E.U. NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS
RESEAU U.E. D'EXPERTS INDEPENDANTS EN MATIERE DE DROITS FONDAMENTAUX

THEMATIC COMMENT No. 4 :

IMPLEMENTING THE RIGHTS OF THE CHILD IN THE EUROPEAN UNION

25 May 2006

Ref.: CFR-CDF.Them.Comment.2005.doc

The E.U. Network of Independent Experts on Fundamental Rights has been set up by the European Commission upon the request of the European Parliament. It monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. It issues reports on the situation of fundamental rights in the Member States and in the Union, as well as opinions on specific issues related to the protection of fundamental rights in the Union.

E.U. NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS
RESEAU U.E. D'EXPERTS INDEPENDANTS EN MATIERE DE DROITS FONDAMENTAUX

Thematic Comment No. 4 :

IMPLEMENTING THE RIGHTS OF THE CHILD IN THE EUROPEAN UNION

20 May 2006

Ref.: CFR-CDF.Them.Comment.2005.doc

The E.U. Network of Independent Experts on Fundamental Rights has been set up by the European Commission upon the request of the European Parliament. It monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. It issues reports on the situation of fundamental rights in the Member States and in the Union, as well as opinions on specific issues related to the protection of fundamental rights in the Union.

Le **Réseau UE d'Experts indépendants en matière de droits fondamentaux** a été mis sur pied par la Commission européenne (DG Justice, liberté et sécurité), à la demande du Parlement européen. Depuis 2002, il assure le suivi de la situation des droits fondamentaux dans les Etats membres et dans l'Union, sur la base de la Charte des droits fondamentaux de l'Union européenne. Chaque Etat membre fait l'objet d'un rapport établi par un expert sous sa propre responsabilité, selon un canevas commun qui facilite la comparaison des données recueillies sur les différents Etats membres. Les activités des institutions de l'Union européenne font l'objet d'un rapport distinct, établi par le coordinateur. Sur la base de l'ensemble de ces (26) rapports, les membres du Réseau identifient les principales conclusions et recommandations qui se dégagent de l'année écoulée. Ces conclusions et recommandation sont réunies dans un Rapport de synthèse, qui est remis aux institutions européennes. Le contenu du rapport n'engage en aucune manière l'institution qui en est le commanditaire.

Le Réseau UE d'Experts indépendants en matière de droits fondamentaux se compose de Florence Benoît-Rohmer (France), Martin Buzinger (Rép. slovaque), Achilleas Demetriades (Chypre), Olivier De Schutter (Belgique), Maja Eriksson (Suède), Teresa Freixes (Espagne), Gabor Halmai (Hongrie), Wolfgang Heyde (Allemagne), Morten Kjaerum (suppléant Birgitte Kofod-Olsen) (Danemark), Henri Labayle (France), Rick Lawson (Pays-Bas), Lauri Malksoo (Estonie), Arne Mavcic (Slovénie), Vital Moreira (Portugal), Jeremy McBride (Royaume-Uni), François Moyse (Luxembourg), Bruno Nascimbene (Italie), Manfred Nowak (Autriche), Marek Antoni Nowicki (Pologne), Donncha O'Connell (Irlande), Ilvija Puce (Lettonie), Ian Refalo (Malte), Martin Scheinin (suppléant Tuomas Ojanen) (Finlande), Linos Alexandre Sicilianos (Grèce), Pavel Sturma (Rép. Tchèque), Edita Ziobiene (Lituanie). Le Réseau est coordonné par O. De Schutter, assisté par V. Van Goethem.
Les documents du Réseau peuvent être consultés via :
http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_fr.htm

The **EU Network of Independent Experts on Fundamental Rights** has been set up by the European Commission (DG Justice, Freedom and Security), upon request of the European Parliament. Since 2002, it monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. A Report is prepared on each Member State, by a Member of the Network, under his/her own responsibility. The activities of the institutions of the European Union are evaluated in a separated report, prepared for the Network by the coordinator. On the basis of these (26) Reports, the members of the Network prepare a Synthesis Report, which identifies the main areas of concern and makes certain recommendations. The conclusions and recommendations are submitted to the institutions of the Union. The content of the Report is not binding on the institutions.

The EU Network of Independent Experts on Fundamental Rights is composed of Florence Benoît-Rohmer (France), Martin Buzinger (Slovak Republic), Achilleas Demetriades (Cyprus), Olivier De Schutter (Belgium), Maja Eriksson (Sweden), Teresa Freixes (Spain), Gabor Halmai (Hungary), Wolfgang Heyde (Germany), Morten Kjaerum (substitute Birgitte Kofod-Olsen) (Denmark), Henri Labayle (France), Rick Lawson (the Netherlands), Lauri Malksoo (Estonia), Arne Mavcic (Slovenia), Vital Moreira (Portugal), Jeremy McBride (United Kingdom), François Moyse (Luxembourg), Bruno Nascimbene (Italy), Manfred Nowak (Austria), Marek Antoni Nowicki (Poland), Donncha O'Connell (Ireland), Ilvija Puce (Latvia), Ian Refalo (Malta), Martin Scheinin (substitute Tuomas Ojanen) (Finland), Linos Alexandre Sicilianos (Greece), Pavel Sturma (Czech Republic), and Edita Ziobiene (Lithuania). The Network is coordinated by O. De Schutter, with the assistance of V. Van Goethem.
The documents of the Network may be consulted on :
http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm

TABLE OF CONTENTS

I. Introduction

1. Preliminary remarks

In accordance with the request made by the Commission and the Parliament, this Thematic Comment (n°4) of the EU Network of Independent Experts on Fundamental Rights addresses the rights of the child in the European Union. The choice of this subject was notified to the Network on 13 February 2006, following an exchange of letters between Vice-President Frattini and Mr Cavada, the Chair of the European Parliament's Committee on Civil Liberties, Justice and Home Affairs. The Commission intends to present a Communication on the rights of the child in May or June 2006. According to the information available to the Network at the time of the preparation of this Thematic Comment (March 2006), that Communication would seek to define the elements of a policy of the Union aimed at implementing the rights of the child through means inspired by the *General Comment n° 5 (2003) : General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6),* adopted by the Committee on the Rights of the Child[1]. The Communication would seek, more precisely, to ensure that the European Union and its Member States design a comprehensive strategy fully compatible with the CRC, including the adoption of legislation to promote its effective implementation ; to develop a framework of Community actions enabling the European Union and its Member States to coordinate, monitor and exchange actions and good practice ; to encourage the collection of reliable information on children as a basis for policy-making ; and to improve capacity of all the actors involved in the implementation process.

The Network welcomes the adoption of this Communication, which demonstrates the willingness of the Commission to treat the rights of the child as a priority issue, as already expressed in its Communication on Strategic Objectives 2005-2009.[2] The actions proposed in the Communication are important and, indeed, may serve as a model for future initiatives of the Commission in order to contribute to the implementation by the Member States of their international obligations in the field of human rights. The contribution of this Thematic Comment is distinct. The objectives of the Network in adopting this Comment are twofold.

First, the Network restates the normative content of the obligations imposed on the Union and on the Member States in the implementation of Union law by the Charter of Fundamental Rights of the European Union. Article 24 of the Charter of Fundamental Rights is of course central to the rights of the child, insofar as this provision explicitly refers to the child and to the cardinal principles, already expressed in Articles 3(1) and 12(1) of the Convention on the Rights of the Child, that in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration, and that the views of the child shall be taken into consideration on matters which concern them in accordance with their age and maturity. However, other provisions of the Charter are equally relevant to the implementation of the rights of the child in the law- and policy-making of the Union. This Thematic Comment seeks to recall the normative content of these provisions, in accordance with the corresponding provisions of international and European human rights law.

Second, since it first launched its activities in 2002, the Network has been confronted to a number of problematic areas where the rights of the child were being threatened or, in some cases, were violated.

[1] CRC/GC/2003/5.
[2] Strategic objectives 2005-2009. Europe 2010 : A partnership for European renewal, Prosperity, Solidarity and Security., COM (2005) 12 final of 26.1.2005.

In certain cases, such violations result directly from Union law. More often, such violations are attributable rather to the Member States, but the Union could have ensured a better protection of the rights of the child in order to prevent such violations from happening. In yet other cases, these violations result from the measures adopted by a Member State, and the Union has not been conferred a power to prevent them. The second objective of this Thematic Comment is to identify these more problematic areas, in order to draw the attention of the institutions and of the Member States to the remaining lacunae. A policy aiming at implementing the rights of the child requires, of course, an adequate institutional framework, such as the one the Communication of the Commission currently under preparation seeks to offer. However, it also requires, first and foremost, an identification of where the Union may have failed to fully uphold the rights of the child, and where, therefore, further initiatives are most urgently required.

The Network recognizes that the Union only has limited powers to ensure the implementation of the rights of the child. However, the powers it has been conferred upon are already significant. Article 13 EC provides that 'the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'[3]. This provision has allowed the adoption, on 27 November 2000, of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation,[4] which prohibits discrimination on grounds of age in employment and occupation. Article 18 EC, which provides that 'every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect', served as basis for the adoption, by the European Parliament and the Council, of Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States[5]. On the basis of Articles 63 and 64 EC, which provide for the development by the Union of measures on asylum and immigration policy,[6] the Council adopted Directive 2003/86/EC of 22 September 2003 on the right to family reunification,[7] Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers,[8] 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,[9] and Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.[10]

All these instruments deeply affect the rights of the child in the European Union. It is of course important to examine whether they respect those rights, as identified in the Convention on the Rights of the Child and the in the EU Charter of Fundamental Rights. But it is no less important to ask whether these legal bases, and the other legal bases which could be relied upon by the Union, should not be used more fully in order to address the problems which are identified as the most urgent for the situation of the rights of the child in the Union today. In the exercise of its powers, the institutions of the Union – and the Member States when they implement Union law – are bound by the Charter of Fundamental Rights and, even beyond the Charter, by the fundamental rights recognized as general principles of Union law (Article 6(2) EU). The Network has also argued, however, that the Charter may impose certain positive obligations on the institutions of the Union to take action, where, by

[3] The equivalent provision in the Treaty establishing a Constitution for Europe is Article III-124.
[4] OJ L 303 of 2.12.2000, p. 16.
[5] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, p. 77.
[6] The equivalent provisions in the Treaty establishing a Constitution for Europe are Articles III-266 and III-267.
[7] OJ L 251 of 3.10.2003, p. 12.
[8] OJ L 31 of 6.2.2003, p. 18.
[9] OJ L 304 of 30.09.2004, p.12.
[10] OJ L 326 of 13.12.2005, p. 36.

exercising their competences, they could protect and promote the fundamental rights they are committed to comply with, in situations where such rights are threatened or risk being violated.

With those aims in mind, this Comment adopts the following approach. After this introduction, the following paragraphs examine the different areas where the rights of the child are affected by Union laws or policies, or could be affected by them. The remainder of this introductory chapter recalls the central role the rights of the child should be recognized in combating child poverty and social exclusion. It also notes the impact certain choices made with respect to the definition of the family in Union instruments may have on the requirement of non-discrimination between children. Chapters II and III then examine the protection of maternal health and of maternity, and the protection of the family. It is clear that the child would benefit from policies and legislative changes which better accommodate the needs of maternity and ensure an adequate conciliation between professional and family life ; and that children, for whom the right to respect of family life is of crucial importance, also have an important interest in the full respect of the right to family reunification. Chapter IV addresses the protection of the child. This chapter examines the protection of the child from domestic violence – highlighting certain emerging good practices in this field – and the protection of the child from sexual exploitation and child pornography, as well as from trafficking, especially for the purposes of sexual exploitation. Finally Chapter IV examines the treatment of juvenile offenders : even children who have committed criminal offences ought to be protected, and in this difficult context also, should their best interests remain the guiding principle of any policies adopted in this field. Chapter V examines the right to education, focusing especially on children who are members of minorities, including Roma children, on children with disabilities, and on access to education of children of undocumented migrants (although Chapter VII discusses more extensively the rights of children who are asylum-seekers). One specific section of that chapter comments on the affordability of education, as one of the important components of the right to access to education, identifying certain developments in this area, both positive and negative. Chapter VI highlights that, in certain cases, obstacles may exist to a child acquiring a nationality, which constitutes a important impediment to the exercise of a wide range of social and economic rights. Chapter VII concerns migrant children: it devotes special attention to children who are asylum-seekers and unaccompanied minors. Chapter VIII describes the prohibition of child labour and the protection of young people at work, identifying certain remaining problems within the union Member States, on the basis especially of the findings of the Council of Europe European Committee of Social Rights monitoring compliance with the European Social Charter. Chapters IX and X concern more procedural matters, relating to the implementation of the principle of the best interests of the child and to the participation of the child in any decisions concerning him or her, and to the establishment of national mechanisms for the implementation of the rights of the child.

On each of these issues, the normative requirements of international and European human rights law are recalled ; the main findings made by the Network on the situation of fundamental rights in the Union are summarized ; and recommendations are made. The findings are based on the previous work of the Network in this area as well as on the findings of other expert bodies (in particular, the Committee on the Rights of the Child, the UN Committee on Economic, Social and Cultural Rights, the Human Rights Committee, the European Committee of Social Rights, and the Advisory Committee of the Framework Convention for the Protection of National Minorities). The conclusions drawn from these findings have been discussed within the Network. The Network also benefited considerably from the contributions of the United National High Commissioner for Refugees and of non-governmental organizations, particularly Save the Children, Euronet, and Defence of the Child International. Before entering into these findings however, the Network makes these preliminary observations.

2. The central role of the rights of the child in combating child poverty and social exclusion

While this Comment is primarily guided by legal considerations based on the existing norms of international and European human rights law, as these should guide the interpretation of the Charter of Fundamental Rights, the enjoyment of the guarantees offered therein cannot be achieved without stepping up the fight against social exclusion and, more particularly, taking into account the situation

of the poorest members of our society. For instance, Article 7 of the Charter asserts the right of each individual to respect for family life. Yet family unity is threatened by abject poverty: in Europe, children are still being institutionalized because their parents lack the financial means and because they are presumed to be incapable of caring for them. Similarly, Article 14 of the Charter recognizes the right to education. Yet children of very poor families, because of the poverty of their parents, are placed in a situation that puts them at a serious disadvantage in relation to other children, although they should be able to exercise their right to education under the same conditions. As is pointed out by the International Movement ATD Fourth World, one of the international non-governmental organizations that were consulted for the purposes of the present thematic comment, the situation of the poorest illustrates in an exemplary manner the interdependence of all the rights that are recognized by the Charter.

It is clear moreover that the risks of poverty facing children are unequally spread. They affect disproportionately children belonging to ethnic minorities and immigrant communities. Targeted policies aimed especially at tackling social and economic exclusion of minorities should therefore be considered a priority. Thus, the Committee on the Rights of the Child expressed concerns in its Concluding observations on **Austria** about the high rate of poverty, mainly affecting single-parent families, large families and families of foreign origin ; it therefore recommended that Austria should 'continue to provide well-coordinated financial assistance to provide support to economically disadvantaged families, in particular single parent families and families of foreign origin, so as to guarantee the right of a child to an adequate standard of living'.[11] In **Denmark**, 8 % of the children, i.e. 90 000 children, are considered to live in poverty, and ethnic minorities are at a far higher risk than ethnic Danes.[12] As regards the social and economic situation of the Roma minority in the **Slovak Republic**, according to the socio-graphic mapping of Roma settlements carried out in 2004, which was initiated by the Office of Plenipotentiary of the Slovak Government for Roma minority, only 39% of Roma settlements are connected to water-supply networks, 13% of settlements are connected to sewerage system; gas is accessible in 15% and electricity in 89% of Roma settlements. The United Nations Committee on the Elimination of Racial Discrimination in its Concluding observations of 2004[13] expresses its concern about the isolation of the Roma community and their critical situation with respect to housing conditions, especially in the Eastern part of the country, where most of the Roma community is concentrated. The Committee encouraged the Slovak Republic to take all possible measures to further improve the housing conditions of Roma, taking especially into account the fact that for families – and particularly for children – living in a proper environment constitutes an essential prerequisite for access to education and employment on an equal footing.

It is true that the Charter of Fundamental Rights of the European Union does not as such recognize the right to protection against poverty and social exclusion, as is guaranteed, for example, by Article 30 of the revised European Social Charter, nor does it guarantee the right to housing as is set forth in Article 31 of the revised European Social Charter or, in different terms, in Article 27 of the Convention on the Rights of the Child. This however does not mean that, in the exercise of the competences that are conferred upon them, the institutions of the Union can ignore those requirements. Article 21 of the Charter of Fundamental Rights prohibits all discrimination on grounds of property. This provision of the Charter should be interpreted as prohibiting not only direct discrimination, but also indirect discrimination, resulting from a failure to take into account, in the adoption of general measures or policies, of the situation of the weakest and most vulnerable segments of society. As the European Committee of Social Rights rightly has emphasized, relying on the case-law of the European Court of Human Rights, "indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all". The institutions of the Union should seek to achieve "measurable progress and to an extent consistent with the maximum use of

[11] Concluding Observations on Austria, Committee on the Rights of the Child, 38th session, CRC/C/15/Add.251, 31.03.2005, para 44, 45.
[12] According to a report published in December 2004 based on data from 2002.
[13] CERD/C/65/CO/7, point 10.

available resources"; they "must also be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities as well as for other persons affected including, especially, their families on whom falls the heaviest burden in the event of institutional shortcomings"[14]. Thus, the tools proposed in the Communication of the Commission on the Rights of the Child should also take into account this obligation not to discriminate, directly or indirectly, against children from the poorest families, and ensure that progress is made towards to elimination of the conditions which put these childrens and their families at a disadvantage in exercising their fundamental rights. In order to face the challenge of severe poverty, a dynamic perspective needs to be adopted on the division of competences between the Union and the Member States. For example, whichever the respective competences of the Union and the Member States in promoting the right to housing or the fight against social exclusion, it should be asked how the Union and the Member States, in the exercise of their respective competences, can contribute to these objectives. It is in this sense that the objective of mainstreaming the rights of the child in the law and policies of the Union ensures that we can move beyond the debate on the allocation of competences and, even under the existing institutional framework, ensure that these rights are fully taken into account in the development of the laws and policies of the Union.

The Network welcomes the initiative of the Commission to prepare a communication on the rights of the child as a unique opportunity to address the question of child poverty and the social exclusion of children. A report commissioned by DG Employment and Social Affairs, containing a thematic study using transnational comparisons to analyse and identify what combination of policy responses are most successful in preventing and reducing high levels of child poverty[15] concluded that "the UN Convention on the Rights of the Child (CRC) should be used as a framework for the development, implementation and monitoring of policies at EU and Member State level. The EU should integrate the principles of the CRC into policy and legislation in order to make children visible at EU level and to better promote children's rights and well-being". The other main substantive conclusions are the following:

> 10. In accordance with the CRC children and young people should participate in decision-making processes that affect their lives. Effort is needed to reach and include those children who are socially excluded.
> 11. On the European level child poverty and social exclusion should gain a more prominent role within the OMC[16] so that processes of benchmarking and peer review are strengthened.
> 12. All Member States should adopt an explicit and integrated approach to tackle poverty and social exclusion among children and young people. A coherent strategy requires central coordination and cross-departmental coordination.
> 13. All Member States should adopt targets for the eradication of child poverty on the basis of clear indicators. The effectiveness of policies and their impact on children and young people

[14] European Committee of Social Rights, decision on the merits of collective complaint no. 13/2002, *Autism Europe against France*, of 4 November 2003.

[15] The objective of this study was to propose a comparative overview of the public strategies developed in different States (EU Member States and the United States) in order to combat child poverty, in order to compare their effectiveness and identify which mix of policies could deliver the best results. The study, presented in March 2004, is available on : http://europa.eu.int/comm/employment_social/social_inclusion/studies_fr.htm

[16] The study has the following comment on the inclusion of a concern for children within the National Action Plans against poverty and social exclusion (NAPs/inclusion): 'The conditions under which children grow up (…) attract more and more attention, on the national as well as European level. Compared to the first round of National Action Plans against Social Exclusion the new NAP/incl. 2003-2005 overall shows an increasing acknowledgement of poverty and social exclusion among children and contains more strategies to ensure children's healthy development and social inclusion – not least because the situation of children has been highlighted in the Common Outline (The Social Protection Committee 2003) as well as in the Common Objectives (The Social Protection Committee 2002). Though this development is encouraging, children's interests and rights are still not broadly taken into account. Many countries see children and their well-being mainly from an adult's perspective and focus on the needs of parents and families whereas children's views tend to be ignored. The growing convergence of objectives and policies to tackle child poverty and social exclusion thus still goes along with a persistent divergence in the underlying perception and recognition of children and their rights'. These comments of course relate to the Lisbon strategy as it developed between 2000 and 2005, before the mid-term revision of the strategy as decided by the Spring 2005 European Council.

should be evaluated.

14. Member States should adopt a balanced policy mix to tackle child poverty. This has to include strategies to bring parents into work that pays, to improve the reconciliation of work and family life, adequate cash transfers, access to high quality and affordable childcare, access to child-related services and healthcare. Particular attention has to be given to ensure equal access to education for all children.

15. In the process of reforming welfare systems the effect of policies on children and on low-income families should be monitored and policies should be child- and poverty-proofed.

16. Policies should focus on children's present quality of life, on longer-term impacts of poverty and social exclusion on their future life as adults and also on the society as a whole. The situation of children at a particularly high risk of social exclusion should be targeted specifically.

What this study demonstrated in March 2004, apart from a relative diversity of approaches between the different States examined combined with a great convergence in the definition of the objectives, is the need to address the prevention and reduction of child poverty by adequate governance mechanisms.

In the Report on the situation of fundamental rights in the Union in 2004 submitted by the Network in March 2005, it was indicated that such mechanisms should include, in accordance with General Comment n°5 (2003) of the Committee on the Rights of the Child (General measures of implementation of the Convention on the Rights of the Child)[17] the adoption of a comprehensive national strategy or national plan of action for children, developed through a process of consultation with children, and in which a priority should be given to marginalized and disadvantaged groups of children ; the definition of real and achievable targets in relation to the full range of rights of children ; an adequate coordination between different departments and levels of government, as well as between Government and civil society ; the systematization of both child impact assessment (predicting *ex ante* the impact of any proposed law, policy or budgetary allocation which affects children and the enjoyment of their rights) and child impact evaluation (evaluating *ex post* the actual impact of implementation) ; the collection and analysis of sufficient and reliable data on children, disaggregated to enable identification of discrimination and/or disparities in the realization of rights ; and the setting up of independent human rights institutions to ensure that the public policies are monitored and that recommendations can be made to improve the situation of children's rights.

The Network welcomes the fact that the Communication of the Commission on the Rights of the Child makes a significant step towards the implementation of this approach, based on the idea that the Union may contribute to facilitating the implementation of their obligations under the Convention on the Rights of the Child.

3. The prohibition of discrimination on the basis of the civil status of the parents

Introduction

In its previous Conclusions relating to the year 2004 (Concl. 2005, pp. 90-91), the Network noted that the failure to extend to same-sex couples advantages recognized to married heterosexual couples where the institution of marriage is reserved to the latter is not, at the present stage of development of the case-law of the European Court of Human Rights, considered a discrimination under the European Convention on Human Rights (Eur. Ct. HR (4th sect.), *Mata Estevez v. Spain* (Appl. N° 56501/00), dec. (inadmissibility) of 10 May 2001, Rep. 2001-VI). It added, however, that matters could have to be considered differently where the advantages reserved to married couples are in fact meant to benefit children.

[17] CRC/GC/2003/5, 27 November 2003.

Indeed, children may not be made to suffer the discriminatory consequences based on the civil status of their parents, whether they had the choice to marry or whether that choice was not open to them. This appears clearly from the final views adopted by the Human Rights Committee in the case of *Derksen and Bakker v. the Netherlands* (Communication 976/2001, final views of 15 June 2004*)*, which involved a differentiation between married and unmarried couples in the field of social security, in which the Committee found a violation of Article 26 ICCPR. Under the Dutch General Widows and Orphans Law (*AWW, Algemene Weduwen en Wezen Wet*), only widows recognized as such (i.e., the spouse of the deceased) could receive benefits for half-orphans after the death of the spouse. On 1 July 1996, the Surviving Dependants Act (*ANW, Algemene Nabestaanden Wet*) replaced the AWW, stipulating that unmarried partners are also entitled to a benefit.

The Human Rights Committee recalled that it had earlier found that a differentiation between married and unmarried couples does not amount to a violation of Article 26 of the Covenant, since married and unmarried couples are subject to different legal regimes and the decision whether or not to enter into a legal status by marriage lies entirely with the cohabitating persons. By enacting the new legislation the Netherlands has provided equal treatment to both married and unmarried cohabitants for purposes of surviving dependants' benefits. Taking into account that the past practice of distinguishing between married and unmarried couples did not constitute prohibited discrimination, the Committee was of the opinion that the Netherlands was under no obligation to make the amendment retroactive. It arrived at a different conclusion, however, with respect to the refusal of benefits for the author's daughter. It found that this constituted prohibited discrimination under Article 26 of the Covenant. In the circumstances of the case it was presented with, the Committee observed that under the earlier AWW the children's benefits depended on the status of the parents, so that if the parents were unmarried, the children were not eligible for the benefits. However, under the new ANW, benefits are being denied to children born to unmarried parents before 1 July 1996 while granted in respect of similarly situated children born after that date. The Committee considered that the distinction between children born, on the one hand, either in wedlock or after 1 July 1996 out of wedlock, and, on the other hand, out of wedlock prior to 1 July 1996, is not based on reasonable grounds. In making this conclusion the Committee emphasised that the authorities were well aware of the discriminatory effect of the AWW when they decided to enact the new law aimed at remedying the situation, and that they could have easily terminated the discrimination in respect of children born out of wedlock prior to 1 July 1996 by extending the application of the new law to them.

The views adopted by the Human Rights Committee in the case of *Derksen and Bakker v. the Netherlands* illustrate, first, that under Article 26 ICCPR, although a difference in treatment between married couples and unmarried couples may be considered to be based on reasonable and objective grounds where the choice has been made by the partners concerned whether or not to marry, this may not be the case where they could not make such a choice, as is the case of same-sex partners in States where marriage is an institution reserved to different-sex couples; second, the case illustrates that benefits to children may not be made dependent on the civil status of parents.

The Member States should screen their legislation in order to identify the situations where differences in treatment between married and unmarried couples have an impact on children, which could be discriminatory against children born out of wedlock even in situations where they would not be discriminatory against the parents. Children should not have to support the consequences of choices made by their parents.

Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States

Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amends Regulation (EEC) No 1612/68 and repeals Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC,

75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.[18] The adoption of this instrument is based on the understanding that it is necessary to simplify and strengthen the right of free movement and residence of all Union citizens by codifying and reviewing the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons. The Directive is also based, in accordance with the case-law of the Court of Justice, on the idea that "Union citizenship should be the fundamental status of nationals of the Member States"[19]. For the purposes of the Directive, 'Family member' means, according to Article 2(2):

> (a) the spouse;
> (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
> (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);
> (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b).

This instrument takes into account, in many respects, the rights of the child. In particular, in order to ensure that the right to respect for family life, including the right to family reunification, is fully respected, Directive 2004/38/EC grants an autonomous right of residence to the family members of the citizen of the Union who has exercised his/her right to move within the Union. Article 12 concerns situations where the citizen has departed from the host Member State or his/her death. Article 13 provides that 'divorce, annulment of the Union citizen's marriage or termination of his/her registered partnership, as referred to in point 2(b) of Article 2 shall not affect the right of residence of his/her family members who are nationals of a Member State'. With regard to the family members of the citizen of the Union who are not nationals of a Member State, Article 13(2) states that divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of those family members where: '(a) prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host Member State; or (b) by agreement between the spouses or the partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has custody of the Union citizen's children; or (c) this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting; or (d) by agreement between the spouses or partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has the right of access to a minor child, provided that the court has ruled that such access must be in the host Member State, and for as long as is required'.

The Network recalls however its view that Member States should implement Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States without discrimination between its beneficiaries, *inter alia*, on grounds of sexual orientation (Concl. 2005, pp. 127-128). The notion of 'spouse' under the Directive therefore may not be restricted to spouses of a different sex, where the marital relationship has been recognized as valid by the national law of the Member State of origin.

As recalled by the Network in its Opinion n°1-2003 delivered on 10 April 2003, a Member State would be creating a direct discrimination based on sexual orientation if it refused to recognize as a 'spouse' the spouse of the same sex as the citizen of the Union wishing to move to that State, validly married under the laws of the Member State of origin. The Network also noted that several States that

[18] OJ L 158 of 30.4.2004, p. 77. The Member States should implement the directive by 30 April 2006 (Article 40).
[19] ECJ, 20 September 2001, *Grzelczyk*, C-184/99, *ECR*, p. I-6193, point 13; ECJ, 2 October 2003, *Garcia Avelo*, C-148/02, *ECR*, p. I-11613, point 22.

instituted forms of registered partnership, under different names, actually wanted to equate those unions, open to same-sex couples, with marriage, save only for certain effects connected with filiations (presumption of paternity or maternity of the partner if a child is born to the couple, and possibility of joint adoption), with the difference in terminology only being kept essentially for symbolic reasons. The solution adopted by Article 2(2)(b) of Directive 2004/38/EC in fact has the effect of instituting an additional difference between marriage and registered partnership which the States that created the latter form of union did not want at the time when they formulated such legislation. Moreover, there where marriage is not open to same-sex couples, the difference in treatment that is established between marriage and registered partnership in terms of the impact on the right to family reunification leads to discrimination on grounds of sexual orientation.

These considerations are further reinforced by taking into account the rights of the child. Where a child is raised by two partners, or by two married persons of the same sex, he or she should also be recognized the possibility to remain with both, and should not be made to ensure the consequences of a separation resulting from the inadequacy of the rules relating to family reunification.

This observation concerning Directive 2004/38/EC can be generalized. In a number of instruments, in particular in the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification[20] and in Council Regulation 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national,[21] a narrow definition of the 'family' has been retained, not taking into account different cultural conceptions of the family and de facto, but stable, relationships. This has a particularly negative impact on the rights of children in such relationships. A policy of the Union genuinely seeking to improve the situation of the rights of the child in the Union should consider expanding such definitions as a priority.

II. Protection of maternal health and of maternity

1. International human rights law

The protection of maternal health and of maternity are integral to the protection of the rights of the child : children must be welcomed by their parents and by society, and all appropriate measures should be adopted in order to ensure that the mother will benefit from adequate counseling during maternity, and that the parents will not suffer adverse consequences from their decision to have a child. Article 12(1) of the International Covenant on Economic, Social and Cultural Rights already recognized 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health', and Article 12(2) enumerates, by way of illustration, a number of 'steps to be taken by the States parties ... to achieve the full realization of this right'. Additionally, the right to health is recognized, *inter alia*, in Article 5 (e) (iv) of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, in Articles 11 (1) (f) and 12 of the Convention on the Elimination of All Forms of Discrimination against Women of 1979. The protection of maternal health is an integral part of the right to health. The Committee on Economic, Social and Cultural Rights, in its General Comment 14 on *The right to the highest attainable standard of health* provides as regards women and the right to health (paragraph 21)[22] that :

> To eliminate discrimination against women, there is a need to develop and implement a comprehensive national strategy for promoting women's right to health throughout their life span. Such a strategy should include interventions aimed at the prevention and treatment of

[20] Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251 of 3/10/2003, p. 12.
[21] OJ L 50 of 25.2.2003, p. 1.
[22] Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 85 (2003).

diseases affecting women, as well as policies to provide access to a full range of high quality and affordable health care, including sexual and reproductive services. A major goal should be reducing women's health risks, particularly lowering rates of maternal mortality and protecting women from domestic violence. The realization of women's right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health. It is also important to undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights.

2. European Union law

Prohibition of dismissal during pregnancy

The most important contribution of Union law to the protection of maternity has been in the prohibition of dismissal during pregnancy and in the guarantee of a right to paid maternity leave and to parental leave. At the most general level, Article 30 of the Charter of Fundamental Rights of the European Union provides that 'Every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices'. Article 33(2) of the Charter of Fundamental Rights of the European Union moreover provides that 'To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child'. While Article 30 of the Charter of Fundamental Rights corresponds to Article 24 of the Revised European Social Charter, [23] the protection of the pregnant woman from unjustified dismissals is reinforced by Article 33(2) of the Charter of Fundamental Rights, which corresponds to Article 8 (2) of the Revised European Social Charter. The latter provision obliges the States that accepted that provision to consider it illegal for an employer to dismiss an employed woman during the period between the moment when she notifies her employer that she is pregnant and the end of her maternity leave, or on a date that causes the notice period to expire during that period. The protection afforded to employed woman has therefore been considerably extended with the adoption of the Revised European Social Charter, since this protection now covers the entire period of pregnancy and not merely the maternity leave as was provided for by Article 8 of the European Social Charter of 1961. By prohibiting the dismissal of a employed woman on grounds of pregnancy, the European Committee of Social Rights seeks to protect her not only against the economic consequences of such a measure, but also against the psychological effects that are certain to accompany it. The aim therefore is not only to offer employed woman financial security, but also job security. In case of dismissal contrary to the stipulated prohibition, the employed woman must in fact be reinstated in her job, which is the only way to effectively guarantee job security. Reinstatement is the rule, and the damages, to be awarded in highly exceptional cases, must consequently be sufficiently dissuasive for the employer and offer sufficient compensation for the dismissed employee. All female workers must be able to benefit from such protection, even if they are employed on a part-time basis for example. Article 8(2), however, is not absolute in character. The Appendix to the revised European Social Charter specifies that exceptions could be made to the protection of pregnant women against dismissals, for instance, in the following cases: (a) if an employed woman has been guilty of misconduct which justifies breaking off the employment relationship; (b) if the undertaking concerned ceases to operate; (c) if the period prescribed in the employment contract has expired. The European Committee of Social Rights notes in this connection that the increased use of employment contracts of specified duration is likely to effectively deprive the prohibition of Article 8(2) of the Revised European Social Charter of its effect. In response to the concern expressed in Article 2(3) of the Termination of Employment Convention (No. 158) of the International Labour Organization, it asks the States Parties to the Revised European Social Charter to supply figures showing the proportion of female workers on insecure contracts whose situation is consequently weakened in terms of the protection of pregnant female workers.

[23] Updated explanations relating to the text of the Charter of Fundamental Rights, 9 July 2003, CONV 828/03, p. 14

Right to paid maternity leave and to parental leave

The right to parental leave and to a paid maternity leave also have their source in the international human rights law. Article 10 (2) of the International Covenant on Economic, Social and Cultural rights reads: "special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits". Article 8 (1) of the revised European Social Charter provides that with a view to ensuring the effective exercise of the right of employed women to the protection of maternity, the Parties undertake to provide either by paid leave, by adequate social security benefits or by benefits from public funds for employed women to take leave before and after childbirth up to a total of at least fourteen weeks"[24]. Article 11 (2) (b) of the Convention on the Elimination of All Forms of Discrimination against Women specifies that in order to prevent discrimination against women on the grounds of maternity and to ensure their effective right to work, States Parties shall introduce maternity leave without loss of former employment, seniority or social allowances. The ILO Convention No. 183 on Maternity Protection of 15 June 2000 adds, in its Article 5, that the paid maternity leave shall be compatible with medical leaves in the case of illness, complications or risk of complications arising out of pregnancy or childbirth. In addition, Article 27 (2) of the revised European Social Charter provides that with a view to ensuring the exercise of the right to equality of opportunity and treatment for men and women workers with family responsibilities, the States Parties shall provide a possibility for either parent to obtain, during a period after maternity leave, parental leave to take care of a child, the duration and conditions of which should be determined by national legislation, collective agreements or practice. The parental leave is also indirectly targeted by ILO Convention No. 156 of 1981 on Workers with Family Responsibilities.

