



## **FAMILY REUNIFICATION IN INTERNATIONAL LAW: THE CURRENT UNITED NATIONS LEGAL FRAMEWORK AND THE PRACTICE OF HUMAN RIGHTS BODIES\***

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### **1. Introduction**

**I**l According to recent statistical data residence permits for family reasons have been the type most frequently issued in the regional context of the European Union<sup>1</sup>. In several countries (for instance Germany, Luxembourg, Italy and Spain) “family reasons accounted for more than 50% of all first permits issued”<sup>2</sup>. These data reveal an important but perhaps

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<sup>1</sup> Data referred to 2015 and released in 2016. See EUROSTAT, *Statistic Explained* available at: <http://ec.europa.eu/eurostat/statisticsexplained/>. (Last access: June 2017).

<sup>2</sup> *Ibidem*.

unsurprising feature, i.e. that movements for family reasons constitute a significant part of the migration flows in the European area. As known, the term “family reasons” applies to a broad and general category of residence permits that also includes the ones issued for family reunification.

Generally speaking, there is no doubt that family reunification is seen as one of the fundamental pillars of the family life of immigrants and beneficiaries of international protection. In this perspective, in order to promote and protect family unity, the inclusion at domestic level of specific and adequate legislative measures aimed to ensure reunion with family members must be made a priority. Moving from theory to practice, unfortunately, a quick overview of the domestic laws of several European States reveals the presence of restrictions that may constitute an obstacle to family reunion<sup>3</sup>, in spite of the widely recognised importance of the family unity goal. Under these circumstances, broadly speaking, all States are encouraged to introduce and strengthen national policies on family reunification, taking into particular account the relevant international obligations.

With this in mind, we must underline that, from the point of view of international law, family reunification is regulated, directly or indirectly, by several international legal instruments at universal and regional level, especially – in the latter regard – within the institutional framework of the European Union<sup>4</sup>. Therefore, an overview of the international legal framework applicable to family reunification would help us identify the main legal obligations of the States.

However, we should also specify in advance that the analysis of the regional legal instruments is not included in this study, although some unavoidable references will be made with regard to specific issues and in a comparative key. The actual purpose of this contribution is to discuss the current legal framework on family reunification at universal level and, more specifically, in the United Nations context.

From a methodological point of view, the first part of the study will be an in-depth analysis of the main relevant human rights international instruments, both those of a general character (such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights) and those devoted to the protection of specific groups of individuals, in particular the Convention on the Rights of the Child (a very interesting treaty indeed, in that various parts of it make direct and specific references to family reunification, as will be discussed

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<sup>3</sup> According to recent data of the European Union Agency for Fundamental Rights, in fact, “some EU Member States have reduced the timeframe for lodging an application for preferential family reunification, or have made fulfilling necessary conditions more burdensome”. See European Union Agency for Fundamental Rights, Thematic Focus: Family Tracing and Family Reunification, available at: <http://fra.europa.eu/en/theme/asylum-migrationborders/overviews/focus-family>. (Last access: October 2017).

<sup>4</sup> More important is also the contribution of the Council of Europe. Within this regional Organization, family reunification is regulated by numerous soft law acts adopted both by the Committee of Ministers and the Parliamentary Assembly and by some treaties. In this latter regard see, in particular, the European Social Charter adopted in 1961 (Art. 19, para. 6). This provision was reiterated, without amendments, by the following 1996 European Social Charter (Revised). To complete this brief legal overview, we should also recall that while the European Convention on Human Rights (ECHR) does not explicitly regulate family reunification, it is widely known that, thanks to the judgments of the European Court of Human Rights (ECtHR), the right to family reunification is included in the sphere of application of Art. 8 ECHR, devoted to the protection, *inter alia*, of the right to family life.

further on). This will be followed by a study of the specific international instruments aimed to promote and protect the rights of refugees and migrants.

The analysis in its whole will not only focus on normative standards but also pay close consideration to the practice of the pertinent monitoring bodies, some of which have in fact provided significant contributions to the development of international standards in the field of family reunification.

## I. The United Nations Human Rights Framework and Family Reunification.

### 1. From the Declaration of Human Rights to the UN Covenants: The Indirect Protection of Family Reunification and the Practice of the UN Human Rights Committee

The Universal Declaration of Human Rights (UDHR), adopted by the General Assembly in 1948 in Paris<sup>5</sup>, does not contain a specific rule concerning the right to family reunification. However, one may argue that this right is indirectly protected by Art. 16, para. 3 relating to family rights, in particular by the passage stating that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State”.

