on entry to the territory. It has been expressly excluded by the European Court of Human Rights in relation to decisions regarding other aspects of immigration control (*Maaouia v. France*), while the UN Human Rights Committee has left the question open. Expulsion procedures thus are not subject to the full protection of the right to fair trial and its consequent guarantees. However, Article 13 of the ICCPR and Article 1 of *Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, respectively, guarantee procedural rights in expulsion proceedings in terms similar to Article 32 of the *Geneva Refugee Convention*. They require that a non-national lawfully in the territory of a State (ICCPR) or "lawfully resident" there (Protocol 7 ECHR) may be expelled only in pursuance of a decision reached in accordance with law. In addition, the non-national must be allowed, prior to expulsion, to submit reasons against expulsion and to have his or her case reviewed by, and be represented before, the competent authority or a person or persons especially designated by the competent authority. Exceptions to these guarantees are provided in case of national security or public order.

In addition, collective expulsions are strictly forbidden in international law (Article 4 Protocol 4 ECHR).

International law

Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms¹

Article 1 Procedural safeguards relating to expulsion of aliens

1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be

¹ Germany, the Netherlands and the United Kingdom are not parties to Protocol 7 ECHR (as of 7 July 2016).

allowed:

- a) to submit reasons against his expulsion,
 - b) to have his case reviewed, and
 - c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.
2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms

Article 4 Prohibition of collective expulsion of aliens

Collective expulsion of aliens is prohibited.

International Covenant on Civil and Political Rights (ICCPR)

Article 13

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.

Geneva Refugee Convention, 1951

Article 32 Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order and in pursuance of a decision reached in accordance with the process of law.
2. Each refugee shall be entitled, in accordance with the established law and procedure of the country, to submit evidence to clear himself and to be represented before the competent authority.
3. The Contracting States shall allow such refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Maaouia v. France, ECtHR, GC, Application No. 39652/98, Judgment of 5 October 2000

36. The Court points out that the provisions of the Convention must be construed in the light of the entire Convention system, including the Protocols. In that connection,

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the Court notes that Article 1 of Protocol No. 7, an instrument that was adopted on 22 November 1984 and which France has ratified, contains procedural guarantees applicable to the expulsion of aliens. In addition, the Court observes that the preamble to that instrument refers to the need to take “further steps to ensure the collective enforcement of certain rights and freedoms by means of the Convention ...”. Taken together, those provisions show that the States were aware that Article 6 § 1 did not apply to procedures for the expulsion of aliens and wished to take special measures in that sphere. That construction is supported by the explanatory report on Protocol No. 7 in the section dealing with Article 1, the relevant passages of which read as follows:

“6. In line with the general remark made in the introduction ..., it is stressed that an alien lawfully in the territory of a member state of the Council of Europe already benefits from certain guarantees when a measure of expulsion is taken against him, notably those which are afforded by Articles 3 (prohibition of inhuman or degrading treatment) and 8 (right to respect for private and family life), in connection with Article 13 (right to an effective remedy before a national authority) of the ... Convention ..., as interpreted by the European Commission and Court of Human Rights ...

7. Account being taken of the rights which are thus recognised in favour of aliens, the present article has been added to the ... Convention ... in order to afford minimum guarantees to such persons in the event of expulsion from the territory of a Contracting Party. The addition of this article enables protection to be granted in those cases which are not covered by other international instruments and allows such protection to be brought within the purview of the system of control provided for in the (...) Convention (...)

(...)

16. The European Commission of Human Rights has held in the case of Application No. 7729/76 that a decision to deport a person does 'not involve a determination of his civil rights and obligations or of any criminal charge against him' within the meaning of Article 6 of the Convention. The present article does not affect this interpretation of Article 6.”

37. The Court therefore considers that by adopting Article 1 of Protocol No. 7 containing guarantees specifically concerning proceedings for the expulsion of aliens the States clearly intimated their intention not to include such proceedings within the scope of Article 6 § 1 of the Convention.

XI. Access to effective remedy

1. General principles

International human rights treaties require States to ensure effective remedies for violations of rights. The remedy/remedies must be prompt, effective, accessible, enforceable, and lead to cessation of and reparation for the human rights violation concerned. Those conducting the investigation and adjudicating on the remedy must be independent and impartial. In certain cases, the remedy must be provided by a judicial body. The remedy must be accessible and effective in practice as well as in law.

Such remedies must be available to all persons including migrants without discrimination.

Migrant children, even more when undocumented, are often practically unable to access remedies when their rights are violated. States have the obligation to ensure an effective access to remedies for all migrants.

International law

International Covenant on Civil and Political Rights (ICCPR)

Article 2

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

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

Article 13 Right to an effective remedy

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.

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See also: Protocol 7 ECHR (Section 2. Right to be heard)

Human Rights Committee, [General Comment No. 31](#) on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004)

15. (...) States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children. (...)

16. Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. (...)

CEDAW [General Recommendation No. 26](#) on women migrant workers, UN Doc. CEDAW/C/2009/WP.1/R (2008)

21. Access to justice may be limited for women migrant workers. In some countries, restrictions are imposed on the use of the legal system by women migrant workers to obtain remedies for discriminatory labour standards, employment discrimination or sex- and gender-based violence. Further, women migrant workers may not be eligible for free government legal aid, and there may be other impediments, such as unresponsive and hostile officials and, at times, collusion between officials and the perpetrator. In some cases, diplomats have perpetrated sexual abuse, violence and other forms of discrimination against women migrant domestic workers while enjoying diplomatic immunity. In some countries, there are gaps in the laws protecting migrant women workers. For example, they may lose their work permits once they make a report of abuse or discrimination and then they cannot afford to remain in the country for the duration of the trial, if any. In addition to these formal barriers, practical barriers may prevent access to remedies. Many do not know the language of the country and do not know their rights. Women migrant workers may lack mobility because they may be confined by employers to their work or living sites, prohibited from using telephones or banned from joining groups or cultural associations. They often lack knowledge of their embassies or of services available, due to their dependence on employers or spouses for such information. For example, it is very difficult for women migrant domestic workers who are scarcely ever out of sight of their employers to even register with their embassies or file complaints. As such, women may have no outside contacts and no means of making a complaint, and they may suffer violence and abuse for long periods of time before the situation is exposed. In addition, the withholding of passports by employers or the fear of reprisal if the women migrant worker is engaged in sectors that are linked to criminal networks prevent them from making a report.

22. Undocumented women migrant workers are particularly vulnerable to exploitation and abuse because of their irregular immigration status, which exacerbates their exclusion and the risk of exploitation. They may be exploited as forced labour, and their access to minimum labour rights may be limited by fear of denunciation. They may also face harassment by the police. If they are apprehended, they are usually prosecuted for violations of immigration laws and placed in detention centres, where they are vulnerable to sexual abuse, and then deported.

26. States parties in countries where migrant women work should take all appropriate measures to ensure non-discrimination and the equal rights of women migrant workers, including in their own communities. Measures that may be required include, but are not limited to, the following:

(...)

(c) Access to remedies: States parties should ensure that women migrant workers have the ability to access remedies when their rights are violated. Specific measures include, but are not limited to, the following (articles 2 (c), (f) and 3):

(i) Promulgate and enforce laws and regulations that include adequate legal remedies and complaints mechanisms, and put in place easily accessible dispute resolution mechanisms, protecting both documented and undocumented women migrant workers from discrimination or sex-based exploitation and abuse;

(ii) Repeal or amend laws that prevent women migrant workers from using the courts and other systems of redress. These include laws on loss of work permit, which results in loss of earnings and possible deportation by immigration authorities when a worker files a complaint of exploitation or abuse and while pending investigation. States parties should introduce flexibility into the process of changing employers or sponsors without deportation in cases where workers complain of abuse;

(iii) Ensure that women migrant workers have access to legal assistance and to the courts and regulatory systems charged with enforcing labour and employment laws, including through free legal aid;

(...)

***Al-Nashif v. Bulgaria*, ECtHR, Application No. 50963/99, 20 June 2002**

132. As the Court has stated on many occasions, Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. Article 13 thus requires the provision of a domestic remedy to deal with the substance of an “arguable complaint” under the Convention and to grant appropriate relief, although the Contracting States are afforded some discretion as to the manner in which they comply with to their Convention obligations under this provision.

Giving direct expression to the States' obligation to protect human rights first and foremost within their own legal system, Article 13 establishes an additional guarantee for an individual in order to ensure that he or she effectively enjoys those rights.

The “effectiveness” of a “remedy” within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the “authority” referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (...).

***Muminov v. Russia*, ECtHR, Appl. no. 42502/06, 11 December 2008**

100. As to the merits of the complaint, the Court reiterates that the remedy required by Article 13 must be effective both in law and in practice, in particular in the sense

that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (...). The Court is not called upon to review in abstracto the compatibility of the relevant law and practice with the Convention, but to determine whether there was a remedy compatible with Article 13 of the Convention available to grant the applicant appropriate relief as regards his substantive complaint (...). Even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (...). The "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant (...).

Jabari v. Turkey, ECtHR, Application No. 40035/98, (11 July 2000)

39. The Court further observes that, having regard to the fact that Article 3 enshrines one of the most fundamental values of a democratic society and prohibits in absolute terms torture or inhuman or degrading treatment or punishment, a rigorous scrutiny must necessarily be conducted of an individual's claim that his or her deportation to a third country will expose that individual to treatment prohibited by Article 3 (...).