Other issues

European Union law makes a significant contribution to those safeguards. The disadvantage imposed on a female worker on account of her motherhood is a form of direct discrimination on grounds of gender, in accordance with the case-law of the Court of Justice, which interprets in that sense Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions[25]. The European Court of Justice has also ruled as being contrary to Community law, national regulations that deny women the right to professional promotion on the grounds that they were absent from work due to maternity leave[26]. As regards protection against dismissal on grounds of pregnancy, Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding prohibits the dismissal of pregnant workers or workers who have recently given birth or are breastfeeding for reasons connected with their condition during the period of pregnancy until the end of their maternity leave.[27] If a female worker in one of those situations is dismissed during the period in question, the employer must cite duly substantiated grounds for her dismissal in writing. Member States must also take the necessary measures to protect those workers from the consequences of unlawful dismissal (Article 10).

As to maternal leave and parental leave, Council Directive 92/85/EEC imposes to the Member States to provide a maternity leave of at least 14 continuous weeks, allocated before and/or after confinement, and renders necessary the compulsory nature of maternity leave of at least two weeks, allocated before and/or after confinement (Article 8). Member States shall also take the necessary

[24] 12 weeks under the European Social Charter of 1961.

[25] See eg: Case C-177/88, *Dekker / Stichting Vormingscentrum voor Jong Volwassenen* [1990] ECR I-3941 (judgment of 8 November 1990); Case C-320/01, *Busch,* [1993] ECR I-2041 (judgment of 27 February 2003).

[26] Case C-136/95*, Caisse nationale d'assurance vieillesse des travailleurs salariés / Thibaul* [1998] ECR I-2011 *(*judgment of 30 April 1998).

[27] Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), *JO* L 348 , 28.11.1992.

measures to ensure that pregnant workers are entitled to time off, without loss of pay, in order to attend ante-natal examinations, if such examinations have to take place during working hours. Directive 96/34/EC on the Framework Agreement on Parental Leave concluded by UNICE, CEEP and the ETUC (*supra*), which grounds the point 16 of the Community Charter of Fundamental Social Rights for Workers, provides that "measures should be developed enabling men and women to reconcile their occupational and family obligations", and cites the minimum conditions to be observed with regard to parental leave for mothers or fathers[28]. It establishes an individual right for men and women workers to parental leave on the grounds of the birth or adoption of a child, the right to return to the same job or to an equivalent or similar job at the end of parental leave, protection against dismissal on the grounds of parental leave, maintenance of rights acquired or in the process of being acquired on the date on which parental leave starts until the end of parental leave, and the right to take time off from work on grounds of force majeure for urgent family reasons.

The protection afforded under Union law of workers in the event of their employer's insolvency also should take into account the need to protect maternity. In the case of *Mau*[29], the Court was asked to offer an interpretation of Articles 3 and 4 of Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer[30] and of Article 141 EC. The applicant, Ms Karin Mau, was on child raising leave at the time of the onset of the employer's insolvency and this was the date chosen by Germany to calculate the guarantees due by guarantee institutions for payment of employees' outstanding claims resulting from contracts of employment or employment relationships and relating to pay for the period prior to that date (Art. 3(1) of Directive 80/987/EEC). Under Article 4(2) of the Directive, the Member States must "ensure the payment of outstanding claims relating to pay for *the last three months* of the contract of employment or employment relationship occurring within a period of six months preceding the date of the onset of the employer's insolvency", when this is the choice of the relevant date made by the State concerned. Under German law, the employment of Ms Mau was maintained during the child raising leave, however the main obligations flowing from that employment (obligation to work and to pay remuneration) were suspended. Therefore if the expression 'the last three months of the period of employment' were to be interpreted to cover the period of child reasing leave, no remuneration would be guaranteed to Ms Mau. The Court considered however that, if the expression 'the last three months of the contract of employment or employment relationship' were to be interpreted as including a period during which no remuneration is to be paid, the social purpose of the Directive to ensure a minimum level of protection for all workers would be defeated. It therefore concluded that 'Periods during which the employment relationship is suspended on account of child raising are (…) excluded by reason of the fact that no remuneration is due during those periods' (point 44).

The Network of Independent Experts on Fundamental Rights emphasizes the importance for European Union Member States to take into consideration all the relevant provisions of international and European human rights law as well as the case-law of the European Court of Justice when implementing Community Directives in that area.

It also should be considered whether the development of short-term employment contracts, as part of the broader trend towards flexibilisation of the employment relationship, affects the protection of the pregnant woman from discrimination on grounds of pregnancy, as feared in particular by the European Committee of Social Rights in its Conclusions adopted under Article 8 para. 2 of the Revised European Social Charter.

[28] See also Council Recommendation 92/241/EECof 31 March 1992 on child care, *OJ* L 123, 08.05.1992.
[29] Case C-160/01, *Mau*, (judgment of 15 May 2003).
[30] OJ 1980 L 283, p. 23.

III. Protection of the family

1. Removal of the child from the family

Article 7 of the Charter of Fundamental Rights of the European Union provides that "Everyone has the right to respect for his or her private and family life, home and communications". Probably the most important threat to the right embodied in Article 7 of the Charter of Fundamental Rights is in the removal of a child from his or her family, in situations where the risks which the removal seek to prevent could have been prevented by other means, less disruptive of the right to respect for family life. States are under an obligation, in international law, to protect the child from negligence, violence or exploitation.[31] Article 9(1) of the Convention on the Rights of the Child states that "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interest of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence". However, all appropriate measures should be adopted to ensure that such separation of a child from his or her family will not be necessary. Preventive policies have a decisive role to play in this regard. Whereas Article 19(1) of the Convention on the Rights of the Child states that "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child", Article 19(2) adds that "Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement".

The Network is struck by the fact that very poor families, and families with a foreign background, are disproportionately affected by such removals, which States seek to justify in the name of the best interests of the child : the best interests of the child are, first in foremost, in no situations occuring where removal from the family becomes necessary, where such situations could have avoided by adequate preventive State intervention. Morever, where removal indeed is necessary for the best interests of the child, placement in foster homes is to preferred above placement in institutions.

The Network notes, for instance, that during its consideration of the report submitted by **Sweden** under the UN Convention on the Rights of Children in 2005, the Committee on the Rights of the Child expressed its concern about the increase in number of children placed in institutions rather than foster homes and about the fact that the proportion of children with a foreign background who are placed in institutions is higher than that of Swedish children. The Committee therefore recommended that: "a) preventive measures specifically targeted at families with a foreign background be taken, including awareness-raising within social services about the relevance of cultural background and immigrant status, so that help can be given before a situation develops that necessitates the taking of children into care; b) the regulation of cases where children are taken into care against their will take place under a separate umbrella from that of the National Board of Institutional Care, and that this regulation also ensures the quality of care".[32] The Network also notes that, in its conclusions concerning **Sweden** under Article 17 of the Revised European Social Charter, while concluding that this country was not in violation of that provision, the Committee emphasized that in order to comply with Article 17 (1) of

[31] See, inter alia, Art. 17(1)(b) of the Revised European Social Charter; Article 19(1) of the Convention on the Rights of the Child.
[32] UN Doc. CRC/C/15/Add.248, 28 January 2005, p. 6.

the Revised European Social Charter "children placed in institutions should be entitled to the highest possible degree of satisfaction of their developing emotional needs and their physical well-being as well as to special protection and assistance. In order to be considered as adequate institutions, they shall provide a life protecting human dignity for the children placed there and shall provide conditions promoting their growth, physically, mentally and socially. A special unit in a child welfare institution shall be set up to resemble the home environment and it should not accommodate more than 10 children."[33] As regards the **Slovak Republic**, the Network notes that in May 2005, the President of the Slovak Republic challenged the provision of the Section 49 paragraph 1 (first sentence) of the *zákon o rodine* [Act on Family][34] before the Constitutional Court arguing its incompatibility with Article 41 paragraph 4 (second sentence) of the Slovak Constitution, Article 32 paragraph 4 (second sentence) of the Charter of Fundamental Rights and Freedoms, and Article 9 first point (first sentence) of the Convention on the Rights of the Child. The challenged provision allows, though only temporarily, to put a child held in an institutional care in a custody of a person who has expressed an interest to become a foster parent of the child without a prior decision of a court. According to the President of the Slovak Republic, the decision on a custody of a child, regardless whether the custody is temporal or not, should be taken by the court, and not by the administrative organ of social-legal protection of children as stated by the challenged provision at present. At the time of the preparation of this Thematic Comment, the Constitutional Court has already admitted the motion for further proceeding (the motion is registered under the Ref. no. PL. ÚS 14/05) and in the meanwhile suspended the applicability of the provision.

The Network recalls that, according to the Basic principles on the rights of children living in residential institutions appended to Recommendation Rec(2005)5 of the Committee of Ministers to the Member States of the Council of Europe,[35] the family is the natural environment for the growth and well-being of the child and the parents have the primary responsibility for the upbringing and development of the child; preventive measures of support for children and families in accordance with their special needs should be provided as far as possible; the placement of a child should remain the exception and have as the primary objective the best interests of the child and his or her successful social integration or re-integration as soon as possible; the placement must guarantee full enjoyment of the child's fundamental rights ; the placement should not be longer than necessary and should be subject to periodic review with regard to the child's best interests that should be the primary consideration during his or her placement; the parents should be supported as much as possible with a view to harmoniously reintegrating the child in the family and society; a child leaving care should be entitled to an assessment of his or her needs and appropriate after-care support in accordance with the aim to ensure the re-integration of the child in the family and society; the decision taken about the placement of a child and the placement itself should not be subject to discrimination on the basis of gender, race, colour, social, ethnic or national origin, expressed opinions, language, property, religion, disability, birth or any other status of the child and/or his or her parents; the procedure, organisation and individual care plan of the placement, including a periodic review of the placement, shall guarantee the rights of the child, notably the child's right to be heard; due weight should be given to these views in accordance with the child's age and his or her degree of maturity; any measures of control and discipline which may be used in residential institutions, including those with the aim of preventing self-inflicted harm or injury to others, should be based on public regulations and approved standards; the family of the child should, if possible, be involved in the planning and organisation of the child's placement; when the return of the child to his or her own family is not possible, other means of care or the continuation of the placement should be envisaged, taking into account the child's wishes and the continuity in his or her life path and his or her fulfilment and own needs.

[33] Council of Europe, European Committee of Social Rights, Conclusions 2005 (Sweden), p. 10, www.coe.int
[34] *Zákon _. 36/2005 Z. z. o rodine a o zmene a doplnení niektor_ch zákonov. Zákon nadobudol ú_innos_ 1. apríla 2005* [The Act no. 36/2005 Coll. on family, amending and supplementing certain other laws. The law came in force on 1 April 2005]
[35] Adopted by the Committee of Ministers on 16 March 2005 at the 919th meeting of the Ministers' Deputies.

2. Conciliation of family and professional life

As made explicit by the localisation of Article 33(2) of the Charter of Fundamental Rights, the right to conciliation of family and professional life contributes to the protection of the family. This right facilitates the professional integration of women. It is also to be understood as a right instituted in favor of the child, who will benefit from inclusive policies ensuring that the child will not be seen as a burden or an obstacle to the fulfilment of a professional career or either parent, and will not be neglected for the sake of that career. The contribution of Union law to this objective has been important.[36]

Reconciliation of family and professional life often involves an organization of working time for men and women. Article 27 (1) (b) of the revised European Social Charter refers indirectly to the organization of working time by providing that with a view to ensuring the exercise of the right to equality of opportunity and treatment for men and women workers with family responsibilities and between such workers and other workers, the Parties undertake to take appropriate measures to take account of their needs in terms of conditions of employment and social security. Directive 93/104/EC of 23 November 1993, concerning certain aspects of the organisation of working time[37] lays down minimum safety and health requirements for the organization of working time and organizes certain aspects of the organization of working time such as daily rest and weekly rest, breaks, night work, maximum weekly working time, annual leave, health assessment and transfer of night workers to day work, and patterns of work. Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC[38] recognizes that part-time work has an important impact on employment and is aimed at removing discrimination against part-time workers, improving the quality of part-time work, facilitating the development of part-time work on a voluntary basis and contributing to the flexible organization of working time in a manner which takes into account the needs of employers and workers. The prohibition of all indirect indiscrimination against female workers also contributes to the protection of workers who chose to work on a part-time basis, given that women are usually overrepresented in that category of workers. In the case of *Kowalska v. Freie und Hansestadt Hamburg*[39], the European Court of Justice ruled that Article 119 EEC (having become Article 141 EC after amendments) is to be interpreted as precluding the application of a clause in a collective wage agreement under which employers may exclude part-time employees from the payment of a severance grant on termination of their employment when in fact a considerably lower percentage of men than of women work part time, unless the employer shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex. The Court pointed out that the implementation of the principle of equal treatment for men and women precludes national legislation which requires that, for the purposes of calculating the length of service of public servants, periods of employment during which the hours worked are between one-half and two-thirds of normal working hours are counted only as two-thirds of normal working hours[40]. A similar decision was delivered in the case of *Hill and Stapleton v. The Revenue Commissioners and Department of Finance*[41] on the assignment of pay scales.

Reconciliation of family and professional life also involves the organization and provision of special childcare services and arrangements. This is the objective of Article 27 (1) (c) of the revised European Social Charter which encourages the States parties to develop or promote services, public or private, in particular child day care services and other childcare arrangements.The Convention on the Rights of

[36] The Network also refers to its Conclusions and Recommendations on the situation of fundamental rights in the European Union and the Member States in 2004 (Concl. 2005, p. 119), where the initiatives adopted by the Member States in this regard have been described.
[37] *OJ L 307,* 13.12.1993
[38] *OJ* L 14, 20.01.1998.
[39] Case C-33/89, *Kowalska / Freie und Hansestadt Hamburg*, [1990] *ECR* I-2591 (judgment of 27 June 1990).
[40] Case C-1/95, *Gerster / Freistaat Bayern,* [1997] *ECR* I-5253 (judgment of 2 October 1997).
[41] Case C-243/95, *Hill and Stapleton / The Revenue Commissioners and Department of Finance,* [1998] *ECR* I-3739 (judgment of 17 June 1998).

the Child also points in the same direction. Thus for instance, the Committee on the Rights of the Child has considered, on the basis of Articles 18 (3) and 25 of the Convention on the Rights of the Child and in light of the recommendations of the Committee on Economic, Social and Cultural Rights (E/C.12/1/Add.68, para. 44), that **Germany** should take measures to establish more childcare services to meet the needs of working parents, and to set up national standards to ensure quality childcare is available to all children. Council Recommendation 92/241/EEC of 31 March 1992 on child care[42] asks Member States to provide child-care services for parents who are working, following a course of education or training in order to obtain employment, or are seeking employment or a course of education or training in order to obtain employment. The Recommendation stresses that those services should be "offered at prices affordable to parents". The Court of Justice has held that Community law does not preclude a scheme under which, in a context characterized by a proven insufficiency of proper, affordable care facilities, nursery places are reserved for female workers alone. However, the Court adds that "that is so only in so far, in particular, as that exception in favour of male officials is construed as allowing those of them who take care of their children by themselves to have access to the nursery places scheme on the same conditions as female officials". In order to reinforce the measures allowing reconciliation of family and professional life, the Presidency conclusions of the Barcelona European Council provide that "Member States should remove disincentives to female labour force participation and strive, taking into account the demand for childcare facilities and in line with national patterns of provision, to provide childcare by 2010 to at least 90% of children between 3 years old and the mandatory school age and at least 33% of children under 3 years of age".

3. Right to family reunification and to respect for private and family life in the context of removal decisions

Council Directive 2003/86/EC on the right to family reunification

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification[43] seeks to determine the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States (article 1). Directive 2003/86/EC in principle guarantees a right to family reunification to the members of the 'nuclear family', i.e., the spouse of the sponsor, the minor children of the sponsor and/or his/her spouse, provided they are below the age of the majority set by the law of the Member State concerned and are not married. In its previous conclusions (see *Report on the situation of fundamental rights in the Union in 2003*, pp. 53-56; Concl. 2004, p. 29; Concl. 2005, p. 48), the Network has emphasized that the right to family reunification is not simply a humanitarian measure which the Member States could or not decide to adopt : where the family life cannot be pursued elsewhere than in the host State, it was a fundamental right, protected under Article 8 of the European Convention on Human Rights and Article 17 of the International Covenant on Civil and Political Rights. Therefore, the Network advocated a careful examination of the measures adopted by the Member States for the implementation of Directive 2003/86/EC, in order to ensure that those measures fully comply with the Charter of Fundamental Rights and with the international obligations of the Member States.

From the point of view of the rights of the child, the Network expressed in particular its concerns about Article 4 (1) of Directive 2003/86/CE providing that 'where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member State may, before authorising entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its existing legislation on the date of implementation of this Directive'. In commenting upon this provision, the Network noted that there where family life cannot continue elsewhere, refusal of family reunification constitutes an infringement of the right to respect for family life as recognized by Article 8 of the European Convention on Human Rights. Such an infringement, the Network noted, does not appear to be justifiable by one of the admissible grounds for restriction enumerated in Article 8 (2) of the Convention. Moreover, it may be paradoxical to want to verify this 'integration' whereas,

[42] *OJ* L 123, 08.05.1992 – see also: COM(98) 237 final
[43] Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251 of 3/10/2003, p. 12.

by definition, a minor who requests the right to family reunification, if he wishes to be 'integrated', has not had the opportunity to develop ties with the host country, and his ties with his family may have weakened as a result of the separation.

This provision is therefore particularly problematical from the viewpoint of the requirements of fundamental rights. At the same time, noting that the difficulty lies not in what the Directive imposes on the Member States as an obligation, but in the margin of appreciation that it allows the States, the Network emphasized that – whichever the result of the action for annulment filed against Directive 2003/86/EC by the European Parliament – the primary task laid on the Commission, as the guardian of the obligations imposed under Community law on the Member States, to monitor whether the implementation measures adopted by the Member States may result in violations of fundamental rights recognized in the Union legal order.

Another function of such monitoring, the Network argued, was in order to ensure that the Family Reunification Directive would not serve as a pretext to lower to level of protection of the right to family reunification already achieved. The Network noted for instance that in **Denmark**, the Act (2004:427), amending the Aliens Act and the Integration Act, reduces the age limit for minor children's right to family reunification from 18 years to 15 years. Under Article 4(5) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, the Member States are authorised, by way of derogation, to request "that the applications concerning family reunification of minor children have to be submitted before the age of 15, as provided for by its existing legislation on the date of the implementation of this Directive [3 October 2005]". The adoption the provision in the Danish Act (2004:427) amending the Aliens Act and the Integration Act reducing the age limit for minor children's right to family reunification from 18 years to 15 years therefore therefore may have been encouraged by the Directive on the right to family reunification, offering a regrettable example of a Community legislation which has encouraged a race to the bottom by the Member States seeking to rely upon the derogations it allows for.

Proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals

The right to respect for family life also should be complied with in the adoption of decisions to remove third-country nationals from the host State. The Network welcomes the fact that the proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals which the Commission presented on 21 September 2005 (COM(2005) 391 final) includes a provision (Article 5) stating, under the title 'Family relationships and best interest of the child', that "When implementing this Directive, Member States shall take due account of the nature and solidity of the third country national´s family relationships, the duration of his stay in the Member State and of the existence of family, cultural and social ties with his country of origin. They shall also take account of the best interests of the child in accordance with the 1989 United Nations Convention on the Rights of the Child". The Network notes, however, that this provision may be too vague, even in combination with the 18th Recital of the draft Directive, which makes an explicit reference to the European Convention on Human Rights. Guideline 2, para. 2, of the Guidelines on forced return adopted by the Committee of Ministers of the Council of Europe, states more explicitly that "The removal order shall only be issued after the authorities of the host state, having considered all relevant information readily available to them, are satisfied that the possible interference with the returnee's right to respect for family and/or private life is, in particular, proportionate and in pursuance of a legitimate aim". At the very least, in accordance with the case-law of the European Court of Human Rights,[44] Article 5 of the draft Directive should include a reference not only to the right to respect for the family life of the person concerned in the expelling State, but also to his or her right to respect for

[44] Eur. Ct. HR, *C. v. Belgium*, 7 August 1996; Eur. Ct. HR, *Ezzoudhi v. France* judgment of 13 February 2001; Eur. Ct. HR (1st Sect.), *Amrollah v. Denmark* judgment of 11 July 2002, Appl. No. 56811/00; Eur. Ct. HR, *Boultif v. Switzerland* judgment of 2 August 2001, Appl. No. 54273/00; Eur. Ct. HR, *Benhebba v. France* judgment of 19 June 2003, Appl. No. 53441/99, para. 32; Eur. Ct. HR, *Mokrani v. France*, judgment of 15 July 2003, Appl. No. 52206/99, para. 30-32.

private life. Whereas the current wording of this provision refers to the need to "take due account of" the family relationships of this person in the host State, it should be emphasized that no interference should be acceptable unless necessary for the realization of a legitimate aim, including the 'prevention of disorder' which would result from the violation of the national rules relating to the entry, stay and residence of third-country nationals.

IV. Protection of the child

1. Domestic violence

Prevention of violence against children

Article 19(1) of the Convention on the Rights of the Child provides that "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child". Article 17(1)(b) of the Revised European Social Charter of 3 May 1996 (ETS 163) regarding the right of children and young persons to social, legal and economic protection, states that "With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake (…) to take all appropriate and necessary measures designed: (…) to protect children and young persons against negligence, violence or exploitation (…)". These provisions make explicit requirements which are already imposed under Article 4 of the Charter of Fundamental Rights of the European Union and Article 3 of the European Convention on Human Rights, as well as Article 7 of the International Covenant on Civil and Political Rights, which prohibit the infliction of inhuman and degrading treatments.

The persistence of domestic violence remains a significant area of concern in the Union. The most important initiative adopted at the level of the Union to address this issue has been through the *Daphne programme (2000-2003)*, the first phase of which was completed on 31 December 2003. This initiative demonstrates the added value of a Community intervention in the support, co-ordination and exchange of experiences aimed at preventing violence against children, young people and women, and the protection of victims and groups at risk. Indeed, the European Parliament assessed very positively the Daphne programme, asking for an increase in the budget earmarked for the second phase of the programme[45] – planned for a five-year period from 1 January 2004 (2004-2008) –. The objectives of the programme are unchanged in its second phase, although its instruments are somewhat modified[46]: in particular, more ambitious projects may be considered for Community support, while the proposed programme may also develop the dimension of sharing and disseminating the knowledge contained in the programme, with a view to mutual instruction on the good practices to be followed with a view to the prevention of violence. On 1 December 2003, the Council on Employment, Social Policy, Health and Consumer Affairs adopted the Daphne II programme (2004-2008)[47], and approved a proposal for a budget of 50 million euros for the five years of the programme.

[45] Resolution of 4 September 2002 (2001/2265(INI)).

[46] Proposal for a Decision of the European Parliament and of the Council establishing a second phase of a programme of Community action (2004-2008) to prevent violence against children, young people and women and to protect victims and groups at risk (the Daphne II programme), COM(2003)54 final of 4/2/2003; subsequently, after receipt of the opinion of the European Parliament formulated in a resolution of 3 September 2003, Amended Proposal for a Decision of the European Parliament and of the Council establishing the second phase of a programme of Community action (2004-2008) to prevent violence against children, young people and women and to protect victims and groups at risk (the Daphne II programme), COM(2003)616 final of .

[47] 2549th meeting of the Council on Employment, Social Policy, Health and Consumer Affairs in Brussels, 1 and 2 December 2003.

Throughout its different reports, the EU Network of Independent Experts on Fundamental Rights as identified a number of good practices in this field.[48] In its Report on the situation of fundamental rights in the Union and its Member States in 2003 for instance (Concl. 2004, p. 19), the Network welcomed the adoption by **Luxembourg** of the Law of 8 September 2003 on Domestic Violence, which sets up measures for the expulsion of the perpetrator of the violence from the family home as well as measures of assistance for the victims. The Network (Concl. 2005, p. 28) welcomed the adoption in **France** of a comprehensive plan to combat violence against women and the fact that domestic violence is taken into consideration in the law reforming divorce (Act no. 2004-439 on divorce of 26 May 2004, published in the JORF of 27 May 2004, p. 9319). It welcomed in particular Article 22 of this Act amending Article 220-1(3) of the Civil Code, which allows the courts, where domestic violence threatens the spouse and/or children, before any petition for divorce, to organize separate residences, to allow the injured spouse the use of the marital home and to rule on the contribution towards the marital expenses as well as on parental authority. The Network also welcomed the adoption of the Act of 2 January 2004 on the care and protection of children, which establishes a national Observatory for Children at Risk and which allows medical personnel to report cases of ill-treatment without exposing themselves to disciplinary sanctions (Act no. 2004-1 of 2 January 2004 on the care and protection of children, published in the Official Journal of 3 January 2004, p. 184). While regretting the remaining lacunae in this legislation, the Network also welcomed the adoption in the **United Kingdom** of the Children Act 2004, which has removed the defence of reasonable chastisement in any proceedings for an offence of assault occasioning actual bodily harm, unlawfully inflicting grievous bodily harm, causing grievous bodily harm with intent, or cruelty to a child and which also prevents the defence being relied upon in any civil proceedings where the harm caused amounted to actual bodily harm.[49] It noted that in **Sweden**, the Government has allocated budget to sheltered housing and other measures for people at risk of honour-related violence. Acting on government instructions, the Swedish Integration Board, in cooperation with other institutions, has highlighted good examples and methods for preventing conflicts between the individual and the family that may be caused by ideas about honour ; and that in **Ireland**, a new program has been set up aimed at preventing domestic violence by integrating the work of criminal justice system with that of victims support agencies. In later conclusions (Concl. 2005, p. 26), the Network noted that in **Cyprus** the authorities had sought to tackle the question of domestic violence by adopting the *Violence in the Family (Prevention and Protection of Victims) Law* L. 119(I)/2000.[50] It highlighted the fact that this Act, after it was revised in July 2002, contains provisions authorising the recording of the victim's declarations by electronic audiovisual means and the production thereof in court, together with witness statements taken electronically so as to avoid confrontation with the accused; guaranteeing celerity of procedure and protection of witnesses from any harassment or intimidation; allowing for the admissibility of the testimony of a medical practitioner who, during a consultation with a child patient, has heard disclosures of ill-treatment committed by any person[51] ; establishing an obligation for the spouse of the accused to testify (introducing thereby an exception to the usual rules of criminal procedure); and creating shelters of victims. More recently, the *Law Amending the Violence in the Family (Prevention and Protection of Victims) Law*, L. 212(I)/2004[52] was adopted, seeking to further remedy the

[48] The Network refers also, generally, to Recommendation Rec(2002)5 of the Committee of Ministers to the Member States of the Council of Europe on the protection of women against violence, adopted by the Committee of Ministers on 30 April 2002 at the 794th meeting of the Ministers' Deputies. However, that Recommendation is only tangentially related to the protection of the child from abuse within the family; therefore its content will not be developed in the context of this Thematic Comment.

[49] The defence remains available, however, in proceedings before the Magistrates' Court for common assault on a child.

[50] *O* _____ *π*__ _____ ___ ___ _____ ___ ____ ____ _____ ___ ___ ___ _____ ___ _____ N. 119(I)/2000.

[51] The Network recalls in this respect that, according to the Principles and suggestions appended to Recommendation No. R (79) 17 concerning the protection of children against ill-treatment, adopted on 13 September 1979 at the 307th meeting of the Ministers' Deputies, the Member States of the Council of Europe are recommended 'to take such measures as are necessary to enable persons subject to professional secrecy to disclose cases of ill-treatment or neglect of minors, on the basis of established procedures and in a manner consistent with professional ethics, inter alia by the enactment of legislative provisions for this purpose or encouraging the adoption of similar provisions in codes of professional conduct'.

[52] _____ *π*__ ___*π*_*π*____ ___ ____ ____ ____ _____ *(*_____ ___ _____ _____*)* _____ (_. 212(_)/2004.

weaknesses of available judicial and administrative procedures in the handling of cases of domestic violence and also to provide for the necessary support and assistance to the victims.

More recently (in the Conclusions and Recommendations adopted on the year 2005), the Network also welcomed the proposals made in the **Czech Republic,** for further legislative amendments improving the protection of victims of domestic violence. The new Sec. 215a of the Penal Code, introduced by Act No. 91/2004 Coll., made "maltreatment of a person living in common with a perpetrator in an apartment or house" a special punishable offence. By granting the police a new power to expel a perpetrator of domestic violence from a common apartment in order to protect a victim against a menace of continuing maltreatment, the Czech Republic would be further reinforcing the protection owed to the victim. In **Denmark**, the Ministry of Gender Equality launched a new plan of action to fight men's violence against women and children in the family in April 2005. The Network notes however that evidence gathered by the LOKK, the Organisation of Crisis Centres For Women,[53] suggests that social workers are not trained to deal with children who have witnessed domestic violence against their mothers. The LOKK annual report for 2005 also states that of 1 681 children interviewed over half had been subjected to violence and over 75% had witnessed their mother being abused.

In **Greece** the Minister of Justice on 25 November 2005 announced a new bill on domestic violence prepared by an interdepartmental committee. This bill aims, among other things, to safeguard the freedom, dignity and self-determination of persons in the family context, to protect the physical and mental well-being of underage children and to ensure a healthy family environment. The bill proposed by the Minister provides stiffer penalties for violations of bodily integrity where such violations are committed in the family; conjugal rape is expressly criminalized; a judicial mediation procedure has been introduced in an effort to re-establish family harmony; acts of violence committed before an underage child against a member of his family are henceforth punished, as are acts of violence against elderly, disabled or sick persons, intimidation or active corruption of witnesses examined in cases of domestic violence, and, in particular, the infliction of severe physical or mental pain. Offences of domestic violence are to be prosecuted automatically according to the procedure for *flagrante delicto*. The legislative instrument in question will not only apply to situations of marriage, but also to situations of cohabitation. The Minister of Justice has announced that the new bill will be subject to wide consultation before it is tabled in Parliament very shortly. The Network emphasizes that the bill proposed by the Minister of Justice will come to fill a serious gap that has been highlighted in the last two years by several committees of experts on the United Nations treaties in the field of human rights which have examined the reports submitted by Greece. It also expresses the hope that the new legislative instrument will offer adequate support to the victims of domestic violence.

Throughout these findings, the Network has sought to recognize the need to reconcile the potentially conflicting concerns for respect of the right to family life and for the protection of victims from domestic violence. For instance, in **Hungary**, 2005. évi XCI. törvény [Act XCI of 2005] modified Article 195 of 1978. évi IV. törvény a Büntet_ Törvénykönyvr_l [Act IV of 1978 on Criminal Code], making it possible to sentence a single parent to imprisonment, if s/he made it impossible for the other parent to meet or contact their child. The Network shares certain of the concerns expressed by the Habeas Corpus Working Group concerning this modification. Under the 1952. évi IV. törvény a házasságról, családról és gyámságról [Act IV of 1952 on Marriage, Family and Custody], upon dissolution of marriage, in the absence of agreement by the parents, the court places the child with the parent who can best ensure its physical, intellectual and moral development. The new legislation threatens the parent who can better ensure the development of the child with prison sentence, if s/he does not force the child to meet his or her other parent even if the child does not want to do so, without clearly referring to cases where the parent having custody rights unduly prevents the other parent from seeing the child : thus, it chooses to sanction *all* parents who make it impossible for the other parent to meet or contact their child.[54] The Network noted in this regard that a clarification of the legislation,

[53] Landsorganisation af kvindekrisecentre, LOKK Års rapport 2005
[54] http://hc.netstudio.hu/jogok/btk/lathatas.akadalyozasa.peticio.2005.06.17.htm

defining more restrictively the conditions in which the criminal responsibility of the parent may by engaged, and excluding such liability where the child refuses to meet the other parent, would be desirable.

As recognized already in 1979 by the Committee of Ministers of the Council of Europe, "the long-term effects of the abusive home environment are frequently disastrous for the child's growth, his learning capacities, his personality development as well as his future behaviour as a parent and thus costly for society in the long run".[55] In order to challenge this phenomenon, a dual strategy is required, consisting of effective measures of immediate intervention, detection and management, and secondly a policy of prevention. The abuse of the child within the family is a social problem, calling for an answer in social policies targeted towards the most vulnerable, before it becomes a problem for criminal law and policy. Among the preventive measures which should be privileged, many of which were already identified in the Appendix to that Recommendation, the Network includes in particular the improvement of general socio-economic conditions and the adoption of "measures for family welfare giving special consideration to those population groups which are economically and socially at a disadvantage" ; the development of family planning services "with a view to enabling couples to avoid unwanted pregnancies"; the preparation of young people for parenthood, through means including "the provision of courses at school and use of the mass media for teenagers and the public in general"; ensuring, 'especially during the first pregnancy, that all parents have adequate opportunities to learn and discuss methods of child rearing appropriate to the various stages of development and are encouraged to do so'; devoting particular attention to the perinatal period in order to "promote the establishment of emotional bonds between the parents and the newborn child by: ensuring a good preparation for childbirth and parenthood for both parents ; emphasising support and understanding for the mother in labour and discouraging the excessive use of emotionally traumatising practices at the time of birth, which might affect the mother's attitude towards the child ; encouraging rooming-in in the maternity wards ; promoting parents' self-confidence and competence in handling their baby, avoiding over-emphasis on the acquisition of technical skills ; favouring and promoting breast-feeding, where appropriate, by educating parents and persons who are likely to advise mothers ; recognising the important role of the father vis-à-vis both the mother and the newborn child, for example by giving the father the opportunity to participate at the childbirth and by giving consideration to providing for childbirth leave without loss of income for him". The Principles and Suggestions appended to the Recommendation also proposes that when low birth weight or sick newborn babies, particularly handicapped babies, are in special care units, maximum contact between parents and infants and especially to ensure support and counselling by nurses, doctors and others, should be encouraged. They also emphasize the need 'to ensure that there exists a comprehensive preventive child health care system capable of following, by regular checks, the progress of every pre-school child, paying special attention to the continuity of health care, and to ways of improving the take-up of services by families prone not to make full use of them. They advocate the establishment of a mechanism, or further research, for predicting vulnerable families at an early stage in the antenatal and perinatal period. Special care and support should be given to vulnerable families with parenting problems in the early stages of the child's life. Finally, "since many parents concerned have unrealistic expectations about child development and bearing in mind that the majority have not had a good model of parenting themselves and have great difficulty in understanding how to achieve a warm family relationship", the Principles and Suggestions recommend to "pay very special attention to: i. teaching these parents to understand the needs and behaviour of young children at different stages of development ; ii. understanding and treating marital problems, giving psychological help where necessary ; iii. relieving environmental stresses which often coexist".

Where such preventive measures as have been described fail and abuses are committed, a swift reaction is required, in order to interrupt the ill-treatment and prevent future abuse. However, the Network would emphasize, first, that it should be endeavoured to maintain as far as practicable the child in his or her family by effective measures of support and treatment of the whole family unit;

[55] Recommendation No. R (79) 17 concerning the protection of children against ill-treatment, adopted on 13 September 1979 at the 307th meeting of the Ministers' Deputies, para. 10.

second, that the end goal should always remain to reintegrate the child within his or her family, and that even measures protecting the child should not create an irreversible situation which would make such reintegration impossible in the future ; third, the procedures either for short-term emergency removal of a child from its family to a place of safety or for partial or total deprivation of parental rights or of the exercise of those rights for a period or permanently, the criterion for the decision being the best interests of the child, should respect the right of the parents to be involved in the procedure and to put forward their views, in accordance with the case-law of the European Court of Human Rights and with the requirements of Article 9(2) of the Convention on the Rights of the Child, according to which all interested parties shall be given an opportunity to participate in the proceedings and make their views known in proceeding which could lead to a child being separated from his or her parents.

