



anno VI, n. 1, 2016
data di pubblicazione: 25 aprile 2016

Saggi

Legal Treatment of Unaccompanied Immigrant Children against Spanish and International Legal and Political Parameters

di Gabriele Vestri *

1. Introduction

Preliminarily, we are obligated to place the figure of unaccompanied children. It is, thereby, important to establish the definitions that identify this figure warning that between international law and community law differences exist that can induce to considering the same situation, according to different legal aspects.

* International Doctor in Law and Political Sciences by Universidad of Pablo de Olavide in Seville and Extraordinary Doctorate Award. Professor of Constitutional Law at the same university, accredited Hired PhD Professor (ANECA). Researcher at the Centro Euro-Árabe de Estudios Jurídicos Avanzados, coordinator of International Relations and Mobility of the Faculty of Law at Universidad Pablo de Olavide in Sevilla. Paper subjected to a double blind peer review.



anno VI, n. 1, 2016
data di pubblicazione: 25 aprile 2016

Saggi

In this sense, in 1997, UNHCR promulgated the definition of Unaccompanied Foreign Children (MENA, in Spanish), according to which these are “children and adolescents under 18 years of age outside their country of origin and who are separated from both parents or from the person who by law or custom had them under their care”. By 1999, the very UNHCR revised its own definition and introduced the concept of “separated”¹. This point of view, seeks to substitute the concept of unaccompanied children for that of separated children motivated by the “desire to broaden the care setting of not only children who are alone in European countries, but also of all those who are not with their biological parents or legal guardians and live in the host countries accompanied by adult relatives (sibling, uncle/aunt, cousins, etc.), who have also endured prior separation processes and who have required or require protection. In some cases, the fact that children live specifically with them does not mean that these relatives are capable of caring for them” (Capdevila, Ferrer 2003, 17).

Added to this is the MENA definition offered by EU law: “children under 18 years of age, citizens of third countries or who are stateless, who arrive to territories of member States of the European Union without being accompanied by an adult responsible for them, whether legally or through a custom agreement, while not effectively under the care of said responsible adult, as well as those children left alone after their

¹ Definition by the High Commissioner for Refugees of the United Nations and the Save the Children Organization in its declaration of good practices.



anno VI, n. 1, 2016
data di pubblicazione: 25 aprile 2016

Saggi

entry to the member States”². This refers to the condition of their nationality, literally understanding that children who are citizens of member States of the European Union do not fit into this definition. The consequence is the risk of a different treatment among collective equals and, hence, the creation of two models: unaccompanied children from the European Union and unaccompanied foreign children.

2. Constitutional norms and immigrant children

It is undoubtedly necessary to highlight the constitutional parameters also related to immigrant children. In the first place, it seems opportune to establish entitlement and the exercise of freedoms of foreigners within the Spanish constitutional order (Bordonado Bermejo 2006, 417). Thus, Article 13 of the CE establishes that “foreigners are entitled in Spain of the public freedoms guaranteed in its Title I, in the terms established by Treaties and the Law”. Along with Article 13, we must also appreciate Article 10.1 CE that establishes the dignity of an individual, inviolable rights, free development of personality, respect for the law and social peace. Posing, in this sense, the question of what rights are recognized to all, nationals and foreigners, and which are only recognized for nationals (e.g. article 14 CE)³.

² EU Council (Resolution), 26/06/1997. Diario Oficial number. C 221 of 19/07/1997. Directives of the EU Council 2001/55/CE, 2003/9/CE and 2003/86/CE, which incorporate the reference of the stateless.

³ In this sense, it is convenient to remember that certain precepts of Organic Law 4/2000, of 11 January, on the rights and freedoms of foreigners in Spain, and their social



anno VI, n. 1, 2016

data di pubblicazione: 25 aprile 2016

Saggi

The Spanish Constitutional Tribunal, STC 107/1984 of 23 November, FJ.3, alludes to the articles mentioned, upon solving an appeal of protection for alleged violation of Articles 13 and 14 of the Constitution, referring to the difference in treatment between Spaniards and foreigners. In this sense, on one hand, it is stressed that in the Spanish Constitution there is no prescription that extends such quality to foreigners; however, on the other hand the Spanish Constitution does have a direct relationship with international treaties. It is in this aspect that foreigners in Spain will have the same freedoms attributed by Treaties and the Law. The High Tribunal also mentions “direct” recognition of the fundamental rights included in the Spanish Constitution that correspond to foreigners through constitutional mandate.

After this, the second paragraph of Article 13 CE excludes foreigners from enjoying political rights, although some exceptions exist in municipal elections. The Constitutional Tribunal highlights how Article 13 CE “recognizes for the legislator the possibility of establishing additional conditions to the exercise of fundamental rights by foreigners, but for them, in all cases constitutional prescriptions must be respected, given that said precept cannot be estimated by permitting the legislator to freely configure the right itself, when it has been recognized for foreigners directly by the Constitution (...). One thing is, in effect, to authorize differences in treatment between Spaniards and foreigners, and another

integration was declared in part unconstitutional in that it denied recognition of certain to fundamental rights to foreigners residing illegally in Spain (Spanish Constitutional Tribunal, Sentence 236/2007).



anno VI, n. 1, 2016
data di pubblicazione: 25 aprile 2016

Saggi

is to understand that authorization as a possibility of legislating to that extent without considering the constitutional mandates”⁴.

Also, it is necessary to deal with entitlement and the exercise of rights and freedoms of foreign children. In the first place, the Constitution in article 10 recognizes the dignity of the individual without distinction of nationality or age. In the second place, article 14 CE, although not specifically, collects non-discrimination on grounds of age; the same Constitutional Tribunal, in sentence 75/1983 of 03 August, highlights:

Age is not among the circumstances normatively enunciated in Article 14, but it should not be seen herein a closed typifying intention that excludes any other precept, alluding to any other personal or social condition or circumstance, nature of personal circumstance that must be preached of age.