40. The Court is not persuaded that the authorities of the respondent State conducted any meaningful assessment of the applicant's claim, including its arguability. It would appear that the applicant's failure to comply with the five-day registration requirement under the Asylum Regulation 1994 denied her any scrutiny of the factual basis of her fears about being removed to Iran (...). In the Court's opinion, the automatic and mechanical application of such a short time-limit for submitting an asylum application must be considered at variance with the protection of the fundamental value embodied in Article 3 of the Convention. It fell to the branch office of the UNHCR to interview the applicant about the background to her asylum request and to evaluate the risk to which she would be exposed in the light of the nature of the offence with which she was charged. The Ankara Administrative Court, on her application for judicial review, limited itself to the issue of the formal legality of the applicant's deportation rather than the more compelling question of the substance of her fears, even though by that stage the applicant must be considered to have had more than an arguable claim that she would be at risk if removed to her country of origin.

41. The Court for its part must give due weight to the UNHCR's conclusion on the applicant's claim in making its own assessment of the risk which the applicant would face if her deportation were to be implemented. It is to be observed in this connection that the UNHCR interviewed the applicant and had the opportunity to test the credibility of her fears and the veracity of her account of the criminal proceedings initiated against her in Iran by reason of her adultery. It is further to be observed that the Government have not sought to dispute the applicant's reliance on the findings of Amnesty International concerning the punishment meted out to women who are found guilty of adultery (...). Having regard to the fact that the material point in time for the assessment of the risk faced by the applicant is the time of its own consideration of the case (...), the Court is not persuaded that the situation in the applicant's country of origin has evolved to the extent that adulterous behaviour is no longer considered a reprehensible affront to Islamic law. It has taken judicial notice of recent surveys of the current

situation in Iran and notes that punishment of adultery by stoning still remains on the statute book and may be resorted to by the authorities (...).

...

50. In the Court's opinion, given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised and the importance which it attaches to Article 3, the notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and the possibility of suspending the implementation of the measure impugned. Since the Ankara Administrative Court failed in the circumstances to provide any of these safeguards, the Court is led to conclude that the judicial review proceedings relied on by the Government did not satisfy the requirements of Article 13. Accordingly, there has been a violation of Article 13 of the Convention.

***Rahimi v. Greece*, Application no. 8687/08, European Court of Human Rights, (5 April 2011)**

Case Summary:

Background:

The complainant was 15 years old when he arrived in Greece from Afghanistan as an unaccompanied minor. Upon his arrival, he was arrested and sent to a detention camp for refugees pending deportation. While being detained, he was offered no information on the possibility to seek asylum or about his other legal rights in a language that he could understand. He was held among adults, in poor, unhygienic conditions. Following his release, he was not appointed a legal guardian or offered any other assistance; the complainant thus lived on the streets until he received help by local NGOs.

Ruling of the Court:

The Court found that the individual's right to be free from torture or inhumane or degrading treatment was violated as a result of the conditions in which he had been detained and the failure of the authorities to ensure his care, as an unaccompanied minor take care of him upon his release. The Court also concluded that the authorities failed to ensure the individual's right to remedy.

EU law

EU Charter on Fundamental Rights

Article 47 Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Other relevant EU legislation:

- Art 6 Dublin Regulation (UAC must be represented)
- Art 31 QD (Unaccompanied minors)
- Art 25 APD (limitations – age conditions)
- Art 8 Victims Directive

EU Directive on rights of the child in criminal proceedings

Article 19 Remedies

Member States shall ensure that children who are suspects or accused persons in criminal proceedings and children who are requested persons have an effective remedy under national law in the event of a breach of their rights under this Directive.

2. Access to effective remedy in expulsion proceedings, the right to an appeal with a suspensive effect

Expulsion of a migrant or the threat there of is likely to have a direct and/or indirect effect on the individual's right to a remedy for a violation of his or her rights:

Direct effect: an expulsion, once carried out, can render a remedy against a violation of rights that occurred in the host country meaningless or ineffective, as the person, once expelled, may not have access to it, or access to it might be impracticable due to the situation in the country to which the individual has been expelled. States duties to ensure access to remedies for human rights violations should extend to measures necessary to ensuring that people outside the country (including people who have been expelled) can also effectively access the remedy.

Indirect effect: The threat or fear of expulsion constitutes a powerful disincentive for migrants to exercise their right to access a remedy against violations of their human rights, particularly by authorities in the host country. States must create conditions allowing migrants - both regular and undocumented - to avail themselves of remedies for violations of their rights, without fear of expulsion.