Prohibition of corporal punishment

Both the Human Rights Committee[56] and the European Committee on Social Rights have emphasized the obligation under Article 7 of the International Covenant on Civil and Political Rights and under Article 17 of the Revised European Social Charter to prohibit, by imposing effective, dissuasive and proportionate sanctions, any forms of corporal punishment of children, whether this occurs within the family or whether it is inflicted in educational institutions. The European Committee of Social Rights has recently clarified the scope of this obligation in its decisions on the merits on the collective complaints lodged by the World Organisation against Torture (OMCT) against **Greece** (collective complaint n°17/2003, following which a new legislative provision prohibited the exercise of any form of corporal punishment of students in secondary schools), **Belgium** (collective complaint n°21/2003), **Ireland** (collective complaint n°18/2003), **Italy** (collective complaint n°19/2003), and **Portugal** (collective complaint n°20/2003). Article 17 of the revised European Social Charter requires that "the prohibition of all forms of violence [against children] must have a legislative basis. The prohibition must cover all forms of violence regardless of where it occurs or of the identity of the alleged perpetrator. Furthermore the sanctions available must be adequate, dissuasive and proportionate" (decision on the merits of collective complaint n°18/2003, para. 64). Such an obligation is also imposed under Article 3 of the European Convention on Human Rights, and under Article 19 and 37 of the European Convention on Human Rights. The European Court of Human Rights has noted that : "Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity [constituting inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals]"[57]. Following the adoption by the Parliamentary Assembly of the Council of Europe, on 24 June 2004, of the Recommendation 1666 (2004) regarding *Europe-wide ban on corporal punishment of children*[58], the Committee of Ministers has recommended the member States to adopt an appropriate legislation prohibiting corporal punishment of children, in particular within the family (Reply from the Committee of Ministers adopted at the 924th meeting of the Ministers' Deputies (20 April 2005)). In the view of the Network, one example of such legislation could be found in the 'Anti-spanking law' contained in **Sweden** in the Parental Code,[59] which is in effect since 1 July 1979.

The Network points out that an identical problem exists in **Spain.** As the Committee of Social Rights observes in its Conclusions with regard to Article 17 of the European Social Charter (*Conclusions XVII-2 (Spain)* 2005), Article 154 of the Civil Code still provides that parents "may punish their children within reasonable limits and in moderation", and corporal punishment inflicted within the family environment is not prohibited. The ALUPSE association has alerted the EU Network of Independent Experts on Fundamental Rights to the fact that, in **Luxembourg,** the law does not formally prohibit corporal punishment inflicted by parents on their children. Bearing in mind that, in

[56] Observations finales du Comité des droits de l'homme : Grèce, 25/04/2005, CCPR/CO/83/GRC.
[57] Eur. Ct. HR, judgment A v. the United Kingdom of 23 November 1998 (appl. n°25599/94), § 22.
[58] Recommendation 1666 (2004) is available on the following website :
http://assembly.coe.int/ASP/Doc/ATListing_E.asp?selCriteres=&search=children&YYYY=2004
[59] Chapter 6, Custody and Access, Introductory Provisions, Section 1.

its annual report of 2005, the *Ombuds-Comité fir d'Rechter vum Kand* devotes special attention to this issue, the Network encourages Luxembourg to urgently improve the legislative framework in this matter without awaiting a formal observation by the European Committee of Social Rights or the Committee on the Rights of the Child that the current situation is not satisfactory. Upon considering the third periodic report of **Denmark** (CRC/C/129/Add.3, para. 35), the UN Committee on the Rights of the Child expressed its concern at the high level of child abuse and neglect and other forms of domestic violence in that country, recommending to Denmark that it continue and strengthen its efforts to provide adequate assistance to children who are victims of child abuse, through various concrete initiatives. Moreover, research suggests that Danish social workers do not receive adequate training on child abuse, especially child sexual abuse.[60] As already noted above, the adoption in the **United Kingdom** of the Children Act 2004 has maintained the defence of reasonable chastisement in proceedings before the Magistrates' Court for common assault on a child.

Children placed in institutions are at particular risk of being ill-treated or disciplined in ways which would be incompatible with the prohibition of inhuman or degrading treatments or punishments. On 16 March 2005, the Committee of Ministers of the Council of Europe adopted Recommendation Rec(2005)5 on the rights of children living in residential institutions[61] stating in particular the right of children placed in such institutions to respect for their human dignity and physical integrity, and the right to conditions of human and non-degrading treatment and a non-violent upbringing, including the protection against corporal punishment and all forms of abuse.[62]

2. Fight against the trafficking and the sexual exploitation of children

Fight against the trafficking of children

(i) International and European human rights law

Article 5 of the Charter of Fundamental Rights provides that "No one shall be held in slavery or servitude', and that 'No one shall be required to perform forced or compulsory labour"; and it prohibits trafficking in human beings. In accordance with Article 52(3) of the Charter of Fundamental Rights, paragraphs 1 and 2 of this provision of the Charter correspond to Article 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950). Article 5 of the Charter of Fundamental Rights must also be read in accordance with, in particular, Articles 19, 32, 34 and 35 of the Convention on the Rights of the Child (1989). The Network also takes into account in its reading of this provision of the Charter Article 7(10) of the European Social Charter, unmodified in the Revised European Social Charter, under which the States parties undertake to ensure special protection against physical and moral dangers to which children and your persons are exposed, particularly against those resulting directly or indirectly from their work. Moreover Article 17(1)(b) of the Revised European Social Charter of 3 May 1996 (ETS 163) regarding the right of children and young persons to social, legal and economic protection, provides that 'with a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed (…) to protect children and young persons against negligence, violence or exploitation'.

[60] *To What Extent are social work students in England and Denmark equipped to work deal with child sexual abuse ?*, Unpublished M.sc study. Aalborg University, 2005.

[61] Adopted by the Committee of Ministers on 16 March 2005 at the 919th meeting of the Ministers' Deputies.

[62] The Recommendation also noted, *inter alia*, 'the right to have access to all types of education, vocational guidance and training, under the same conditions as for all other children'; 'the right to be prepared for active and responsible citizenship through play, sport, cultural activity, informal education and increasing responsibilities'; 'the right to participate in decision-making processes concerning the child and the living conditions in the institution'; 'the right to be informed about children's rights and the rules of the residential institution in a child-friendly way'; and 'the right to make complaints to an identifiable, impartial and independent body in order to assert children's fundamental rights'.

The international law framework for the fight against the trafficking in human beings has been steadily developing during the recent years. The Council of Europe Convention on Action against Trafficking in Human Beings (ETS No. 197) has been adopted on 16 May 2005. According to its Article 1 para. 1, the purposes of this Convention are 'to prevent and combat trafficking in human beings, while guaranteeing gender equality ; to protect the human rights of the victims of trafficking, design a comprehensive framework for the protection and assistance of victims and witnesses, while guaranteeing gender equality, as well as to ensure effective investigation and prosecution ; and to promote international cooperation on action against trafficking in human beings'. Trafficking in human beings is defined for the purposes of the Convention as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs" (Art. 4, a)) ; the consent of the victim is irrelevant (Art. 4, b)). Moreover, although the general definition of trafficking in human beings takes into account the means which are resorted to, the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in human beings' even if this does not involve any of the means listed (Art. 4, c)).

At the time of writing, none of the Member States of the European Union have ratified the Council of Europe Convention on Action against Trafficking in Human Beings. Moreover the following Member States have not signed it: **Czech Republic, Denmark, Estonia, Finland, France, Hungary, Ireland, Latvia, Lithuania, Slovak Republic, Spain** and the **United Kingdom.** The EU Member States and the European Community[63] are encouraged to sign and ratify as soon as possible the Council of Europe Convention on Action against Trafficking in Human Beings, in order to demonstrate their willingness to address this question through the most effective means possible, and in conformity with the standards defined within the Council of Europe.

At the universal level, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children[64] supplementing the United Nations Convention Against Transnational Organised Crime,[65] offers a first internationally agreed definition of 'trafficking in human beings' in Article 2. The purpose of the Protocol is to prevent and combat trafficking, to protect and assist victims and to promote international cooperation. Although victims and witnesses are also dealt with in the Convention against Transnational Organised Crime, the protection of, and assistance to, victims is specified as a core purpose of the Protocol in recognition of the acute needs of trafficking victims and the importance of victim assistance, both as an end in itself and as a means to support the investigation and prosecution of trafficking crimes.

In a Resolution of 20 October 2003 (OJ C 260 of 29.10.2003, p. 4), the Council has called upon the Member States to ratify both the Convention against Transnational Organised Crime and the Trafficking Protocol. The Network has encouraged all the Member States to follow upon this Resolution, and to ratify as well the Protocol Against the Smuggling of Migrants by Land, Sea and Air. At the time of writing, although all the Member States have signed the Convention against Transnational Organised Crime, seven States still have not ratified it: **Czech Republic**, **Germany, Greece, Hungary, Ireland, Italy** and **Luxembourg.** As to the Protocol to Prevent, Suppress and

[63] In the future, the Network believes it should be explored whether the European Union should not be defined as a potential party to such agreements, which relate to competences the Member States exercise jointly within the framework of the European Union. The Network notes in this regard that it follows from Article 24 EU and, indeed, from its practice, that the Union has an international legal personality allowing it to conclude international treaties with other international organisations or States.

[64] The Protocol was adopted by resolution A/RES/55/25 of 15 November 2000 at the fifty-fifth session of the General Assembly of the United Nations.

[65] The Convention was adopted by resolution A/RES/55/25 of 15 November 2000 at the fifty-fifth session of the General Assembly of the United Nations.

Punish Trafficking in Persons, Especially Women and Children, all the Member States have signed it but eight States have not ratified it: **Czech Republic, Germany, Greece, Finland, Hungary, Ireland, Italy** and **Luxembourg.** The European Community signed the United Nations Convention against transnational organised crime as well as the Trafficking and Smuggling Protocols on 12 December 2000. Acting upon the proposal of the Commission,[66] it approved the Convention against transnational organised crime on 12 May 2004. However, it has not yet ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the Convention against Transnational Organized Crime. The Smuggling Protocol essentially seeks to ensure a humane treatment for migrants and respect for their fundamental rights. The parties to the Protocol undertake to punish the illicit trafficking of human beings, including the production, possession or acquisition of falsified travel or identity documents, and to consider as aggravating circumstances putting the life or security of migrants at risk or ill-treating them. The abused migrant may not be prosecuted by the State of destination. This State must moreover ensure that the conditions for the resettlement in the country of origin are adequate, in case of forced repatriation. It should also be emphasized that the Trafficking Protocol includes a saving clause stating that its provisions are without prejudice to the obligations of States under International law, including the 1951 Geneva Convention and the 1967 Protocol relating to the status of refugees and the principle of non-refoulment contained therein. As stated in the Explanatory Memorandum to the proposal of the Commission to ratify the Protocol, although the EC is not a Party to the said Convention, it is bound by its content in particular through Article 63 point 1 EC.

(ii) Framework Decision 2002/629/JHA of the Council on combating trafficking in human beings

At the level of the Union, the main recent initiative in the fight against human trafficking is the Framework Decision 2002/629/JHA of the Council of 19 July 2002 on combating trafficking in human beings[67], which provides that, by 1 August 2004, the Member States shall render punishable certain acts connected with trafficking in human beings. Moreover in 2003, the Commission set up a consultative group called "Experts Group on Trafficking in Human Beings"[68], consisting of twenty individuals specially qualified in this field, proposed by the governments of the European Union Member States (including Candidate Countries), as well as by international, inter-governmental and non-governmental organizations active in preventing and combating trafficking in human beings. The mission of this Group is to issue opinions or reports to the Commission at the latter's request or on its own initiative, taking into due consideration the recommendations set out in the Brussels Declaration that was adopted following the "European Conference on Preventing and Combating Trafficking in Human Beings – Global Challenge for the 21st Century", which was held from 18 to 20 September 2002. One of those recommendations was precisely the setting up of such an experts group. The first task of the experts group has been to submit, on the basis of these recommendations, a report to assist the Commission with a view to launching further concrete proposals at European level. This report has led to the adoption of the Communication presented by the European Commission on 8 October 2005 with a view to the adoption of an action plan on the fight against trafficking in human beings, 'Fighting trafficking in human beings: an integrated approach and proposals for an action plan'[69]. This Communication is a response to the request formulated by the European Council in the Hague Programme. The Communication rightly emphasizes the contribution to fundamental rights made by stepping up the fight against trafficking in human beings, pointing out that 'Article 5(3) of the Charter

[66] Proposal for a Council Decision on the conclusion, on behalf of the European Community, of the United Nations Convention Against Transnational Organised Crime, COM(2003)512 final, of 22/8/2003 ; Proposal for a Council Decision on the conclusion, on behalf of the European Community, of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organised Crime, COM(2003)512-2 final of 22/8/2003 ; Proposal for a Council Decision on the conclusion, on behalf of the European Community, of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women And Children, supplementing the United Nations Convention Against Transnational Organised Crime, COM(2003)512-3 final of 22/8/2003.

[67] OJ L 203 of 1.8.2002, p. 1.

[68] Commission Decision 2003/209/EC of 25 March 2003 setting up a consultative group, to be known as the "Experts Group on Trafficking in Human Beings", OJ *L 079 of 26/3/2003, p. 25.*

[69] COM (2005) 514 of 18 October 2005

of Fundamental Rights prohibits human trafficking in the context of inviolable human dignity which is at the very core of national constitutions and international human rights instruments binding the Member States'. The Network underscores in particular the importance that the Commission attaches to the situation of the victims and to the need to put them in the centre of the response to be given, including through active protection measures. In the name not only of fundamental rights, but also of the very effectiveness of the fight against trafficking in human beings, it is important not to confuse the victims of trafficking with the individuals and groups that are responsible for this special form of organized crime. The Communication of 18 October 2005 underscores the close link that exists between trafficking in human beings and illegal immigration. Efficient checks and surveillance at the external borders of the European Union as part of the fight against illegal immigration should also help to prevent trafficking in human beings. The Commission recommends, on the one hand, the implementation of all the legal instruments already adopted at Community level in the fight against illegal immigration and surveillance of the external borders and, on the other hand, the strengthening of operational cooperation between Member States in the area of border controls. The European External Borders Agency should take into account the need to combat the traffic of human beings in the coordination and organization of joint operations and pilot projects at the external borders and in the fulfilment of its risk analysis function. Without questioning the reality of this link, the Network underlines the need to incorporate in the training of officers responsible for surveillance of the external borders the requirements ensuing from the right to seek asylum and from the very distinction that the Communication makes between the victims of trafficking and the criminal networks responsible for this trafficking.

Naturally, in order to facilitate the fight against human trafficking, it is essential that the victims can make it easier through their testimony to take legal action against the perpetrators, and that they do not hesitate to denounce these perpetrators for fear of immediate removal to their country of origin. In previous conclusions (Concl. 2005, p. 34), the Network expressed its conviction that the full cooperation of the victims is essential to the effectiveness of the fight against trafficking in human beings. It therefore welcomed the adoption of Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.[70] The purpose of the Directive, it will be recalled, is to allow non-Community nationals who are victims of trafficking in human beings or – if the Member State concerned chooses to make this extension – who have been the subject of an action to facilitate illegal immigration to be granted a short-term residence permit in return for their cooperation in combating those activities by testifying against the traffickers. This Directive marks an important step forward in the protection of fundamental rights through Community law. All the Member States of the Union, except for the three Member States that requested a derogation, are witnessing the general implementation of a type of protection that had been to a large extent unknown in most of the national legislations, and which makes a welcome contribution to the realization of Article 5 of the Charter of Fundamental Rights.

The Network refers to the Recommended Principles and Guidelines on Human Rights and Human Trafficking, as presented in a Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council.[71] The Principles and Guidelines are based on the idea that 'Anti-trafficking measures shall not adversely affect the human rights and dignity of persons, in particular the rights of those who have been trafficked, and of migrants, internally displaced persons, refugees and asylum-seekers'. They state, with respect to children who are victims of trafficking that these children 'shall be identified as such. Their best interests shall be considered paramount at all times. Child victims of trafficking shall be provided with appropriate assistance and protection. Full account shall be taken of their special vulnerabilities, rights and needs' (§ 10). The Guidelines also address the training of law enforcement officers, who 'should be sensitive to the needs of trafficked persons, particularly those of women and children, and should acknowledge the practical value of providing incentives for trafficked persons and others to come forward to report traffickers' (Guideline 5 :

[70] OJ L 261 of 6.08.2004, p. 19. The Member States are to ensure the implementation of this directive by 6 August 2006.
[71] UN doc. E/2002/68/Add.1, 20 May 2002.

Ensuring an adequate law enforcement response, para. 2). Guideline 8 (Special measures for the protection and support of child victims of trafficking) notes that :

> The particular physical, psychological and psychosocial harm suffered by trafficked children and their increased vulnerability to exploitation require that they be dealt with separately from adult trafficked persons in terms of laws, policies, programmes and interventions. The best interests of the child must be a primary consideration in all actions concerning trafficked children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. Child victims of trafficking should be provided with appropriate assistance and protection and full account should be taken of their special rights and needs.

A number of consequences follow from this guideline. States (or, where applicable, international organisations and non-governmental organisations) should consider :

> 1. Ensuring that definitions of trafficking in children in both law and policy reflect their need for special safeguards and care, including appropriate legal protection. In particular, and in accordance with the Palermo Protocol [Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children , referred to above], evidence of deception, force, coercion, etc. should not form part of the definition of trafficking where the person involved is a child.
> 2. Ensuring that procedures are in place for the rapid identification of child victims of trafficking.
> 3. Ensuring that children who are victims of trafficking are not subjected to criminal procedures or sanctions for offences related to their situation as trafficked persons.
> 4. In cases where children are not accompanied by relatives or guardians, taking steps to identify and locate family members. Following a risk assessment and consultation with the child, measures should be taken to facilitate the reunion of trafficked children with their families where this is deemed to be in their best interest.
> 5. In situations where the safe return of the child to his or her family is not possible, or where such return would not be in the child's best interests, establishing adequate care arrangements that respect the rights and dignity of the trafficked child.
> 6. In both the situations referred to in the two paragraphs above, ensuring that a child who is capable of forming his or her own views enjoys the right to express those views freely in all matters affecting him or her, in particular concerning decisions about his or her possible return to the family, the views of the child being given due weight in accordance with his or her age and maturity.
> 7. Adopting specialized policies and programmes to protect and support children who have been victims of trafficking. Children should be provided with appropriate physical, psychosocial, legal, educational, housing and health-care assistance.
> 8. Adopting measures necessary to protect the rights and interests of trafficked children at all stages of criminal proceedings against alleged offenders and during procedures for obtaining compensation.
> 9. Protecting, as appropriate, the privacy and identity of child victims and taking measures to avoid the dissemination of information that could lead to their identification.
> 10. Taking measures to ensure adequate and appropriate training, in particular legal and psychological training, for persons working with child victims of trafficking.

Certain of these recommendations are taken into account by the Council Framework Decision of 19 July 2002 on combating trafficking in human beings (2002/629/JHA) itself. The first requirement appears to be meet by the definitions contained in Article 1 of the Framework Decision, which, after stating that 'Each Member State shall take the necessary measures to ensure that (...) the recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person [shall be made punishable], where: (a) use is made of coercion, force or threat, including abduction, or (b) use is made of deceit or fraud, or (c) there is an abuse of authority or

of a position of vulnerability, which is such that the person has no real and acceptable alternative but to submit to the abuse involved, or (d) payments or benefits are given or received to achieve the consent of a person having control over another person, for the purpose of exploitation of that person's labour or services, including at least forced or compulsory labour or services, slavery or practices similar to slavery or servitude, or for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including in pornography' (Art. 1(1)), adds that where such conduct involves a child, it shall be a punishable trafficking offence even if none of the means set forth above have been used (Art. 1(3)). Moreover, children who are victims of trafficking as defined in Article 1 of Council Framework Decision of 19 July 2002 on combating trafficking in human beings should be considered as particularly vulnerable victims pursuant to Article 2(2), Article 8(4) and Article 14(1) of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings.[72] Finally, Article 7(3) of the Framework Decision of 19 July 2002 on combating trafficking in human beings provides that 'Where the victim is a child, each Member State shall take the measures possible to ensure appropriate assistance for his or her family. In particular, each Member State shall, where appropriate and possible, apply Article 4 of Framework Decision 2001/220/JHA to the family referred to.'

However, where the Framework Decision is silent, the Member States are urged to take into account Guideline 8 referred to above, in addition to the minimum requirements set forth under the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA), which already requires each Member State to ensure that victims who are particularly vulnerable can benefit from specific treatment best suited to their circumstances (Art. 2(2)). This will ensure a uniform implementation of the Framework Decision and, more importantly, it will ensure that the Framework Decision is implemented in full compliance with the rights of the child recognized under the international law of human rights. The Network notes that a number of these recommendations have been replicated in Decision n° 685 of the OSCE Permanent Council adopting an Addendum to the OSCE Action Plan to Combat Trafficking in Human Beings : Addressing the Special Needs for Child Victims of Trafficking for Protection and Assistance[73] which however also ask States, *inter alia*, to 'develop child-friendly procedures related to criminal and civil proceedings, from initial questioning to the conclusion of the proceedings which are consistent with the rule of law' (para. 7).

Although, under the influence of these developments at international and Union level, the EU Member States have been significantly improving the legal framework under national law in order to combat human trafficking more effectively, certain situations remain a matter for concern. In its Conclusions and Recommendations on the situation of fundamental rights in the European Union and its Member States in 2004 (Concl. 2005, pp. 32-33), the Network noted that in the Concluding Observations concerning **Denmark**, the Committee on Economic, Social and Cultural Rights noted the persistence of trafficking in persons in that country, especially of women and children, as well as commercial sexual exploitation (E/C.12/1/Add.102, 26 November 2004, adopted by CSECR at its thirty-third session of 8 -26 November 2004).[74] The Committee on Economic, Social and Cultural Rights voiced a similar concern with respect to **Spain** (Concluding Observations, 7 June 2004, E/C.12/1/Add.99) and with respect to **Greece** (Concluding Observations of the Committee on Economic, Social and Cultural Rights, E/C.12/1/Add.97, of 7 June 2004, adopted on 14 May 2004, para. 18), particularly in view of the high number of women and children in the latter country who are victims of human trafficking and are subjected to forced labour and sexual exploitation; such persons are often expelled to their country of origin reportedly in an expeditious manner and without the benefit of the necessary procedural

[72] OJ L 82, 22.3.2001, p. 1.

[73] PC.DEC/685, 7 July 2005. See also the UNICEF Guidelines for the Protection of the Rights of Children Victims of Trafficking in South Eastern Europe, endorsed in the Statement on Commitments on Victim/Witness Protection and Trafficking in Children by the Fourth Regional Ministerial Forum of the Stability Pact Task Force on Combating Trafficking in Human Beings, Sofia 2003.

[74] The Network also welcomed, however, the introduction of a provision Section 262a on human trafficking in the Danish Criminal Code and the adoption of an action plan against trafficking in women and awareness raising within the police and border officials of the crime of trafficking.

safeguards. The Committee also recommended that Greece continue its efforts to protect the victims and intensify its cooperation with neighbouring countries in combating trafficking in persons. In this respect, the Network welcomes the recent signing of a bilateral agreement between Greece and Albania for the protection and assistance of children victims of trafficking. In its third report on **Greece** published on 8 June 2004 (ECRI (2004) 24, adopted on 5 December 2003 and published on 8 June 2004), the European Commission against Racism and Intolerance (ECRI) notes that Greece is a country of destination and of transit for the traffic in human beings. Women and children coming from neighbouring countries such as Albania, but also from more distant countries, are especially affected. ECRI recommends that additional measures be taken to counter the problem of trafficking in women and children, particularly by carrying out preventive and awareness-raising measures about this serious problem that aim at all segments of the population concerned. It points out that the situation remains disturbing as regards trafficking, in women for prostitution, but also in children – Albanian nationals who are subjected to forced labour. Children over 12 that are arrested by the police are considered as illegal immigrants in an irregular situation that must be deported, rather than as victims of the trafficking in human beings. Children under 12 are placed in reception centres until their families can be located. The Network shares ECRI's concern over allegations that several hundred Albanian children placed in state-run reception centres disappeared from the centres in 2002. It may be that some of them have once again fallen into the hands of the traffickers who brought them into Greece. ECRI encourages the Greek authorities to persist in their new approach of protecting the victims of trafficking in human beings and effectively penalising the traffickers. The Committee on Economic, Social and Cultural Rights also expressed its concern over the high number of women and children who are victims of human trafficking in Greece (Concluding Observations of the Committee on Economic, Social and Cultural Rights, E/C.12/1/Add.97, of 7 June 2004, adopted on 14 May 2004), and recommended that Greece continue its efforts to protect the victims and launch an initiative for close cooperation with the neighbouring states to combat trafficking.

This same concern is expressed with regard to **Latvia** by the Committee for the Elimination of Discrimination against Women (CEDAW/C/2004/II/CRP.3/Add.5/Rev.1, points 28 – 29). Although the CEDAW Committee noted the 2002 *National Action Plan to Combat Trafficking in Persons* and the special police unit established to deal with the problem, it expressed concerns about the increase in trafficking in women and girls in Latvia, and recommended introducing "measures aimed at improving the economic situation of women", taking education initiatives and providing social support. The Network expressed its satisfaction in this regard that the Office of the Prosecutor-General has paid attention to the cases of trafficking in human beings as reflected in cases being brought in front of the courts in 2004. In the 2004 Concluding Observations of the Committee on Economic, Social and Cultural Rights, the Committee noted with concern that trafficking in women and children continued to be a problem in **Lithuania**, which is a country of origin and transit, in spite of the existence of the "Programme on control and prevention of prostitution and commercial trade in people for 2002-2004" and that the new Criminal Code provided for criminal liability for a number of trafficking-related crimes. The Committee also expressed its concern about the high number of persons who were reported missing in Lithuania. Similarly in its 2004 Concluding Observations, the Human Rights Committee (CCPR/CO/80/LTU) expressed its concern with regard to the trafficking in persons in Lithuania, in particular the low number of criminal proceedings against documented cases of trafficking. The Committee on the Rights of the Child encouraged **Slovenia** to further strengthen its efforts on this field, which in this country has been demonstrated to be a serious problem (Committee on the Rights of the Child, 35th session, Consideration of reports submitted by State parties under Article 44 of the Convention, Concluding observations of the Committee on the Rights of the Child: Slovenia), CRC/C/15/Add.230).

Finally, the Network regrets that the collection of data in relation to child trafficking remains very insufficient in most Member States, making it difficult to assess policies and legislation in force. Lack of child specific information prevents adequate responses from being developed, in terms of actually combating the problem, identifying the victims or establishing children's specific protection needs. The Network is also struck by the fact that, in its recent evaluation report on the implementation of the Framework Decision of 19 July 2002 on combating trafficking in human beings, the Commission

noted that it received from the Member States very little information concerning Articles 7(2) and 7(3) of this instrument.[75]

Fight against the sexual exploitation of children

(i) Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography

A first step towards preventing sexual exploitation of children and child pornography would consist in fully implementing the applicable instruments of international law. All the Member States should ratify the Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. At the time of writing, although all the Member States have signed the Protocol**,** the **Czech Republic, Finland, Germany, Greece, Hungary, Ireland, Luxembourg, Malta, Sweden** and the **United Kingdom** still have not ratified it. The Network notes that, while **Sweden** has not yet ratified the 2002 Optional Protocol to the UN Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, a number of legal amendments have been adopted in that country in order to make ratification possible at the earliest possible date.[76] The Network welcomes the fact that, after the ratification on 10 June 2004 of this Protocol,[77] **Lithuania** confirmed that it would launch the *National Preventive Programme for Child Assistance and Against Violence*[78]. **Greece** should implement the recommendations of the Special Rapporteur on the sale of children, child prostitution and child pornography made after his visit in Greece in November 2005 concerning the coordination of action of different services and cooperation with civil society. As noted by the Committee on the Rights of the Child, **Sweden** should "strengthen measures to reduce and prevent the occurrence of sexual exploitation and trafficking, including sensitizing professionals and the general public to the problems of sexual abuse of children and trafficking through education including media campaigns".[79] A similar recommendation has been addressed to **Finland** by that Committee (CRC/C/15/Add.272 of 30 September 2005).

(ii) Council Framework Decision 2004/68/JHA on combating the sexual exploitation of children and child pornography

This also is an area where the Union has exercised its competences in order to protect the rights of the child. The adoption of Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography (OJ L 13, 20.1.2004, p. 44), which the Member States are to implement before 20 January 2006, should be seen as an important contribution to the protection of the child. This Framework Decision complements Council Decision 2000/375/JHA of 29 May 2000 to combat child pornography on the Internet (OJ L 138, 9.6.2000, p. 1), by defining the sexual exploitation of children, including coercing or recruiting a child into prostitution, and child pornography as serious criminal offences the constituent elements of which in the criminal law of all Member States shall be harmonized through the Framework Decision, which shall also oblige States to provide for effective, proportionate and dissuasive sanctions. The Network makes the following observations on the implementation of the Framework Decision 2004/68/JHA :

First, as the Network already emphasized in its previous conclusions covering the year 2004 (Concl. 2005, p. 36), with respect to the dissemination of child pornography through a computer system, the

[75] COM(2006) 187 final, of 2.5.2006, p. 9.
[76] Regeringskansliet, Statsrådsberedningen, Planerade propositioner och skrivelser 2005/2006, 13 September 2005, www.regeringen.se
[77] _statymas D_l Jungtini_ Taut_ vaiko teisi_ konvencijos fakultatyvinio protokolo d_l vaik_ pardavimo, vaik_ prostitucijos ir vaik_ pornografijos ratifikavimo [The Law on the ratification of Optional Protocol to the Convention of the Rights of the Child of Sale of Children] Valstyb_s _inios, 2004, No. 108-4028.
[78] Vyriausyb_s 2005 m. gegu__s 4 d. nutarimas Nr. 491, D_l nacionalin_s smurto prie_ vaikus prevencijos ir pagalbos vaikams 2005-2007 met_ programos patvirtinimo [Government of the Republic of Lithuania, Resolution, 4 May 2005, No. 491] Valstyb_s _inios, 2005, No. 58-2021.
[79] UN Doc. CRC/C/15/Add.248, 28 January 2005, p. 8.

effectiveness of the national measures implementing the Framework Decision 2004/68/JHA shall be enhanced by an adequate implementation of Article 19 of Title 4 of the Cybercrime Convention, which relates to the search and seizure of stored computer data. To this extent the two instruments should be seen as complementary. The protection of the right to respect for private life should not be considered as an obstacle to such searches, provided these are regulated by law with a sufficient degree of precision and remain strictly tailored to the needs of combating child pornography on the internet.

Second, the implementation of the Framework Decision 2004/68/JHA should take into account the conclusions adopted by the European Committee on Social Rights on the basis of Article 7(10) of the European Social Charter.[80] Under this provision, the States parties undertake to ensure special protection against physical and moral dangers to which children and young persons are exposed, particularly against those resulting directly or indirectly from their work. According to the European Committee on Social Rights, the States parties 'must take specific measures to prohibit and combat all forms of sexual exploitation of children, in particular their involvement in the sex industry. This prohibition shall be accompanied with an adequate supervisory mechanism and sanctions. An effective policy against commercial sexual exploitation of children shall cover the following three primary and interrelated forms: child prostitution, child pornography and trafficking in children. To implement such a Policy, Parties shall adopt legislation, which criminalise all acts of sexual exploitation, and a national action plan combating the three forms of exploitation mentioned above'.[81] In previous conclusions (Concl. 2005, pp. 52-53), the Network has already encouraged the Member States to consider adopting a national action plan targeting the sexual exploitation of children, including coercing or recruiting a child into prostitution, and child pornography, which the European Committee of Social Rights has considered to derive from the undertakings of the States which have accepted to be bound by Article 7(10) of the European Social Charter or the Revised European Social Charter. It noted in that respect that such a national action plan could facilitate addressing issues such as, for instance, the means service providers have at their disposal in order to control the material they host, the identification of the circumstances which lead to child prostitution in order to combat the phenomenon at its roots, or the cultural attitude towards the availability of child pornography on the internet.

Third, the Network recalls that the Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography makes it possible for each State not to establish its jurisdiction over the offences of sexual exploitation of children and child pornography, including the instigation of, or aiding or abetting of these offences, where the offence has not been committed on its territory, even if it is committed by one of its nationals or for the benefit of a legal person established in the territory of that Member State (Article 8(2)). The adoption of extra-territorial legislation by all Member States should be encouraged: according to the Committee on the Rights of the Child, the States parties to the 1989 Convention on the Rights of the Child should make their citizens liable to criminal prosecution for child abuse committed abroad.[82]

Finally, the Network notes that the main problem in this area consists in the identification of the victims of commercial sexual exploitation of children via the Internet. In comments it transmitted to the Network, Save the Children noted that 'very few victims of this form of child abuse are identified and given access to justice and to therapeutic services. Interpol's database of abuse images contains images of more than 20.000 individual children who have been sexually abused. Globally, less than 350 of these children have been identified and protected according to Interpol. This low number of children being identified is of great concern. The fact that primary recorded evidence of sexual abuse is not leading to more children being protected and given justice needs to be addressed urgently'.

[80] This provision has been replicated in the Revised European Social Charter without modification.
[81] See, e.g., Conclusions 2004 on Cyprus.
[82] Committee on the Rights of the Child, 35th session, Consideration of reports submitted by State parties under Article 44 of the Convention, Concluding observations of the Committee on the Rights of the Child: Slovenia), CRC/C/15/Add.230. In previous conclusions (Concl. 2005, p. 36), the Network already expressed its regret that **Sweden** has announced that it shall not make the listed offences subject to extra-territorial jurisdiction.

3. Detention of juvenile offenders

International human rights law

Article 37(b) of the Convention on the Rights of the Child provides that "arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time". Article 40 (2) (b) (ii-iv) and (vii) of the Convention on the Rights of the Child guarantee the right of the child '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'; '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'; 'not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality'. Article 40 (2), b), (vii), of the Convention on the Rights of the Child states that the child shall 'have his or her privacy fully respected at all stages of the proceedings'. According to Article 40 § 3 of the same instrument, 'States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular: (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law; (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected'.

The specific needs and vulnerability of children must be taken into account in the definition of the conditions of detention of juvenile offenders who are sentenced to a deprivation of liberty. According to para. 38 of the United Nations Rules for the protection of juveniles deprived of their liberty, adopted by General Assembly resolution 45/113 of 14 December 1990, "Every juvenile of compulsory school age has the right to education suited to his or her needs and abilities and designed to prepare him or her for return to society. Such education should be provided outside the detention facility in community schools wherever possible and, in any case, by qualified teachers through programmes integrated with the education system of the country so that, after release, juveniles may continue their education without difficulty. Special attention should be given by the administration of the detention facilities to the education of juveniles of foreign origin or with particular cultural or ethnic needs. Juveniles who are illiterate or have cognitive or learning difficulties should have the right to special education". The United Nations Rules for the protection of juveniles deprived of their liberty also provide that an independent supervisory mechanism of places of detention of juvenile offenders should be set up : para. 72 of the Rules in particular state that 'Qualified inspectors or an equivalent duly constituted authority not belonging to the administration of the facility should be empowered to conduct inspections on a regular basis and to undertake unannounced inspections on their own initiative, and should enjoy full guarantees of independence in the exercise of this function. Inspectors should have unrestricted access to all persons employed by or working in any facility where juveniles are or may be deprived of their liberty, to all juveniles and to all records of such facilities'.