Similarly, the International Covenant on Civil and Political Rights (ICCPR), adopted in 1966<sup>6</sup>, does not expressly include the right to family reunification among the list of rights protected; as the relevant provisions are formulated along the lines of the Universal Declaration, the Covenant also includes a specific provision dedicated to the protection of the family (Art. 23). In this respect, the wording of Art. 23, para. 1 of the Covenant is substantially identical to that of the Universal Declaration and it merely provides that the “family” is “[...] the natural and

<sup>5</sup> See the General Assembly Resolution 217 A (III) of 10 December 1948. There is an abundance of literature on the UDHR: see, among others, G. SPERDUTI, *La Dichiarazione universale dei diritti dell'uomo*, in *La Comunità internazionale*, 1950, pp. 216-235; R. CASSIN, *La Déclaration universelle et la mise en oeuvre des droits de l'homme*, in *Recueil des cours*, 1951, pp. 237-367; J. P. HUMPHREY, *The Universal Declaration of Human Rights: Its History, Impact and Juridical Character*, in B. G. RAMCHARAN (ed.), *Human Rights: Thirty Years After the Universal Declaration*, L'Aja, 1979, pp. 21-37; M. R. SAULLE, *I sessant'anni della Dichiarazione universale dei diritti umani*, in G. TARANTINO (a cura di), *Vita, libertà e sicurezza della persona nella Costituzione italiana e nella Dichiarazione universale dei diritti dell'uomo*. Atti delle giornate di studio (Università del Salento, 23-25 ottobre 2008), Napoli, 2011, pp. 133-139; L. PINESCHI, *La Dichiarazione universale dei diritti umani*, in ID. (a cura di), *La tutela internazionale dei diritti umani. Norme, garanzie, prassi*, Milano, 2006, pp. 67-77; C. ZANGHÌ, *La tutela internazionale dei diritti umani*, 3<sup>rd</sup> ed., Torino, 2013, pp. 19-29; F. KLUG, *The Universal Declaration of Human Rights: 60 Years on*, in *Public Law*, 2009, pp. 205-217; M. R. ISHAY, *The Sixtieth Anniversary of the Universal Declaration of Human Rights: Exploring the Past, Anticipating the Future*, in *Transnational Law and Contemporary Problems*, 2010, pp. 639-654; U. VILLANI, *Dalla Dichiarazione universale alla Convenzione europea dei diritti dell'uomo*, Bari, 2012.

<sup>6</sup> See the General Assembly Resolution 2200 A (XXI) of 16 December 1966. For an analysis of this Covenant see, among others, F. CAPOTORTI, *Patti internazionali sui diritti dell'uomo. Studio introduttivo*, Padova, 1967; G. GAJA, *I Patti internazionali sui diritti economici, sociali e culturali e sui diritti civili e politici*, in E. VITTA, V. GREMENTIERI, *Codice degli atti internazionali sui diritti dell'uomo*, Padova, 1981, pp. 47-63; L. HENKIN, *The International Bill of Rights: The Covenant on Civil and Political Rights*, New York, 1981; F. POCAR, I. VIARENGO, *Il Patto internazionale sui diritti civili e politici*, Milano, 2004; M. NOVAK, *The International Covenant on Civil and Political Rights, CCPR Commentary*, Kehl, 2<sup>nd</sup> ed., 2005; L. PINESCHI, *Il Patto delle Nazioni Unite sui diritti civili e politici*, in ID. (a cura di), *La tutela internazionale dei diritti umani*, op. cit., pp. 78-128; C. ZANGHÌ, *La tutela internazionale dei diritti umani*, op. cit., pp. 100-107; E. DECAUX (sous la dir.), *Le Pacte international relatif aux droits civils et politiques: commentaire article par article*, Paris, 2011; S. JOSEPH, M. CASTAN (eds.), *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 3<sup>rd</sup> ed., Cambridge, 2013.

fundamental group unit of society and is entitled to protection by society and the State”<sup>7</sup>. The subsequent paragraphs of the rule, provide, *inter alia*, for the right of men and women – of marriageable age – to marry and to found a family (para.2)<sup>8</sup>. However, it is important to note that neither of these international legal instruments contains a definition of the term “family”<sup>9</sup>, due to the lack of a universally agreed definition.