The content of Articles 10 and 14 of the Spanish Constitution is applied not only to national children, but also to foreign children and immigrants. In this sense, the right to life, to physical and moral integrity, personal freedom, right to honor, to intimacy, and right to freedom of speech are recognized.

3. Supranational norms

At international level, the principal norm is – undoubtedly – the International Convention on the Rights of the Child (ICRC), approved by

⁴ Spanish Constitutional Tribunal, Sentence 115/1987 of 7 July



anno VI, n. 1, 2016
data di pubblicazione: 25 aprile 2016

Saggi

the General Assembly of 20 November 1989, which culminates the path traced internationally by the Geneva Declaration of 1924 on the Rights of the Child and the Declaration of the Rights of the Child approved by the General Assembly of 20 November 1959, and continued by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, as well as the pertinent statutes and instruments of specialized organisms and international organizations concerned with protecting children.

The spirit of the 1989 Convention, along with the dispositions underpinned by a logic of understanding the child as a weak subject, supposes recognizing dispositions that emphasize on the autonomy of children⁵. Emblematic in this sense is Article 12 of the Convention, according to which it must be guaranteed that “Member States will guarantee children to be in conditions of forming their own views, the right to freely express their opinion on all issues that affect children, duly bearing in mind the opinions of the child, in function age and maturity of the child”. With said purpose, it is foreseen that “particularly, the child will be granted the opportunity to be heard in every legal or administrative procedure affecting the child, whether directly or through a representative or an appropriate organ, in keeping with procedure norms of national law”.

⁵ According to Article 1 of the Covenant of the Rights of the Child: “for the effects of the present Covenant, as child we understand every human being below 18 years of age, unless, by virtue of the law applicable to said individual, full age had already been reached”.



anno VI, n. 1, 2016

data di pubblicazione: 25 aprile 2016

Saggi

The dimension of the child as an autonomous subject, however, is clearly perceptible, for example, in Article 13, which recognizes the child's right to freedom of speech⁶, or Article 14 that requires observing the child's right to freedom of thought, of conscience, and religion, as well as article 15 on the Rights of the Child to the freedom of association and the freedom of peaceful assembly. These dispositions show us the sense of a subject that is not perceived merely as a beneficiary of protection, but also as an active player of social life, which intervenes as an individual person or as a team.

The specific aim of these dispositions allows the Convention to address with greater detail matters that general norms find more difficult to rule. On the basis of this finding, the innovative content of the 1989 Convention could be the "ripe fruit" of a new sensitivity, but could also be a logical consequence of the specificity of the Convention, whose reach would not have imposed a selection – to the essential setback in a law, Charter of General Rights – of the most relevant profiles from which the previously mentioned dispositions previously could be erased.

The 1989 Convention recognizes not only the rights of children, but, rather, the Human Rights of children, at least regarding their entitlement (Bázquez López 1998, 58).

It is in light of these considerations that the Charter of Fundamental Rights becomes especially important, signed and proclaimed by the

⁶ Including "the freedom to seek, receive, and disseminate information and ideas of all types, without consideration of borders, whether orally, in writing or in print, in artistic form, or through any other medium elected by the child".



anno VI, n. 1, 2016

data di pubblicazione: 25 aprile 2016

Saggi

Presidents of the European Parliament and Commission in the European Council of Nice on 7 December 2000. It included some norms that can be found in all (or in the most part of) contemporary Constitutions⁷; however, the chapter on equality received a separate article – Article 24 – on the “Rights of the Child”⁸.

The three paragraphs of this article highlight the complexity of the legislation on childhood, discipline toward the protection of a weak subject (“Children have the right to protection and to the care necessary for their wellbeing”: paragraph 1, first period) – the importance of the relationship with the parents (“Every child has the right to periodically maintain personal relations and direct contacts with his/her father and mother, unless they are contrary to their interests”; paragraph 3), but also to the intervention from public power and the community in general (“In all actions related to children carried out by public authorities or

⁷ We think, for example, of Article 14: “1. Every person has the right to education and access to professional and permanent formation. 2. This right includes the faculty of receiving free of charge obligatory teaching. 3. According to the national laws that regulate their exercise, respect is guaranteed for the freedom to create schools within the respect to democratic principles, as well as the right of the parents to guarantee the education and teaching of their children in keeping with their religious, philosophical, and pedagogical convictions”.

⁸ Article 24: “1. Children have the right to protection and to the necessary care for their well-being. They will be able to freely express their opinion. It will be kept in mind in relation to issues that affect them, in function of their age and of their maturity. 2. In all actions related to children carried out by public authorities or private institutions the higher interest of the child will continue being a primordial consideration. 3. Every child has the right to periodically maintain personal relations and direct contacts with their father and mother, except, if these are contrary to their interests”.



anno VI, n. 1, 2016

data di pubblicazione: 25 aprile 2016

Saggi

private institutions, the higher interest of the child will constitute a primordial consideration"; paragraph 2); without overlooking the dimension of the child as an active member of society, capable, with the passing of age, of completing evermore conscious acts, both for themselves as in relational life. In this sense, the provision of the second period of paragraph 1 is particularly significant, guaranteeing children the right to freely express their opinions, distinguishing that this right is even more significant when the opinion expressed has direct effects upon the child, so that it is indicated that "this will be kept in mind in relation to the issues affecting them, in function of their age and maturity".

Concisely written, Article 24 of the Nice Charter, was able to gather in few dispositions the profiles that constitute the legal condition of the child, making explicit the necessary adoption of a new approach. Within this context, Spanish legislation, at the level of constitutional sources, seems at least partially deficient. In fact, it is true that when the Constitution speaks of children it always does so by taking a certain perspective, and it is not less true that the Constitution must be appreciated in function, not only of what is said, but also of what is suggested or implied.