Article 10(3) of the International Covenant on Civil and Political Rights states that "Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status". As recalled by the Network in previous conclusions (Concl. 2005, p. 23), the lack of sufficient budgetary resources cannot constitute an excuse for not complying with this requirement, especially where the lack of space in specialized centres for juvenile offenders is not due to an exceptional, temporary, and unexpected rise in the number of juvenile offenders concerned, but is a structural phenomenon developing over a number of years.

Recommendations of the European Committee for the prevention of torture and inhuman or degrading treatment or punishment

The 9th General Report on the activities of the European Committee for the prevention of torture and inhuman or degrading treatment or punishment (CPT)[83] addresses in detail the issue of juveniles deprived of their liberty. The CPT identifies a number of the safeguards against ill-treatment which it considers should be offered to all juveniles deprived of their liberty, before focusing on the conditions which should obtain in detention centres specifically designed for juveniles. The Committee hopes in this way to give a clear indication to national authorities of its views regarding the manner in which such persons ought to be treated. The Report start by stressing out that any standards which the Committee may be developing in this area should be seen as being complementary to those set out in other international instruments, including the 1989 United Nations Convention on the Rights of the Child; the 1985 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (*the Beijing Rules*); the 1990 United Nations Rules for the Protection of Juveniles Deprived of their Liberty (referred to above) and the 1990 United Nations Guidelines for the Prevention of Juvenile Delinquency (*the Riyadh Guidelines*). The Committee also expressly states its approval of "one of the cardinal principles enshrined in the above-mentioned instruments, namely that juveniles should only be deprived of their liberty as a last resort and for the shortest possible period of time". The Network underlines the following recommendations of the CPT, based on its visits of places of detention in the States parties to the 1987 Council of Europe Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.[84]

First, as regard the *detention centres for juveniles* (paragraph 28 of the 9th General Report), the CPT underlines that ' all juveniles deprived of their liberty because they are accused or convicted of criminal offences ought to be held in detention centres specifically designed for persons of this age, offering regimes tailored to their needs and staffed by persons trained in dealing with the young. Moreover, the care of juveniles in custody requires special efforts to reduce the risks of long-term social maladjustment. This calls for a multidisciplinary approach, drawing upon the skills of a range of professionals (including teachers, trainers and psychologists), in order to respond to the individual needs of juveniles within a secure educative and socio-therapeutic environment '.

Second, as to the *regime activities*, the Committee notes (in paragraph 31) that 'although a lack of purposeful activity is detrimental for any prisoner, it is especially harmful for juveniles, who have a particular need for physical activity and intellectual stimulation. Juveniles deprived of their liberty should be offered a full programme of education, sport, vocational training, recreation and other purposeful activities. Physical education should constitute an important part of that programme. (…) In this respect, the CPT wishes to express its approval of the principle set forth in Rule 26.4 of the *Beijing Rules*, to the effect that every effort must be made to ensure that female juveniles deprived of their liberty 'by no means receive less care, protection, assistance, treatment and training than young male offenders. Their fair treatment shall be ensured'.'

Third, as to the *staffing issues* (paragraph 33), the Committee considers that 'the custody and care of juveniles deprived of their liberty is a particularly challenging task. The staff called upon to fulfil that task should be carefully selected for their personal maturity and ability to cope with the challenges of working with - and safeguarding the welfare of - this age group. More particularly, they should be committed to working with young people, and be capable of guiding and motivating the juveniles in their charge. All such staff, including those with purely custodial duties, should receive professional training, both during induction and on an ongoing basis, and benefit from appropriate external support and supervision in the exercise of their duties'. The CPT attaches considerable importance to the maintenance of good contact with the outside world for all persons deprived of their liberty (para. 34). The guiding principle should be to promote contact with the outside world; any restrictions on such

[83] Covering the period 1 January to 31 December 1998.
[84] ETS, No. 126; amended according to the provisions of Protocols No. 1 (ETS No. 151) and No. 2 (ETS No. 152) which entered into force on 1 March 2002.

contacts should be based exclusively on security concerns of an appreciable nature or considerations linked to available resources.

As regards the *complaints and inspection procedures* (paragraph 36)**,** the Committee considers that 'effective complaints and inspection procedures are basic safeguards against ill-treatment in juvenile establishments. Juveniles should have avenues of complaint open to them, both within and outside the establishments' administrative system, and be entitled to confidential access to an appropriate authority'. Moreover the CPT also 'attaches particular importance to regular visits to all juvenile establishments by an independent body (for example, a visiting committee or a judge) with authority to receive - and, if necessary, take action on - juveniles' complaints and to inspect the accommodation and facilities'.

Finally, the Network refers to Recommendation Rec(2003)20 addressed by the Committee of Ministers of the Council of Europe to the Member States on 24th September 2003, regarding new methods for dealing with juvenile delinquency and the role of justice for minors. The Recommendation emphasizes that the principal aims of juvenile justice and associated measures for tackling juvenile delinquency should be to prevent offending and re-offending; to (re)socialise and (re)integrate offenders; and to address the needs and interests of victims. It identifies a number of new responses to juvenile delinquency, stating :

> 7. Expansion of the range of suitable alternatives to formal prosecution should continue. They should form part of a regular procedure, must respect the principle of proportionality, reflect the best interests of the juvenile and, in principle, apply only in cases where responsibility is freely accepted.
>
> 8. To address serious, violent and persistent juvenile offending, member states should develop a broader spectrum of innovative and more effective (but still proportional) community sanctions and measures. They should directly address offending behaviour as well as the needs of the offender. They should also involve the offender's parents or other legal guardian (unless this is considered counter-productive) and, where possible and appropriate, deliver mediation, restoration and reparation to the victim.
>
> 9. Culpability should better reflect the age and maturity of the offender, and be more in step with the offender's stage of development, with criminal measures being progressively applied as individual responsibility increases.
>
> 10. Parents (or legal guardians) should be encouraged to become aware of and accept their responsibilities in relation to the offending behaviour of young children. They should attend court proceedings (unless this is considered counter-productive) and, where possible, they should be offered help, support and guidance. They should be required, where appropriate, to attend counselling or parent training courses, to ensure their child attends school and to assist official agencies in carrying out community sanctions and measures.
>
> 11. Reflecting the extended transition to adulthood, it should be possible for young adults under the age of 21 to be treated in a way comparable to juveniles and to be subject to the same interventions, when the judge is of the opinion that they are not as mature and responsible for their actions as full adults.
>
> 12. To facilitate their entry into the labour market, every effort should be made to ensure that young adult offenders under the age of 21 should not be required to disclose their criminal record to prospective employers, except where the nature of the employment dictates otherwise.
>
> 13. Instruments for assessing the risk of future re-offending should be developed in order that the nature, intensity and duration of interventions can be closely matched to the risk of re-offending, as well as to the needs of the offender, always bearing in mind the principle of

proportionality. Where appropriate, relevant agencies should be encouraged to share information, but always in accordance with the requirements of data protection legislation.

14. Short time periods for each stage of criminal proceedings should be set to reduce delays and ensure the swiftest possible response to juvenile offending. In all cases, measures to speed up justice and improve effectiveness should be balanced with the requirements of due process.

15. Where juveniles are detained in police custody, account should be taken of their status as a minor, their age and their vulnerability and level of maturity. They should be promptly informed of their rights and safeguards in a manner that ensures their full understanding. While being questioned by the police they should, in principle, be accompanied by their parent/legal guardian or other appropriate adult. They should also have the right of access to a lawyer and a doctor. They should not be detained in police custody for longer than forty-eight hours in total and for younger offenders every effort should be made to reduce this time further. The detention of juveniles in police custody should be supervised by the competent authorities.

16. When, as a last resort, juvenile suspects are remanded in custody, this should not be for longer than six months before the commencement of the trial. This period can only be extended where a judge not involved in the investigation of the case is satisfied that any delays in proceedings are fully justified by exceptional circumstances.

17. Where possible, alternatives to remand in custody should be used for juvenile suspects, such as placements with relatives, foster families or other forms of supported accommodation. Custodial remand should never be used as a punishment or form of intimidation or as a substitute for child protection or mental health measures.

18. In considering whether to prevent further offending by remanding a juvenile suspect in custody, courts should undertake a full risk assessment based on comprehensive and reliable information on the young person's personality and social circumstances.

19. Preparation for the release of juveniles deprived of their liberty should begin on the first day of their sentence. A full needs and risk assessment should be the first step towards a reintegration plan which fully prepares offenders for release by addressing, in a co-ordinated manner, their needs relating to education, employment, income, health, housing, supervision, family and social environment.

20. A phased approach to reintegration should be adopted, using periods of leave, open institutions, early release on licence and resettlement units. Resources should be invested in rehabilitation measures after release and this should, in all cases, be planned and carried out with the close co-operation of outside agencies.

Detention of juvenile offenders in the Member States

(i) Administration of juvenile justice: in general

While all these standards are by now well-developed, a number of serious concerns remain, which often may be attributed to the fact that the budgetary means which would be required for an adequate treatment of juvenile offenders remain insufficient. Thus, in its Conclusions and Recommendations on the situation of fundamental rights in the European Union and the Member States in 2003 (Concl. 2004, p. 23), the Network noted a range of problems regarding the administration of juvenile justice and the adoption of measures, including detention, against young offenders. It noted that in **Ireland,** Shanganagh Castle had been closed, although this was the only open detention centre for young offenders in the State and although there is no proposal for a replacement facility, despite the fact that Shanganagh Castle had provided an essential and appropriate platform for rehabilitative and educational approaches for convicted 16- to 21-years-old. In **Latvia**, the law and the practice

concerning juvenile offenders was mentioned as a source of concern, as detention measures and prison terms are commonly used where other measures would appear more appropriate. In **Austria,** the increase of juvenile offenders sent to jail linked to the practice of jailing foreign juveniles for petty crimes was also identified as a cause for serious concern, with the situation being worst in Vienna where in 3 years the rate of new inmates under the age of 21 has risen by 74% above average. With respect to **Belgium**, the Network noted that the law of 1 March 2002, the implementation of which has created in Everberg the Centre for the temporary placement of young offenders, has not solved the problem of the lack of adequate facilities for the accommodation of young offenders. Moreover the implementation of the law of 1 March 2002 has highlighted several difficulties: whereas the placement in the closed centre of Everberg should in principle be decided only for want of alternative solution for the placement of the young offender, many judicial decisions bring to the fore the difficulty of determining the number of places available in the public institutions for the protection of young offenders (I.P.P.J.). Besides whereas the law of 1 March 2002 subordinates the young offender's deprivation of liberty to the existence of serious indicia of guilt, this requirement is not always respected in practice.

More recently, the Network has noted the recommendation by the Committee of the Rights of the Child[85] that **Denmark** should as a matter of priority review the current practice of solitary confinement, which should be resorted to only in the most exceptional cases, and should make progress towards the abolition of this practice. **Sweden** should ensure that a sufficient number of prosecutors and judges are trained on children's issues ; that, following the necessary legislative amendments, punitive measures are taken only by judicial authorities, with due process and legal assistance.[86] It should also devise means to revert the trend in an increase of the number of children in pre-trial detention, and ensure that no child placed in pre-trial detention will be detained in prison facilities ill-equipped to meet the specific needs of children. Finally, a last specific concern with respect to **Sweden** is in the absence of fully independent inspectors who can conduct regular inspections of the facilities run by the National Board of Institutional Care, which is in violation of para. 72-74 of the 1990 UN Rules for the Protection of Juveniles deprived of their Liberty, cited above. On 2 February 2006, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) published its report on the **Slovak Republic**[87]. The CPT is very concerned by the continuing lack of out-of-cell activities for remand prisoners. Even minors were deprived of anything remotely resembling a regime of activities. The CPT recommends the Slovak Republic, as a matter of urgency, to ensure that juveniles held on remand are provided with a full programme of educational activities, including physical education. The CPT mentions that under Slovak law, juveniles held on remand may be placed in solitary confinement for up to 10 days. In this regard, the CPT stresses that such a measure can compromise the physical and mental integrity of the persons. Consequently, resort to solitary confinement of persons under 18 must be considered as highly exceptional. If juveniles are held separately from others, this should be for the shortest possible period of time and, in all cases, they should be guaranteed appropriate human contact, granted access to reading material and offered at least one hour of outdoor exercise every day[88]. The Network also encouraged the **Czech Republic** to re-examine the amendment to the Act on Execution of Institutional

[85] CRC/C/15/Add.273 30 September 2005, available at : http://www.humanrights.dk/frontpage/RogM/reports/
[86] UN Doc. CRC/C/15/Add.248, 28 January 2005, p. 9.
[87] The Report is available on the website of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment:
http://www.cpt.coe.int/documents/svk/2006-05-inf-eng.pdf
[88] The new *zákon o v_kone trestu od_atia slobody* [Act on execution of punishment of imprisonment [Act no. 475/2005 Coll. on execution of punishment of imprisonment, amending and supplementing certain other laws]] came into force in January 2006. According to the new legislation on execution of punishment of imprisonment, the disciplinary punishment of solitary confinement or al-day placement to the closed section (closed section is placed apart from other accommodation spaces) for up to 10 days and the disciplinary punishment of placement to the closed section out with the working hours for up to 14 days may be imposed to adolescent. Moreover the new *Trestn_ zákon* [Criminal Code], which came into force on 1 January 2006, reduces the minimal age of criminal liability of minors from 15 to 14 years with the exception of the crime of sexual abuse. In case of proceedings against minors, the new Criminal Code states as obligatory to examine the mental capacities of the minor offender in the age from 14 to 15 years, i.e. whether he/she has been capable to understand wrongfulness of the act and whether he/she had been capable to take control of his/her own actions.

Care,[89] which appears to allow the placement juvenile offenders sentenced to protective care, in the same establishments as children put in institutional care, who are orphans or who have been removed from their families because of the risk of abuse or because of the inability of their families to take care of them. Still other developments raise serious concerns. In **Poland**, according to the information provided by the Helsinki Foundation for Human Rights and the Ombudsman Office, the average period of the juveniles' stay at correctional institutions has increased in recent times. Moreover, the Network received information about some cases where the court makes decisions to send minors to correctional institutions following pressure from public opinion, where other measures, of an educational nature, should have been adopted instead. In **Ireland**, it was reported that 147 children, between the ages of 15 and 17, had been placed in adult prisons since the beginning of this year. The Network expressed its full support of the efforts of the Ombudsman for Children to put an end to the practice of placing children in adult prisons, and it welcomes information according to which plans to end the practice of incarcerating children in the same institutions as adults were to be brought before the Cabinet shortly.[90]

Juvenile offenders detained in special institutions are at particular risk of being ill-treated or disciplined in ways which would be incompatible with the prohibition of inhuman or degrading treatments or punishments. Although it welcomes the adoption by **Luxembourg** of the Act of 16 June 2004 concerning the reorganization of the State Socio-educational Centre, which reduces from 20 to 10 days the maximum length of the disciplinary sanction that consists in putting a person under 18 in solitary confinement, and which gives minors the right to appeal to a juvenile court, the Network shares the concerns of the Committee on the Rights of the Child regarding the recourse to and length of solitary confinement as well as the particularly severe provisions that deprive children of all contact with the outside world and of outdoor activity. Solitary confinement for minors should be resorted to in absolutely exceptional circumstances. Conditions of detention should also be improved, and minors should be allowed to be outdoors for at least one hour per day and be granted access to recreational facilities. In **Latvia**, the only prison for convicted juvenile boys (*at C_sis*) remains seriously overcrowded. On 1 April 2005, 184 juveniles were being held in the prison with an official capacity of 140 places. Conditions in the pre-trial section of the prison remained appalling and could only be described as inhuman and degrading. Finally, the Network noted that in **Poland,** the Regulation of the Council of Ministers on the conditions and manner of using direct coercion measures against juveniles[91] came into effect on 26 February 2005, regulating the conditions under which such measures may be adopted, and guaranteeing the juvenile the right to file a complaint against the application of a coercion measure against him, which is then considered by the judge responsible for supervising the facility or centre. The Network encouraged the Polish authorities to regularly monitor how this Regulation is applied in practice, and in particular, to verify whether its application complies with the recommendations of the European Committee for the Prevention of Torture.

(ii) Detention of juvenile offenders with adult convicted criminals

The country reports prepared within the Network of Independent Experts on Fundamental Rights show that, in many Member States, juvenile offenders are detained with adult convicted criminals. In previous conclusions (Concl. 2005, pp. 22-23), the Network found this to be the case, for instance, in

[89] Zákon _. 383/2005 Sb., kter_m se m_ní zákon _. 109/2002 Sb., o v_konu ústavní v_chovy nebo ochranné v_chovy ve _kolsk_ch za_ízeních a o preventivn_ v_chovné pé_i ve _kolsk_ch za_ízeních a o zm_n_ dal_ích zákon_, ve zn_ní pozd_j_ích p_edpis_ a dal_í související zákony [Act No. 383/2005 Coll., amending the Act No. 109/2002 Coll.], amending Zákon _. 109/2002 Sb., o v_konu ústavní v_chovy nebo ochranné v_chovy ve _kolsk_ch za_ízeních a o preventivn_ v_chovné pé_i ve _kolsk_ch za_ízeních a o zm_n_ dal_ích zákon_ [Act No. 109/2002 Coll., on Execution of Institutional Care or Protective Care].

[90] *Ibid*.

[91] Rozporz_dzenie Rady Ministrów z dnia 1 lutego 2005 r. w sprawie szczegó_owych warunków i sposobów u_ycia przymusu bezpo_redniego wobec nieletnich umieszczonych w zak_adach poprawczych, schroniskach dla nieletnich, m_odzie_owych o_rodkach wychowawczych oraz m_odzie_owych o_rodkach socjoterapii (Dz.U. z 2005 r. nr 25, poz. 203) [The regulation of the Council of Ministers of 1 February 2005 on the conditions and manner of using direct coercion measures against juveniles placed in correctional facilities, juvenile shelters, youth educational centres and youth socio-therapeutic centres, (The Official Journal of 2005, No. 25, item 203)]

Luxembourg and in the **Netherlands**. Concerns were especially strong about the conditions of detention in the central prison in Nicosia, Cyprus, which according to converging reports, including one following an official visit of Members of the Parliamentary Committee of Human Rights on 12 November 2003, is characterized by overcrowding, by the holding together of convicted prisoners and detainees on remand, as well as of aliens facing deportation and juvenile offenders (Concl. 2005, p. 19). In **Denmark**, young people between 15 and 17 years may be placed in detention together with adult prisoners on remand. In the 2004 Concluding Observations of the Human Rights Committee on **Lithuania** (CCPR/CO/80/LTU), the concern is expressed that according to Lithuanian legislation, adults may be detained together with minors in "exceptional cases". While noting that the separation of minors and adults was the rule, the Committee observed that the law did not contain any criteria determining these "exceptional cases". In **Ireland**, the closure In 2004 of the juvenile detention centre (for over 16 year olds) at Spike Island (*Fort Mitchel Place of Detention*) risks making it more difficult, in the future, to accommodate the specific needs of juvenile offenders by placing them in specialized education centers. These situations are unacceptable and deserved to be remedied, as a matter of priority, by the national authorities concerned. Article 10(3) of the International Covenant on Civil and Political Rights states that "Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status". The lack of sufficient budgetary resources cannot constitute an excuse for not complying with this requirement, especially where the lack of space in specialized centres for juvenile offenders is not due to an exceptional, temporary, and unexpected rise in the number of juvenile offenders concerned, but is a structural phenomenon developing over a number of years (Concl. 2005, p. 23).

V. Right to education

Article 14 of the Charter of Fundamental Rights of the European Union provides that everyone has the right to education, including the possibility to receive free compulsory education (para. 2) and to have access to vocational and continuing training (para. 1). It also guarantees the freedom to found educational establishments 'with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right' (para. 3). Paragraphs 1 and 3 of this provision of the Charter have the same meaning than the corresponding Article 2 of the First Protocol to the Convention for the protection of Human Rights and Fundamental Freedoms (1952) although their scope may be extended. Paragraphs 1 and 2 must be read in accordance with the requirements formulated by Articles 6 (2) and 13 of the International Covenant on Economic, Social and Cultural Rights (1966), by Article 28 of the Convention on the Rights of the Child (1989) and by Article 17 of the Revised European Social Charter. With respect to the right to vocational training, Article 14 (1) of the Charter must be read in accordance with the requirements formulated by Article 10 of the European Social Charter or Article 10 of the Revised European Social Charter.

1. Right to education for children belonging to minorities

According to Article 12(3) of the Council of Europe Framework Convention for the Protection of National Minorities of 1st February 1995 (STE 157) (FCNM), 'The Parties undertake to promote equal opportunities for access to education at all levels for persons belonging to national minorities'. Article 13 of the Framework Convention provides that : 'Within the framework of their education systems, the Parties shall recognise that persons belonging to a national minority have the right to set up and to manage their own private educational and training establishments' (para. 1) ; and that 'The exercise of this right shall not entail any financial obligation for the Parties' (para. 2). Articles 12 (3) and 14 (1) and (2) of the Framework Convention for the Protection of National Minorities (1995) should be taken into account in the interpretation of Article 14 of the Charter of Fundamental Rights, since these provisions extend the protection provided by the Charter. Moreover, for the interpretation of Article 14

(3) of the Charter, Article 13 of the Framework Convention for the Protection of National Minorities should also be taken into account since it extends the protection provided by the Charter.

Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin[92] imposes on the Member States to prohibit direct and indirect discrimination on grounds of race or ethnic origin, including harassment and the instruction to discriminate, in education. However, education does not fall under the scope of the prohibition of discrimination under Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.[93] Therefore, while Union law prohibits discrimination in education against ethnic minorities, religious or linguistic minorities do not benefit from such a protection, with the exception of the protection from discrimination on grounds of religion in access to vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience as imposed under the Framework Employment Directive[94].

The Network notes, moreover, that beyond the mere prohibition of discrimination, the realisation of effective equality between persons belonging to an ethnic, cultural, religious or linguistic minority and the rest of the population requires the elimination of obstacles to the access of these persons to all domains of social, economic, cultural and political life. States have positive obligations in this regard, which cannot be reduced to an obligation not to discriminate.[95] Under Article 4 of the Council of Europe Framework Convention for the Protection of National Minorities, States parties are to adopt ' adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority ', taking due account in this respect of ' the specific conditions of the persons belonging to national minorities '; such measures are specifically designated as not being discriminatory in character. They also have an obligation to promote equal opportunities for access to education at all levels for persons belonging to national minorities (Article 12 (3) FCNM) and to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage (Article 5 (1) FCNM).[96] In its Thematic Comment n°3 : the Rights of Minorities in the Union, the Network emphasized, on the basis of the case-law of the European Court of Human Rights[97] and of the European Committee of Social Rights,[98] that such positive obligations could be seen as an implication of the requirement of non-discrimination itself, if we include in that requirement an understanding of the notion of indirect discrimination going beyond the definition provided by the Racial Equality and Framework Equality Directives.

It is clear therefore that Article 13 EC, although it only allows for the adoption of measures which seek to 'combat discrimination', may be relied upon to go beyond the existing instruments adopted on that legal basis not only in order to afford a protection from direct and indirect discrimination on the grounds of religion beyond the current scope of application of Council Directive 2000/78/EC,[99] but

[92] OJ L 180 of 19.7.2000, p. 22.
[93] OJ L 303 of 2.12.2000, p. 16.
[94] Article 3(1)(b) of the Framework Employment Directive.
[95] EU Network of Independent Experts on Fundamental Rights, *Report on the Situation of Fundamental Rights in the European Union in 2003*, p. 100. See also Article 2 (2) of the International Convention on the Elimination of All Forms of Racial Discrimination.
[96] See also Article 4 (1) and (2) of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992.
[97] Eur. Ct. HR (GC), *Thlimmenos v. Greece* (Appl. N° 34369/97), judgment of 6 April 2000, § 42.
[98] European Committee of Social Rights, Collective Complaint n°13/2002, *Autisme-Europe v. France*, decision on the merits (4 November 2003), at § 52.
[99] The reference specifically to religion should not be construed to imply that such an extension would not be equally justified with respect to the other grounds of prohibited discrimination under Article 13 EC. Indeed, the Network of Independent Experts has consistently taken the view that such an extension would be fully justified – and indeed, might be seen as required – with respect to disability-based discrimination, as well as with respect to discrimination on the grounds of sexual orientation. The exclusive emphasis in this Thematic Comment on ethnic origin and religion among the grounds listed in Article 13 EC is to be attributed to the fact that that measures adopted against discrimination on these grounds may contribute

also in order to adopt a more extensive understanding of the notion of indirect discrimination. The prohibition of indirect discrimination should not be interpreted too narrowly, as imposing only a negative obligation not to adopt or maintain measures imposing a particular disadvantage on the members of certain protected categories, unless such measures are objectively and reasonably justified by the pursuance of a legitimate aim. This prohibition should be seen as also imposing positive obligations to ensure that the application of generally applicable and apparently neutral regulations, criteria or practices do not have a disproportionate impact on certain categories, which in turn requires an adequate monitoring of the situation of the members of these categories in the fields (employment, education, housing for instance) where this prohibition is imposed ; and to take into account the specific situation of the members of certain minorities by carving exceptions into generally applicable regulations, where in the absence of such exceptions they would be negatively affected by the application of such regulations, even in situations where the general rule is fully justified.

The Advisory Committee on the Framework Convention for the Protection of National Minorities encourages the introduction of positive measures in favour of members of minorities, which are particularly disadvantaged.[100] The Network of Independent Experts on Fundamental Rights has adopted the view that, because of the specific situation of the Roma minority in the Union, positive action measures should be adopted in order to ensure their integration in the fields of employment, education and housing. This is the only adequate answer which may be given to the situation of structural discrimination – and, in many cases, segregation – which this minority is currently facing. However, the question whether positive action measures should be adopted is to be distinguished from the question whether the impact of generally applicable regulations or policies on certain minorities, especially ethnic and religious minorities, should be monitored by statistical means, as well as from the question whether the specific situation of the members of certain minorities should be taken into account by carving exceptions into generally applicable regulations where in the absence of such exceptions, these minorities could be put at a disadvantage by the application of such regulations. The latter requirements should be treated as a consequence of the prohibition of indirect discrimination, and there is no reason to limit their application to certain groups, such as the Roma, who are facing a situation of structural discrimination.

Neither should the use of positive action measures be confused with the adoption of special measures which promote substantive equality, although the use of these terms is not fixed and may vary according to the instruments in which they appear. Positive action measures *stricto sensu* may seem to constitute an exception to the principle of equal treatment, insofar as, in order to achieve full and effective equality, they grant preferential treatment to the members of a group which has traditionally been subject to discrimination or whose members are placed in a situation of structural disadvantage. Special measures may be adopted as affirmative measures which seek to promote full and effective equality between persons belonging to a minority and persons belonging to the majority. But such measures do not necessarily entail the use of preferential measures in favour of the members of a minority group which create a risk of discrimination. For instance, in **Belgium** and **Luxembourg**, special classes are organized for children of immigrants in order to facilitate their integration in the educational system, in particular by assisting them in the acquisition of the official language. In **Italy**, some schools have started to make use of 'linguistic/cultural mediators', with ethnic minority backgrounds, who perform a bridging function between teachers and foreign families, and are involved in developing and planning intercultural teaching programmes in the form of film, theatre and other cultural performances. Moreover in recent years some intercultural training courses are created for Italian teachers and many schools develop and implement intercultural programmes. In **Latvia**, bilingual (Russian-Latvian) classes have been set up, in order to facilitate the integration of the Russian-speaking minority, without obliging the children of that minority to renounce being taught in their own language. The training of officials in order to facilitate intercultural communication and to

to the protection of ethnic and religious minorities, which – with linguistic minorities – are the focus of the Thematic Comment.

[100] See e.g. Opinion on Azerbaijan, 22 May 2003, ACFC/OP/I(2004)001, para.28; Opinion on Ukraine, 1 March 2002, ACFC/OP/I(2002)010, para.27; Opinion on Serbia and Montenegro, 27 November 2003, ACFC/OP/I(2004)002, para.38.

improve their understanding of the situation of minorities falls under this category of measures. On 4 March 2005 the Minister of Education of the **Slovak Republic** and the Plenipotentiary of the Slovak Government for Roma minority accredited 25 new teachers of Roma language and literature, who have since started to operate in some primary and secondary schools and also at universities as teachers and assistants. Roma language has become an optional subject at some secondary schools and universities. A dictionary of Roma language based on a dialect of Roma settled mainly in the Eastern part of Slovak Republic has been in the process of preparation. Such schemes may be required if children belonging to certain minority groups are to have effective access to education. However the extremely bad housing conditions, poverty and social exclusion of most of the Roma in the Slovak Republic negatively influence the live of Roma children. In this context, the decision of the Constitutional Court of the Slovak Republic of 18 October 2005 (published in the Collections of Laws under no. 539/2005 on 7 December 2005) affirming the non-compliance of the positive action principle contained in the Anti-discrimination Act with the Slovak Constitution is particularly regrettable. In the view of the Network, this decision is likely to have far-reaching consequences on the further protection of minorities in the Slovak Republic in general, and in particular of the Roma minority, since the widespread *de facto* discrimination of the Roma minority can not be eliminated or reduced without a reasonable use of positive action measures.

As regards **Ireland**, a report published in June 2005, highlighted the fact that hundreds of Roma children resident in Ireland were failing to receive an education.[101] The report highlighted a number of factors which contributed to such educational disadvantage, including language difficulties and differing cultural attitudes to education, and also identified the sense of insecurity experience by families in the asylum process as being one of the principal contributory factors.[102] The steering committee set up within the Ministry for Education in order to address the educational needs of minority communities within Ireland should, as a matter of priority, identify which special measures, taking their specific situation into account, could ensure that Roma children have access to education.

Such schemes providing for special measures seeking to achieve substantive equality between groups are only to be encouraged only insofar as they seek to provide the members of minorities with an opportunity to seek integration in the mainstream of society. Indeed, such schemes may in certain instances be required as a form of accommodation of the specific situation of minorities. This is the case where, in the absence of such accommodation, minority groups would be suffering a form of indirect discrimination, being placed *de facto* in a disadvantageous situation because of the imposition of generally applicable regulations, criteria or practices, which although apparently neutral, are discriminatory in fact[103]. Such measures however, should neither lead to instances of segregation – for instance by confining children from certain minority groups to special classes –, nor impose a form of coercion on the members of minority groups, obliging them to assimilate and to abandon the specific traits, including language, which constitute them as a minority – which could not be reconciled with Article 5 of the Framework Convention –. Article 1(1), c), of the Convention against Discrimination in Education adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 14 December 1960 defines as 'discrimination', in the context of education, any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education in particular by "establishing or maintaining separate educational systems or institutions for persons or groups of

[101] Louise Lesovitch, *Roma Educational Needs in Ireland: Contexts and Challenges* (June, 2005).
[102] *Ibid* at p.72.
[103] For instance, the Advisory Committee of the Framework Convention for the Protection of National Minorities noted with regard to the United Kingdom, under Article 4 of the Framework Convention, that "from information it has received, the different health needs of the various ethnic minorities and that problems persist in accessing public health care, due in part to language difficulties and sometimes the hostile reaction of services. Furthermore there exists a lack of awareness of cultural needs, including dietary and religious needs. Also highlighted to the Advisory Committee are the problems ethnic minority health staff face to be promoted, in particular to senior positions, and that they often have to take up the least desired specialties". In such case affirmative action must be taken to remedy these obstacles to access of ethnic minorities to health services, which requires taking into account their specific needs, for instance in terms of dietary or religious needs or of language interpretation.

persons", except where such separation consists in the establishment or maintenance of separate educational systems or institutions for pupils of the two sexes under conditions of equality (Article 2, a)); where the establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering an education which is in keeping with the wishes of the pupil's parents or legal guardians, if participation in such systems or attendance at such institutions is optional and if the education provided conforms to such standards as may be laid down or approved by the competent authorities, in particular for education of the same level (Article 2, b)); or where "the object of [the establishment or maintenance of private educational institutions] is not to secure the exclusion of any group but to provide educational facilities in addition to those provided by the public authorities, if the institutions are conducted in accordance with that object, and if the education provided conforms with such standards as may be laid down or approved by the competent authorities, in particular for education of the same level" (Article 2, c) of the Convention).

The Network looks forward to the outcome of the discussions currently ongoing in the **Netherlands**, after the *Commissie gelijke behandeling (CGB)* [Equal Treatment Tribunal] rejected the so-called *spreidingsbeleid* in the town of Tiel, according to which allochtonous children were 'spread out' over primary schools with the objective of countering the emergence of 'black schools' (opinion n° 2005-25). A general advice is now being prepared by the *Onderwijsraad* [Education Board], an advisory body to the Government, which is also considering proposals to base school admission policies on the level of education of the parents, instead of nationality or ethnicity. The problem of segregated schooling is as pressing in the Netherlands as it is in other European countries. In the view of the Network, all EU Member States would benefit from a thorough and systematic comparison of the approaches chosen in other Member States, so as to identify best practices and the risks associated with certain approaches.

Whereas this debate should be welcomed and, indeed, encouraged through cross-country comparisons, the Network restates that practices leading to de facto segregation should be absolutely avoided. This question concerns, in particular, the Roma children. It is not limited to certain Member States (the **Czech Republic, Slovak Republic,** and **Hungary**) where this issue has been most widely publicized. In **Denmark,** the Commissioner for Human Rights, Mr. Alvaro Gil-Robles, expressed concern in his report, For instance, after his visit to Denmark on 13-16 April 2004, the Commissioner for Human Rights, Mr. Alvaro Gil-Robles, expressed concern about the Roma children's difficult access to education, referring in particular to the special classes in the Municipality of Elsinore which 30 children at the time attended, the majority of the children never returning to 'normal' classes again. It appeared there that, in reality, the criteria for placement of the children in these classes were the children's ethnic background and not the individual need. The Commissioner asked why the Roma children with special educational needs are not placed in traditional special classes with Danish pupils with similar needs. The Roma-classes had also been criticised by the OECD in its report from 2003. The practice of the Municipality of Elsinore has since been deemed illegal by the Minister of Education and the last remaining Romi-classed was closed down in the summer of 2005.

The preceding comments lead the Network to emphasize the need to adopt a broad understanding of the notion of prohibited indirect discrimination in education, the adequate response to which consists in the adoption of special measures taking into account the specific situation of certain disadvantaged groups, in particular ethnic and religious minorities. They also lead to firmly condemn situations where segregation in education is persistent. A number of consequences follow, some of which were highlighted in *Thematic Comment n°3 : the Rights of Minorities in the Union*[104] :

First, the debate which the European Commission may open on the need to expand Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation beyond its current scope of application which is limited to employment and occupation, should include the question whether the understanding of the notion of discrimination

[104] All the documents of the EU Network of Independent Experts on Fundamental Rights are available on the following website : http://europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm

in the current Directives should not be clarified and further improved. In particular, it should be asked whether the prohibition of indirect discrimination should be seen as imposing an obligation on the Member States to monitor, by statistical means, the impact on ethnic and religious minorities of the measures they introduce or maintain in the fields to which the prohibition of discrimination applies. The imposition of such an obligation should be considered as inherent to the prohibition of discrimination. It should include both an obligation to develop impact assessments on an *ex ante* basis, when a new regulation or practice is introduced, in order to anticipate its potential impact, and an obligation to evaluate, *post hoc*, the effective impacts on ethnic or religious minorities of existing regulations or practices at regular intervals. As explained in the *Thematic Comment n°3 on the rights of minorities in the Union* (at para. 2.3. and 2.4.), the protection of the right to respect for private life vis-à-vis the processing of personal data should not be seen as an obstacle to the introduction of such a form of statistical monitoring.