In accordance with rulings of the European Court of Human Rights and the Council of Europe guidelines, in order to comply with the right to a remedy, a person threatened with an expulsion which arguably violates another Convention right must have:

- Access to relevant documents and information on the legal procedures to be followed in his or her case and the procedures available for a person to make out their claim, in a language the individual can understand;
- When necessary, translated material and interpretation;
- Effective access to legal advice, if necessary by provision of legal aid;

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- The right to put forward a claim and access to and to participate effectively in proceedings;
- An individualized and reasoned decision
- Timely notification of the decision
- Access to a fair and effective procedure before a competent independent and impartial body to dispute the factual and legal basis for the decision
- A rigorous assessment of the claim prior to removal

The appeal should always have a suspensive effect.

I.M. v. France, ECtHR, Application no. 9152/09, 2 February 2012

In May 2008, the Applicant Mr I.M., a Sudanese national, was arrested by the Sudanese police and spent eight days in detention and a further two months under surveillance by the authorities, who interrogated him on a weekly basis using violence. In December 2008 he travelled to Spain with a view to crossing the border into France, carrying a forged French visa. On 23 December 2008, Mr I.M. was arrested in France for “unlawful entry” and for “using forged documents”. During his police custody, his claim for asylum was not recorded by the police officer. On 26 December 2008, he was condemned in a “fast track” trial to one month in jail for “unlawful entry”. During his detention, another claim for asylum was not recorded. On 7 January 2009, the local prefect ordered the deportation of Mr I.M. to Sudan. On 12 January 2009, the appeal against his deportation order was rejected by an administrative judge of the administrative tribunal of Montpellier. On 16 January 2009, he was detained at the immigration detention centre of Perpignan awaiting his deportation to Sudan. On 22 January 2009, his claim for asylum was recorded by the French Office for the Protection of Refugees and Stateless Persons (OFPRA) and registered under the “fast track” procedure. On 30 January 2009, his asylum interview was conducted by a case worker of OFPRA and his application was denied on 31 January 2009. Mr I.M. appealed against that decision to the National Asylum Tribunal (Cour nationale du droit d’asile). Nevertheless, on 11 February 2009, Mr I.M. was brought by French police officers to the Sudanese Consulate to obtain travel document for his deportation.

On 16 February 2009 the Applicant applied to the European Court under Rule 39 of the Rules of Court, seeking to have the order for his deportation suspended. He alleged that enforcement of the decision of the French authorities to deport him to Sudan would place him at risk of treatment in breach of Article 3 (prohibition of inhuman or degrading treatment). Relying on Article 13 (right to an effective remedy), taken together with Article 3, he submitted that no effective remedy had been available to him in France owing to the fact that his asylum application had been dealt with under the fast-track procedure. The Court granted his request for the duration of the proceedings before it. On 19 February 2011 the National Asylum Tribunal granted the Applicant refugee status. In the meantime he had obtained a certificate of residence from his municipality of origin in Darfur and a medical report issued by a psychiatrist stating that he had been subjected to violence.

The application to the Administrative Court challenging the removal order, which had full suspensive effect, had theoretically made it possible to conduct an effective examination of the risks allegedly faced by the Applicant in Sudan. However, he was only provided with 48 hours to prepare his application, which was particularly short

compared with the 2 months period granted under the regular procedure before the Administrative Courts. The Applicant had been able to submit his application only in the form of a letter written in Arabic, which an officially appointed lawyer, whom he had met briefly before the hearing, had read out without having the opportunity to add any evidence to it. This lack of conclusive evidence had formed the basis for the rejection of the application lodged by I.M., who had also been criticised for not having previously lodged an asylum claim; being in detention he had actually not been in a position to do so. Accordingly, the Court had serious doubts as to whether I.M. had been able to effectively assert his Art. 3 complaints before the administrative court.

The Court, therefore, concluded as to the effectiveness of domestic legal remedies available in theory that their accessibility in practice had been limited by a number of factors, relating mainly to the automatic registration of his application under the fast-track procedure, the short deadlines for submitting applications and the practical and procedural difficulty of producing evidence while in custody or detention. As to the standard of examination of applications by OFPRA and the Administrative Court, this was inadequate due to the conditions in which the applications had been prepared and the lack of legal and linguistic assistance provided to the Applicant. Moreover, the interview with OFPRA had been of short duration given the fact that the case had been complex and had concerned a first-time asylum claim. I.M. was not provided access to any suspensive remedy before appeal courts or the Court of Cassation. The appeal to the National Asylum Tribunal against OFPRA's rejection of an asylum application did not have suspensive effect when the fast-track procedure had been applied. The deportation of the Applicant had been prevented only by the application of Rule 39 of the Rules of Court. Hence, while the effectiveness of a remedy within the meaning of Art. 13 did not depend on the certainty of a favourable outcome for the Applicant, the Court could not but conclude that, without its intervention, the Applicant would have been deported to Sudan without his claims having been subjected to the closest possible scrutiny. Accordingly, the Applicant had not had an effective remedy in practice by which to assert his complaint under Art. 3 while his deportation to Sudan was in progress.