Thus, the fundamental Law is presented, as already indicated, as a text of great potential that has not remained confined to the time it went into effect, but perpetuating, permitting adjustment of the social changes the country has had and will have. The evolution observed in the concept of children, thereby, leads to searching within the constitutional text for useful elements to support the legal evolution of the child's status. The consideration of the child as a full subject is present, although mostly in implicit manner.



anno VI, n. 1, 2016

data di pubblicazione: 25 aprile 2016

Saggi

The adaptation – which can be deduced from the text – of the constitutional dispositions between the child and the adult supports this assertion. That adaptation bears in mind the need to place limits derived from the peculiarities of the child's situation, as woman or man in formation; characteristics that, additionally, also guarantee, along with the limits, the obligations designed for children to benefit. Specifically, it may be seen how many constitutional dispositions, referring to the "person" are applied to adults and children. This occurs, above all, in the dispositions related to civil rights, but it is also found in political rights.

It should be highlighted that civil rights are recognized to children in a substantially similar manner to what occurs for adults; it is impossible not to extend to children the guarantees related to personal freedom, to the right to inviolability of the home, to freedom and secrecy of correspondence, freedom of assembly, of association, to profess their religion, to express their ideas. Although it is also true that some additional restrictions for children – in spite of not being expressly provided in the Constitution – may be found with respect to freedom of circulation, while in procedural and criminal matters the condition of children leads, inevitably, to discipline separated from that of adults.

With respect to social rights, these are especially developed for the child, as a result of what has been previously demonstrated, and agreeing with the vision of the child recognized, as we have stated on repeated occasions, as a weak subject.

In addition, we can highlight the application of the Hague Convention of 19 October 1996 related to Competence, Applicable Law, Recognition, Execution, and Cooperation regarding Parental Responsibility and of Measures to Protect Children and, particularly, it should be made



anno VI, n. 1, 2016

data di pubblicazione: 25 aprile 2016

Saggi

evident – as demonstrated by Professor Nuria González Martín – that “the cooperation measures contained in the Convention can be useful, given the increasing number of situations in which unaccompanied children cross borders, trying to find a better livelihood, looking for work, or trying to regroup with their parents or with their family that, as a general rule, crossed, in principle, the same borders illegally or without proper documentation. These boys, girls, and adolescents are in situations of true vulnerability in which the possibilities of being subjects of exploitation, sale, or trafficking are not distant. If the unaccompanied child is a refugee, asylum seeker, displaced, or simply a fugitive adolescent, the Hague Convention of 1996 aids them by permitting cooperation to locate them, determining the authorities from which country are competent to take the necessary protection measures, and permitting cooperation between the national authorities from the host country and from the country of origin to exchange necessary information and the start of necessary protection measures (González Martín 2010, 131).

4. Children: between human trafficking and illegal trafficking in persons?

We cannot ignore the migration phenomenon of boys, girls and the consequential gender problem that affects this doubly margined group by being a migrant collective and a feminine collective at the same time (Chiarabotti Boero 2006, 6-23). In this sense, for males, transferring from



anno VI, n. 1, 2016

data di pubblicazione: 25 aprile 2016

Saggi

their country of origin to Europe is often due to economic reasons; the girls, on the contrary, are victims of human trafficking⁹.

More so, in many cases, girls do not choose to face the journey on their own, but rather, they are obligated to leaving their own country under the promise of a better future or the threat of injury or death to her or her relatives. A premise is therefore essential to really help us to understand what human trafficking means and who the victims are.

Trafficking was first defined in International law through a Protocol to prevent, repress, and sanction trafficking in persons, especially women and children, which complements the United Nations Convention against transnational organized crime; document known as the "Palermo Protocol" or the "Trafficking Protocol". Article 3 shows a broader definition of trafficking in persons and which provides an essential base to reform national laws (UNHCR 2005, 11).

"The international definition covers a wide range of activities linked to a process. Catchment takes place in the victims' place of residence, which is also frequently their place of origin... Catchment refers to engagement or recruitment, that is, the first contact the victims have with the trafficking network through the recruiter" (Torres Falcón 2010, 31). It is absolutely necessary to highlight that human trafficking is a serious crime that many governments and other parties seek to solve throughout the world.

⁹ We wish to indicate that nonage boys are also object of human trafficking, but within the context of unaccompanied child immigrants and making a balance between boys and girls who fit within the same collective, girls are affected by organized crime whose only purpose is that of trafficking for purposes of prostitution. Boys arrive triggered, of course, by organized crime attracted by easy income and work.



anno VI, n. 1, 2016
data di pubblicazione: 25 aprile 2016

Saggi

The concept of human trafficking is different from that of trafficking of migrants and of personal migration because the victim in illegal trafficking in persons will be exploited by people involved in managing their passage from one place to another. Being exploited means that someone who is not the victim profits with said situation. In some legal systems the mere exploitation is sufficient for the case to be typified as illegal trafficking in persons. However, in practice, it may be difficult to distinguish human trafficking and illegal migration from illegal trafficking in persons because it often occurs that an individual begins the journey as an emigrant and ends up being a victim of illegal trafficking in persons (Ecpat 2006, 6).

“Both illegal trafficking of migrants and illegal trafficking in persons involve movement of human beings to obtain some benefit. However, with human trafficking two additional elements must be considered with respect to illegal trafficking: a form of undue capture, for example, with coercion, deception, or abuse of power; and a purpose of exploitation, although it is finally not fulfilled. In sum, in the assumption of illegal trafficking in persons, the main source of income for the delinquents and the economic motive driving the crime is the product obtained through the exploitation of the victims in prostitution, forced labor, or other forms of abuse; while in the case of illegal trafficking the price paid by the irregular immigrant is the origin of the income, and no lasting relation persists between the delinquent and the immigrant once they have arrived at their destination” (García Vázquez 2008, 233).