One of the actions proposed by the Commission in the Communication it plans to adopt on the rights of the child would consist in assessing the impact on children's' rights of Union policies.[105] The Commission would intend to define a set of appropriate indicators allowing a review of the influence and impact that relevant EU legislation, policies and programming has on children. These indicators would be both qualitative and quantitative and should include, amongst others, the effect on children's education.[106] The Network recommends that such indicators be broken down according to ethnicity, and perhaps also according to the religion of the parents and the language spoken at home. Alternatively, proxies such as the country of birth of the parents or their nationality could be used in order to ensure that such impact assessments include the requirement of non-discrimination on the ground of ethnic origin, or membership of a religious or linguistic minority.[107] For similar reasons – because it considers that monitoring the situation of minorities constitutes an essential component of an effective anti-discrimination policy –, the Network recommends that insofar as the Commission encourages the drawing up of an inventory of the actions adopted by the Member States in order to implement the Convention on the Rights of the Child,[108] such inventory should include, in particular, the development of any indicators which would serve to identify instances of discrimination against specific categories of children.

Second, an initiative by the Union in this area would make clear that segregation in education is unacceptable, even if it is *de facto* rather than formally institutionalized. Giving such a clear signal is important in the current context, where – despite the near unanimity among human rights expert bodies – certain decisions seem to entertain doubts in this regard. The Network notes for instance that in **Hungary**, after the Esély a Hátrányos Helyzet_ Gyerekeknek Alapítvány (Chance for Children Foundation) brought an action for violation of the principle of equal treatment against the Local Authority of Miskolc on the basis of the Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (AETPEO) when the closing of several primary schools by that Local Authority led to the segregation of Roma and disadvantaged children, the first instance court dismissed the claim of discrimination. Such a situation should be seen a discrimination prohibited under the Racial

[105] This is action 2, in the version of the draft Communication which the Network had access to.
[106] In fact, this action envisaged in the Communication would be more ambitious, and would intend to measure the effect of Union policies also on children's health, economic situation, and living conditions. The same recommendation applies with respect to the choice of indicators in these other fields.
[107] In its Thematic Comment n°3, the Network commented the following about the need for an improved monitoring of the situation of minorities in the Member States, through the use of statistical indicators : 'The European Commission could lead by example by including, in the impact assessments it prepares on its legislative proposals, an examination of the impact on the situation of minorities. The existence of Union-wide harmonized indicators, ensuring a comparability of the data collected within each Member State with respect to the situation of the minorities in that State, should not be seen as a prerequisite to such impact assessments of Union legislation and policies. Indeed, in assessing legislative or regulatory proposals at the level of the Union, the relevant question is whether the adoption of these proposals and their implementation by each Member State may lead, in certain or all States, to a situation where certain minorities would be negatively and disproportionately affected, would be put at a particular disadvantage, or would not have their specific needs recognized. In order to answer adequately such a question, the reliance on the indicators defined at the level of each Member State should be seen as an advantage, rather than as an obstacle, insofar as this ensures the visibility in such assessments of minorities whose situation may be neglected in the context of less refined assessments conducted at the level of the Union' (under para. 3.4.).
[108] This is action 5, in the version of the draft Communication which the Network had access to.

Equality Directive, which should be interpreted as outlawing all forms of segregation, whether *de jure* or *de facto*, unless actions leading to separate treatment may be justified as special measures aimed at the integration of the concerned category of persons.

2. The accommodation of religious practices

Freedom of religion is protected by Article 10 of the Charter of Fundamental Rights. Article 14 of the Charter on the right to education, guarantees the freedom to found educational institutions with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions. According to Article 8 of the Framework Convention for the Protection of National Minorities, a person belonging to a national minority has the right to manifest his or her religion or belief and to establish religious institutions, organisations and associations.

However religious freedom is not only to be respected. It should impose positive duties on the State, as recognized by the European Court of Human Rights.[109] This can be derived as well from Article 5(1) FCNM, according to which the States undertake to promote the conditions necessary for persons belonging to national minorities to practice their religion. Moreover, in its General Policy Recommendation No.5, ECRI recommends governments of the Member States to ensure that public institutions are made aware of "the need to make provision in their everyday practice for legitimate cultural and other requirements arising from the multi-faith nature of society".[110] Indeed, as emphasized by the Network in *Thematic Comment n°3 on the rights of minorities in the Union* (in para. 5.3.), freedom of religion should be seen as imposing on both public and private parties an obligation to provide reasonable accommodation to all religious faiths, where the application of generally applicable and neutral measures might otherwise result in indirect discrimination on the grounds of religious belief. In *Thlimmenos v. Greece*, as has been recalled, the European Court of Human Rights considered that the refusal to take into account the religious beliefs of the applicant could constitute a form of prohibited discrimination, resulting from a failure to recognize relevant differences in the application of generally applicable and neutral laws.

In *Thematic Comment n°3*, the Network noted a growing tendency, among the Member States of the Union, towards accepting certain accommodations within public institutions – in particular schools – to allow minority religions' adherents to practice their religion, at least with regard to adapting meals composition to religious dietary requirements and/or permitting to take leave for religious holidays. In some States, such accommodations are laid down by law or regulation. In other States, they are provided for in practice. In **Ireland**, as a matter of practice, religious requirements are accommodated in public institutions such as schools, hospitals, the army, and prisons, on a non-statutory basis. In **France,** pupils at State educational establishments and people who use the public hospital services can in principle request a diet in accordance with the precepts of their religious faith. In **Sweden**, the composition of the meals served, for example the offering of a vegetarian option, at Swedish schools shows that in practice respect for various religions is observed. In **Finland**, members of religious minorities are allowed to follow their own dietary requirements in public institutions.

A similar tendency towards improving the accommodation of religious practice was identified with respect to the right to religious holidays. In **Austria**, Section 13 of the School Time Act (*Schulzeitgesetz*) allows that pupils be exempted from attendance for religious reasons in certain cases. In **Poland**, persons belonging to religious minorities have the right to leave of absence from work or school during the period necessary to celebrate their religious holidays. Leave of absence from work may be given under the condition that the time of leave will be made up for without the right to

[109] Eur. Comm. HR, 12 March 1981, *X. v. United Kingdom*, Application No.8160/78, D.R. 22, p. 3. See also ECtHR, 20 September 1994, *Otto-Preminger Institute v. Austria*, Series A-295, § 47 and Eur. Ct HR, 25 November 1996, *Wingrove v United Kingdom*, Series A 1996-V No.23, § 48.

[110] ECRI General Policy Recommendation No.5 on combating intolerance and discrimination against Muslims, adopted on 27 April l2000, CRI (2000) 21.

additional payment for work during days that are legally free from work or work in overtime[111]. In **Belgium,** a decree of the Flemish government authorizes pupils to be absent from school to celebrate their religious holidays recognized by the Constitution,[112] but the French and German-speaking communities have not adopted such a provision, thus leaving in those communities the decision to authorize certain pupils to be absent for a religious feast to the discretion of the principal of the educational establishment. In **France,** in the State schools, leave of absence is granted on an exceptional basis and for certain days, insofar as they correspond to the religious feasts featuring on the calendar that has been drawn up at the national level and that they do not disrupt the regular schooling. In the public service, the principle of secularism does not prevent the departmental heads from granting exceptional leave of absence for religious feasts. Similarly, in **Luxembourg,** absence from school for religious feasts is normally allowed on a case-by-case basis by the schools. On the other hand, a general dispensation from compulsory school attendance on Saturdays for a Seventh Day Adventist pupil has been declared incompatible with the Luxembourg Constitution: the Constitutional Court considered that a child's right to education must not be threatened by consistent absence on Saturdays, even for religious reasons.[113]

More recently, the public debate has focused on the question of the wearing of religious signs in schools. This debate was fuelled by the adoption in **France** of the Act of 15 March 2004,[114] which prohibits "the wearing in public primary and secondary educational establishments of signs or clothing conspicuously demonstrating the pupils' adherence to a particular religion". In the case of *Leyla Sahin v. Turkey*, the European Court of Human Rights agreed with the Turkish Constitutional Court that the principle of secularism, which guides the State in its role of impartial arbiter, and necessarily entails freedom of religion and conscience, also served to protect the individual not only against arbitrary interference by the State but from external pressure from extremist movements, and that upholding that principle could moreover be considered necessary to protect the democratic system in Turkey. The Court also noted the emphasis placed in the Turkish constitutional system on the protection of the rights of women and gender equality. Taking into account the fact that in Turkey, the majority of the population, while professing a strong attachment to the rights of women and a secular way of life, adhered to the Islamic faith, and that there were extremist political movements in Turkey which sought to impose on society as a whole their religious symbols and conception of a society founded on religious precepts, the Court took the view that imposing limitations on the freedom to wear the headscarf could be regarded as meeting a pressing social need by seeking to achieve those two legitimate aims, especially since that religious symbol had taken on political significance in Turkey in recent years.[115]

The present case-law of the European Court of Human Rights therefore does not confirm the view that the prohibition of the wearing of religious signs in public schools constitutes either a violation of the freedom of religion, or discrimination in the exercise of one's religion, under Articles 9 and 14 of the European Convention of Human Rights. On the other hand, the Network emphasizes that this case-law does not allow for any restrictions to freedom of religion in public institutions ; neither does it allow

[111] Based on Article 42 of the act of 17 May 1989 on guarantees concerning freedom of conscience and denomination (*The Journal of Laws* of 2000, no. 26, position 319). The rules concerning granting leave from work are regulated by the Ordinance of the ministers of labour and social policy, and national education of 11 March 1999. The Labour Code, in Article 11 no. 3, states that any kind of discrimination as part of labour relations, i.e. because of religious beliefs, is unacceptable. The Polish law does not acknowledge the possibility of refusing to excuse from work or school for the period of celebrating religious holidays, which are not legally free from work.

[112] Article 10c, 2° of the Decree of the Flemish government of 12 November 1997 on the supervision of the enrolment of pupils in primary education, as amended by the Decree of 21 March 2003.

[113] The judgment given on 20 November 1998 by the Constitutional Court subsequently gave rise to an application submitted to the European Court of Human Rights, in which the parents complained about the fact that they were unable to keep their child from school on Saturdays in accordance with the precepts of their faith. The Court, however, found the application inadmissible and manifestly ill-founded, thus endorsing the reasoning of the Constitutional Court: Eur. Ct. HR, *Martins Casimiro and Cerveira Ferreira v. Luxembourg*, decision (inadmissibility) of 27 April 1999 (Appl. N° 44888/98).

[114] Act of 15 March 2004 regulating, in implementation of the principle of secularism, the wearing of signs or clothing demonstrating adherence to a particular religion in public primary and secondary education (Act n°2004-228 of 15 March 2004, J.O. of 17.3.2004, p. 5190)

[115] Eur. Ct. HR (GC), *Leyla Sahin v. Turkey*, application no. 44774/98, judgment of 10 November 2005.

for a religious faith to be targeted by a regulation of vestimentary codes in public schools : any such regulation should be neutral between religious faiths and generally applied to all faiths. The European Court of Human Rights explicitly notes, in the judgment it delivered in *Leyla Sahin*, that 'practising Muslim students in Turkish universities are free, within the limits imposed by educational organisational constraints, to manifest their religion in accordance with habitual forms of Muslim observance', and that the contested regulation – a resolution adopted by Istanbul University on 9 July 1998 – 'shows that various other forms of religious attire are also forbidden on the university premises' (para. 118). The Network recalls its observation in *Thematic Comment n°3 on the rights of minorities in the Union* (at para. 5.4.) that the prohibition of particular religious signs without any justification should be considered arbitrary and a violation of the freedom of religion protected under Article 9 ECHR and Article 18 ICCPR. The Network referred in this regard to the final views adopted by the Human Rights Committee on 5 November 2004 under Communication No. 931/2000 (*Hudoyberganova v. Uzbekistan*),[116] where the Human Rights Committee noted (at para. 6.2.):

> The Committee considers that the freedom to manifest one's religion encompasses the right to wear clothes or attire in public which is in conformity with the individual's faith or religion. Furthermore, it considers that to prevent a person from wearing religious clothing in public or private may constitute a violation of Article 18, paragraph 2, which prohibits any coercion that would impair the individual's freedom to have or adopt a religion. As reflected in the Committee's General Comment No. 22 (para. 5), policies or practices that have the same intention or effect as direct coercion, such as those restricting access to education, are inconsistent with article 18, paragraph 2, of the Covenant. It recalls, however, that the freedom to manifest one's religion or beliefs is not absolute and may be subject to limitations, which are prescribed by law and are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others (Article 18, paragraph 3, of the Covenant). In the present case, the author's [a student at the Persian Department of the Faculty of Languages of the State Institute for Oriental Languages of Tashkent] exclusion took place on 15 March 1998, and was based on the provisions of the Institute's new regulations [under which students were no longer allowed to wear religious attire]. The Committee notes that the State party has not invoked any specific ground for which the restriction imposed on the author would in its view be necessary in the meaning of Article 18, paragraph 3. Instead, the State party has sought to justify the expulsion of the author from University because of her refusal to comply with the ban. Neither the author nor the State party have specified what precise kind of attire the author wore and which was referred to as 'hijab' by both parties. In the particular circumstances of the present case, and without either prejudging the right of a State party to limit expressions of religion and belief in the context of Article 18 of the Covenant and duly taking into account the specifics of the context, or prejudging the right of academic institutions to adopt specific regulations relating to their own functioning, the Committee is led to conclude, in the absence of any justification provided by the State party, that there has been a violation of article 18, paragraph 2 of the Covenant.

When the United Nations Committee on the Rights of the Child was confronted with the new Act of 15 March 2004 adopted in France, it stated its concern that the new legislation in France on wearing religious symbols and clothing in public schools may be counterproductive, by neglecting the principle of the best interests of the child and the right of the child to access to education (CRC/C/15/Add.240, 30 June 2004). It recommended that **France** continue to closely monitor the situation of girls being expelled from schools as a result of the new legislation and ensure they enjoy the right of access to education. The Act of 15 March 2004 has, however, already led to the exclusion of Muslim or Sikh pupils who persistently refuse to remove their veil or turban at the schools where they were being educated. In accordance with the law, those exclusions were the outcome of an unsuccessful process of negotiations between the schools, the pupils and their families. Those pupils have henceforth to be educated at private establishments or follow courses of the national centre for distance learning. It is to be feared that this breaking with education at the public educational establishments will for some

[116] CCPR/C/82/D/931/2000, 18 January 2005.

mean breaking with school in general, whereas one of the objectives of this law was in fact to combat exclusion and foster integration. Certain Member States have chosen to affirm a right to wear religious signs in schools. In **Austria** for instance, the authorities have explicitly specified that the wearing of headscarves by pupils in schools was not prohibited. Following a case at a secondary school in Upper Austria, the Minister of Education, Science and Culture issued a binding decree on 23 June 2004 to all schools and subordinate authorities clarifying that any restrictions in rules of the school or other regulations on the wearing of headscarves by female Muslim students were unlawful[117]. Generally, the wearing of headscarves, turbans, kippas and similar religious headgears or religious symbols like the Christian cross may not be prohibited, unless compelling circumstances so require (e.g. provisions on special protective clothing (helmets) at dangerous workplaces for risks of injury). A same solution appears to be recommended in the **Netherlands** by the Commissie Gelijke Behandeling [Equal Treatment Commission], which found that educational institutions may prohibit the wearing of a niquaab, i.e. a veil that covers the entire face. The CGB accepted that the decision to wear a niquaab may well be an expression of religious beliefs, but it found that the prohibition was justified: niquaabs render communication between staff and students (and between the students themselves) more difficult. In addition identification of those visiting the school premises is impossible if niquaabs are allowed.[118] In a general opinion about the possibilities to prohibit these garments under the law on equal treatment, the CGB stated that exceptions on the prohibition of direct discrimination can only be sanctioned by law; exceptions on the prohibition of indirect discrimination are only allowed when an objective justification can be given. Examples of the latter are impediments to communication in the classroom and conflict with the religious identity of a school.[119] In **Luxembourg**, the wearing of religious insignia at school has been the subject of debate, but has not led to prohibition measures. Disputes are settled by the school principals. The Ministry of Education has issued a circular on Muslim veils and/or headscarves worn by young Muslim girls, tolerating the wearing of a veil or headscarf, provided that it is removed for certain activities where justified for reasons of hygiene and safety. *Thematic Comment n°3 on the rights of minorities in the Union* provides further information on this subject (in para. 5.4.).

The Network notes that, in the Framework Equality Directive, reasonable accommodation is to be provided for persons with disabilities, in order to meet their specific needs where they are otherwise qualified to take up an employment or to occupy a certain position. The examples above illustrate that, if and when Community law shall prohibit direct and indirect discrimination on grounds of religion in the field of education, following an extension of the scope of application ratione materiae of the prohibition of discrimination under the Framework Equality Directive, it should consider including an obligation to provide reasonable accommodation as an integral component of this prohibition. Indeed, the question whether the obligation to provide reasonable accommodation should be considered as resulting from the principle of equal treatment is already present in the present context of the implementation and application of Council Directive 2000/43/EC, insofar as certain groups which may be defined as "ethnic", such as the Sikhs, have a vestimentary code, such as the wearing of turbans or of a kirpan, which may be seen not only as a manifestation of their religion, but also as a mode of expression of their ethnic identity.

3. Access to education of children belonging to linguistic minorities

Article 14 of the Framework Convention for the Protection of National Minorities reads :

1. The Parties undertake to recognise that every person belonging to a national minority has the right to learn his or her minority language.
2. In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if there is sufficient demand, the Parties shall endeavour to ensure, as far as possible and within the framework of their education systems, that persons

[117] Erlass des BMfBWK vom 23.6.2004, ZI 20.251/3-III/3/2004.
[118] CGB, 20 March 2003, *oordeel* 2003-40.
[119] *Advies inzake "gezichtssluiers en hoofddoeken op scholen",* 16 April 2003, *advies* 2003/01, www.cgb.nl

belonging to those minorities have adequate opportunities for being taught the minority language or for receiving instruction in this language.

3. Paragraph 2 of this article shall be implemented without prejudice to the learning of the official language or the teaching in this language.

The principles formulated in this provision should also guide the Member States in the definition of their policies towards immigrant communities, even though the question whether such communities should be recognized as "minorities" remains controversial, as recalled in the *Thematic Comment n°3* adopted by the Network on the rights of minorities in the Union (para. 1.1.). Indeed, certain States, such as **Luxembourg** by the regulation of 10 July 2003, have sought to facilitate the integration of children of immigrants, by the adoption of special measures in the field of education. In **Austria**, an initiative was presented in October 2005 to provide early language support especially targeted at children with mother tongues other than German[120]. Registration for primary schools started for the first time in October. During the registration process the children's language skills are tested. If deficiencies in German are identified, the child receives a so-called "language ticket" with can be used to receive 120 hours of remedial instruction. The ticket is worth € 80 and can be converted at kindergartens who will receive € 80 from the Integration Fund (*Integrationsfonds*) of the Ministry of Interior. The remaining costs for language support, which are estimated to be another € 80 per student, are to be carried by the community or the federal province[121]. According to the initiative, children with language problems should have the option of "growing into" the language in which subjects are taught before entering primary school. Such initiatives are to be welcomed and, wherever possible, they should be encouraged. Similarly, the Network has consistently encouraged the authorities in **Latvia** and in **Estonia** to improve the availability of training courses in Latvian and Estonian for the Russian-speaking minority, acknowledging that important efforts have already been made in this regard, for instance through the introduction, in **Latvia**, of bilingual education programmes.

Most Member States guarantee the possibility to receive total or partial education in a minority language at public schools. Such a possibility, however, is usually limited to certain minorities, to specific areas or to a certain level of education. Interestingly, some States have set up bilingual schools. The following situations are representative:

• A first group of States guarantee the possibility to receive total or partial education in a minority language at public schools. In **Austria**, only the Slovene and Croatian ethnic groups enjoy the enforceable and constitutionally guaranteed right to receive education in their language at primary school level and in a proportionate number of secondary schools (Vienna State Treaty 1955). As a consequence Parliament passed the Minority School Act 1959 for the Slovene minority in Carinthia[122] and – finally – the Minority School Act 1994 for the Croatian and the Hungarian minority in the Burgenland.[123] The minority school acts allow for different options in order to comply with the prerogative of minority protection: primary and lower secondary schools with education purely in the minority language, bilingual schools, and additionally German schools having compulsory minority language courses. In practice, the first option was not realised because of lacking demand as graduates from such schools without proper education in German would have had serious disadvantages in their later professional lives. In 1989 the Constitutional Court ruled that in the traditional areas of residence the right to education in the minority language was enforceable without further conditions whereas in the rest of the province the right was subject to a "sustainable local demand" (*VfSlg. 12245/1989*). A different trend can recently be noticed in regular schools, since the knowledge of Eastern languages has become a desirable asset in many job descriptions. A growing number of schools adapt their optional language courses to satisfy the increasing demand of German-speaking students to learn Eastern languages, notably Slovenian and Hungarian. Indeed, due to the increasing interest in the languages of neighbouring countries, the number of pupils participating in minority language

[120] Austrian Education News, Federal Ministry of Education, Science and Culture, No. 43, September 2005, available at: http://www.bmbwk.gv.at/fremdsprachig/en/schools/aen.xml?style=text (21.11.2005).
[121] "Neue Pläne: Deutschkurse schon im Kindergarten", in *ORF ON News,* 17.10.2005.
[122] *Kärntner Minderheitenschulgesetz, BGBl. Nr. 101/1959 idgF.*
[123] *Burgenländisches Minderheitenschulgesetz, BGBl. Nr. 641/1994.*

education increased during the school year 2004/05. Compared to the school year 2003/04 the number of pupils participating in bilingual German-Croatian or German-Hungarian education in Burgenland schools increased from 3,469 to 4,043.[124] In the federal province Carinthia the number of pupils participating in classes taught in Slovenian slightly increased from 3,407 in 2003/04 to 3,573 in 2004/05[125]. In its report on Austria the Committee of Experts on the European Charter for Regional or Minority Languages, "welcomes as a very positive element the fact that the structure of regional or minority language education in Burgenland, and to a lesser extent in Carinthia, is open to monolingual German speakers living in areas where bilingual education is provided in accordance with Austrian law."[126] On the other hand, this Committee also found that "the objective situation of the languages for which there is a specific legal framework, i.e. the Slovenian, Burgenland-Croatian and Hungarian languages in their respective language areas in Carinthia and in Burgenland, is considerably better than that of the other regional or minority languages." The Committee further identifies shortcomings with respect to teaching materials and teacher training in regional or minority languages. In regard to the situation in Vienna, the Committee states that the provisions for regional or minority language teaching in Vienna are in considerable need of development as there are no provisions for Burgenland-Croatian teaching, and Hungarian is only taught at the primary school level.[127]

In **Hungary**, children belonging to a minority community can receive pre-school and primary school education in the language of their choice. They can choose bilingual education as well, in Hungarian and in their mother tongue. The language of higher education is Hungarian, but any national or ethnic minority can maintain a college or university, where the teaching language is partly or completely their mother tongue. In the **Netherlands**, education in the province *Friesland* takes place in Frisian and Dutch[128]. Outside the province, Dutch will be used – but Frisian and other regional languages may also be used in places where these languages are actually used[129]. In addition there exist quite extensive programmes for language education in the languages of ethnic minorities. In 2004, however, the Government announced that it intends to cut subsidies for the latter programmes. The Government believes that it is of vital interest to the children's future integration into Dutch society that they learn Dutch. Since all efforts should be geared towards that goal, education in the languages of ethnic minorities will no longer be supported[130]. In **Greece,** there are more than 200 primary schools in Thrace where pupils belonging to the Muslim minority can learn Turkish and be educated partly in Turkish and partly in Greek. In secondary education, there are four private educational establishments using accommodation made available by the State, where tuition is given in Greek and in Turkish. In the mountainous areas where the Pomaks live, the State has set up and provides funding for secondary schools using the Greek language, where religious education is given in Turkish and the Koran is taught in Arabic. In **Cyprus**, the Armenian community is the only minority having its own language. There are kindergartens and elementary schools in Armenian which are funded by the state but are autonomous since they are governed by the Armenian School Board. With regard to secondary education, there is one private Armenian school, the Melkonian but the State supports Cypriot Armenian students attending the Melkonian by paying their fees. However, the Melkonian institute is closing down. Alternative arrangements will thus need to be taken for the secondary education of Armenian children. In **Spain,** the laws governing state education allow the Autonomous Communities to include in the curriculum the study of their official languages along with aspects of their own

[124] Schülerzahlen im Bereich des Minderheitenschulwesens im Burgenland, published by *Landesschulrat Burgenland*, available at: http://www.lsr-bgld.gv.at/schul/daten/aps/mhs/statistikmhs.htm (10.11.2005).
[125] Information provided by the Austrian Focal Point of the European Monitoring Centre on Racism and Xenophobia upon request: original source, Landesschulrat für Kärnten, information provided on 21.10.2005.
[126] Report on Austria of the Committee of Experts on the European Charter for Regional or Minority Languages, ECRML (2005) 1, 19.01.2005, p. 61, available at: http://www.coe.int/T/E/Legal_Affairs/Local_and_regional_Democracy/Regional_or_Minority_languages/ (10.11.2005).
[127] Report on Austria of the Committee of Experts on the European Charter for Regional or Minority Languages, ECRML (2005) 1, 19.01.2005, p. 61, 62, available at: http://www.coe.int/T/E/Legal_Affairs/Local_and_regional_Democracy/Regional_or_Minority_languages/ (10.11.2005)
[128] Article 9 (4) of the *Wet op het primair onderwijs* [Primary Education Act].
[129] Article 9 (8) of the *Wet op het primair onderwijs*.
[130] *Nationaal Actieplan Kinderen [National Plan of Action for Children], Kamerstukken II* 2003-2004, 29284, No. 3 Add., p. 18).

history and culture. The Autonomous Communities are also empowered to regulate the use and tuition of their languages at university. The universities situated in the Autonomous Communities that have a language of their own may therefore provide tuition in that language. However, it is for each university to decide on the extent of this right.[131] In **Finland**, education in Swedish is guaranteed by law as part of public education, based on certain conditions. Sami language is available as a language of instruction in the Sami homeland. There is a programme of providing education in the Romani language. Besides, in many municipalities, immigrants receive education in their own language, in order to facilitate their participation in general education. In **Lithuania**, Article 28 of the Law on Education provides that in localities where a national minority traditionally constitutes a substantial part of the population, upon that community's request, the municipality ensures the possibility of learning in the language of the national minority.[59] The subject of the Lithuanian state language is a constituent part of the curriculum at schools providing for teaching in a minority language.[60] According to the Law, other state-run and municipal schools shall provide opportunities for pupils belonging to ethnic minorities to learn their mother tongue, subject to the existence of a real need and the availability of teachers of that language. In **Slovenia**, Article 64 of the Constitution guarantees to members of the Italian and Hungarian autochthonous national communities the right to education and schooling in their own languages and provides that "[t]he geographic areas in which bilingual schools are compulsory shall be established by law."

In the **Slovak Republic**, according to Article 34 of the Slovak Constitution, persons belonging to national minorities and ethnic groups, in addition to their right to learn the official language, they also have the right, under the conditions laid down by a law, to be educated in their language. Pursuant to the Act no. 270/1995 Coll. on state language, the education of state language is compulsory on all primary and secondary schools. Other than the state language may be used for education and examination to the extent determined by the law. Textbooks and other educational materials for the purpose of education in schools of national minorities are published in the language of respective national minority. According to the Act no. 29/1984 Coll. on system of primary and secondary schools, as amended, training and education are carried out in the state language. Citizens of Czech Republic, Hungarian, German, Polish and Ukrainian (Ruthenian) nationality are ensured the right to education in their own language to an extent proportional to the interests of their national development. School reports for students of primary schools and students of secondary schools are issued in the state language. Students of primary schools and students of secondary schools in which a national minority language is the language of instruction are issued bilingual school reports, in the state language and in the language of the relevant national minority. Pedagogical documentation at primary and secondary schools is kept in the state language. At schools where a national minority language is the language of instruction, the pedagogical documentation is bilingual, in the state language and in the language of the respective national minority. Moreover, the *Národn_ plán v_chovy k _udsk_m právam na roky 2005 – 2014* [National plan for human rights education for the period of years 2005 - 2014][132] approved in February 2005, pays specific attention to the education of national minorities, namely to Roma minority and to the right of parents to freely choose the education for their children.

In **Poland**, the Act on national and ethnic minorities and regional language[133], adopted by the Sejm on 6 January 2005, confirmed, in Article 17, the right of individuals, who belong to national or ethnic

[131] See initial periodical report presented by Spain to the Secretary - General of the Council of Europe in accordance with Article 15 of the Charter, Report on the Application in Spain of the European Charter for Regional or Minority Languages of 23 September 2002.
[59] Lietuvos Respublikos _vietimo _statymo pakeitimo _statymas [The Law of the Republic of Lithuania on the Amendment of the Law on Education], Official Gazette, 2003, Nr. 63-2853
[60] Lietuvos Respublikos _vietimo _statymo pakeitimo _statymas [The Law of the Republic of Lithuania on the Amendment of the Law on Education], Official Gazette, 2003, Nr. 63-2853
[132] The National plan for human rights education for the period of years 2005 – 2014 is published on website of the Ministry of Education of the Slovak Republic: http://www.minedu.sk/MIN/KaP/kap.htm (only in Slovak).
[133]Ustawa z dnia 6 stycznia 2005 r. O mniejszo_ciach narodowych i etnicznych oraz o j_zyku regionalnym (Dz.U. Z 2005 r. Nr 17, poz. 141) [The Act of 6 January 2005 on national and ethnic minorities and regional language (The Official Journal of 2005, No 17, item. 141)]

minorities to learn the minority language or have classes held in the minority language, and to learn the history and culture of the minority. In the **United Kingdom**, schooling in Welsh has been provided since the enactment of the Education Act 1944 and some 25% of children in school are so taught. There is also provision for further and higher education in Welsh and Welsh is taught in other schools as part of the national curriculum. There are Irish and Gaelic medium schools in Northern Ireland and Scotland but not all are publicly funded.

In **Sweden**, despite the demand amongst persons belonging to national minorities to receive bilingual education, legal guarantees exist so far only with regard to the Saami language. In addition, municipalities are, under certain conditions, obliged to provide education of any mother-tongue as a subject if it is requested by at least five pupils or, as regards Saami, Meänkeli and Romani Chib, by one or more pupils. The above mentioned obligation is conditioned on the availability of teachers and in practice this has had negative impact on the scope of the legal guarantee. Moreover, the volume of the mother-tongue education is generally limited to one to two hours per week. Swedish NGOs have pointed out that during recent years only about 52 per cent of the pupils entitled to mother-tongue teaching have participated in these classes. The adoption of the Bill submitted by the Government on 26 October 2005 (prop. 2005/06:38, *Trygghet, respekt och ansvar-om förbud mot diskriminering och annan kränkande behandling av barn och elever*), one of the major proposals of which is to expand the Prohibition of Discrimination Act (*lagen om förbud mot diskriminering* (SFS 2003:37)) which currently guarantees protection against discrimination solely in higher education, so that it shall cover all levels of education, should be seized as an opportunity in this regard.[134] Efforts should be pursued, however. Despite the fact that a special University programme has been funded with the aim to remedy the serious shortage of teachers who can provide instruction in mother tongue education for Sámi children, the problem continues to persist. The large geographical distances place additional obstacles for many children to access some of the existing six Sámi schools in Sweden. The majority of the Swedish municipalities (3 out of 4) do not apply the legal guarantees for education in ones' mother tongue for children in pre-school age.[135] The European Commission against Racism and Intolerance (ECRI) noted in its third report on Sweden that "in practice, national minority children do not always have access to mother tongue education and that there are differences in this respect between municipalities".[136] Therefore, the Commission encouraged the Swedish authorities to intensify their efforts to guarantee the practical enjoyment by members of national minorities of their mother tongue education throughout the country. Moreover, all schools should educate their pupils about the culture, religion and history of national minorities.

- Some countries have recently taken measures reducing the availability of education in a minority language at state schools. In **Latvia**, the legal reform requires public schools providing instruction in a minority language to implement a bilingual education model[137]. In September 2004, secondary schools providing instruction in other than the State language began bilingual education programmes at the 10th grade of studies. 60% of subjects must be taught in Latvian and 40% of subjects can be taught in a minority language. The choice of subjects for one or another language is left to each school. The objective is to enable non-Latvian speaking population to be better prepared for the competition on the labour market and in higher educational establishments. In **Estonia**, whereas at present persons belonging to linguistic minorities enjoy the possibility of receiving education in their language, the legally enshrined State policy foresees that all State-financed gymnasiums will in 2007 go over to the instruction in Estonian. It remains a domestically debated issue in Estonia whether and to what extent it is legitimate to compel Russian pupils to study (almost) exclusively in Estonian at the gymnasium level. Since the higher education in Estonia is largely in Estonian, some consider that the State should not support disadvantaging some of its pupils by not providing them proper instruction in the state language. However, a careful balance must be drawn in that regard and minority educational interests and needs should be properly taken into account.

[134] See also Faktablad, U05.046, 26 October 2005, www.regeringen.se
[135] See Rapport om modersmål i förskolan, November 2005, www.skolverket.se
[136] CRI(2005)26, p. 10.
[137] "Valodas inspekcija soda skolot_ju", 08.12.2004.

The situation in **Belgium** deserves special attention. In accordance with the Act of 30 June 1963 on the use of languages in education[138], State education is, as a rule, given only in the language of the region (in the two languages in the case of the Brussels-Capital Region). Exceptionally, in the municipalities with linguistic facilities, State education in another language than that of the region may be organized on certain conditions. In the six municipalities with facilities in the Brussels periphery, however, access to French-speaking state schools is limited: only children may be enrolled who have French as their native or everyday language and on condition that the head of the family lives in the municipality concerned. Verification of compliance with those conditions is entrusted to the school principals and to the language inspectorate. At the moment of enrolment, the parents must complete a linguistic declaration concerning the native or usual language of their child, the correctness of which may be challenged by the language inspectorate. In its judgment of 23 July 1968, the European Court of Human rights declared that the fact of preventing children whose parents do not live on the territory of one of those municipalities from attending French-language schools constitutes discrimination in the enjoyment of the right to education[139]. The Parliamentary Assembly of the Council of Europe has repeatedly called upon Belgium to bring its legislation into line with this judgment[140]. On the other hand, in his report on the situation of the French-speaking population living in the Brussels periphery, Rapporteur D. Columberg of the Committee on Legal Affairs and Human Rights of the Council of Europe said that in his view this procedure of linguistic verification should be abolished, a procedure which he considers "undignified and unnecessary".

- Finally, some States limit themselves to offering in public schools the possibility to learn certain minority languages (by contrast with offering instruction *in* the minority language). In **France,** under certain regional education authorities[141], the regional languages may be taught at primary and secondary educational establishments. There are also optional regional language tests for the general certificate of education. Only the regional language spoken in the geographical area where the establishment is situated can be taught. Since there are relatively few pupils who want to learn a regional language, it would be materially impossible to provide tuition at each educational establishment in all the regional languages that are spoken on the French territory. In **Poland**, pursuant to Article 13 of the law of 7 September 1991 on the educational system[142], schools and public institutions shall provide students with an opportunity to maintain the sense of national, ethnic, linguistic and religious identity, especially by learning their language. The provision of minority language courses is compulsory when a minimal number of students' parents or students themselves submit a written declaration to this effect. The most developed educational system is that of the Lithuanian minority. Minority representatives complain that the actions carried out by the authorities in this domain are insufficient.[143] They often encounter problems related to lack of appropriate educational programmes, insufficient number of updated handbooks, lack of qualified staff and insufficient funding. The Bill on National and Ethnic Minorities and Regional Language, recently approved by the Sejm, establishes the right of the minorities to be instructed in their mother tongue.