Twenty Guidelines on Forced Return, adopted by the Committee of Ministers of the Council of Europe

Guideline 5. Remedy against the removal order

1. In the removal order, or in the process leading to the removal order, the subject of the removal order shall be afforded an effective remedy before a competent authority or body composed of members who are impartial and who enjoy safeguards of independence. The competent authority or body shall have the power to review the removal order, including the possibility of temporarily suspending its execution.
2. The remedy shall offer the required procedural guarantees and present the following characteristics:
 - the time-limits for exercising the remedy shall not be unreasonably short;
 - the remedy shall be accessible, which implies in particular that, where the subject of the removal order does not have sufficient means to pay for necessary legal assistance, he/she should be given it free of charge, in accordance with the relevant

national rules regarding legal aid;

– where the returnee claims that the removal will result in a violation of his or her human rights as set out in Guideline 2.1, the remedy shall provide rigorous scrutiny of such a claim.

Isakov v. Russia, ECtHR, Application no. 14049/08, 8 July 2010

136. The Court notes that the scope of a State's obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Given the irreversible nature of the harm that might occur if the alleged risk of torture or ill-treatment materialised and the importance which the Court attaches to Article 3, the notion of an effective remedy under Article 13 requires (i) independent and rigorous scrutiny of a claim that there are substantial grounds for believing that there was a real risk of treatment contrary to Article 3 in the event of the applicant's expulsion to the country of destination, and (ii) the provision of an effective possibility of suspending the enforcement of measures whose effects are potentially irreversible (or "a remedy with automatic suspensive effect" as it is phrased in *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05, §66 in fine, ECHR 2007-V, which concerned an asylum seeker wishing to enter the territory of France; see also *Jabari v. Turkey*, no.40035/98, §50, ECHR 2000-VIII; *Shamayev and Others*, cited above, §460; *Olaechea Cahuas v. Spain*, no. 24668/03, §35, ECHR 2006-X; and *Salah Sheekh v. the Netherlands*, no.1948/04, §154, ECHR 2007-I (extracts)).

137. Judicial review proceedings constitute, in principle, an effective remedy within the meaning of Article 13 of the Convention in relation to complaints in the context of expulsion and extradition, provided that the courts can effectively review the legality of executive discretion on substantive and procedural grounds and quash decisions as appropriate (see *Slivenko v. Latvia (dec.) [GC]*, no.48321/99, §99, ECHR 2002-II). Turning to the circumstances of the present case, the Court observes that the decision of the Prosecutor General's office to extradite the applicant was upheld on appeal by the Tyumen regional court and the Supreme Court. In their decisions the domestic courts did not conduct a detailed examination of the applicant's allegation of the risk of ill-treatment in Uzbekistan and only referred in general terms to the assurances provided by the Uzbek authorities (...). Consequently, the courts failed to rigorously scrutinise the applicant's claims of the risk of ill-treatment in the event of his extradition to Uzbekistan.

M.S.S. v. Belgium and Greece, Grand Chamber of the ECtHR, Application no. 30696/06, (2011)

318. However, the Court reiterates that the accessibility of a remedy in practice is decisive when assessing its effectiveness. The Court has already noted that the Greek authorities have taken no steps to ensure communication between the competent authorities and the applicant. That fact, combined with the malfunctions in the notification procedure in respect of "persons of no known address" reported by the Council of Europe Commissioner for Human Rights and the UNHCR (see paragraph 187 above), makes it very uncertain whether the applicant will be able to learn the outcome of his asylum application in time to react within the prescribed time-limit.

320. Lastly, the Court cannot consider, as the Government have suggested, that the

length of the proceedings before the Supreme Administrative Court is irrelevant for the purposes of Article 13. The Court has already stressed the importance of swift action in cases concerning ill-treatment by State agents (...). In addition it considers that such swift action is all the more necessary where, as in the present case, the person concerned has lodged a complaint under Article 3 in the event of his deportation, has no procedural guarantee that the merits of his complaint will be given serious consideration at first instance, statistically has virtually no chance of being offered any form of protection.

Jabari v. Turkey, ECtHR, Application No. 40035/98, (11 July 2000), paras. 39-42.

50. In the Court's opinion, given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised and the importance which it attaches to Article 3, the notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and the possibility of suspending the implementation of the measure impugned. Since the Ankara Administrative Court failed in the circumstances to provide any of these safeguards, the Court is led to conclude that the judicial review proceedings relied on by the Government did not satisfy the requirements of Article 13. Accordingly, there has been a violation of Article 13 of the Convention.

Conka v. Belgium, ECtHR, Application no. 51564/99, 5 February 2002

79. The Court considers that the notion of an effective remedy under Article 13 requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible (see, mutatis mutandis, *Jabari*, cited above, § 50). Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision (...).