Under the ICCPR, the mentioned rule constitutes, without a doubt, the main legal frame of reference governing the right to family reunification. Nevertheless, in this context, it is also important to note that the rule must be read in conjunction with Art. 2, which prohibits any form of discrimination in the enjoyment of the rights and freedoms set forth in the Covenant<sup>10</sup>.

After these preliminary remarks, we may now proceed to the analysis of Art. 23. First of all, it should be made clear that this rule is not self-executing, and that this interpretation has been confirmed by the Committee established to oversee the implementation of the Covenant (the so-called “Human Rights Committee”, CCPR)<sup>11</sup>. As the monitoring body stressed in its General Comment No. 19 “[...] ensuring the protection [provided by Art. 23] requires that States parties should adopt legislative, administrative or other measures”<sup>12</sup>. In other words, we might say that the rule imposes on States positive obligations aimed to protect the family.

The next consideration concerns the scope of application of the rule. From this point of view, the aforementioned monitoring body pointed out that “the right to found a family”, protected by Art. 23, para. 2, of the Covenant “[...] implies, in principle, the possibility to procreate and *live together*”<sup>13</sup>. Sensing a necessity to specify these concepts further, the CCPR went on to note that the possibility to live together “*implies the adoption of appropriate measures*, both at the international level and as the case may be, in cooperation with other States, *to ensure the unity or reunification of families*, particularly when their members are separated for political, economic or

<sup>7</sup> A similar wording was also included in the International Covenant on Economic, Social and Cultural Rights (see Art. 10, para. 1) approved by the General Assembly with the aforementioned Resolution 2200A.

<sup>8</sup> It is important to point out that this restrictive approach relating to the concept of family, enshrined in the aforementioned provision, was amended by monitoring body of the Covenant which has developed a more wide and inclusive concept of family. This practice will be mentioned further in this work.

<sup>9</sup> For an overview of the international legal framework relating to the protection of the family see, among others, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS AND THE DEPARTMENT FOR ECONOMIC AND SOCIAL AFFAIRS, *The Family in International and Regional Human Rights Instruments*, New York, 1999; M. R. SAULLE, *Famiglia e diritto internazionale*, in *Iustitia*, 1999, pp. 306-315.

<sup>10</sup> More specifically, the provision contains a non-exhaustive list of forbidden grounds of discrimination. According to Art. 2 “[e]ach State Party to the [...] Covenant undertakes to respect and to ensure to *all individuals* within its territory and subject to its jurisdiction the rights recognized in the [...] Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (emphasis added).

<sup>11</sup> On the practice of this Committee see generally S. GHANDHI, *The Human Rights Committee of the International Covenant on Civil and Political Rights: Practice and procedure in the New Millennium*, in *Indian Journal of International Law*, 2008, pp. 208-231; Y. TYAGI, *The UN Human Rights Committee: Practice and Procedure*, Cambridge, 2011.

<sup>12</sup> See CCPR Committee, General Comment No. 19 (1990): Article 23 (Protection of the Family), para. 3. The adoption of General Comments is a consolidated practice not only of the CCPR but also of other UN treaty bodies. On this topic see generally H. KELLER, L. GROVER, *General Comments of the Human Rights Committee and their Legitimacy*, in H. KELLER, G. ULFSTEIN (eds.), *UN Human Rights Treaty Bodies: Law and Legitimacy*, Cambridge, 2012, pp. 116-198; E. KLEIN, D. KRETZMER, *The UN Human Rights Committee: The General Comments. The Evolution of an Autonomous Monitoring Instrument*, in *German Yearbook of International Law*, 2016, pp. 189-229.

<sup>13</sup> Emphasis added.



similar reasons”<sup>14</sup>. In other words, the format of Art. 23 has been interpreted to give additional weight to the issue of family reunification.

This milestone interpretative approach has been confirmed by the practice of the monitoring body in regards to reporting and individual complaint procedures. With respect to the former mechanism, the CCPR, in a number of Concluding Observations, has often invoked Art. 23 to express its disappointment and to make specific recommendations to States parties when necessary: for instance, the monitoring body has expressed concern about the length of family reunification procedures for recognised refugees<sup>15</sup> or about some legal restrictions on the definition of eligible “family members”<sup>16</sup>. More recently, the CCPR has also expressed concern on legislative amendments to the Aliens Act adopted by Denmark, which introduce “restrictions on family reunification for persons under temporary protection status”<sup>17</sup>, requiring them, in particular, to have held a residence permit for more than three years. In this case, the monitoring body has called upon the State “to reduce the duration of residence required of persons under temporary protection in order for them to obtain family reunification, in compliance with the Covenant”<sup>18</sup>.