4. Access to education of Roma children

Patterns of segregation in education and disproportionate representation of Roma children in 'special classes'

On the basis of its examination of the situation of the Roma/Gypsies in the Member States, the Network has repeatedly confirmed the need to act in order to achieve the desegregation of this

[138] *M.B.*, 22 August 1963.
[139] Eur. Ct. H.R., *Case relating to certain aspects of the laws on the use of languages in education in Belgium,* judgment of 23 July 1968.
[140] See Resolution 1172 (1998) on the situation of the French-speaking population living in the Brussels periphery (para. 7) and Resolution 1301 (2002) on the protection of minorities in Belgium (para. 23).
[141] The Regional Education Authority is the regional subdivision of the Ministry of Education.
[142] *The Journal of Laws* of 1996 No. 67, position 329, with following amendments.
[143] The Right to Education, Monitoring Report, HFHR, Warsaw 2002 p. 150-153.

community, which the simple tool of non-discrimination is incapable, by itself, to realize, although it does have an essential function to fulfil in an overall strategy for the inclusion of the Roma/Gypsies. The segregation concerns all sectors of society; and it affects the new Member States of the Union as well as the States who were Members of the Union prior to 1 May 2004.

The European Roma Rights Centre (ERRC) carried out a research on segregation in education in Central and Eastern European countries, including **Hungary**, the **Czech Republic** and **Slovak Republic**. This research highlighted the pervasive character of the segregation of the Roma children in these countries. Segregated schooling of Roma/Gypsies is a result of the interplay of a number of factors such as deep-seated anti-Roma racism, the indifference of the educational systems to cultural diversity, and a lack of effective protections against discrimination and equal opportunity policies. In some places, patterns of segregation in education for Roma/Gypsies appear as a result of residential segregation. Racial segregation has also arisen as a result of the exclusion of Roma/Gypsies by virtue of their specific language and culture. Finally, racial segregation has resulted from the conscious efforts of school and other officials to separate Roma children from non-Roma children for reasons ranging from their personal dislike of Roma/Gypsies to responding to pressure from non-Roma.[144] With respect to **Hungary**, a study showed that 5.8 % of the students in primary schools study in such special schools. Every fifth Roma/Gypsy child is oriented to these institutions.[145] Official estimates are that approximately the half of the children in these schools is of Roma/Gypsy origin. The conditions in the special schools are much worse than in ordinary primary schools, and although they aim to provide special attention to pupils with special needs, they fail to employ teachers with the necessary qualifications. Classes are also bigger than the size prescribed by law. In principle, there are chances to be put back to normal schools, but statistics show that in the last five years only 173 students out of 308 schools were advised to be placed back in the ordinary education system.[146]

The concerns expressed in March 2005 by the Network of Independent Experts, in its *Thematic Comment on the rights of minorities in the Union*, have been confirmed in the Annual Report of the European Monitoring Centre on Racism and Xenophobia[147] that, in the **Slovak Republic**, many non-Roma parents enrol their children in schools with lower concentration of Roma children. In particular, in the vicinity of segregated Roma settlements, this leads to homogeneous Roma classes or schools. Moreover, Roma children are frequently placed in special institutions. The resulting pattern of educational segregation should be combated both through incentive measures and through legal actions being filed against school directors who are formally responsible for transferring children into special schools. The Network is aware that the regulation of the Ministry of Education[148] stipulates the exact mechanisms that must be observed before making a decision about placing or transferring children into special schools, and that a thorough supervision of these mechanisms might prevent unjustified transfers. Indeed, the introduction in the Slovak Republic of the post of Roma assistant teacher, the creation of auxiliary education programs, the reduction of the number of pupils in a class, and support to teaching of Roma language, all may contribute to ensuring the integration of the Roma children into mainstream education. However, the Network notes the view of the Committee on the Elimination of Racial Discrimination that while the extensive measures adopted by the State party in the field of education aimed at improving the situation of Roma children, including the 'Roma assistants' project, are to be welcomed, the *de facto* segregation of Roma children in special schools, including special remedial classes for mentally disabled children, continues to be a source of concern. The Committee recommended in its most recent Concluding Observations 'that the State party prevent

[144] Stigmata: Segregated Schooling of Roma in Central and Eastern Europe, a survey of patterns of segregated education of Roma in Bulgaria, the Czech Republic, Hungary, Romania, and Slovak Republic. Available at: http://www.errc.org/db/00/04/m00000004.pdf

[145] *A kisegít_ iskolák elkülönítenek* (Special schools segregate), HVG, 4 March 2004

[146] *Ibid.*

[147] Racism and Xenophobia in the EU Member States – trends, developments and good practice, EUMC – Annual Report 2005, Part 2.

[148] *Vyhlá_ka Ministerstva _kolstva Slovenskej republiky _. 49/2004 Z. z., ktorou sa mení vyhlá_ka Ministerstva _kolstva Slovenskej republiky _. 212/1991 Zb. o _peciálnych _kolách v znení neskor_ích predpisov* [Order of the Ministry of Education no. 49/2004 Coll. which amends the Order of the Ministry of education no. 212/1991 Coll. on special schools as amended].

and avoid the segregation of Roma children, while keeping open the possibility of bilingual or mother-tongue education [and] that the State party intensify its efforts to raise the level of achievement in school by Roma children, recruit additional school personnel from among members of Roma communities and promote intercultural education'[149].

Similar concerns have been expressed by the Committee on the Elimination of Racial Discrimination with respect to the **Czech Republic**. In its Concluding Observations of 10 December 2003, the CERD noted : 'While appreciating the complexity of the problem of special schooling and noting the accompanying measures taken by the Government with a view to promoting adequate support to Roma children, the Committee remains concerned, as does the Committee on the Rights of the Child (see CRC/C/15/Add.201, para. 54), at the continued placement of a disproportionately high number of Roma children in 'special schools'. Recalling its general recommendation XXVII, the Committee urges the Government to continue and intensify the efforts to improve the educational situation of the Roma through, *inter alia*, enrolment in mainstream schools, recruitment of school personnel from among members of Roma communities, and sensitization of teachers and other education professionals to the social fabric and world views of Roma children and those with apparent learning difficulties'[150]. Initiatives to address this problem have been taken by the Czech government since these Concluding Observations were adopted. The Government has adopted an amendment to its Regulation on conditions and way of granting subsidies from the State budget for activities of members of national minorities and in support of integration of the Roma community.[151] More needs to be done, however. The current practice of allowing a vast majority of the Roma children to be put in special schools is discrimination under international law. In a judgment it delivered on 7 February 2006, a Chamber of the European Court of Human Rights (2nd sect.), 'while acknowledging that [the statistics presented by the applicants about the placement of Roma children in 'special' schools meant for children with learning disabilities] disclose figures that are worrying and that the general situation in the Czech Republic concerning the education of Roma children is by no means perfect' (para. 51), considered that it could not in the circumstances find that the measures taken against the applicants were discriminatory.[152] The Network disagrees.

While it may be the case that, as stated by the European Court of Human Rights in the case of *D.H. v. the **Czech Republic*** of 7 February 2006, it is 'the parents' responsibility, as part of their natural duty to ensure that their children receive an education, to find out about the educational opportunities offered by the State, to make sure they knew the date they gave their consent to their children's placement in a particular school and, if necessary, to make an appropriate challenge to the decision ordering the placement if it was issued without their consent' (para. 52), it is unrealistic to approach the question of consent without taking into account the history of segregation of the Roma in education and the lack of adequate information concerning the choices open to parents. Moreover it is clear that the integration of the Roma children requires them to be encouraged to join the mainstream educational system, and cannot be said to be facilitated by such relegation in special schools devised for children with disabilities.

In **Portugal**, following the recommendations of the study on "Special Educational Needs" commissioned by the Ministry of Education[153], the revision of Decree-Law 319/91 and related legislation is apparently being envisaged. This revision should benefit all children with "special educational needs", which "includes pupils of all capacity levels who may have needs in cognition and learning, communication and interaction, sensory or physical aspects, and/or behavioural, emotional and social development." This comprises students with disabilities, students with learning difficulties, and students with socio-economic disadvantages (such as immigrants and the Roma).

---

[149] Concluding observations of the Committee on the Elimination of Racial Discrimination : Slovak Republic (CERD/C/65/CO/7, 10 December 2004), at para. 8.
[150] CERD/C/63/CO/4, 10 December 2003, at para. 14.
[151] Na_ízení vlády _. 262/2005 Sb., kter_m se m_ní na_ízení vlády _. 98/2002 Sb. [Governmental Regulation No. 262/2005 Coll., amending Regulation No. 98/2002 Coll.].
[152] Eur. Ct. HR (2nd sect.), *D.H. v. the Czech Republic* (Appl. n° 57325/00) judgment of 7 February 2006.
[153] In http://www.min-edu.pt/ftp/docs_stats/d_1110569553310.pdf

These initiatives would gain from being collected on a systematic basis, and those experiences shared between the Member States in order to identify the most adequate solutions to a situation which calls for urgent action. The Network thus reiterates the recommendation it made in that respect contained in its Thematic Comment on the rights of minorities in the Union. The available indicators demonstrate that more should be done on this issue. While the **Slovak Republic** has developed certain good practices in this field which have been mentioned above, serious problems remain. According to the publication of the *V_skumné demografické centrum informatiky a _tatistiky – INFOSTAT* [Demographic Research Centre of the Institute of Informatics and Statistics – INFOSTAT] named *Obyvate_stvo Slovenska pod_a v_sledkov SODB* [Population of the Slovak Republic according to Census 2001][154] from January 2005, the lowest attained level of education can be seen in the regions with the higher concentration of Roma population. The Final Report on the human rights situation of the Roma, Sinti and Travellers in Europe prepared by the Commissioner for Human Rights of the Council of Europe Mr. Alvaro Gil-Robles, mentions that in some regions of the Slovak Republic 80% of Roma children were placed in specialized institutions, only 3% reached as far as secondary school and only 8% enrolled in secondary technical school.[155]

According to data made available through the Ministry of Education on the ethnic breakdown of students at public schools, the division of students according to the language of instruction and their ethnicity, the number of minority schools and the number of students there, the situation of Roma in education has been decreasing in **Latvia**. For the last two years, the number of Romani children registered at mainstream schools has continued to fall: in the school year 2004/2005 there were 1,464, in 2003/2004 – 1,508.[156] Taking into account that the Roma in Latvia is the only ethnic group with a positive demography (more births than deaths) and that according to official sources very few Roma have left Latvia,[157] this may indicate that existing school practices fail to integrate Roma into the mainstream educational system (although the possibility that Roma have migrated to other countries cannot be fully excluded). Difficulties faced by Roma in the Latvian educational system are also documented by the study *Romani Identity in a Multicultural School* conducted by the NGO Centre for Educational Initiatives and presented in 2005. The report does not provide for specific numbers but indicates the main problems faced by Roma: low enrolment, early drop-outs, and others.[158]

In **Hungary**, the practice of placing Roma children in special educational institutions has been observed both in public and private schools. The Hungarian Examination and Evaluation Centre for Public Education, for example, presented its findings on a private school in Jászladány in February 2004. The school shares the building with a local municipality-run school. The establishment of the private school resulted in the polarisation of the two halves of the school in a way that students coming from standard families ended up in the private part, while those coming from disadvantaged background attend the municipal section. Recently, the Budapest Metropolitan City Court of Appeals upheld the first instance judgment awarding damages for Roma families because their children were taught separately in a primary school. The damages must be paid by the municipalities running the school.[159]

---

[154] The publication goes out from the data of census of inhabitants, houses, and apartments in the year 1970, 1980, 1991 and 2001. The publication is published on website of the Demographic Research Centre of the Institute of Informatics and statistics: http://www.infostat.sk/vdc/sk/index.html (only in Slovak).

[155] CommDH(2006)1, p. 21 (referring to the Report of the Commissioner's visit to the Slovak Republic, 14-16 May 2001, CommDH(2001)5).

[156] Data provided by the Ministry of Education and Science: statistics on number of students at mainstream schools according to their ethnicity in 2004/2005, http://www.izm.gov.lv/default.aspx?tabID=7&lang=1&id=1268.

[157] Central Statistical Bureau of Latvia, Demographic Year Book of Latvia, 2004, page 44.

[158] The Centre for Educational Initiatives (2005), *Romani Identity at a Multicultural School*, http://www.iic.lv/petijums1/pdf

[159] On 7 October 2004, in a major test case, the Budapest Metropolitan City Court of Appeals (F_városi Ítél_tábla) upheld the first instance court decision, dated 1 June 2004, by which the Borsod-Abaúj-Zemplén County Court ordered the primary school in Tiszatarján and the local governments of Tiszatarján and Hej_kürt respectively to pay damages in the total amount of 3 650 000 Hungarian forints (approximately 14600 euro), with accrued interest, to nine families whose children have been unlawfully kept in a segregated class and taught based on a special (inferior) curriculum from 1994 to 1999, in the absence of any prior certification declaring them mentally deficient and unable to attend regular classes. All of the children affected,

The practice of creating special 'Roma classes' exists (or existed) in other countries, such as in **Latvia**, **Lithuania**, **Denmark** and **Sweden**. Even though such practices are, in certain cases, aimed at addressing the special educational needs of Roma/Gypsy children, they raise serious concern as they risk hampering the effective integration of Roma children in the society. In **Sweden**, some municipalities have established specific classes for Roma/Gypsy children. Even when that kind of initiatives have been undertaken to provide additional support for the pupils concerned, there is a great risk that classes devoted to one national minority as such might place these children at a disadvantage.[160] There is, in other words, a risk of being marginalised in the school setting. In **Latvia** and **Lithuania** as well, separate Roma/Gypsy classes have been established in mainstream schools. Besides, in **Latvia**, some towns have introduced the system of house visits and individual approach of teachers to the education of Roma/Gypsy children. These may be in itself good measures but they also raise issue of integration of Roma/Gypsy children into the society.

In **Denmark**, the municipality of Elsinore (*Helsingør Kommune*), where there are a considerable number of Roma/Gypsies (approximately 200 Roma/Gypsy families reside there), has established special so-called Roma-classes to deal with the highly unauthorized absence of pupils with a Roma background from classes. These pupils do not have any general learning difficulties. However, in a guiding statement from the Ministry of Education to the Supervisory Council (Tilsynet med kommuner) this initiative was assessed not to be in accordance with the Act on Public Schools. The Supervisory Council thereafter decided that the municipality of Elsinore had violated the Act on Public Schools by establishing special classes for pupils with a high absence rate. A memorandum of the Ministry of Education on this initiative concludes that the establishment of classes based solely on e.g. ethnicity, gender or religion is a violation of the basic principles of equal treatment.

Absenteeism, dropout and high failure rates

Absenteeism, dropout and high failure rates in schools are widespread problems among Roma/Gypsies, Sintis and Travellers communities across Europe. Resolution 89/C 153/02 on School Provision for Gypsy and Traveller Children,[161] adopted in 1989 by the Council of Ministers of Education, indicates that, in States which were member of the European Union at that time, only 30 to 40 % of Roma or Traveller children attended school with any regularity, that half of them had never been to school, that a very small percentage attended secondary school, and that the illiteracy rate among adults was frequently over 50% and in some places 80 % or more. Despite the initiatives taken by some countries, the situation in this regard remains extremely preoccupying today, in both old and new EU countries. In **Lithuania**, according to the Programme on the Integration of Roma in the Lithuanian society for 2000 – 2004, only some 25 % of Roma children attend schools. In **Poland**, about 30% of the population of Roma children do not fulfil the school obligation at all.[162] In the **Czech Republic**, the education of Roma children often stops at the lowest level. In many other countries, such as the **Czech Republic**, **Belgium**, **France**, **Finland**,[163] **Italy** or **Spain**, a disproportionate number of Roma, Sintis and Travellers do not finish their schooling. This may be attributed to a variety of factors, among which primarily : the low social and economic status of these communities and the low level of instruction of the parents ; an insufficient knowledge of the national language (**Slovak Republic**, **Finland**, **Poland**, or, in Western European countries, in the case of Roma who have recently emigrated); insufficient pre-school education (**Slovak Republic**, **Poland**, **Belgium**) ; cultural factors, in particular the lack of positive model oriented towards education ; problems arising from the upheaval in cultural identity (**Finland**), insufficient inter-cultural skills of teachers (**Finland**), These

---

most of them Roma, came from families with low income and social standing in the community and have accordingly had difficulties in asserting their legal rights and interests in the education context. See http://www.errc.org

[160] ACFC/INF/OP/I(2003)006, § 53. See also CRI(2003)7, § 37.

[161] O.J. No. C 153/3, 21st June 1989.

[162] Programme for the Roma community in Poland, II. Description of the problems, 1. Education; available at the webpage http://www.mswia.gov.pl./spr_oby_mn_prog_romowie_txt.html (16.09.04)

[163] Finnish National Board of Education, Survey on the Status of Roma Children's Basic Education, School Year 2001-2002, English summary available at http://www.oph.fi/SubPage.asp?path=1,438,3449,29564.

factors point at the structural and self-perpetuating, rather than transitional character of the disadvantage of the Roma/Gypsy children in education, and therefore to the need to affirmatively act in order to break the cycle.

Ensuring the compatibility of the right to education with the nomadic or semi-nomadic lifestyle

Finally, as noted in previous reports of the Network (Concl. 2004, pp. 87-88), in several States, including **Belgium**, **France**, **Ireland**, and the **United Kingdom**, part of the Roma/Gypsies, Sintis or Travellers retain a nomadic or semi-nomadic lifestyle. For children belonging to these communities, the absence of an educational system adapted to their way of life constitutes another obstacle to their access to education. Some countries have taken measures to address this problem, but their success in doing so has been variable. In **Ireland**, the policy of the Department of Education and Science is that children be fully integrated into mainstream classes whenever possible. This is in accordance with the position of the Advisory Committee of the Framework Convention for the Protection of National Minorities which recalled, in an opinion on Ireland, that "Traveller children share the need for contact with children from different backgrounds and…the placing of Traveller children in separate educational facilities only on the basis of their Traveller background gives rise to deep concern form the point of view of Article 10 of the Framework Convention."[164] However there are, in some areas, Education Centres which admit only members of the Traveller Community. The Government has expressed its desire in the near future to integrate such centres into the general system of education, and a number of measures have been adopted to that effect: Rule 10 of the *Rules for National Schools*[165] states that "No child may be refused admission to a national school on account of the social position of its parents, nor may any pupil be kept apart from the other pupils on the grounds of social distinction"; in order to ensure that Traveller children will be able to be integrated into mainstream education, funding is made available by the Department of Education and Science for early childhood care and education for Traveller children aged 3-5. Visiting teachers for Travellers are charged with the task of encouraging enrolment of children of Travellers into both primary and post-primary education. So far however, the aim of ensuring that all Traveller children receive a full primary and secondary education has had mixed results. Virtually all children complete primary school, but at secondary level the rate of participation by Traveller children in education decreases significantly so that very few complete this level and even fewer go on to third-level education.[166] Moreover, the current system in place for encouraging Traveller children to participate in the education system does not cater adequately to the needs of Traveller children who are members of itinerant or semi-itinerant communities.

The Committee of Ministers of the Council of Europe has recommended to the Member States of the Organisation that 'Educational policies for Roma/Gypsy children should be accompanied by adequate resources and the flexible structures necessary to meet the diversity of the Roma/Gypsy population in Europe and which take into account the existence of Roma/Gypsy groups which lead an itinerant or semi-itinerant lifestyle. In this respect, it might be envisaged having recourse to distance education, based on new communication technologies.'[167] Other States offer examples of good practices in the field.

In **Greece,** in order to facilitate access to educational establishments for pupils who travel with their families, the authorities introduced the "school transit pass", which facilitates enrolment of the pupils at any time of the year, as well as the follow-up of the notes and files concerning them. In **France,** the

[164] Advisory Committee on the Framework Convention for the Protection of national Minorities, *Opinion on Ireland,* 2004, p17

[165] http://www.education.ie/servlet/blobservlet/rules_for_national_schools_1_7.pdf, Rules for National Schools Under the Department of Education, 22/11/2004

[166] Advisory Committee on the Framework Convention for the Protection of national Minorities, *Opinion on Ireland,* 2004,, p16

[167] Recommendation No R (2000) 4 of the Committee of Ministers to member states on the education of Roma/Gypsy children in Europe (adopted by the Committee of Ministers on 3 February 2000 at the 696th meeting of the Ministers' Deputies). The passage cited is the first of the Guiding principles of an education policy for Roma/Gypsy children in Europe appended to the recommendation.

situation varies from one region to another, yet certain school inspectorates have taken measures in conjunction with the associations, the CNED and the prefectures to promote access to education for children leading a nomadic or semi-nomadic lifestyle. This is primarily the case in regions that accommodate these population groups during the winter period, though not only so. In those regions, the schools teach those children during their semi-sedentary period, after which the CNED takes over. The schools often have a special teacher who oversees the proper functioning of that partnership. At certain schools, a special school report for educational guidance and supervision is distributed to those children. On the other hand, the associations have also instituted, in partnership with the school inspectorates, "school buses" that enable them to follow the nomads and semi-nomads and thus to monitor their children's education. In the **United Kingdom**, some local initiatives have been taken to favour the access of these children to education. These initiatives are primarily conducted by local authorities and prompted by guidance and/or financial support from central government. In particular, the Gypsy/Traveller Achievement Project has provided funding for efforts to engage parents, to interview pupils and to modify curricula or produce alternative curriculum materials. Most local authorities now have a Traveller Education Service as the focus for their efforts. There have been other initiatives such as one school initiating a flexible programme of out-of-school sessions covering literacy, maths, crafts and outdoor activities, an authority producing packs to facilitate transfer from primary to secondary schools and another school arranging a transfer to a college for courses such as blacksmithing where a pupil became disaffected with the curriculum. Material for teaching, particularly on literacy, has been produced in association with travellers and funding for this has come from charitable foundations. The government Office of Standards in Education has been generally very critical of the achievements in relation to education for travellers but it has been positive about those kinds of initiatives.

5. The right to education for children with a disability

According to para. 1 of Article 15 of the Revised European Social Charter : 'With a view to ensuring to persons with disabilities, irrespective of age and the nature and origin of their disabilities, the effective exercise of the right to independence, social integration and participation in the life of the community, the Parties undertake, in particular (...) to take the necessary measures to provide persons with disabilities with guidance, education and vocational training in the framework of general schemes wherever possible or, where this is not possible, through specialised bodies, public or private'. The European Committee of Social Rights views this provision as 'both reflecting and advancing a profound shift of values in all European countries over the past decade away from treating them as objects of pity and towards respecting them as equal citizens – an approach that the Council of Europe contributed to promote, with the adoption by the Committee of Ministers of Recommendation (92) 6 of 1992 on a coherent policy for people with disabilities. The underlying vision of Article 15 is one of equal citizenship for persons with disabilities and, fittingly, the primary rights are those of 'independence, social integration and participation in the life of the community'. Securing a right to education for children and others with disabilities plays an obviously important role in advancing these citizenship rights. This explains why education is now specifically mentioned in the revised Article 15 and why such an emphasis is placed on achieving that education 'in the framework of general schemes, wherever possible'' (decision on the merits of the Collective Complaint n°13/2002, *Autisme-Europe v. France*, § 48).

The European Committee on Social Rights considers under Article 15 par. 1 of the revised European Social Charter that[168] :

[168] Concl. 2003-1, p. 159 (France – Article 15 para. 1) ; Concl. 2003-1, p. 292 (Italy – Article 15 para. 1) ; Concl. 2003-2, p. 498 (Slovenia – Article 15 para. 1) ; Concl. 2003-2, p. 608 (Sweden – Article 15 para. 1). The Committee defers its conclusion concerning the compliance of France with Article 15 para. 1 of the Revised Charter, as it excepts France to comment on the fact that the number of children with disabilities is special schools is significantly larger than the number of children educated in mainstream educational institutions. The conclusion is also deferred with respect to Sweden. As to Italy and Slovenia, the Committee concludes that these States are not in conformity with Article 15 para. 1 of the Revised Charter as there is no anti-discrimination legislation in relation to disability in the field of education.

> In so far as Article 15 par. 1 of the Revised Charter explicitly mentions 'education', (…) the existence of non-discrimination legislation [is necessary] as an important tool for the advancement of the inclusion of children with disabilities into general or mainstream educational schemes. Such legislation should, as a minimum, require a compelling justification for special or segregated educational systems and confer an effective remedy on those who are found to have been unlawfully excluded or segregated or otherwise denied an effective right to education.

As the Network has emphasized in previous reports (*Report on the situation of fundamental rights in the Union in 2003*, pp. 114-115), the European Community has the competence to adopt measures prohibiting discrimination in education, under Article 13 EC. Article 26 of the Charter of Fundamental Rights, read in conformity with the requirements of Article 15 par. 1 of the Revised European Social Charter, should be seen as an encouragement to the Community institutions to exercise this competence, if this adds value to the initiatives which Member States may take at the national level to comply with this requirement[169]. If and when the Community will propose a directive extending the scope of protection from discrimination on grounds of disability beyond employment and occupation as provided by Council Directive 2000/78/EC, it will have to be inquired into the conditions under which such legislation requires non-discrimination in the field of education, including, but by no means limited to, the prohibition of segregated education unless justified by compelling reasons[170].

Further efforts are required for the integration into mainstream education of children with disabilities, including learning disabilities, and the adoption of supplementary legislation at the level of the Union would constitute an important contribution to the promotion of such efforts. In previous reports (Concl. 2005, pp. 66-67), the Network has noted that access to education for children with disabilities constitutes a serious difficulty throughout the Union. The Ombudsman in **Cyprus** has confirmed the continued relevant of the observation made by the Committee on the Rights of the Child when it examined the State periodical report on the implementation of the Convention on the Rights of the Child at its 33rd session on 6 June 2003, and expressed its concern about the "broad scope of special schools which are intended for children with physical, mental or emotional needs, which *inter alia* is not conclusive to their integration into mainstream schools". The Ombudsman in **Poland** has noted the need to limit the number of special education centres for children with disabilities, whose cost is moreover prohibitive, in favour of establishing specialised rehabilitation and revalidation centres providing professional assistance to those children (General Approach to the Minister of National Education and Sport of 4 May 2004, No. RPO/470256/04/XI). In **Sweden**, a more recent study has highlighted that only 10 to 15 per cent of the students with disability (hearing impairment) continue their studies at university level.[171] The Network notes with interest that in **Latvia**, *Apeirons*, an organisation of people with disabilities and their friends, in co-operation with *Vaivari* elementary school, Liepaja City Council and the Regional Council of Madona launched a project, co-financed by the European Social Fund, *Creating a supportive environment for juveniles with special needs for integration in the education system*, which aims to promote a social, psychological, informative and physical environment for integration of children with special needs into the educational system,

[169] The principles of subsidiarity and proportionality do not constitute an obstacle to the adoption of such legislation, as demonstrated by the adoption, on 29 June 2000, of Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180 of 19.7.2000, p. 22. See also the reasoning of the Commission, as presented in the Proposal for a Council Directive implementing the principle of equal treatment between women and men in access to goods and services and provision of goods and services, COM(2003) 657 final, of 5.11.2003, pp. 10.12.

[170] Indeed, including children with disabilities in mainstream education, although necessary, may not be sufficient, as an equal right to education requires more than imposing similar standards to all, even those with different needs. The European Committee of Social Rights requires that the normal curriculum is adjusted to take account of disability; that individualized educational plans are crafted for students with disabilities; that resources follow the child, by provision of support staff and other technical assistance; that testing or examining modalities are adjusted to take into account the disability, and if taken under non-standard conditions, that this is not revealed to third parties; that the qualifications recognized are the same for all children and rated the same after the child leaves the educational system. Moreover, where special education is provided where this cannot be avoided, the Committee seeks to ensure that it leads to qualifications which are recognized and may give access to vocational training or employment on the open labour market.

[171] Hörselskadades riksförbund, Sanning och konsekvens, om hörselskadades situation i Sverige, Årsrapport 2005, p. 65.

reducing the risk of their being socially excluded. In **Poland**, the Educational Strategy 2007-2013 adopted by the government on 2 August 2005 seeks to raise the level of education of Polish society and to adapt the educational model to the changing social conditions. The Network welcomes that, as part of the strategy, the Government proposed *inter alia* to develop a system of early support for children who have additional schooling needs, to remove barriers in access to education for individuals with special educational needs, to increase access to education, and to increase the role of pre-school education.

6. Right to education for children whose parents are illegally residing on the territory of a Member State

The Network has also emphasized that the right to education should be recognized to all children, without distinction based on the administrative situation of their parents. The UN Committee for the Elimination of Racial Discrimination encourages the States parties to the International Convention on the Elimination of All Forms of Racial Discrimination – this includes all the EU Member States – to ensure that public educational institutions are open to non-citizens and children of undocumented immigrants residing in the territory of a State party (General Recommendation n°30 on discrimination against non-citizens, adopted at the 65th session of the Committee, HRI/GEN/1/Rev.7/Add.1, 4 May 2005).

The Network has identified certain promising developments in this regard. In **Poland**, the amended Act on the Educational System extended the right to free schooling to the children of individuals applying for refugee status : according to Article 94A par. 2 p. 10[172], since 1 October 2005 children of aliens applying for refugee status are granted the right to education on similar conditions as Polish citizens. In **Cyprus**, the Ministry of Education reaffirmed that the right to education is recognised by the Constitution and covers not only citizens of the Republic but also any other citizen irrespective of whether he/she resides in the Republic illegally or not. In **Greece,** following complaints received from underage foreign nationals, the Office of the Ombudsman (Section Children's Rights) asked the relevant Special Secretary of the Ministry of National Education to remind the heads of the country's educational establishments that all children have the right to primary and secondary education, irrespective of their nationality or legal situation (regular or not) of their residence in the country. The Network welcomes this initiative, which guarantees that the law ensuring access for all underage foreign nationals, including refugees, asylum-seekers and children in an irregular situation[173] to educational establishments can henceforth be applied without exception, in accordance with the requirements of the right to education. In earlier reports (Concl. 2004, p. 66), the Network noted that in **Portugal**, Government's Decree Law 67/2004 (Decreto-lei nº 67/2004, de 25 de Março), created a national record for minors, which are illegally living in Portugal, in order to ensure them access to the same rights that law attributes to the minors in regular situation on the domestic territory, in particular health and education facilities.

The situation in other Member States is less promising. In its Concluding Observations relating to **Sweden**, the Committee on the Rights of the Child expressed its concern about the fact "that children without residence permit, in particular children 'in hiding', do not have access to education" and that "there are considerable variations of results among various regions',[174] and recommended that this be remedied. The Swedish Government decided in September 2005 during the negotiations for the 2006 budget to reserve funds to cover the free education of children 'in hiding', *i.e.* asylum applicants whose requests for protection in Sweden have been rejected. However, the education of these children poses certain practical problems since it is difficult for a child to remain in hiding and to attend a school at the same time, unless the school board decides not to cooperate with the public authorities. In order to resolve these problems the Minister for Immigration referred recently to her plans to

[172]Ustawa o zmianie ustawy o cudzoziemcach oraz ustawy o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej [Act on the amendment of the Act on aliens and the Act on granting protection to aliens within the territory of the Republic of Poland]
[173] See Article 72 of Act 3386/2005.
[174] UN Doc. CRC/C/15/Add.248, 28 January 2005, p. 7.

initiate the setting up of an inquiry with the explicit task to propose a new bill on this particular subject matter.[175]

The Network reiterates its view that children should not be prohibited from attending school because of the illegal situation of their parents and out of fear that this situation will be denounced to the authorities. The Member States should exchange the best practices in this field which provide a solution to such situations, which comply with Article 14 of the Charter of Fundamental Rights and Article 13 of the International Covenant on Economic, Social and Cultural Rights.

7. The affordability of education

A number of Member States have adopted measures in order to improve the accessibility of education, in particular its affordability for children whose parents have low revenues. As emphasized by the UN Committee on Economic, Social and Cultural Rights, 'educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party'. The requirement of accessibility includes financial accessibility : 'education has to be affordable to all'.[176] In **Denmark**, in December 2004 Act (2004:1457) amending the Act on Public Schools (Free place subsidy on economical, social or educational reasons)[177] was adopted by Parliament. This act introduces an obligation of reduced payment for families with children in the so-called SFOs (a care institution linked to public schools) similar to families with children in day care institutions in all municipalities, which have an income below 387.400 DKK or where it may be necessary due to social or educational purposes. Previously families with low incomes experienced in some municipalities a high increase of fees when their children went from kindergarten to a SFO. In the **Netherlands**, the *Tweede Kamer* [House of Representatives] has adopted a legislative proposal abolishing tuition fees for 16 and 17 year-olds taking part in secondary and professional education from the school year 2005-2006 onwards (*Kamerstukken* 30199, *Handelingen* TK, 2005-2006, No. 21, pp. 1328-1329). The bill is now under consideration in the *Eerste Kamer* [Senate]. The Network notes that the abolishment of tuition fees is in line with Article 13 ICESCR, which provides for 'the progressive introduction of free education' with regard to both secondary and higher education. In a letter to the Dutch Member of the Network, of 24 November 2005, the responsible Ministry of Education, Culture and Science added that the proposal is also in line with Article 14 of the EU Charter of Fundamental Rights. The Government interprets the notion of "free education" as requiring that there are no financial obstacles to participation in secondary and higher education. Present rules applied that principle by offering financial support to indigent parents; the new rules set the next step by abolishing the tuition fees altogether. However, financial support will continue to be available for additional costs, for instance for school books.

On the other hand, the Network notes that in **Poland**, the Educational Strategy for the years 2007-2013 includes a recommendation to charge fees for all higher education, combined with a grant system for students from low-income families and a student loan system. The Network underlines in this regard that, when States have committed themselves to progressively realizing the right to education, 'any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources'.[178]

[175] *D.Nilsson*, Gömda flyktingbarn får rätt att gå i skolan, SvD 17 September 2005, p. 12.
[176] General comment No. 13: The right to education (art. 13) (1999), *Compilation of the general comments or general recommendations adopted by human rights treaties bodies*, HRI/GEN/1/Rev.7, 12 May 2004, para. 6.
[177] Lov (2004:1457) om ændring af lov om folkeskolen. (Fripladstilskud i skolefritidsordninger af økonomiske, sociale eller pædagogiske grunde).
[178] UN Committee on Economic, Social and Cultural Rights, General comment No. 3: The nature of States parties' obligations (art. 2, para. 1, of the Covenant) (1990), *Compilation of the general comments or general recommendations adopted by human rights treaties bodies*, HRI/GEN/1/Rev.7, 12 May 2004, para. 9.

VI. Right of the child to acquire a nationality

Article 7 (1) of the Convention on the Rights of the Child provides that the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents. In recent Concluding Observations concerning **Slovenia**, the Human Rights Committee expressed its concern at the fact that some children are registered at birth without a nationality, recommending that the State party ensure the right of every child to acquire a nationality. However, in a number of Member States of the Union, the conditions of access to citizenship have been a source of concern, in particular because of their potentially discriminatory nature. Two specific problems may be highlighted.