81. An application for a stay of execution under the extremely urgent procedure is not suspensive either. The Government stressed, however, that the president of the division may at any time – even on bank holidays and on a few hours' notice, as frequently occurred in deportation cases – summon the parties to attend so that the application can be considered and, if appropriate, an order made for a stay of the deportation order before its execution. It will be noted that the authorities are not legally bound to await the Conseil d'Etat's decision before executing a deportation order. It is for that reason that the Conseil d'Etat has, for example, issued a practice direction directing that on an application for a stay under the extremely urgent procedure the registrar shall, at the request of the judge, contact the Aliens Office to establish the date scheduled for the repatriation and to make arrangements regarding the procedure to be followed as a consequence. Two remarks need to be made about that system.

82. Firstly, it is not possible to exclude the risk that in a system where stays of execution must be applied for and are discretionary they may be refused wrongly, in

particular if it was subsequently to transpire that the court ruling on the merits has nonetheless to quash a deportation order for failure to comply with the Convention, for instance, if the applicant would be subjected to ill-treatment in the country of destination or be part of a collective expulsion. In such cases, the remedy exercised by the applicant would not be sufficiently effective for the purposes of Article 13.

83. Secondly, even if the risk of error is in practice negligible – a point which the Court is unable to verify, in the absence of any reliable evidence – it should be noted that the requirements of Article 13, and of the other provisions of the Convention, take the form of a guarantee and not of a mere statement of intent or a practical arrangement. That is one of the consequences of the rule of law, one of the fundamental principles of a democratic society, which is inherent in all the Articles of the Convention (see, *mutatis mutandis*, *Iatridis v. Greece* [GC], no. 31107/96, § 58, ECHR 1999-II).

However, it appears that the authorities are not required to defer execution of the deportation order while an application under the extremely urgent procedure is pending, not even for a minimum reasonable period to enable the Conseil d'Etat to decide the application. Furthermore, the onus is in practice on the Conseil d'Etat to ascertain the authorities' intentions regarding the proposed expulsions and to act accordingly, but there does not appear to be any obligation on it to do so. Lastly, it is merely on the basis of internal directions that the registrar of the Conseil d'Etat, acting on the instructions of a judge, contacts the authorities for that purpose, and there is no indication of what the consequences might be should he omit to do so. Ultimately, the alien has no guarantee that the Conseil d'Etat and the authorities will comply in every case with that practice, that the Conseil d'Etat will deliver its decision, or even hear the case, before his expulsion, or that the authorities will allow a minimum reasonable period of grace.

Each of those factors makes the implementation of the remedy too uncertain to enable the requirements of Article 13 to be satisfied.

84. As to the overloading of the Conseil d'Etat's list and the risks of abuse of process, the Court considers that, as with Article 6 of the Convention, Article 13 imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet its requirements (see, *mutatis mutandis*, *Sußmann v. Germany*, judgment of 16 September 1996, Reports 1996-IV, p. 1174, § 55). In that connection, the importance of Article 13 for preserving the subsidiary nature of the Convention system must be stressed (see, *mutatis mutandis*, *Kudła*, cited above, § 152).

85. In conclusion, the applicants did not have a remedy available that satisfied the requirements of Article 13 to air their complaint under Article 4 of Protocol No. 4. Accordingly, there has been a violation of Article 13 of the Convention and the objection to the complaint of a violation of Article 4 of Protocol No. 4 (see paragraph 57 above) must be dismissed.

 **See also:**

- [Garayev v. Azerbaijan](#), ECtHR, paras. 82 and 84;
- [Vilvarajah and Others v. United Kingdom](#), ECtHR,

- *Yuldashev v. Russia*, ECtHR, para. 110-111;
- *C.G. and Others v. Bulgaria*, ECtHR, para. 56,
- *Gebremedhin v. France*, ECtHR, Application No. 25389/05, 26 April 2007, 58, 66;
- *Muminov v. Russia*, ECtHR, para. 101;
- *De Souza Ribeiro v. France*, ECtHR, GC, Application No. 22689/07, 13 December 2012, para. 82;
- *Hirsi Jamaa and Others v. Italy*, ECtHR, GC, para. 206,
- *Mohammed v. Austria*, ECtHR, para. 80. And 83

3. The rights of child victims of crime

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

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

States must ensure protection of individuals who have fallen victim to crime and their rights including in the course of criminal investigations and prosecutions against those who are suspected of committing the crime and provide avenues for them to seek compensation and other forms of assistance as victims of crime.

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

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

International law

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

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

1. In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential.
2. Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:
 - (a) Information on relevant court and administrative proceedings;
 - (b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.