Following and sharing the reasoning by Marta Torres Falcón, it is worthing to highlight the catchment mechanisms, which especially materialize on work promises, life changing opportunities, sentimental se-



anno VI, n. 1, 2016

data di pubblicazione: 25 aprile 2016

Saggi

duction, and abduction, which are later turned into transfer and exploitation (2010, 46). Once again, we bring up the difference between human trafficking and illegal trafficking in persons¹⁰, although, above all, the catchment methods manifest some similar assumptions that trigger the immigrant's journey.

In spite of dealing with different concepts, it is true that a close relationship exists between both, which fundamentally takes place when the emigrant person ends up in a trafficking situation, *i.e.*, is exploited (Torres Falcón 2011, 158 and Nieto 2010, 43-46) along the migratory process, whether during transit or in the place of destination. But it must be noted, nevertheless, that this can occur both in cases in which the individuals are displaced through illegal means as when these means are legal. Consequently, irregular migration is not a pre-requisite to configure the crime of human trafficking (International Organization for Migration, Save the Children 2007, 29).

According to the 2009 Trafficking in Persons Report by the US Department of State, it is calculated that 12.3-million adults, boys and girls endure conditions of forced labor and sexual servitude with commercial purposes. Further, it is estimated that at least 1.39-million of these people are victims of sexual servitude with speculative purposes, in the

¹⁰ The terms "illegal trafficking in persons" and "trafficking of migrants" have been used as synonymous, but refer to different concepts. The objective of sexual trafficking is the exploitation of the person, instead, the purpose of trafficking of migrants is the illegal entry of migrants. In the case of sexual trafficking, it is not indispensable for the victims to cross borders to configure the criminal act, while this is a necessary element for the commission of trafficking of immigrants.



anno VI, n. 1, 2016

data di pubblicazione: 25 aprile 2016

Saggi

transnational setting and within the countries. Besides this being one of the most lucrative “businesses” after drug and weapons trafficking, it underlies an important gender component, given that it mostly affects women and girls¹¹.

It remains clear how upon approaching the theme of trafficking with girls we cannot forget that this problem does not only affect girls, but the whole female gender and not only in Spain but internationally: “only in Spain, the data provided by shelter and protection centers supported by institutions of the Catholic Church show that the majority of the women object of illegal trafficking come from Latin America (Colombia, Brazil, Dominican Republic, Ecuador), with the rest originating in Eastern Europe (Russia, Lithuania, Croatia). This information coincides with data delivered by the General Direction of the Civil Guard, which cite Latin America as place of origin of 70% of the victims of trafficking of women” (Chiarabotti Boero 2006, 8).

We feel it is absolutely important to always be on the alert about both themes that, due to some common characteristics, have the risk of combining. The danger is that illegal trafficking in persons, in our investigation on girls, boys, and adolescents, is disguised as illegal trafficking of migrants. We understand that identifying the victims is fundamental: in the first assumption, victims of human trafficking, exploitation is verified, thus, there is violation of principal Human Rights, while if we consider the illegal entry of a person to a given country, we are against an illicit and illegal aid an-

¹¹ Data offered by Save The Children during the activity *Boys, girls, and adolescents victims of sexual trafficking*, on 03 March 2011 in Motril, Granada, Spain.



anno VI, n. 1, 2016
data di pubblicazione: 25 aprile 2016

Saggi

other person offers (through prior payment) to the emigrant. This leads to the different application of protection measures of victims.

It is true that the Spanish Penal Code has introduced a truly concrete norm that at least clarifies the position of the Spanish State against this problem and also against the relation between both assumptions. Article 318.2-*bis* Spanish Penal Code¹² reminds us that illegal trafficking of migrants may hide trafficking for purposes of exploiting persons: “if the purpose of the illegal trafficking or clandestine immigration were the sexual exploitation of persons, these will be punished with a penalty from 5 to 10 years in prison” (Muñoz Conde 2010).

We agree on the difficulty of considering the immigration of unaccompanied children as victims of trafficking, although it is possible that, at least some doubt is raised. It must be kept in mind that in most cases boys and girls who arrive to Spain, after a true migratory process, have had to pay for their journey to mafia groups and to traffickers. At a closer look, we may state that traffickers take advantage of the individuals and their sentiments. And there is no doubt that this is a form of exploitation with which we already have one of the elements that characterize trafficking of humans. To that we could add the higher vulnerability of the boys and girls who are much more impressionable than the adults. That is, the key lies in starting from a broad concept of exploitation, given that it seems that the exploitation is “only” the pattern following the

¹² Article of the Spanish Penal Code introduced by LO 11/2003 of 29 September (except its first section that was introduced by LO13/2007 of 19 November), “concrete measures on the matter of citizen security, the mystic violence, and social integration of the foreigners”.



anno VI, n. 1, 2016
data di pubblicazione: 25 aprile 2016

Saggi

catchment, in other words, the trafficker captures the victims with the intention of exploiting them, which is not always manifested in practice. In the case of children, isn't the mere fact of capturing a vulnerable subject like the child, accepting, or favoring the transfer already translated into exploitation? Is it really necessary to clarify the fact that the child assumes or not his or her transfer?

In recent years, an international law on Human Rights has been developed, especially, within the setting of protection of the most vulnerable groups¹³. Within the setting of the struggle against illegal trafficking in persons and illegal trafficking of migrants, respectively, the First and Second Protocols directly impact upon the aim of eradicating said crimes. In addition, in European Law, there have also been important normative developments implemented by the European Union in its objective to eradicate said crimes of violation of Human Rights. After this, it is difficult to carry out the struggle against illegal trafficking in persons and illegal trafficking of migrants in those countries where much still needs to be done to reach a democratic State¹⁴.