1. Access to citizenship and the prohibition of discrimination on the grounds of ethnic origin : the russophones in Estonia and Latvia

In **Latvia**, non-citizens under the 1995 *Law on Status of citizens of the former USSR who are not citizens of Latvia or any other country* are neither citizens, nor foreigners, nor stateless persons. A great proportion of the large Russian-speaking population of the country falls within this category,[179] unknown in public international law. The Network previously noted (Concl. 2004, pp. 94-95) that, in its Comments to the Concluding observations of the Human Rights Committee, the Government of Latvia acknowledges that "currently, a large proportion of the population is treated as a specific and distinct category of persons with long-standing and effective ties to Latvia. The Government regards them as potential citizens" (CCPR/CO/79/LVA/Add.1, 16 November 2004). The citizenship issue also is one of the main concerns in the Report by the Council of Europe Commissioner for Human Rights (CommDH(2004)3, 12 February 2004), which states, for instance, that "The vast majority of non-citizens either are Latvian-born or have lived in Latvia for most of their lives, and they must not be held responsible for past aberrations, of which they are themselves victims. For that reason I believe the state should do even more to bring those populations into its fold, as a forthright demonstration to them of their place in Latvian society. All who love the Latvia where they were born, where they have lived most of their lives, where their children have been born and where their family dead are buried, all who have a sense of belonging to the country they regard as their homeland, must be allowed full membership of the national community" (paragraph 35). A specific problem in Latvia has its source in the *Citizenship Law*, which provides that children born after 21 August 1991 of Latvian non-citizen parents have a right to be registered as citizens without having to be naturalized. The law does not foresee automatic grant of citizenship to them. Initially they have to be registered as Latvian non-citizens, and afterwards the parents or adopters have a right to submit an application.[180] If persons who have the right to submit an application regarding the recognition of a child as a citizen of Latvia have not done so, then a minor on reaching the age of 15 has the right to apply for the Latvian citizenship. Although the number of applications is growing, particularly after information campaigns, the number of eligible non-citizen children still remains high at more than 15,000, while children with non-citizen status continue to be born.[181]

The same applies to non-citizens in **Estonia**, where the 162 890 'non-citizens' represented 12 % of the total population, on 31 October 2003. Out of a total 1 356 045 inhabitants living in Estonia on that date, another 80,6 % (1 092 633 persons) are Estonian citizens, 6,5 % (88 202 persons) are Russian citizens, and 0,9 % (12 320 persons) have the nationality from another country. Non-citizens in Estonia cannot take part in parliamentary elections, although they can vote and run in elections for local municipalities. In its concluding observations published on April 15, 2003 following the second periodic report submitted by Estonia, the UN Human Rights Committee expressed its concern at the high number of stateless persons in Estonia and the comparatively low number of naturalizations, and

[179] In 2003, there were 494 319 non-citizens residing among a population of 2 324 183.
[180] In 2005, the government started discussions on *Citizenship Law* amendments, providing, *inter alia*, the possibility to register the children of non-citizen parents as Latvian citizens, right after birth, if the parents clearly express such a wish.
[181] Latvian Centre for Human Rights and Ethnic Studies. *Human Rights in Latvia in 2004*, p. 21.

it recommended that Estonia reduce the number of stateless persons, with priority for children, *inter alia* by encouraging their parents to apply for Estonian citizenship on their behalf and by promotion campaigns in schools. The Network shares this view. Although including a language test requirement as a naturalization condition cannot be criticized as such, provided that such a test is organized in conditions which are transparent and non-discriminatory, the Network took the view that Estonia should send a more clear signal to its non-citizens that citizenship is both worth acquiring and acquirable. Information campaigns for the non-citizens to encourage them getting citizenship are desirable. Estonia should also make further efforts in making the study of Estonian language accessible in all regions of the country. In this respect, the Network encouraged the recent campaign that the state gives back the money spent for a language course if the person has succeeded in the citizenship exam.

These conclusions appear to be shared by the Council of Europe Commissioner for Human Rights, when he dealt with this issue in his report on **Estonia** published on 12 February 2004 (CommDH(2004)5). Mr Gil-Robles observed that although various measures have been taken in recent years to improve the access to Estonian citizenship, of the total population of approximately 1.370.000 persons, 80 percent have Estonian citizenship, 7 percent have a citizenship of another country (mainly Russian), and 12 percent still are "persons whose citizenship is undetermined" (they do not have citizenship of any state). The lack of citizenship deprives these persons of a number of rights, and carries an increased risk of social exclusion. The slow pace of naturalisation may be attributed to two factors: it may be explained, first, by the difficulties that some persons continue to experience in passing the examinations required for the acquisition of Estonian citizenship and second, by the relatively limited motivation of some of the non-citizens to seek naturalisation. In order to avoid a perpetuation of the status of non-citizens, all newborn children of non-citizen parents should acquire a nationality after birth. This possibility is guaranteed by the law on the basis of an application by the parents. However, many parents do not apply for Estonian citizenship for their children or, apparently, for any other citizenship, and leave it up to the child to decide whether to apply for citizenship through naturalisation when he or she turns 15. Mr Gil-Robles recalled in his report that the right to acquire a nationality entails a positive obligation for the State to ensure an effective exercise of this right. He emphasized that a state should not accept a situation where newborn children are rendered stateless on the basis of a mere option available for the parents to apply for another citizenship. In order to ensure the effective enjoyment of the right of the child to acquire a nationality from birth, Mr Gil-Robles proposed during his visit that the interpretation of the Law on Citizenship be modified so that the registration of a new-born child of non-citizens would be automatically considered as an application for Estonian citizenship, unless the parents of the child declare in writing that they have applied for citizenship of another state, under which laws the child is entitled to acquire citizenship of that country. Mr Gil-Robles argued in his report that such a solution would ensure that every child would acquire citizenship at birth, instead of subjecting the child to statelessness at least until she or he turns 15 and becomes eligible for a naturalisation on his or her own right. This interpretation would ensure that a child would acquire one citizenship or another from birth, without the effect of imposing Estonian citizenship on those who apply for another citizenship. Mr Gil-Robles noted in his report of 12 February 2004 that many of his interlocutors in Estonia noted that the level of language proficiency required for acquiring Estonian citizenship continued to be too high for some persons, particularly for the elderly, and for many those who live in regions predominantly inhabited by Russian-speakers. It was estimated that 20 percent of candidates do not pass the language exam. The Commissioner for Human Rights suggested that successful participation in a language course would be regarded as sufficient proof of the knowledge of the language without having to pass the exam.

In this context, the Network noted with satisfaction that **Estonia**'s entry into the European Union has made acquiring the Estonian citizenship more attractive for the part of the Russian-speaking minority that had/has not acquired the citizenship yet. Indeed, the increase of non-citizens applying for citizenship was very noticeable in 2004: during the first six months of 2003 2229 persons applied for citizenship while during the first six months of 2004 the number of applications was already 3648; altogether, 6500 stateless individuals were naturalized in Estonia in 2004. As of 28 December 2004,

there were 153 500 stateless persons ("non-citizens") in Estonia, making up 11 % of the population, a percentage that has diminished considerably since the 1990s. The number of stateless persons as compared to the 2000 population census data has decreased by 18 000 persons. As of 1 May 2004, 4080 under 15-year-old children of stateless persons who were born in Estonia had received citizenship by way of simplified naturalisation.

The Network commended the Estonian authorities for the steps they have taken in order to make the acquisition of citizenship easier for school pupils, especially by ensuring that the Examination and Qualification Centre improves the conditions for pupils to pass the citizenship exam. It also welcomed the approval by the Government on 6 May 2004 of the action plans of sub-programmes of the integration programme for 2004-2007, foreseeing a gradual increase of allocations to cultural societies of national minorities with the aim to create possibilities for stable base funding of umbrella organisations of national minorities from the state budget.

2. Access to citizenship of former Yugoslav citizens living in Slovenia

A second question on which previous reports by the Network have shed light is that of the 'erased' in Slovenia (Concl. 2004, pp. 94-95). Non-governmental organizations (see Amnesty International, Europe and Central Asia, Concerns in Europe and Central Asia, July – December 2003, AI Index: EUR 01/001/2004) and human rights expert bodies (see Committee on the Rights of the Child, 35th session, Consideration of reports submitted by State parties under Article 44 of the Convention, Concluding observations of the Committee on the Rights of the Child: Slovenia), CRC/C/15/Add.230) have expressed their concern at the status of thousands of former Yugoslav citizens who were removed from the Slovenian population registry in 1992. These individuals were citizens of other former Yugoslav republics who had been living in **Slovenia** but have not filed an application for Slovenian citizenship, after Slovenia became independent. The Slovenian Constitutional Court had recognized that the removal of these persons from the Slovenian population registry constituted a violation of the principle of equality and, in those cases where the individuals concerned had to leave the Slovenian territory, it gave rise to a violation of their rights to a family life and to freedom of movement. As noted in particular by Amnesty International, the removal from population registries may also gave rise to violations of the social and economic rights; in some cases the individuals concerned lost their employment and pension rights. The Slovenian Constitutional Court had established in April 2003 that previous provisions to solve this issue were inadequate to restore the rights of former Yugoslav citizens who were unlawfully removed from Slovenian population registries. The Slovenian Parliament and Executive should adopt all the necessary measures to implement this judgment of the Constitutional Court, and address the situation of the "erased" persons adequately.

VII. Rights of migrant children

1. Asylum seekers

As further confirmed by Article 18 of the Charter of Fundamental Rights, if follows from Article 63 EC that the European Community considers itself bound bound by the rules of both the Convention relating to the Status of Refugees of 28 July 1951 and the New York Protocol relating to the Status of Refugees of 31 January 1967. It follows that the instruments adopted by the Union in the field of asylum should be read in conformity with the Geneva Convention of 28 July 1951 as interpreted by the United Nations High Commissioner for Refugees. The Network emphasizes in this regard that, under Article 10(1) of 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,[182]

[182] OJ L 304 of 30.9.2004, p. 12.

a group shall be considered to form a particular social group where in particular:

— members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and he or she has been recognised as a refugee have ceased to exist, to return to the country of former habitual residence.

— that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society; depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States: Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article.

Article 10(2) of the Directive adds that 'When assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristicpersecution'.

In line with the recommendations adopted by the UNHCR, these provisions should imply that the Member States consider that children may form a 'social group' under the Geneva Convention of 28 July 1951, and that forms of persecution targeted especially at children therefore be taken into account in order to recognize the status of refugee. Such forms of persecution include forcible under-age recruitment into armed forces, female genital mutilation, forced marriage of children, sexual exploitation of children, child abuse or child pornography, or child trafficking for the purposes of economic or sexual exploitation.

A larger set of observations relate to the procedure for the determination of the claim to asylum and the conditions of reception of asylum-seekers. Several provisions of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers in the Member States[183] are devoted to the situation of minors, whose specific situation has been taken into account. Article 10 provides for their schooling and education, which may be provided in accommodation centres. Articles 18 and 19, which both appear in the chapter of the directive on 'persons with special needs', state that the best interests of the child shall be a primary consideration for Member States when implementing the provisions of the Directive that involve minors and that they shall ensure access to rehabilitation services for minors who have been victims of any form of abuse, neglect, exploitation, torture or cruel, inhuman and degrading treatment, or who have suffered from armed conflicts, and ensure that appropriate mental health care is developed and qualified counselling is provided when needed (Art. 18); and that unaccompanied minors will be adequately represented and placed, possibly in accommodation centres, taking into account their specific needs (Art. 19). A number of problems remain, however. The Network would highlight the following difficulties in particular.

The right to social and medical assistance

Article 17 of the Revised European Social Charter provides that children and young persons are entitled to appropriate social, legal and economic protection. Observing that in **France,** unlawfully resident minors are only entitled to medical assistance in case of life-threatening situations and children of illegal immigrants are only admitted to the medical assistance scheme after a certain period of residence on the territory, the European Committee of Social Rights considered in the case of *FIDH v. France* (collective complaint n° 14/2003) that the situation in France was not in conformity with

[183] OJ L 31 of 6.2.2003, p. 18. Unlike Denmark and Ireland, the United Kingdom marked its intention to participate in this instrument.

Article 17 of the Charter. This development ensures that Article 17 of the Revised European Social is interpreted in accordance with the Convention on the Rights of the Child, from which it is directly inspired (see for instance, Committee on the Rights of the Child, 35th session, Concluding observations of the Committee on the Rights of the Child: Slovenia (CRC/C/15/Add.230), where the Committee encourages **Slovenia** to take further measures to ensure that asylum seeking and refugee children are granted equal access to services, including healthcare).

The Network has noted certain positive developments in this area (Concl. 2004, p. 124). **Portuga**l has created a registry for illegal immigrant children, in order to guarantee them access to health assistance in the same conditions as other children. In **Spain,** the public authorities grant health care to illegal foreign nationals, foreign pregnant women and, generally, to any foreign national in emergency situations. Cooperation efforts between the Government, the Autonomous Communities and the NGOs are also designed to take care of any person in difficulty (United Nations Committee of Economic, Social and Cultural Rights. *Summary Record of the 13th meeting: Spain 24/05/2004. E/C 12/2004/SR 13*). In **Sweden**, the Government decided on 25 November 2004 to increase the financial compensation to the county councils for their health care expenses in connection with the treatment of asylum-seekers, a decision which will come into force on 1 January 2005. There exist ample opportunities for exchanges of best practices between the Member States in this field, in order to improve compliance with the requirements of the Convention on the Rights of the Child.

Detention of asylum-seekers, children in particular

Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers in the Member States appears to confirm the possibility of detaining asylum-seeking minors at other than specialized centres subsists. In its General Comment n°6 (2005): Treatment of Unaccompanied and Separated Children outside their country of origin (CRC/GC/2005/6, 1 September 2005), the Committee on the Rights of the Child emphasized however that 'Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof. Where detention is exceptionally justified for other reasons, it shall be conducted in accordance with Article 37 (b) of the Convention [on the rights of the child] that requires detention to conform to the law of the relevant country and only to be used as a measure of last resort and for the shortest appropriate period of time' (§ 61). In conformity with Article 7(3) of Directive 2003/9/EC, asylum-seekers, including children seeking asylum, should only be detained, for the shortest possible period, where special circumstances exist, for instance for reasons of public order or pending the determination of the nationality of the asylum-seeker. A detention cannot be justified by the sole reason that a person is seeking asylum. Article 31(1) of the 1951 Geneva Convention on the status of refugees stipulates :

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

Even where it would be considered justifiable to detain children asylum-seekers, certain specific requirements should be recalled. The Network has already expressed the view that children should only be detained in exceptional circumstances in centres set up for adults facing deportation, where this is required by the need to preserve the unity of the family (Conclusions 2005, pp. 23-24).[184] Moreover, this situation – where a child is detained with his parent(s) – constitutes the only situation

[184] Indeed, Guideline 10, para. 4, of the Twenty Guidelines on Forced Return adopted by the Committee of Ministers of the Council of Europe (CM(2005)40 final and Addendum final and CM/Del/Dec(2005)924/10.1) states that, where third-country nationals are detained in specialized centres pending their removal, the principle of the unity of the family should be respected and families should therefore be accommodated accordingly.

where minors may be detained with adults. Nevertheless, where the deprivation of liberty of children in such circumstances is unavoidable, the facilities should be equipped in order to meet the educational and recreational needs of children. The Network cannot but be impressed by the report issued by the *Inspectie voor Sanctietoepassing* [the new inspection service for implementation of sanctions; see below] concerning the detention of juvenile asylum seekers together with their parents in the **Netherlands** (*Ouders met minderjarigen in vreemdelingenbewaring*, August 2005), which highlights that the focus in these detention regimes lies on order and security, which can be detrimental on the mental health of juveniles, especially on those who are forced to stay in the facility for a longer period of time, and emphasizes the need to equip these facilities in order to accommodate the needs of minors. The Network notes that the Government responded by announcing that it will investigate the viability of the inspection's suggestions (*Kamerstukken II,* 2005-2006, 29344, nr. 48).

The fact that in almost all the EU Member States very serious concerns continue to be raised, on a regular basis, about the conditions of detention in centres for the detention of foreigners awaiting to be removed from the national territory, justifies this matter being addressed at the level of the Union. The fact that the Commission has proposed the adoption by the European Parliament and the Council of a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (COM(2005) 391 final, of 1.9.2005), Article 15 of which defines certain minimum safeguards relating to the conditions of the temporary custody of third-country nationals who have been addressed a removal order, is therefore to be welcomed.

However, the Network notes that Article 15 para. 3, while it states that 'Particular attention shall be paid to the situation of vulnerable persons. Member States shall ensure that minors are not kept in temporary custody in common prison accommodation', does not impose an obligation on the Member States to ensure that the educational and recreational needs of children are satisfied and that the facilities for the detention of third-country nationals facing removal are adequately equipped to accommodate those needs, and in particular to respect the right of the child to education.

The need for specific asylum-determination procedures

The specific situation of children should be taken into account in the design of procedures for the determination of claims to asylum by children. In particular, the officers responsible for hearing the child seeking asylum should be trained to that effect, and the child should be heard in a context which takes into account his vulnerable status. Mutatis mutatis, the good practices developed by the Member States in the implementation of the Council Framework Decision of 15 March 2001 (2001/220/JHA) on the standing of victims in criminal proceedings, with respect to vulnerable victims, especially children, could inspire changes in the procedures for the determination of the claim to asylum which take into account the specific position of children.

2. Unaccompanied children seeking asylum

Appointment of a guardian or adviser and legal representative

Article 19 of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers relates to unaccompanied minors and provides, in particular, that 'Member States shall as soon as possible take measures to ensure the necessary representation of unaccompanied minors by legal guardianship or, where necessary, representation by an organisation which is responsible for the care and well-being of minors, or by any other appropriate representation. Regular assessments shall be made by the appropriate authorities'. Article 17 of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, which concerns the guarantees for unaccompanied minors in these procedures, provides that the Member States shall 'as soon as possible take measures to ensure that a representative represents and/or assists the unaccompanied minor with respect to the examination of the application'. The Council of Europe Parliamentary Assembly in its Recommendation 1703 (2005) regarding the protection and assistance for separated children seeking asylum, recommends that the

Committee of Ministers issue a recommendation urging the Member States of the Council of Europe, inter alia, to 'amend their legislation and remove any administrative obstacle so as to ensure that separated children can have a legal guardian and a legal representative appointed as a matter of urgency and not later than two weeks of their presence coming to the knowledge of the authorities' ; and to 'ensure that separated children are heard in the context of the asylum procedure, either directly or through their legal guardian, and that they are questioned in a manner in keeping with their age, maturity and psychological situation'.

These rules or recommendations are derived from Articles 3(1) and 24 of the Convention on the Rights of Child, and from the requirement that the child be provided with legal and other appropriate assistance formulated in Article 37 (d) of the Convention on the Rights of the Child in all the situations where the child is deprived from his liberty. The principles they embody should apply, *mutatis mutandis*, to the procedures leading to the adoption of removal decisions against the unaccompanied child. The Guidelines on forced return adopted by the Committee of Ministers of the Council of Europe, which provide that 'Before deciding to issue a removal order in respect of a separated child, assistance – in particular legal assistance – should be granted with due consideration given to the best interest of the child' (guideline 2, para. 5).

In the implementation of these rules, the Member States should seek inspiration from the "Declaration on Good Practices", adopted under the programme "Separated Children in Europe" ("Save the Children" and UNHCR). The following prescriptions were also put forward by the Committee on the Rights of the Child in its General Comment n° 6 (2005), referred to above. The Committee insisted that :

> 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.
>
> 34. In the case of a separated child, guardianship should regularly be assigned to the accompanying adult family member or non-primary family caretaker unless there is an indication that it would not be in the best interests of the child to do so, for example, where the accompanying adult has abused the child. In cases where a child is accompanied by a non-family adult or caretaker, suitability for guardianship must be scrutinized more closely. If such a guardian is able and willing to provide day-to-day care, but unable to adequately represent the child's best interests in all spheres and at all levels of the child's life, supplementary measures (such as the appointment of an adviser or legal representative) must be secured.
>
> 35. Review mechanisms shall be introduced and implemented to monitor the quality of the exercise of guardianship in order to ensure the best interests of the child are being represented throughout the decision-making process and, in particular, to prevent abuse.

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.
37. At all times children should be informed of arrangements with respect to guardianship and legal representation and their opinions should be taken into consideration.
38. In large-scale emergencies, where it will be difficult to establish guardianship arrangements on an individual basis, the rights and best interests of separated children should be safeguarded and promoted by States and organizations working on behalf of these children.

Care and accommodation of unaccompanied children

In its Conclusions and Recommendations on the situation of fundamental rights in the European Union and the Member States in 2004, the Network questioned whether the very principle of placing unaccompanied minors in detention centres, in particular in centres where aliens served with a removal order are deprived of their liberty, was compatible with Article 3(1) of the Convention on the Rights of the Child, which requires that in all actions concerning children, the best interests of the child shall be a primary consideration (Concl. 2003, pp. 75-76). Although Article 37 of the Convention on the Rights of the Child does not prohibit the detention of children it does provide in particular that this 'shall be used only as a measure of last resort and for the shortest appropriate period of time' (Art. 37(b)). According to Article 20(1) of this Convention moreover, "A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State".

Unaccompanied children are particularly at risk of becoming victims of trafficking in human beings, and as noted by the Human Rights Committee with respect to **Greece** (Concluding observations of the Human Rights Committee : Greece. 25/04/2005. CCPR/CO/83/GRC) and by the Committee on the Rights of the Child with respect to **Denmark** (Concluding Observations relating to Denmark : CRC/C/15/Add.273 30 September 2005, para. 51-52), they should be protected, and not released into the general population without supervision and the provision of welfare assistance. Problems in this regard seem to have surfaced also in **Finland**. In **Sweden**, according to official statistics presented by the Swedish Government during the consideration of the third report under the UN Convention on the Rights of the Child, 124 cases of disappearances regarding asylum seeking children were registered by the end of 2004.[185] Despite that there are reasons to believe that, in some cases, one child could have been the object of two or more registered disappearances, this number still appears to be very high. The Council of Europe Commissioner on Human Rights (CommDH(2004)13, p. 10) had previously expressed his concern about the considerable number of unaccompanied children who had disappeared from the special centres where they were accommodated, run by the Migration Board, and about the inadequate reaction to such disappearances (see also the statement made by the Children's Ombudsman, Annika Åhnberg, Barn har det inte bra i Sverige, NU 19/04, p. 6). ECRI therefore recommended in its third report on **Sweden** that "the Swedish authorities extend the competences of legal custodians of unaccompanied children in order to take better care of the children's needs and, in particular, avoid disappearances",[186] and the UN Committee on the Rights of the Child, while taking note of the efforts made by Sweden to address the situation of unaccompanied minors and to enhance the quality of interviewing and reception of asylum seeking children, also expressed concern about the high number of unaccompanied children that have gone missing from the Swedish Migration Board's special units for children without custodians as well as the very long processing period for asylum application, which obviously have negative consequences for the mental health of the child. Bearing this in mind, the Committee recommended that Sweden should pursue its efforts to: "increase coordination between the different actors, in particular the police, the social services and the Swedish

[185] UN Doc. CRC/C/RESP/74, Written replies by the Government of Sweden concerning the list of issues received by the Committee of the Rights of the Child relating to the consideration of the third periodic report of Sweden, p. 5.
[186] CRI(2005)26, p. 20.

Board of Migration, in order to react efficiently and in a timely manner when children disappear; consider appointing a temporary guardian within 24 hours of arrival for each unaccompanied child and conduct refugee status determination procedures of children in a child sensitive manner, in particular by giving priority to applications of children and by considering child specific forms of persecution when assessing an asylum seeking child's claim under the 1951 Convention relating to the Status of Refugees".[187]

The Member States should take into account these recommendations in the implementation of Article 19 of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, referred to above. Where unaccompanied children seek asylum, their claims should be treated with the highest priority, in order to ensure that they will be placed in reception centres for the shortest time possible. This however should not be at the expense of the procedural guarantees surrounding the examination of the claim to asylum. Indeed, due to their particular vulnerability, unaccompanied minors may be particularly affected by accelerated procedures for the determination of their claims to asylum.[188] All appropriate measures should be taken in order to minimize the risk that unaccompanied children disappear and become targets for sexual and economic exploitation. Structures such as foster institutions or families, ensuring supervision and assistance without detention, should be privileged.

In its General Comment n°6 (2005), the Committee on the Rights of the Child took the view that 'care and accommodation arrangements should comply with the following parameters:

- Children should not, as a general rule, be deprived of liberty;
- In order to ensure continuity of care and considering the best interests of the child, changes in residence for unaccompanied and separated children should be limited to instances where such change is in the best interests of the child;
- In accordance with the principle of family unity, siblings should be kept together;
- A child who has adult relatives arriving with him or her or already living in the country of asylum should be allowed to stay with them unless such action would be contrary to the best interests of the child. Given the particular vulnerabilities of the child, regular assessments should be conducted by social welfare personnel;
- Irrespective of the care arrangements made for unaccompanied or separated children, regular supervision and assessment ought to be maintained by qualified persons in order to ensure the child's physical and psychosocial health, protection against domestic violence or exploitation, and access to educational and vocational skills and opportunities;
- States and other organizations must take measures to ensure the effective protection of the rights of separated or unaccompanied children living in child-headed households;
- In large-scale emergencies, interim care must be provided for the shortest time appropriate for unaccompanied children. This interim care provides for their security and physical and emotional care in a setting that encourages their general development;
- Children must be kept informed of the care arrangements being made for them, and their opinions must be taken into consideration.'

The implementation of Article 19 of Directive 2003/9/EC and of Article 17 of Directive 2005/85/EC would also be considerably facilitated by the adequate training of the public servants in charge of examining the application to asylum by the unaccompanied child and of the appointed representative of the child, and the members of social services involved. In **Hungary** for instance**,** in January 2005, Menedék (Hungarian Association for Migrants) and the UNHCR organized a training to employees

[187] UN Doc. CRC/C/15/Add.248, 28 January 2005, pp. 7-8.

[188] In the **Netherlands**, in response to criticism on the accelerated procedure, the Minister for Immigration and Integration promised that asylum requests of children under 12 years old would no longer be reviewed under the accelerated procedure (*Kamerstukken II*, 2003-2004, 19 637, No. 826). In the **Czech Republic**, the amendment to the Asylum Act, which offers a definition of the unaccompanied minor asylum seeker (Zákon _. 57/2005 Sb., kter_m se m_ní zákon _. 325/2005 Sb., o azylu (…) [Act No. 57/2005 Coll., which changes the Law No. 325/1999 Coll., Asylum Act]), stipulates that an application by an unaccompanied minor cannot be dismissed as manifestly unfounded.

working at local authority's family help services, in order to point out the defencelessness of refugee families with special regard to minors' social, mental and language troubles. In **Sweden**, the Swedish Migration Board has developed together with the Office of the Children's Ombudsman and the Linköpings University a method for conversing with asylum-seeking children in order to better understand and deal with children's vulnerability and considering their own grounds for asylum.[189] The translation and dissemination of the 'Declaration on Good Practices', adopted under the programme "Separated Children in Europe", referred to above, also would serve this goal, as illustrated by the example of **Portugal**. Similarly, initiatives such as that taken in **Spain** by the Defensor del Pueblo (Spanish Ombudsman), who adopted the *Informe sobre la asistencia jurídica a los extranjeros en España 2005* [2005 Report on Legal Assistance to Foreigners in Spain], are welcome to encourage the development of good practices in this area. On the other hand, the Network regrets that in other States, the degree of acquaintance of public officials with the rights of asylum-seekers, in particular unaccompanied children, remains insufficient. In **Latvia**, the one year long study programme of the State Border Guard School includes only 4 academic hours in the course of the year are devoted to the question of asylum-seekers. And although the State Border Guard College (a two-year first-level higher professional education programme for qualification of State Border Guard junior officer) foresees 20 academic hours for matters related to asylum seekers, most of these are devoted to technical issues (e.g., use of the EURODAC system), according to information provided by I. Z_l_tis, Head of the State Border Guard College (letter Nr. 23/11-3/1400 from 4 November 2005).

Remaining reasons for concern

The issues highlighted above deserve careful consideration, because of the scope of the remaining problems. The Network refers, for instance, to the presentation in **Ireland** of a report commissioned by the Health Service Executive (Pauline Conroy and Frances Fitzgerald, *Separated Children Seeking Asylum, Research Study 2004 – Health and Social Education Needs* (September, 2005)). This report raises a number of concerns about the standards of care provided to hundreds of unaccompanied children seeking asylum in the State, highlighting a disparity in the level and standard of services provided to unaccompanied minors seeking asylum, as compared to Irish children in State care and calling for a concerted effort to address such disparities.[190] The report recommended the adoption of a comprehensive action plan, incorporating the statutory and voluntary sectors, to improve the services provided to such children. The main elements of the proposed plan include (i) a preliminary, followed by annual, multidisciplinary roundtable for all those involved in service provision to unaccompanied minors to facilitate the orientation of a coherent policy, (ii) the development of a "school retention plan" to insure that children in this category benefit from education, (iii) the delivery of information packs, relating to their medical, social and educational entitlements, to all minors and (iv) a review of actions taken to promote the reproductive and sexual health of unaccompanied minors.[191]

Other concerns put forward by the Network are the following :

- In **Latvia,** although unaccompanied minors should be provided with free legal aid during the asylum procedure, no independent lawyer is involved. Moreover, recent practice indicates that responsible state institutions have no interest in providing required legal assistance. The main source of information about their rights is officials of the State Border Guard and the Office of Citizenship and Migration Affairs (OCMA).

- In **Lithuania,** the Law on Foreigners Legal Status[192] does not recognise the right of a Convention refugee, who is an unaccompanied minor, to reunify with his parents in Lithuania, which might raise a serious concern with regard to the conformity of the Law with the Council Directive 2003/86/EC on the right to family reunification. Moreover

[189] Government Offices of Sweden, To seek asylum-a human rights, Stockholm 2005, p. 11 at www.regeringen.se
[190] *Ibid* at p.45.
[191] *Ibid* at pp.50-52.
[192] 2004 04 29 LR _statymas "D_l u_sienie_i_ teisin_s pad_ties" Nr. IX-2206 [29 April 2004 Law on Foreigners Legal Status No. IX-2206] // Valstyb_s _inios, 2004, Nr. 73-2539

according to 2 February 2005 Minister of Internal Affairs and Minister of Social Security and Labour Order on Accommodation of Unaccompanied Minors Asylum Seekers in the Refugee Reception Center[193], the Refugee Reception Center is empowered to act as the guardian. This will naturally lead to *de facto* compulsory accommodation of such children in the Refugee Reception Centre till the age of majority and excludes them from access to the permanent guardianship system including placement of children in foster families. This arrangement might raise a concern regarding its compliance with the principle of the best interests of the child.

- In **Poland**, according to the Supreme Chamber of Control report of 27 June 2005 – covering the period from 1 September 2003 to 30 June 2004 – there were certain violations of rights of unaccompanied minors, in particular with regard to ensuring around the clock care, as required by the Regulation of the Minister of Internal Affairs and Administration on the conditions of accommodation for unaccompanied minors and the standards of care in centres for aliens. As a result of placing two families in the zone for minors, one of the unaccompanied minors was beaten and cut with a knife by an adult living in the zone.[194]

- In **Slovenia**, the implementation of the Asylum Act[195] remains unsatisfactory in particular with respect to concerning asylum claims involving children and the appointment of a guardian to unaccompanied children. According to the Committee on the Rights of the Child, Slovenia should ensure that reception centres have special sections for children and the necessary support, including access to education, is given to children and families throughout the process with the involvement of all concerned authorities with a view to finding durable solutions in the best interest of the child (Committee on the Rights of the Child, 35th session, Consideration of reports submitted by State parties under Article 44 of the Convention, Concluding observations of the Committee on the Rights of the Child: Slovenia), CRC/C/15/Add.230).

Finally, the Network is struck by the fact that data about the arrival of children seeking asylum at the borders of the Union, or about unaccompanied minors seeking protection, are lacking in many Member States. Where such data exist, they are not collected nor processed according to harmonized protocols in the different Member States. The absence of reliable data on this issue makes it very difficult to build effectively evidence-based policies to tackle these situations.[196] The Member States should be strongly encouraged to collect such data and make them available, in order to identify the scope of the problem to be addressed and to allow for a public debate to be launched on the adequacy of the current approaches to this question.

---

[193] 2005 02 02 LR vidaus reikal_ ministro ir LR socialin_s apsaugos ir darbo ministro _sakymas Nr. 1V-31/A1-28 "Nelydym_ nepilname_i_ prieglobs_io pra_ytoj_ apgyvendinimo Pab_g_li_ pri_mimo centre taisykl_s" [2 February 2005 Minister of Internal Affairs and Minister of Social Security and Labour Order No. 1V-31/A1-28 on Accomodation of Unaccompanied Minors Asylum Seekers in the Refugee Reception Center] // Valstyb_s _inios, 2005, Nr. 20-641

[194] Najwy_sza Izba Kontroli, Informacja o wynikach kontroli realizacji przez administracj_ rz_dow_ zada_ zwi_zanych z ochron_ cudzoziemców w kontek_cie przyst_pienia Polski do Unii Europejskiej, 27 czerwca 2005 r. dost_pna na stronie http://bip.nik.gov.pl/pl/bip/wyniki_kontroli_wstep [Supreme Chamber of Control (NIK), Information about the review results from the realization by the government administration of tasks associated with the protection of aliens in the context of Poland's accession in the European Union, 27 June 2005, available on the website http://bip.nik.gov.pl/pl/bip/wyniki_kontroli_wstep]

[195] Zakon o azilu, Asylum Act, *Official Gazette* 1999, nr. 61, 2000, nr. 66, 2000, nr. 113, 2000, nr. 124, 2001, nr. 67, 2003, nr. 98) and the amendments to the Aliens Act (E.g. Zakon o spremembah in dopolnitvah zakona o tujcih, Act on Changes and Amendments of the Aliens Act, *Official Gazette* 2002, nr. 87.

[196] As noted by the Committee on the Rights of the Child, 'the development of a detailed and integrated system of data collection on unaccompanied and separated children is a prerequisite for the development of effective policies for the implementation of the rights of such children' (General Comment n°6, UN doc. CRC/GC/2005/6, para. 99 (1 September 2005)).

3. The return of children who are undocumented third-country nationals

The proposal for the adoption by the European Parliament and the Council of a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals[197] has been mentioned above. The Network has reservations concerning the formulation of Article 5 of the proposal (Family relationships and the best interests of the child). This provision refers to the right to respect for family life but omits a reference to the right to respect for private life, although both may be obstacles to the adoption of a return decision, under Article 8 of the European Convention on Human Rights.

Article 6(3) of the draft Directive states:

> Where Member States are subject to obligations derived from fundamental rights as resulting, in particular, from the European Convention on Human Rights, such as the right to non-refoulement, the right to education and the right to family unity, no return decision shall be issued. Where a return decision has already been issued, it shall be withdrawn.

This provision should be read in accordance with the requirements of the Convention on the Rights of Child, which in the view of the Committee on the Rights of the Child imply in particular that :

> As underage recruitment and participation in hostilities entails a high risk of irreparable harm involving fundamental human rights, including the right to life, State obligations deriving from article 38 of the Convention [on the Rights of the Child], in conjunction with articles 3 and 4 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, entail [a prohibition on] returning a child in any manner whatsoever to the borders of a State where there is a real risk of underage recruitment, including recruitment not only as a combatant but also to provide sexual services for the military or where there is a real risk of direct or indirect participation in hostilities, either as a combatant or through carrying out other military duties.[198]

Moreover, the Committee on the Rights of the Child has adopted the position that :

> 84. Return to the country of origin is not an option if it would lead to a "reasonable risk" that such return would result in the violation of fundamental human rights of the child, and in particular, if the principle of non-refoulement applies. Return to the country of origin shall in principle only be arranged if such return is in the best interests of the child. Such a determination shall, inter alia, take into account:
>
> - The safety, security and other conditions, including socio-economic conditions, awaiting the child upon return, including through home study, where appropriate, conducted by social network organizations;
> - The availability of care arrangements for that particular child;
> - The views of the child expressed in exercise of his or her right to do so under article 12 and those of the caretakers;
> - The child's level of integration in the host country and the duration of absence from the home country;
> - The child's right "to preserve his or her identity, including nationality, name and family relations" (art. 8);
> - The "desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background" (art. 20).
>
> 85. In the absence of the availability of care provided by parents or members of the extended family, return to the country of origin should, in principle, not take place without

[197] COM(2005) 391 final, of 1.9.2005.
[198] Committee on the Rights of the Child, General Comment n°6, UN doc. CRC/GC/2005/6, para. 28 (1 September 2005).

advance secure and concrete arrangements of care and custodial responsibilities upon return to the country of origin.