[Council of Europe Convention on Action against Trafficking in Human Beings](#)

Article 15 – Compensation and legal redress

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

[Convention on Protection of Children against Sexual Exploitation and Sexual Abuse, CETS No. 201, 2007](#)

Article 14 – Assistance to victims

1. Each Party shall take the necessary legislative or other measures to assist victims, in the short and long term, in their physical and psychosocial recovery. Measures taken pursuant to this paragraph shall take due account of the child's views, needs and concerns.
2. Each Party shall take measures, under the conditions provided for by its internal law, to cooperate with non-governmental organisations, other relevant organisations or other elements of civil society engaged in assistance to victims.
3. When the parents or persons who have care of the child are involved in his or her

sexual exploitation or sexual abuse, the intervention procedures taken in application of Article 11, paragraph 1, shall include:

- the possibility of removing the alleged perpetrator;
- the possibility of removing the victim from his or her family environment. The conditions and duration of such removal shall be determined in accordance with the best interests of the child.

4. Each Party shall take the necessary legislative or other measures to ensure that the persons who are close to the victim may benefit, where appropriate, from therapeutic assistance, notably emergency psychological care.

***P. and S. v. Poland*, ECtHR, No. 57375/08, (30 October 2012)**

165. The Court has been particularly struck by the fact that the authorities decided to institute criminal investigation on charges of unlawful intercourse against the first applicant who, according to the prosecutor's certificate and the forensic findings referred to above should have been considered to be a victim of sexual abuse. The Court considers that this approach fell short of the requirements inherent in the States' positive obligations to establish and apply effectively a criminal-law system punishing all forms of sexual abuse (...). The investigation against the applicant was ultimately discontinued, but the mere fact that they were instituted and conducted shows a profound lack of understanding of her predicament.

166. On the whole, the Court considers that no proper regard was had to the first applicant's vulnerability and young age and her own views and feelings.

167. In the examination of the present complaint it is necessary for the Court to assess the first applicant's situation as a whole, having regard in particular to the cumulative effects of the circumstances on the applicant's situation. In this connection, it must be borne in mind that the Court has already found, having examined the complaint under Article 8 of the Convention about the determination of the first applicant's access to abortion, that the approach of the authorities was marred by procrastination, confusion and lack of proper and objective counselling and information (...). Likewise, the fact that the first applicant was separated from her mother and deprived of liberty in breach of the requirements of Article 5 § 1 of the Convention must be taken into consideration.

168. The Court concludes, having regard to the circumstances of the case seen as a whole, that the first applicant was treated by the authorities in a deplorable manner and that her suffering reached the minimum threshold of severity under Article 3 of the Convention.

169. The Court concludes that there has therefore been a breach of that provision.

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

3. The Court reiterates that Article 3 enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment. The obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with Article 3, requires

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States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals (see *A. v. the United Kingdom*, judgment of 23 September 1998, Reports of Judgments and Decisions 1998-VI, p. 2699, § 22). These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge (...).

EU law

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

Article 11 Assistance and support for victims of trafficking in human beings

1. Member States shall take the necessary measures to ensure that assistance and support are provided to victims before, during and for an appropriate period of time after the conclusion of criminal proceedings in order to enable them to exercise the rights set out in Framework Decision 2001/220/JHA, and in this Directive.
2. Member States shall take the necessary measures to ensure that a person is provided with assistance and support as soon as the competent authorities have a reasonable-grounds indication for believing that the person might have been subjected to any of the offences referred to in Articles 2 and 3.
3. Member States shall take the necessary measures to ensure that assistance and support for a victim are not made conditional on the victim's willingness to cooperate in the criminal investigation, prosecution or trial, without prejudice to Directive 2004/81/EC or similar national rules.
4. Member States shall take the necessary measures to establish appropriate mechanisms aimed at the early identification of, assistance to and support for victims, in cooperation with relevant support organisations.
5. The assistance and support measures referred to in paragraphs 1 and 2 shall be provided on a consensual and informed basis, and shall include at least standards of living capable of ensuring victims' subsistence through measures such as the provision of appropriate and safe accommodation and material assistance, as well as necessary medical treatment including psychological assistance, counselling and information, and translation and interpretation services where appropriate.
6. The information referred to in paragraph 5 shall cover, where relevant, information on a reflection and recovery period pursuant to Directive 2004/81/EC, and information on the possibility of granting international protection pursuant to Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (1) and Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (2) or pursuant to other international instruments or other similar national rules.

7. Member States shall attend to victims with special needs, where those needs derive, in particular, from whether they are pregnant, their health, a disability, a mental or psychological disorder they have, or a serious form of psychological, physical or sexual violence they have suffered.

Article 12 Protection of victims of trafficking in human beings in criminal investigation and proceedings

(...) 2. Member States shall ensure that victims of trafficking in human beings have access without delay to legal counselling, and, in accordance with the role of victims in the relevant justice system, to legal representation, including for the purpose of claiming compensation. Legal counselling and legal representation shall be free of charge where the victim does not have sufficient financial resources.