Of course, there is the will of the International Community to end with these forms of modern slavery by using international legal instru-

¹³ Women, workers, immigrant workers, and children - said vulnerable groups - in many cases, are victims of transnational organized delinquency and suffer heinous crimes of sexual and or labor exploitation. In International Penal Law, the international community has managed to develop the Palermo Covenant and its protocols to fight against the activities of organized criminal groups.

¹⁴ In general terms, in 2011 164 States were part in the Palermo Covenant. Hence, we refer to the States that still have not ratified the Palermo Covenant, like Thailand, Vietnam, Sierra Leone, Angola and Ivory Coast.



anno VI, n. 1, 2016
data di pubblicazione: 25 aprile 2016

Saggi

ments¹⁵. It is a challenge for the International Community to pressure said States to ratify the instruments mentioned to accomplish effective international cooperation on the issues of the struggle against illegal trafficking in persons and illegal trafficking of migrants.

The Spanish legal system, as already stated, also implements its legal instruments. In this sense, we must distinguish the new Title VII bis of the Spanish Penal Code related to illegal trafficking in persons (Fernández Palma 2010, 1-28).

Definitely, effective international cooperation must be based on a series of basic instruments, like loyal inter-governmental cooperation, international legal cooperation, and international police cooperation. All these are instruments that must be articulated to reach a common objective that eradicates the condemnable violation of Human Rights committed by transnational organized delinquency in the crimes of illegal trafficking in persons and illegal trafficking of migrants (Escribano Úbeda-Portugués 2011, 148).

Between illegal trafficking and illegal trafficking in persons a minimum common denominator exists represented by the mafia groups that direct all exploitation channels. From this perspective and to act against trafficking, it is necessary to have a useful common strategy to confront this blight. The most important element is to have more clarity and above all, the role of Human Rights and, hence, retake what Nuria

¹⁵ Concretely, Protocol I complementary of the Palermo Covenant related to the fight against illegal trafficking in persons, especially women and children, the number of instruments of ratification has increased in recent years, although there are still important States that have not ratified the Protocol.



anno VI, n. 1, 2016
data di pubblicazione: 25 aprile 2016

Saggi

Cordero Ramos¹⁶ identifies as the “sensitivity of Human Rights”. This sentiment permits broadening the perspective the new global situations offer, thus, discovering wider humanity spaces. With this vision, we can understand Human Rights as a set of social, economic, normative, political, and cultural processes that open and consolidate those spaces of struggle to achieve recognition of human dignity (Cordero Ramos, Cruz Zuñiga, Solórzano Norman 2012, 33).

5. Determining the age of unaccompanied immigrant children

We finally reach one of the key problems of this work: the determination of the age of the unaccompanied child. We must ask if this is really a legal matter or if on the contrary it can remain on the margin of our investigation. The answer is: yes, it is a legal matter. Said affirmation starts at the moment of electing the applicable legal norms. If we declare the alleged minor as such, we must apply the Law of Childhood Protection, as well as the Convention of the Rights of the Child, which implies a broader protection system; while if we are dealing with an adult individual, we apply the Immigration Law.

Circular number 6 of 2006 of the State Attorney General offers a first element to reflect¹⁷: in the case in which the operators who take in the foreign child have doubts regarding the child’s (or alleged child’s) age,

¹⁶ And other authors.

¹⁷ “(...) In those cases in which there is doubt on the age of the alien children, the prosecutors, once the pertinent diagnostic tests have been performed etc..”



anno VI, n. 1, 2016

data di pubblicazione: 25 aprile 2016

Saggi

they will communicate these doubts to the Fiscal Ministry and it will authorize the medical-diagnostic tests for the case¹⁸.

Now, at least three problems emerge in this situation that must be highlighted: 1) arrival of an undocumented child and who has a passport to demonstrate nonage, 2) use of an age determination system, through a comparative “atlas” with a two-year margin of error 3) obligation to submit to medical tests, mainly X-rays or ultrasound of the wrist, hand, elbow, shoulders, or parts of the body with many bones, and of course, the connection with the activity of the Fiscal Ministry.

In most cases we think of an unaccompanied foreign child who arrives to Spain undocumented, a person “without papers”. Recognizing that this occurs often, we cannot forget those cases of documented unaccompanied children, that is, those presenting their own passports or document accrediting their age. Within this context, the “guidelines” from the State Attorney General seem to attribute to the operators, who take in the alleged minor, an arbitrary power to the limit of legality: “in those cases where there is doubt on the age of the foreign children, the Prosecutors, upon conducting the pertinent diagnostic tests...”.¹⁹ The word “doubt” means “suspension or indetermination of the mood between two judgments or two decisions, “to doubt” indicates “distrust, suspect of someone or something... grant little credit to information heard”. In fact, if the operator doubts that the passport can be official, he

¹⁸ In this same sense, there is article 35.3 of the L.O. 2/2009 of 11 December (BOE number 299 of 12 December 2009), a reform of the L.O. 4/2000 of 11 January, on rights and freedoms of foreigners in Spain and their social integration.

¹⁹ Circular 2/2006 of the State Attorney General.



anno VI, n. 1, 2016
data di pubblicazione: 25 aprile 2016

Saggi

requests intervention from the Prosecutor who subjects the alleged minor to tests to determine the age²⁰.

Let us not forget that we are talking about a person who shows up with his or her own passport and which accredits his or her nonage²¹. The explanations some Autonomous Communities, like that of Madrid, offer and which provide positive reflection elements are that it is not about the falsehood of the passport; rather, the falsehood of the data contained in it²².

Additionally, the same Instruction from the General Direction of Registries and Notaries on prevention of documental fraud on civil status of 20 March 2006, informs on the possible "signs of defective, erroneous, or fraudulent nature related to the conditions in which the document was elaborated or drafted"²³. The Instruction, with prior nature reminds us that to determine the effectiveness of a foreign document in Spain, analysis must be made of the concurrence of a set of requisites of two types,

²⁰ The same occurs when the security forces taking an undocumented person of whom they doubt that person's nonage.