86. Exceptionally, a return to the home country may be arranged, after careful balancing of the child's best interests and other considerations, if the latter are rights-based and override best interests of the child. Such may be the case in situations in which the child constitutes a serious risk to the security of the State or to the society. Non-rights-based arguments such as those relating to general migration control, cannot override best interests considerations.

87. In all cases return measures must be conducted in a safe, child-appropriate and gender-sensitive manner.

Finally, the Network regrets a number of changes made to the successive drafts of the Directive on common standards and procedures in Member States for returning illegally staying third-country nationals before it was formally proposed. In particular, previous versions of this text sought to ensure that medical examinations to determine the age of a separated child use methods that are 'safe and respect human dignity'. This has now been removed. While early drafts of the directive confirmed the right of a separated child to be informed about the possibility of medical examination 'in a language which they understand', later versions water this down to 'in a language they may reasonably understand'. The Network questions the reasons for these changes.

VIII. Prohibition of child labour and protection of young people at work

Article 32 of the EU Charter of Fundamental Rights states :

> The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations. Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education.

Article 32 of the UN Convention on the Rights of the Child (CRC) should be taken into account in the interpretation of Article 32 of the Charter. According to this provision, States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development. Furthermore, the CRC covers also the protection against all other forms of exploitation (Article 36 CRC), particularly the exploitation of children in use of drugs (Article 33 CRC), sexual exploitation (Article 34 CRC, and also the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children), child trafficking (Article 35 CRC), as well as the recruitment of children in armed forces (Article 38 CRC, and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict). More general human rights treaties concluded at the universal level also are relevant. Article 24 of the International Covenant on Civil and Political Rights states generally that every child shall have, without any discrimination as to race, colour, sex, language, religion national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. Article 10 (3) International Covenant on Economic, Social and Cultural Rights specifically deals in more specific terms with the issue of child labour. It contains a prescription according to which :

> special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper

their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

Finally, a number of minimum age conventions for determinate areas have been concluded within the International Labour Organisation[199], and the ILO has also promoted the adoption of conventions concerning protection standards at work.[200] Two of the ILO conventions may be considered to be particularly important cornerstones in the field of child labour standards, namely ILO Convention (n° 138)[201] which provides a general minimum age regime valid for all areas of work, and ILO Convention (n° 182)[202] concerning the prohibition of the worst forms of child labour.[203]

Within the Council of Europe, Articles 7 of the European Social Charter of 18 October 1961 (ETS 035) and of the Revised European Social Charter of 3 May 1996 (ETS 163) regarding the right of children and young persons to protection, provide in closely similar terms that:

> With a view to ensuring the effective exercise of the right of children and young persons to protection, the Contracting Parties undertake:
> 1. to provide that the minimum age of admission to employment shall be 15 years, subject to exceptions for children employed in prescribed light work without harm to their health, morals or education;
> 2. to provide that a higher minimum age of admission to employment shall be fixed with respect to prescribed occupations regarded as dangerous or unhealthy;
> 3. to provide that persons who are still subject to compulsory education shall not be employed in such work as would deprive them of the full benefit of their education;
> 4. to provide that the working hours of persons under 16 years of age[204] shall be limited in accordance with the needs of their development, and particularly with their need for vocational training;
> 5. to recognise the right of young workers and apprentices to a fair wage or other appropriate allowances;
> 6. to provide that the time spent by young persons in vocational training during the normal working hours with the consent of the employer shall be treated as forming part of the working day;
> 7. to provide that employed persons of under 18 years of age shall be entitled to not less than three weeks' annual holiday with pay[205];
> 8. to provide that persons under 18 years of age shall not be employed in night work with the exception of certain occupations provided for by national laws or regulations;
> 9. to provide that persons under 18 years of age employed in occupations prescribed by national laws or regulations shall be subject to regular medical control;

[199] ILO Minimum Age (Sea) Convention (Revised) No 58, 24 October 1936; ILO Minimum Age (Industry) Convention (Revised) No. 59, 22. June 1937; ILO Minimum Age (Non Industrial Employment) Convention (Revised) No. 60, 22 June 1937; ILO Minimum Age (Fishermen) Convention No. 113, 19 June 1959, ILO Minimum Age (Underground Work) Convention No. 123, 22 June 1965.

[200] For example ILO Night Work of Young Persons (Non industrial occupations) No. 79, 9 October, 1946; ILO Night Work of Young Persons (Industry) Convention No. 6, 28 November 1919; ILO Medical Examination of Young Persons Convention (Sea) No. 16, 11 November 1921; ILO Medical Examination of Young Persons (Industry) Convention No. 77, 19. September, 1946; ILO Medical Examination of Young Persons (Underground Work) Convention No. 124, 23 June 1965.

[201] ILO Convention No. 138 of 26 June 1973 concerning the Minimum Age for Admission to Employment.

[202] ILO Convention No. 182 of 17 June 1999 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour.

[203] The European Commission has issued a Recommendation to EU member States to ratify ILO Convention 182: Recommendation 2000/581/EC from the Commission of 15 September 2000 on the ratification of International Labour Organisation (ILO) Convention No. 182 of 17 June 1999 concerning the prohibition and immediate action for the elimination of the worst forms of child labour, OJ L 243 of 28. 09. 2000.

[204] Under 18 years of age under Article 7 (4) of the Revised European Social Charter of 3 May 1996 (ETS 163)

[205] To four weeks under Article 7 (7) of the Revised European Social Charter of 3 May 1996 (ETS 163)

10. to ensure special protection against physical and moral dangers to which children and young persons are exposed, and particularly against those resulting directly or indirectly from their work.

Finally, Community has also contributed to implementing the right stipulated in Article 32 of the Charter, by the adoption of Council Directive 94/33/EC of 22 June 1994 on the basis of the then Article 118a EC Treaty[206] and paragraphs 20-23 of the Community Charter of the Fundamental Social Rights of Workers adopted by eleven Member States on 9 December 1989.

The Network has put forward the following areas of concern under this provision of the Charter :

- In a number of situations, it has appeared that the remuneration of young workers or apprentices were insufficient to comply with the requirements of para. 5 of Article 7 of the European Social Charter. The European Committee of Social Rights concluded that the situation in **Greece** was not in conformity with Article 7(5) of the European Social Charter, which recognizes the right of young workers and apprentices to a fair wage, on account of the fact that, during the reference period, the minimum wage that is paid to young workers and that serves as a basis for calculation of apprentices' allowances was too low and that the Government failed to provide evidence that tax and social security benefits ensured young workers and apprentices a decent standard of living.[207] The European Committee considers that under Article 7 (5) of the European Social Charter (1961), wages that are 30% lower than the adult workers' starting or minimum wage are acceptable in the case of young workers aged 15-16 and that a 20% difference is acceptable in the case of young workers aged 16-18 With regard to apprentices, the Committee recalls that they must be granted an allowance which must equal at least one third of the adult minimum or starting wage at the beginning of the apprenticeship and at least two thirds at the end. A similar problem exists in **Belgium**. The report shows that in 2001, in the Wallonia Region, minimum apprentices' allowances, which were set by Government regulations, equalled about 19% of an adult worker's minimum wage during the first year, about 26% during the second year and about 34% during the third year. The report states that in some cases apprentices are entitled to exemptions in social security contributions and in income taxation as well as to social and family allowances. However it does not provide material evidence that these allowances do raise the overall level of their pay to levels required by the Charter. In its Conclusions XVII-2 (2005) on **Belgium**[208], the European Committee of Social Rights considers that the situation in Belgium is not not in conformity with Article 7(5) of the European Social Charter on the ground that apprentices' allowances are too low compared to an adult worker's minimum wage. Similarly, the Committee considered that the situation in **Spain** was not in conformity with Article 7(5) of the European Social Charter because young workers' wages and apprentices' allowances were indexed to the national statutory minimum wage, which was itself too low and therefore not in conformity with Article 4(1) of the Charter. The European Committee of Social Rights has also concluded that the situation in the **United Kingdom** previously was not in conformity with para. 5 of Article 7 of the European Social Charter on the ground that there was no evidence that, during the reference period, young workers' lowest wages were fair compared to adult workers' minimum wages, which were themselves unreasonably low compared to the average wage in industry and services (the minimum wage of 1,076 euros was 34.4% of the average wage). However, as from 1 October 2004 a minimum hourly wage of 4.36€ (62% of the adult minimum wage) has been introduced for 16-17 year old workers (*Conclusions XVII-2*).

- In other situations, children appear to be insufficiently protected from being put at work, beyond the limited exceptions which are considered allowable under the provisions cited above. The European Committee of Social Rights notes, in its Conclusions XVII-2 (2005) on **Belgium,** that Belgian law provides for some exceptions to the general prohibition of night work for young workers.

[206] Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work, OJ L 216 of 20.08. 1994.
[207] European Committee of Social Rights, Conclusions XVII-2 (Greece) : Articles 7, 8, 11, 14, 17 and 18 of the Charter and Articles 1, 2, 3 et 4 of the additional Protcol of 1988. The Committee deferred its conclusion with regard to the minimum age of admission to employment and the prohibition of employment for children of compulsory school age.
[208] European Committee of Social Rights, Conclusions XVII-2 (Belgium) : Articles 7, 8, 11, 14, 17 and 18 of the Charter.

A Royal Decree of 4 April 1972 authorizes night work of young workers in certain limited fields like arts and acting, while Section 34bis of the Employment Act of 16 March 1971 authorises night work until 11 p.m. in cases of *force majeure*. Since 1994, the Committee requested information on the number of young workers who were exceptionally authorized to work at night, in order to assess whether the statutory prohibition applied to the great majority of young workers. Since the Belgian Government did not provide such information, the Committee concluded that the situation of Belgium was not in conformity with Article 7 (8) of the Charter which provides that persons under 18 years of age shall not be employed in night work with the exception of certain occupations provided for by national laws or regulations. In its concluding observations on **Austria** the Committee on the Rights of the Child reiterated its concerns that domestic legislation continues to permit children form the age of 12 to be involved in light work. The Committee recommended that the relevant legislation should be amended by raising this age limit to that set in ILO Convention (n° 138) concerning Minimum Age for Admission to Employment (1973), which was ratified by Austria in 2000.[209] The European Committee of Social Rights found that the situation in Spain was not in conformity with Article 7 (1) of the European Social Charter on the grounds that work of children in family enterprises was excluded from the scope of the Workers' Statute which prohibits work by persons under 16 years of age, and no explicit statutory prohibition on the access to self-employment exists for persons under 16 years of age.[210] Upon examining the report of the **United Kingdom**, the European Committee of Social Rights has noted that there had been no change in the insufficiency of the mandatory rest period during the summer holidays for children still subject to compulsory education because it did not equal half the holiday period and it concluded that the situation in the United Kingdom was not in conformity with para. 3 of Article 7 of the European Social Charter on the ground that it did not ensure that children might fully benefit from such education. Moreover, in an Individual Direct Request concerning ILO Convention (No. 182) Worst Forms of Child Labour, 1999, submitted in 2005, the Committee of Experts on the Application of Conventions and Recommendations noted that Regulation 19 of the Management of Health and Safety at Work Regulations, 1999 places a duty on the employer to protect young persons (ie, a person under 18 years of age) from risks to their health and safety and provides for a detailed list of occupations that young workers shall not perform. However, according to the TUC, the provisional list of hazardous work prohibited for children under 18 was not satisfactory; it argued that underwater and underground work, manual handling of heavy loads, work in confined spaces, work at dangerous heights, and deep-sea fishing are not included therein. The Committee encouraged the Government to adopt, for the sake of clarity, a single comprehensive document compiling the types of work, likely to harm the health, safety or morals of children under 18. It also trusted that, when reviewing the types of hazardous work, the Government wouldl take due consideration of the types of work enumerated in Paragraph 3 of the Worst Forms of Child Labour Recommendation, 1999 (No. 190).

A more rigorous and systematic monitoring of Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work might be justified, in view of the number of problems arising with regard to compliance with its prescriptions, in particular in the new Member States of the Union. The Network refers in this respect to the report prepared by Euronet which contains useful findings in this regard.[211]

[209] Concluding Observations on Austria, Committee on the Rights of the Child, 38th session, CRC/C/15/Add.251, 31.03.2005, para 49, 50.
[210] Conclusions XVII-2 (Spain) 2005. The Committee deferred its conclusions on several other issues not mentioned here pending additional information from Spain.
[211] Euronet, *What about Us? Children's Rights in the European Union : Next Steps*, February 2006, pp. 124-125.

IX. The expression of the views of the child and the principle of the best interests of the child

1. Respect for the views of the child : the right to participation (Article 24(1) of the Charter)

Article 24(1) of the Charter of Fundamental Rights provides that 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'. This guarantee is closely linked to that of Article 24(2) of the Charter, according to which 'In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration'. In order to know what is in the best interests of the child it is important to listen to him or her. The Member States should therefore ensure that the child has the right to express his/her views freely in all matters affecting him/her and that these views must be respected and taken into account, *i.e.,* given due weight when policies are shaped, actions undertaken and results assessed.[212] Article 24(1) of the Charter specifies that children 'may express their views freely'. This implies both they are entitled but are not obliged to express their views, and that such views should be expressed *freely*, i.e., in the absence of any constraint, pressure, influence or coercion.

This provision should guide, for instance, the implementation of the Council Framework Decision of 15 March 2001 (2001/220/JHA) on the standing of victims in criminal proceedings. Indeed, the first judgment of the European Court of Justice about the interpretation of this instrument concerned the possibility to take the testimony of the children, who were witnesses and victims, before the trial and in accordance with a special procedure, in order to protect their dignity, privacy and tranquillity, under the Italian Code of Criminal Procedure.[213] The Court ruled that "articles 2, 3 and 8(4) of the Framework Decision must be interpreted as meaning that the national court must be able to authorise young children, who, as in this case, claim to have been victims of maltreatment, to give their testimony in accordance with arrangements allowing those children to be guaranteed an appropriate level of protection, for example outside the trial and before it takes place. The national court is required to take into consideration all the rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the Framework Decision".

In accordance with Article 24(1) of the Charter, children should not only be seen as objects or passive beneficiaries of policies developed for them, but that they also have competence to be *heard*, *i.e.,* they should be consulted regarding decisions, which materially affect their lives, such as adoption, custody, change of name, education, etc.[214] This approach challenges traditional perceptions of children and aims at reversing traditional stereotypes of children, as they are often seen as mere dependants, incompetent and the property of their parents. There are two limits to this principle, however :

First, Article 24(1) of the Charter makes clear that children's autonomy, i.e., ability to act and to be in lesser degree dependent on the assistance or direction of others, stands in relation to their evolving capacities, i.e., 'in accordance with their age and maturity'. This reflects the idea that while parents/care-givers will have a leading role to play when the child is very young, it will decrease as the

[212] Reference is made in this regard also to Article 12(1) of the Convention on the Rights of the Child and Article 1(2) of the European Convention on the Exercise of Children's Rights. Article 6 of the European Convention on contact concerning children of 15 May 2003 lays down that 'a child considered by internal law as having sufficient understanding shall have the right, unless this would be manifestly contrary to his or her best interests: to receive all relevant information; to be consulted; to express his or her views". Moreover, § 2 of the same provision ascertains that "due weight shall be given to those views and to the ascertainable wishes and feelings of the child'.

[213] Case C-105/03, *Maria Pupino*.

[214] This principle underlies the relevant provisions of 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, OJ L 338 of 23.12.2003. This is underlined also in the 19th Recital of the Preamble of the Regulation as well as in Article 41 § 2(c)

child grows older. There is consequently some limit to the capacity of the child to effectively use his/her participatory rights. In order to take into account the degree of maturity of the child in the definition of the capacity of the child to participate in proceedings relating to matters concerning the child, some States using age as a criterion have adopted a higher age limit. In general however, European national legislators settle *maturity* as the governing criterion for the hearing of the child rather than *age*. This latter solution is to be preferred, as it provides the opportunity of a court hearing for a broad range of children.

Second, the right to have an opinion and participate in decision-making does not mean that the child's views are the only ones to be considered. It means, rather, that with increasing capacity, it is reasonable that children gradually take over more and more responsibility for different areas of their own lives. In other words, the right to participate, to give opinions and views does not suggest having to take responsibility for choices with consequences the young person cannot understand or cannot handle. A balance must be made between the rights to develop and participate and the right to protection. Adult responsibility in relation to participation rights would include ensuring ample opportunities for developing the necessary skills and expressing these rights according to ability.

The child may be heard either directly or through a representative or through an appropriate body, such as an Ombudsperson for children. It is therefore not required that the child appears in person before the competent body. However, the national legislators should create appropriate participation mechanisms so that the viewpoint of the child is necessarily presented to the authority (in particular, in judicial and administrative proceedings[215]) responsible for taking decisions affecting the child.

The principle according to which children should be provided a possibility to 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 is not necessarily easy to translate into appropriate institutional arrangements. It is therefore particularly important that the Member States share their experiences in this regard, and that the best practices developed in certain Member States inspire developments in other States. For instance, in **Austria**, from January 2006 onwards, special support persons will look after the child's interests during divorce proceedings in four district courts in Vienna, Burgenland, Salzburg and Vorarlberg, according to the Federal Minister of Justice and the Minister of Social Affairs, who presented a pilot project to support children. In the course of disputes about child custody the responsible judge can now appoint a child support person, who can have confidential sessions with the child concerned in order to find out the child's interests and opinions. In **Poland**, the new Articles 185 a and b of the Code of Civil Procedure[216] – which entered into force in 2005 – introduced in rules for questioning witnesses under the age of 15 in cases involving sexual offences and offences against morality, as well as offences against family. According to these provisions the minor can be questioned only once. The questioning should be performed in the presence of a qualified psychologist. In 2005, the new law entered into force and judges are becoming more sensitive to this problem. In **Sweden,** children and young people in a great number of the 289 Swedish municipalities are given the opportunity to influence decision-making on issues affecting them by the way of conducting an ongoing dialogue with the decision-makers through the so called 'influence forums'. The UN Committee on the Rights of the Child in its Concluding observations on Sweden's report, welcomed the adoption of these forums.[217]

These developments are especially welcome insofar as, in other respects, deficiencies remain. In several Member States, children can still are unable to adequately express their views in judicial proceeding. The Concluding observations which the Committee on the Rights of the Child adopted in September 2005 on **Finland**[218] expressed a concern that Finland should strengthen its efforts to ensure

[215]The term 'administrative proceedings' is capable of wide application. It may include divorce and custody proceedings, care proceedings, disciplinary proceedings and proceedings determining the status of child asylum seekers.
[216]Ustawa z dnia 6 czerwca 1997 Kodeks post_powania karnego (Dz.U. z 1997 r. nr 89, poz. 555) [Act of 6 June 1997 Code of Criminal Procedure (The Official Journal of 1997, No 89, item. 555)]
[217] UN Doc. CRC/C/15/Add.248, 28 January 2005, p. 4.
[218] CRC/C/15/Add.272 of 30 September 2005.

the principle of the best interests of the child in all legislative and administrative decisions. The Committee is concerned that only children aged 15 and older have the right to be heard directly by a judge or a court. The Committee urged therefore Finland to take legislative measures in order to ensure that Article 12 of the Convention of the Rights of the Child is fully implemented. In **Latvia**, the *Asylum Law*[219] does not explicitly state the obligation of the representative of accompanied minors to participate in interviews and court hearings related to the asylum procedure or detention. In practice, legal assistance is not provided. Appointed representatives did, for instance, not participate in a court hearing concerning three unaccompanied minors who had entered Latvia seeking asylum together with 2 adults who were not their parents[220]. This was however not considered a procedural obstacle to holding the hearing.

In **Malta**, it is still impossible for the child to act in judicial proceedings without being represented. The Court can, however, hear the child directly, if it should so deem necessary, as well as take his evidence either directly or through duly appointed experts. In **Sweden,** the Children's Ombudsman (BO) has expressed concern that younger children, in particular, often are not allowed to express their views in proceedings regarding custody, residence and contact with a parent. Furthermore, when parents are in dispute in a custody case, the child has no access to an adult person, neutral to the conflict between the parents, who will be able to assist him/her in expressing his/her views.[221]

2. The principle of the best interests of the child (Article 24(2) of the Charter)

According to Article 24(2) of the Charter, 'In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration'. While it is clear that the principle of the best interests of the child applies to the institutions and bodies of the Union, giving substance to the principle is a difficult task. The determination of the best interests of the child should be made on a case-by-case basis, with the active participation of the child or, at least, by taking into account his or her views.[222] Priority should be given not to any interest of the child but to her or his *best* interests. The determination of where the best interests of the child lie will depend on each particular factual situation, although they should include in principle the need for continuity, the risk of harm and the child's needs. The best interests of the child may also be identified with the help of the other rights covered by the Convention on the Rights of the Child or the Charter of Fundamental Rights, including the principle of non-discrimination.[223] In situations where different interests compete or conflict with one another, the principle of the best interests of the child becomes decisive, for example, where there exists a conflict between the child and her/his family or between the child and an institution responsible for his or her care. Consideration of the best interests of the child must embrace short as well as long-term considerations for the child.

[219] *Patv_ruma likums* [*Asylum Law*], adopted 7 March 2002, in force since 1 September 2002, with amendments announced to 20 January 2005, Section 11.
[220] R_gas pils_tas Zieme_u rajona tiesa [Riga City Zieme_u District Court], 30 November, 2005.
[221] Barnombudsmannen (BO), Observations with respect to the written replies of the Government of Sweden concerning the list of issues (CRC/C/Q/SWE/3), p. 7, www.bo.se
[222] Thus for instance, in divorce or separation proceedings, the custody of the child should not systematically and automatically be attributed to the mother when the child is below a certain age and to the father when the child is above a certain age.
[223] The Convention on the Rights of the Child rejects *e.g.* the very concept of the illegitimate child. Therefore, as regards the treatment of children born out of wedlock, any distinction based on legitimacy will amount to discrimination by reason of 'birth'. Children born outside marriage should, for example, be given the same succession rights as children born in wedlock. See also Human Rights Committee, Concluding Comments: France, UN Doc. ICCPR/C/79/Add. 80, para. 25 and Human Rights Committee, Concluding Comments: Iceland, UN Doc. ICCPR/C/79/Add. 98, para. 11. See also, in the case-law of the European Court of Human Rights : Eur. Ct. H.R (3rd sect.), *Mazurek v. France* (Appl. No. 34406/97), judgment of 1 February 2000. Thus, States should not refer to 'adulterous children' ('enfants adultérins') in order to distinguish them from 'legitimate children' ('enfants légitimes'); rather, they should use a neutral language, referring instead to children born in (or out) of wedlock (enfants nés dans ou hors mariage).

The principle of the best interests of the child applies primarily in family life, and with regard to the upbringing of the child. However, it also should be taken into account in, for example, education,[224] health,[225] social life, the administration of juvenile justice,[226] the placement and care of children in institutions, procedures for the determination of the status of refugee as well as immigration proceedings, deprivation of liberty, adoption, housing, transport and environmental policies, budgetary allocations, employment policies, etc. The Network is struck, for instance, by the fact that in the **Czech Republic**, Act No. 383/2005 amended the Act on Execution of Institutional Care,[227] allowing the placement of children who have been found guilty of acts that would normally constitute a crime, and were sentenced to so-called protective care, to the same establishments as children in a so-called institutional care, where children are placed to institutional care for a variety of reasons, in particular because they are orphans or because of the social situation of their families.[228] This cannot plausibly be reconciled with the principle of the best interests of the child as stated in Article 24(2) of the Charter.

3. The relationship between children and parents (Article 24(3) of the Charter)

Article 24(3) of the Charter of Fundamental Rights states that 'Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests'.

The UN Convention on the Rights of the Child emphasizes individual rights for children, but also recognizes and underlines the importance of the family and the responsibilities of parents as the primary care givers of the child (Article 18). The Preamble declares, in addition, that the child, for the full and harmonious development of his or her personality, should grow up in a family environment. This implies among other things that governments should render appropriate assistance to parents/legal guardians in the performance of their child-rearing responsibility. This may include that proper child-care facilities and services as well as other institutional support should be made available to assist parents, who work outside the home, to raise their child. It is in this sense that Article 24(3) of the Charter is to be read together with the right to conciliation of professional and family life, the important function of which in the protection of the rights of the child this Thematic Comment has already emphasized.

---

[224] Education is of fundamental importance to the proper development of the child's personality. See Committee on the Rights of the Child, General Comment n°1 : The aims of education, (UN doc. CRC/GC/2001/1) : 'The aims of education that [Art. 29(1) of the Convention on the Rights of the Child] sets out, which have been agreed to by all States parties, promote, support and protect the core value of the Convention: the human dignity innate in every child and his or her equal and inalienable rights. These aims, set out in the five subparagraphs of article 29 (1), are all linked directly to the realization of the child's human dignity and rights, taking into account the child's special developmental needs and diverse evolving capacities. The aims are: the holistic development of the full potential of the child (29 (1) (a)), including development of respect for human rights (29 (1) (b)), an enhanced sense of identity and affiliation (29 (1) (c)), and his or her socialization and interaction with others (29 (1) (d)) and with the environment (29 (1) (e))'.

[225] Notwithstanding the aims of the European Unions' Daphne Programme (2000-2003) which clearly combats violence against children covering its physical, mental and social aspects, children continue to be exposed to serious corporal punishment at some point during their upbringing within the family as well as in pre-schools, in schools and in institutions, despite the existence of a legal ban. Daphne II extended the programme over the period 2004 -2008 (Decision 803/2004/EC of 21 April 2004 of the European Parliament and of the Council adopting a programme of Community action (2004 to 2008) to prevent and combat violence against children, young people and women and to protect victims and groups at risk, OJ L 143 of 30.04.2004, p. 1).

[226] In the cases of *T v. United Kingdom* and *V v. United Kingdom*, the European Court using the UN Standard Minimum Rules for the Administration of Juvenile Justice and the Convention on the Rights of the Child came, *e.g.*, to the conclusion that the two 10 year old boys who were convicted for the murder of a 2 year old child in England, were the victims of a breach of the European Convention (Article 6(1)). In its view the applicants had been denied the right to a fair hearing since they were unable to effectively participate in the proceedings (Eur. Ct. H.R. (GC), *T v. United Kingdom* and *V v. United Kingdom* (Appl. No. 24888/94), judgment of 16 December 1999).

[227] Zákon _. 383/2005 Sb., kter_m se m_ní zákon _. 109/2002 Sb., o v_konu ústavní v_chovy nebo ochranné v_chovy ve _kolsk_ch za_ízeních a o preventivn_ v_chovné pé_i ve _kolsk_ch za_ízeních a o zm_n_ dal_ích zákon_, ve zn_ní pozd_j_ích p_edpis_ a dal_í související zákony [Act No. 383/2005 Coll., amending the Act No. 109/2002 Coll. on Execution of Institutional Care or Protective Care].

[228] The Amendment also introduced a possibility of installing cameras and means to prevent escape of children from these institutions.

Issues of guardianship and custody are important aspects of parental authority. Article 24(3) of the Charter, which has drawn inspiration from Article 9 of the Convention on the Rights of the Child, envisages the significance of maintaining on a regular basis a personal relationship and direct contact between the child and both her or his parents "unless that is contrary to his or her interests". Article 4(1) of the European Convention on contact concerning children lays down that "A child and his or her parents shall have the right to obtain and maintain regular contact with each other". Such contact may be restricted or excluded, however, where necessary in the best interests of the child. The right of the child to maintain contact with both parents is a guiding principle for all decisions on rights of custody and rights of contact. This presupposes, among other things, organization of cross-frontier visitation in the case of children of couples living in different countries, control of the illicit transfer and non-return of children abroad,[229] which usually arises in the context of the breakdown of the relationship of the parents. There is, however, no coherent international structure to support the effective exercise of rights of contact, which is a source of problems such as chronic and costly litigations.[230]

In the case of separation, the Convention on the Rights of the Child (Article 9) indicates that a child's contact with both parents, should be guaranteed. The breakdown of an adult couple's relationship does not thereby terminate the right to family life either parent enjoys with the child/ren of that relationship. States enjoy a wide margin of appreciation to determine custody and access matters, but the principle of the best interests of the child should be guiding any decision which is adopted in this regard. Where the custody of the child is attributed to one of the parents, the other parent should have rights of contact in order to preserve the right to family life under Article 8 of the European Convention on Human Rights. Children sometimes lose the possibility to maintain contact with the non-residential parent for several reasons including the difficulties in the relationship between the parents, the distance from the other parent, etc. However, under the European Convention on Contact concerning Children, the States parties are obliged to provide for and promote the use of certain safeguards and guarantees concerning contact between children and their parents : thus for instance, safeguards and guarantees for ensuring that a contact order is carried into effect may in particular include an obligation for a person to provide for the travel and accommodation expenses of the child (Article 10 § 2(a)) ; safeguards and guarantees for ensuring the return of the child or preventing an improper removal may include the surrender of passports or identity documents, charges on property etc. (Article 10 § 2(b)).

States are, moreover, obliged to prevent children from being separated from their families against their will unless the separation is judged necessary for the best interests of the child (Article 9(1) and (3) of the Convention on the Rights of the Child). The State may intervene in the family relationship by, for example, removing a child from the family home in order to protect his/her rights and freedoms, since his/her position is weaker. This may be the case in the presence of a lack of care, neglect and abuse of the child. Therefore, while this provision contains a guarantee against external intervention, it also presupposes responsible parenthood as a solid basis for the parent-child relationship and should be read in accordance with the principle of the best interests of the child.

States should furthermore avoid the separation of children from their parents due to immigration laws.[231] It has already been mentioned however that under Article 4(1)(d) of the Council Directive 2003/86/EC on the right to family reunification,[232] a child's entry may be refused under certain

[229] The European Convention on contact concerning children obliges the competent authorities in the State Parties where a child at the end of a period of trans-frontier contact based on a contact order is not returned, to ensure, upon request, the child's immediate return (Article 16(1)).

[230] The 1996 Hague Convention offers some hope of achieving a coherent legal framework for decision-making concerning cross-frontier contacts. Questions on parental responsibility as well as protective measures against child abduction are envisaged in the 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, cited above (see in particular Articles 10 and 12).

[231] Eur. Ct. H.R. (1st sect.), *Sen v. The Netherlands* (Appl. No. 31465/96), judgment of 21 December 2001.

[232] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251 of 3.10.2003, pp. 12-18.

circumstances, allowing the Member States to derogate from the rule on admission of children by the way of requiring the child to meet a condition for integration in case the child is over the age of 12 years and he/she has arrived independently from the rest of his/her family. It should be recalled that the Convention on the Rights of the Child imposes the obligation upon State Parties to ensure that a child "(s)hall not be separated from his or her parents against their will" (Article 9(1)). More importantly, Article 10(1) provides that "applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner".

The European Court of Human Rights has acknowledged that persons other than parents having family ties with a child may have the right to contacts with a child.[233] Also Article 5(1) of the European Convention on Contact concerning Children, clearly provides that "subject to his or her best interests, contact may be established between the child and persons other than his or her parents having family ties with the child". Family ties in the context of this treaty means "a close relationship such as between a child and his or her grandparents or siblings, based on law or on a *de facto* family relationship" (Article 2(d)).

Likewise, family life is not brought to an end by a decision to remove a child into public care. There exists a right to contact with the child to have arrangements made for the child to be returned.[234] In principle, the end-goal should always remain the reunification of the family, and all protective measures, including the placement of the child in care institutions, should be reconciled with that aim.[235] This however does not constitute an absolute rule, where it would conflict with the harmonious development (welfare) of the child, which remains at all times the primary consideration.[236]

X. National mechanisms for the promotion and protection of the rights of the child

While this is not required under Article 24 of the Charter of Fundamental Rights and, indeed, could hardly conceivably be limited to complying with the rights of the child the implementation of Union law, the Network welcomes the fact that several European countries are working on the establishment of national mechanisms for the promotion and protection of human rights. These include in particular ombudspersons with a specialized competence on the rights of the child; advisory bodies, established as independent national institutions for the promotion and protection of the rights of the child; and the development of national action plans or strategies for the promotion of the rights of the child. Thus for instance, the Committee of the Rights of the Child insisted in its concluding observations on **Austria**'s second periodic report[237] that Austria should set up an effective co-ordination mechanism on the implementation of the rights of the child at federal and provincial level and incorporate them into the Constitution, but also noted, with praise, the Government's approval of the 'Young Rights Action Plan' (YAP) in November 2004, and recommended that it should be finally approved by the Parliament and effectively implemented. The Committee on the Rights of the Child welcomed the establishment of the post on the Ombudsman for Children in **Finland** as of September 2005,[238] although it regretted that the mandate of the Children's Ombudsman is restricted to promotional work and advisory services, recommending that the mandate of the Ombudsman be expanded in line with General Comment n°2 on the role of independent human rights institutions to include the ability to

[233] Eur. Ct. H.R. (GC), *Scozzari and Giunta v. Italy* (Appl. No. 39221/98 and Appl. No. 41963/98), judgment of 13 July 2000, para. 221, *Rep*. 2000-III.
[234] Eur. Ct. H.R., *Olsson v. Sweden (No. 1)* (Appl. No. 10465/83), judgment of 24 March 1988, *Ser.* A, No.130 ; Eur. Ct. H.R., *Eriksson v. Sweden* (Appl. No. 11373/85), judgment of 22 June 1989, *Ser.* A, No. 156 ; Eur. Ct. H.R., *Andersson v. Sweden* (Appl. No. 20022/92), judgment of 27 August 1997, *Ser.* A, No. 226 ; Eur. Ct. H.R., *Rieme v. Sweden* (Appl. No. 12366/86), judgment of 22 April 1992, *Ser.* A, No.226 B.
[235] Eur. Ct. H.R. (4th sect.), *K & T v. Finland* (Appl. No. 25702/94), judgment of 12 July 2001.
[236] Eur. Ct. H.R. (4th sect.), *L v. Finland* (Appl. No. 25651/94), judgment of 27 April 2000.
[237] Concluding Observations on Austria, Committee on the Rights of the Child, 38th session, CRC/C/15/Add.251, 31 March 2005.
[238] CRC/C/15/Add.272 of 30 September 2005.

receive and investigate complaints from children. In these Concluding observations, the Committee on the Rights of the Child also welcomed the establishment of an advisory committee representing a wide range of expertise, in which also NGOs will be represented. In **Slovak Republic**, the Government approved the establishment of an institution specialised on the protection of children's rights by its Resolution no. 963 of 7 December 2005. The Ministry of Labour, Social Affairs and Family also adopted the Action Plan ensuring the protection of vulnerable children for the period of 2005-2006, which contains set of aims as well as measures for their achievement. **Ireland** has adopted a National Children's Strategy, *Our Children – Their Lives* in November 2000 which is the main vehicle through which the government has sought to implement the Convention on the Rights of the Child at a domestic level.[239] Other structures also have been put in place that are geared towards the greater protection of the rights of the child, including the National Children's Office, the Ombudsman for Children and the National Children's Advisory Council. As regards **Sweden**, the UN Committee on the Rights of the Child recommended in its concluding observations with regard to the Swedish periodic report under the Convention on the Rights of the Child, that Sweden should 'consider providing the Children's Ombudsman with the mandate to investigate individual complaints' and that 'the annual report of the Children's Ombudsman be presented to the Parliament, together with information about measures the Government intends to take to implement the recommendations of the Children's Ombudsman'.[240]

[239] National Children's Office, *United Nations Convention on the Rights of the Child: Ireland's Second Report to the UN Committee on the Rights of the Child* (July, 2005).
[240] UN Doc. CRC/C/15/Add.248, 28 January 2005.