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

1. Child victims of trafficking in human beings shall be provided with assistance, support and protection. In the application of this Directive the child's best interests shall be a primary consideration.

2. Member States shall ensure that, where the age of a person subject to trafficking in human beings is uncertain and there are reasons to believe that the person is a child, that person is presumed to be a child in order to receive immediate access to assistance, support and protection in accordance with Articles 14 and 15.

Article 14 Assistance and support to child victims

1. Member States shall take the necessary measures to ensure that the specific actions to assist and support child victims of trafficking in human beings, in the short and long term, in their physical and psycho-social recovery, are undertaken following an individual assessment of the special circumstances of each particular child victim, taking due account of the child's views, needs and concerns with a view to finding a durable solution for the child. Within a reasonable time, Member States shall provide access to education for child victims and the children of victims who are given assistance and support in accordance with Article 11, in accordance with their national law.

2. Member States shall appoint a guardian or a representative for a child victim of trafficking in human beings from the moment the child is identified by the authorities where, by national law, the holders of parental responsibility are, as a result of a conflict of interest between them and the child victim, precluded from ensuring the child's best interest and/or from representing the child.

3. Member States shall take measures, where appropriate and possible, to provide assistance and support to the family of a child victim of trafficking in human beings when the family is in the territory of the Member States. In particular, Member States shall, where appropriate and possible, apply Article 4 of Framework Decision 2001/220/JHA to the family.

4. This Article shall apply without prejudice to Article 11.

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

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

2. Member States shall, in accordance with the role of victims in the relevant justice system, ensure that child victims have access without delay to free legal counselling and to free legal representation, including for the purpose of claiming compensation, unless they have sufficient financial resources.

3. Without prejudice to the rights of the defence, Member States shall take the necessary measures to ensure that in criminal investigations and proceedings in respect of any of the offences referred to in Articles 2 and 3:

(a) interviews with the child victim take place without unjustified delay after the facts have been reported to the competent authorities;

(b) interviews with the child victim take place, where necessary, in premises designed or adapted for that purpose;

(c) interviews with the child victim are carried out, where necessary, by or through professionals trained for that purpose;

(d) the same persons, if possible and where appropriate, conduct all the interviews with the child victim;

(e) the number of interviews is as limited as possible and interviews are carried out only where strictly necessary for the purposes of criminal investigations and proceedings;

(f) the child victim may be accompanied by a representative or, where appropriate, an adult of the child's choice, unless a reasoned decision has been made to the contrary in respect of that person.

4. Member States shall take the necessary measures to ensure that in criminal investigations of any of the offences referred to in Articles 2 and 3 all interviews with a child victim or, where appropriate, with a child witness, may be video recorded and that such video recorded interviews may be used as evidence in criminal court proceedings, in accordance with the rules under their national law.

5. Member States shall take the necessary measures to ensure that in criminal court proceedings relating to any of the offences referred to in Articles 2 and 3, it may be ordered that:

(a) the hearing take place without the presence of the public; and

(b) the child victim be heard in the courtroom without being present, in particular,

through the use of appropriate communication technologies.

6. This Article shall apply without prejudice to Article 12.

Article 16 Assistance, support and protection for unaccompanied child victims of trafficking in human beings

1. Member States shall take the necessary measures to ensure that the specific actions to assist and support child victims of trafficking in human beings, as referred to in Article 14(1), take due account of the personal and special circumstances of the unaccompanied child victim.

2. Member States shall take the necessary measures with a view to finding a durable solution based on an individual assessment of the best interests of the child.

3. Member States shall take the necessary measures to ensure that, where appropriate, a guardian is appointed to unaccompanied child victims of trafficking in human beings.

4. Member States shall take the necessary measures to ensure that, in criminal investigations and proceedings, in accordance

with the role of victims in the relevant justice system, competent authorities appoint a representative where the child is unaccompanied or separated from its family.

5. This Article shall apply without prejudice to Articles 14 and 15.

Article 17 Compensation to victims

Member States shall ensure that victims of trafficking in human beings have access to existing schemes of compensation to victims of violent crimes of intent.



For more information please see:

- UNICEF, Save the children: Every child's right to be heard
http://www.unicef.org/french/adolescence/files/Every_Childs_Right_to_be_Heard.pdf
- UNICEF Child and Youth Participation Resource Guide
<http://www.jrf.org.uk/sites/default/files/jrf/migrated/files/1859351395.pdf>
- Council of Europe guidelines on child-friendly justice
<http://www.coe.int/en/web/children/child-friendly-justice>
- FRA, Handbook on European law relating to the rights of the child, 2015
<http://fra.europa.eu/en/publication/2015/handbook-european-law-child-rights>
- Amnesty International, [Fair Trial Manual](#), Second edition, 2014