²¹ Among the many cases, we highlight that appearing in the press: "the attorney specialized in the defense of the rights of immigrant children, Juan Ignacio de La Mata, has just presented a caution in the court of Castilla requesting return to the protection system of a minor from Cameroon who sis yesterday has been in the streets."

²² Words by Ms. Paloma Martín Martín, manager of the Instituto Madrileño del Menor y la Familia de la Comunidad de Madrid, pronounced on 9 November 2010 during the *second day of activities of the MINA 2010. The situation of unaccompanied immigrant children: their protection and integration*". Valencia, 8, 9 and 10 November 2010. The author of this work personally witnessed this activity.

²³ Published in the BOE of 24 April 2006.



anno VI, n. 1, 2016

data di pubblicazione: 25 aprile 2016

Saggi

in form and substance. Both must be object of separate consideration in the registration qualification. In this sense:

a) Existence of a long interval between the date of the document and the date of the occurrence referred to; b) that the document had been elaborated after much time since the fact alluded to and soon before the procedure for which the document was issued; c) existence of contradictions or implausible aspects among the different data consigned in the record or in the document; d) that the document was elaborated exclusively on the basis of the Declaration by the person to which it directly relates; e) that the document was elaborated without having an objective element that will guarantee the reality of the fact referred to in the document; f) that this is a document issued by an authority that did not have in its power or did not have access to the original record.

The same Instruction continues indicating the possible “signs of defective, erroneous, or fraudulent nature derived from external elements of the document”:

a) That contradictions or implausible aspects exist among the data of the document presented and those figuring in other records or documents communicated to the competent authority or those acting in its power; b) that the data included in the document presented do not seem to correspond to the person to which it refers; c) that the competent authority on the matter is aware through official means of prior fraud or irregularities attributable to the interested party; d) that the competent authority on the matter is aware through official means of numerous irregularities in the management of civil records



anno VI, n. 1, 2016
data di pubblicazione: 25 aprile 2016

Saggi

or the expedition of certifications of records of the State of origin of the document presented.

We admit, as in this specific case, that it is quite difficult to achieve a perfect balance between the prosecutors activity, which as constitutional organism has the mission of promoting the action of justice in the defense of legality, of the rights of citizens, and of the public interest protected by the Law, and of the alleged minor's right to claim his condition as a minor supported by an official document.

Also, we detect the need for a continuous and joint action of all the participants involved in taking in the alleged minor: cooperation with the countries of origin, personnel specialized in detecting false documents, use of the Registry of unaccompanied foreign children; that is, a collection of measures that can really promote the work of the Fiscal Ministry, which in fact it is the one who makes the final decision.

6. Use of the comparative atlas

At the moment of determining the age and upon the problem of false documentation, we add the use of a comparative "atlas" of the X-rays or ultrasound studies. It is based on the comparison of an X-ray with a series of standard X-rays taken from a sample of the general population, assigning the osseous age that corresponds to the most similar standard or to an intermediate age between two successive standards; particularly, "it is an atlas with a series of typical X-rays of children that gather 30 evolutionary states in the maturity scale" (Tristán Fernández 2005, 60).



anno VI, n. 1, 2016

data di pubblicazione: 25 aprile 2016

Saggi

Although atlas exists for the knee, elbow, and foot, the best known and used is that by Greulich and Pyle for the hand and wrist (Keats, Siström 2002, 309). It is worth remembering that said atlas was developed by its two researchers during the 1940s in the USA and that, as explained by the authors, it takes, in part, into consideration the preceding research and atlas by Prof. Wingate Todd of 1929 (Greulich, Pyle 1950). As indicated by Dr. José Prieto of the Forensic Anatomical Institute in Madrid, the principal inconvenience “is the subjectivity of the X-ray reading”. Normally, after a sufficient learning curve, the variables are tolerable; finding no significant differences with other more precise methods” (Prieto 2010):

Obviously, we must keep in mind that osseous maturity is influenced by different factors: genetic, environmental, socio-economic, etc., with which if taking into consideration X-rays or ultrasound studies from one part of the population with given characteristics, for example, Latin persons, the comparative test will yield results different from those that could be reached if we were to consider another geographical-territorial part of comparison. Further, even if they “balanced” comparison were made, the margin of error would always be too high; give or take two years, with which if we are investigating the age of the person who is, supposedly, between full age and nonage, said activity that is to erroneous could change the treatment and protection granted to the person²⁴.

²⁴ In these cases the principle of *favor minoris* is usually applied. The Prosecution, in its own Instrucción 2/2001 indicates that we should take as age of reference the lowest age resulting from the medical tests performed.



anno VI, n. 1, 2016

data di pubblicazione: 25 aprile 2016

Saggi

Scientifically, among the best known, at least another two methods to determine age are indicated: the 1975 Tanner-Whitehouse method, based on Anglo Saxon children and the Sampé method based on French children. The basis of the Tanner-Whitehouse method consists in adjudicating aliquots of a numerical score that represents the whole process of skeletal maturity, to each of the stages through which the bones develop and which can be evidenced via X-rays (Guimarey, Lejarraga, Cusminsky 1979, 312). This is, then, a numerical method and not a comparative method, as the one by Greulich and Pyle. The Sampé method gathers elements similar to those by Tanner-Whitehouse, although more precise because it uses “maturity tertiary indicators” (Tristán Fernández 2005, 62), that is, osseous indicators related to adolescence.

Currently, although to a lesser extent, medicine also uses the panoramic X-ray system or dental orthopantomography that evaluates the maturity status of teeth in development²⁵. This system, like the rest, does not offer definite certainty about the age of the person with which, until now, there is no 100% reliable technique. However, we are left with the hope that medical and anthropological techniques may provide us, in the near future, with more loyal and certain methods. Clearly, the work of “machines” must be complemented with the work of professionals who will be asked to interpret the data obtained, bearing in mind, of course, a series of prior activities, like identifying the child and interviewing him or her²⁶.

²⁵ System proposed by Demirjian Goldstein and Tanner (1973).

²⁶ In this sense, “identifying the child” means knowing, when available, of prior medical exams that permit having a more complete picture of the person being investigated. “Interviewing”, means elaborating the complete anamnesis as for any other patient.



anno VI, n. 1, 2016

data di pubblicazione: 25 aprile 2016

Saggi

Thereby, we understand that “the medical tests do not always tend to offer an exact age, but always set a rather broad threshold and between its extremes we may find the subject’s true age with a scant margin of error; due to this, we must presume, in the absence of other data and seeking to determine if the subject is older or younger, that the age is that established as lower limit of said threshold. The determination of age will also have the corresponding interview, with the exploration of the alleged minor through the physical exam that will comprise: anthropometric measurements, secondary sexual characters, radiological exploration²⁷, and exploration of the degree of dental maturity” (Nieto García 2011).

In addition to this, it is necessary to reconsider some tools provided by the Law, which, in some cases, are left aside and facilitate the work of all the participants. Article 60.2 of Royal Decree 864/2001 of 20 June²⁸ institutes the “Registry of foreign children in situation of legal abandonment”²⁹. The use of said Registry is scarce, which if correctly employed could propose acceptable results related to displacements among Au-

²⁷ As already explained, particularly through the Greulich-Pyle method, a method that compares bone x-rays of the wrist and part of the arm of the individual whose age we need to determine with a visual Atlas of the method – although criticized because the Atlas of the method by Greulich-Pyle is designed on an upper-middle-class North American population and needs adaptation

²⁸ Through which approves the Regulation of execution of the Organic Law 4/2000, of 11 January, on the rights and freedoms of foreigners in Spain and their social integration, reformed by Organic Law 8/2000, of 22 December.

²⁹ Article 60.2 R.D. 864/2001: “likewise, in the General Direction of the Police, there will be a Registry of Alien Children in situation of legal neglect for merely identifying effects (...)”.



anno VI, n. 1, 2016
data di pubblicazione: 25 aprile 2016

Saggi

tonomous Communities, as well as offer an initial reference of the child taken in.

7. Conclusions

Spain, due to its geographic position, becomes the entry border of immigration (of adults and children). The proximity to the African continent makes the peninsula a territory of arrival and permanence, as well as a transit territory. What could turn out obvious is not if we observe the immigration phenomenon within international perspective and more so according to European Union logic.

The difficulties generated by managing immigration of adults, as well as that of children, cannot be circumscribed only within Spanish confines. Thereby, said phenomenon affects all the countries comprising the European Union. Much is spoken about the “immigration emergency in Spain”, as well as on other occasions solutions are sought for the “problem” of immigration with notable economic investment that, finally, turns out to be a cover used to calm social and political moods after a human disaster that assumes the characteristics of a catastrophe. All this is amplified when at the core of the disgrace we find boys and girls who also do not have the weak protection of their parents (who are also subject to the criminal logic of immigration).

In this sense, and without the presumption of providing solutions (if not work proposals), it is interesting to intervene in different aspects.

It is absolutely necessary to understand univocally that immigration is an unstoppable natural phenomenon. This consideration should not be understood in negative sense, all the contrary. It is an “undulatory” situation that increases or diminishes, depending on the economic and



anno VI, n. 1, 2016
data di pubblicazione: 25 aprile 2016

Saggi

social context. States, including Spain, forcefully and mostly deal with immigration when the parable is ascendant, that is, when immigration has the risk of presenting the country's negative face to international public opinion. Hence, a strong unitary policy is needed at European Union level. The different norms the member States have with respect to immigration fragment the efforts that should, on the contrary, be unitary.

If on one side, the socio-economic conditions in most of the countries from where immigration originates are presented as the cause of displacement; on the other side, it is the obligation of the European Union and of its member States to continue and increase cooperation with the immigration exporter states. We understand this cooperation cannot take place only through economic contribution. Eradicating poverty and beginning to enhance the construction of a possible social state in these countries must be the priority in the political agenda of the European Union. Although the member States of the European Union, are being currently affected by an extraordinary economic crisis, we cannot accept the use of immigration as one of the culprits of the present situation. If unemployment is high, if medical care is reduced due to Budget cuts (etc.), this cannot be used as a political tool to further closet he borders reducing immigrants to merchandize that is returned when not needed and accepted when it is useful for the country's development.

Finally, in the case of unaccompanied immigrant children we must not forget their condition as children before that of immigrants. Children are increasingly arriving without the company of their parents. This is the most recent phenomenon (with respect to adult immigration) that must confront different norms (in the Spanish case, for example, the Law



anno VI, n. 1, 2016

data di pubblicazione: 25 aprile 2016

Saggi

of Legal Protection for the Child and the Immigration Law); this causes difficulties in properly protecting the child. All this is further complicated when the tools to determine the child's age are not suitably qualified. Within this framework and where medical tests erroneously establish full age, theoretically no commitment solution exists. If the child turns out to be an adult, the Immigration Law is applied and having entered Spain illegally he or she is returned to his or her country. On the contrary, if it established that he is a minor, he may remain in Spain. I say "may" because the Public Administration will have to establish if this is of high priority interest. It is, therefore, advantageous for the Spanish government to grant stable guidelines (without these changing with new governments), which help operators to protect children without attacking international norms.



anno VI, n. 1, 2016

data di pubblicazione: 25 aprile 2016

Saggi

Essential References

Alto Comisionado de Naciones Unidas para los Refugiado (2005), *Contra la trata de niños, niñas y adolescentes*, Manual para Parlamentarios núm. 9, <http://www.acnur.org/t3/que-hace/proteccion/trata-y-traffic-de-personas/> (visited 29 November 2013).

Bazán López, J.L. (1998), *Notas acerca de la Convención de Naciones Unidas sobre los derechos del niño*, en M. Núñez Canal (coord.), *El menor en la legislación actual*, Fundación Antonio de Nebrija.

Bordonado Bermejo, M.J. (2006), *El origen de los derechos y libertades de los extranjeros en España*, in *Estudios Geográficos*, LXVII, 261, julio-diciembre.

Chiarotti Boero, S. (2006), *Aportes al Derecho desde la Teoría de Género*, en *Revista Miradas*, Universidad de los Andes, 6(1).

Cordero Ramos, N., P. Cruz Zuñiga y A. Solórzano Norman (Eds.) (2012), *Trata de persona, dignidad y derechos humanos*, ArCiBel Editores.

Departamento de Estado de Estados Unidos, www.america.gov/st/hrspanish/2009/July/20090721152648pii0.0993616.html (visited 10 October 2015).

Ecpat Europe Law Enforcement Group (2006), *Combatiendo la trata de niños, niñas y adolescentes con fines sexuales*, Preguntas y respuestas, Ecpat International.

Escribano Úbeda-Portugués, J. (2011), *Evolución y desarrollos normativos en el derecho internacional y europeo en la lucha contra la trata de personas y el tráfico ilícito de migrantes*, en *Nova et Vétera*, 20(64).

Fernández Palma, R. (2011), *La trata de seres humanos: la universalización del tráfico de personas y su disociación de las conductas infractoras de la*



anno VI, n. 1, 2016

data di pubblicazione: 25 aprile 2016

Saggi

política migratoria, arts. 177bis, 313, 318bis CP, Pamplona, La reforma penal de 2010. Análisis y Comentarios.

García Vázquez, S. (2008), *Inmigración ilegal y trata de personas en la Unión Europea. La desprotección de las víctimas*, en *ReDCE*, 10, Julio-diciembre.

González Martín, N. (2010), *La familia en el derecho comparado: Nuevas Estructuras Familiares, apuntes que trascienden al Derecho Internacional Privado* (Curso Anual de Actualización de Profesores de Derecho Internacional Privado y Derecho Internacional Público), en *Cuadernos de Trabajo del Seminario de Derecho Internacional, Facultad de Derecho de la Universidad Nacional Autónoma de México - Nuevas estructuras familiares: algunos apuntes que trascienden al derecho internacional privado*.

Greulich, W.W., I. Pyle (1950), *Radiographic atlas of skeletal development of the hand and wrist*, Standford University Press, California.

Guimarey, L.M., H. Lejarraga, M. Cusminsky (1979), *Evaluación de la madurez esquelética por el método de Tanner y Whitehouse*, en *Revista Medicina*, Enero-Febrero, Buenos Aires.

Keats, T.E., G. Sistrom (2002), *Atlas de medidas radiológicas*, Ediciones Harcourt.

Martín Martín, P. (2010), *II Jornadas MINA 2010. La situación de los menores inmigrantes no acompañados: su protección e integración* (Valencia, 8, 9 y 10 de Noviembre).

Muñoz Conde, F. (2010), *Derecho Penal*, Tirant Lo Blanch, Valencia.

Nieto García Á.J. (2011), *Derecho de asilo de menores, menores extranjeros no acompañados y otras personas vulnerables*, en *Diario La Ley*, Nº 7597, Sección Doctrina, 25 Marzo 2011, Año XXXII, Editorial LA LEY, LA LEY 3060/2011.



anno VI, n. 1, 2016
data di pubblicazione: 25 aprile 2016

Saggi

Nieto R. (2010), *Derechos Humanos y trata de mujeres con fines de explotación sexual*, Temas para el debate, 191 (octubre) (Copia dedicada a: Los derechos humanos hoy).

Organización Internacional para las Migraciones, Save the Children (2007), *Guía de intervención psicosocial para la asistencia directa con personas víctimas de trata*, México.

Prieto J.L. (2012), *Determinación de la edad en jóvenes indocumentados. Protocolo de actuación médico-forense*, www.justizia.net/docuteca/ficheros.asp?intcodigo=1501&IdDoc=SP (visited 15 enero 2012)

Save the children (2011), *Niños, niñas y adolescentes víctimas de trata*, 3 de marzo (Motril, Granada, España).

Torres Falcón, M. (2010), *Con sus propias palabras. Relatos fragmentarios de víctimas de trata*, Centro de Estudios para el Adelanto de las mujeres y la Equidad de Género, Cámara de Diputados, Gobierno de México LXI Legislatura.

Torres Falcón, M. (2011), *Explotación sexual y violencia de género: un debate de derechos humanos*, en *Nova et Vétera*, 20(64).

Tristán Fernández, J.M. (2005), *Influencias de diversos factores de salud y sociodemográficos en el desarrollo esquelético y antropométrico*, Universidad de Granada.



anno VI, n. 1, 2016
data di pubblicazione: 25 aprile 2016

Saggi

Abstract

Immigrant Children against Spanish and International Legal and Political Parameters

Since the 1990s, Spain has had to face an immigration phenomenon until then unknown. This is the immigration of unaccompanied foreign minors. This newest category of immigrants has specific characteristics compared to displacement of adults. Mainly, they are children who arrive to Spain without the company of their parents or legal guardian. After recognizing this situation, it is interesting to verify the national and international legal treatment granted, considering also the medical tests performed to verify age, resulting in one of the main problems affecting all their legal treatment.

Keywords: Child Immigration, Unaccompanied children, Rights of the Child, Determining age, Comparative atlas.