On the other hand, with regards to complaint procedures, the monitoring body has only had the opportunity to deal with family reunification in a few individual cases.

The case of *Benjoumin Ngambi, Marie-Louise Nébol v. France* is an important example wherein the monitoring body clarified its position on the right to family reunification<sup>19</sup>. The authors, of Cameroonian origin and under refugee status in France, claimed to be the victims of violations of Art. 17, relating to the right to family life<sup>20</sup>, and of the quoted Art. 23 of the Covenant.

The CCPR ruled that the communication was inadmissible, but, interestingly, it also noted that “Art. 23 [...] guarantees the protection of family life *including the interest in family reunification*”<sup>21</sup>. To this end, the CCPR “recalls” that the term “family [...], must be understood broadly as to include all those comprising a family as understood in the society concerned”<sup>22</sup>, according to the law and national practice. This decision is important for several reasons, chiefly because it offers a definition of “family” and also a clear indication that Art. 23 can legitimately be invoked for the exercise of the right to family reunification, although such right is not specifically enshrined in the Covenant.

<sup>14</sup> See CCPR Committee, General Comment No. 19 (1990), quoted, para. 5). Emphasis added.

<sup>15</sup> See CCPR Committee (2008), Concluding Observations, France, CCPR/C/FRA/CO/4. On this practice, see S. JOSEPH, M. CASTAN (eds.), *The International Covenant on Civil and Political Rights. Cases, Materials and Commentaries*, cit., p. 675.

<sup>16</sup> See CCPR Committee (2007), Concluding Observations, Austria, CCPR/C/AUT/CO/4). See, again, S. JOSEPH, M. CASTAN (eds.), *The International Covenant on Civil and Political Rights. Cases, Materials and Commentaries*, cit.

<sup>17</sup> See CCPR Committee (2016), Concluding Observations, Denmark, CCPR/C/DNK/CO/6, para. 35).

<sup>18</sup> *Ibid.*, para. 36.

<sup>19</sup> See CCPR Committee (2004), Communication No. 1179/2003, *Benjoumin Ngambi, Marie-Louise Nébol v. France*, CCPR/C/81/D1179/2003.

<sup>20</sup> Art. 17 read as follows: “1. No one shall be subjected to arbitrary or unlawful interference with his [...] family [...]. 2. Everyone has the right to the protection of the law against such interference or attacks”.

<sup>21</sup> *Ibid.*, para. 6.4. Emphasis added.

<sup>22</sup> *Ibid.* More specifically, the monitoring body stated that “The protection of such family is not necessarily obviated, in any particular case, by the absence of formal marriage bonds, especially where there is a local practice of customary or common law marriage”.

Similarly, in the case *El Dernawi v. Libyan Arab Jamahiriya*, the author of the communication, a Libyan national resident in Olten (Switzerland), where he had applied for asylum, claimed violations of several articles of the Covenant (more specifically, Art. 12, 17, 23 and 24)<sup>23</sup>. In detail, he contended that the refusal by Libyan authorities to allow his wife and his three youngest children to join him in Switzerland was an illegitimate imposition, “apparently motivated by a desire to punish the author [of the communication]”<sup>24</sup>. This, according to the claimant, constituted an arbitrary interference with family life, in breach of Art. 17 and 23 of the Covenant. The monitoring body determined that the “action [confiscation of passport and refusal to permit the departure] amounted to a definitive, and sole, barrier to the family being reunited in Switzerland”<sup>25</sup>. Considering the absence of justification by the State party, it concluded, first of all, that “the interference with family life was arbitrary in terms of Article 17 with respect to the author, his wife and the six children”<sup>26</sup>; more relevantly to the topic under examination, the monitoring body also stated that the “State party failed to discharge its obligation under Article 23 to respect the family unity in respect of each member of the family”<sup>27</sup>.

As a consequence of this ascertained infringement “the State party is under an obligation to ensure that the author, his wife and their children have an effective remedy, including compensation and return of the passport of the author’s wife without further delay in order that she and the covered children may depart the State party for purposes of family reunification”<sup>28</sup>.

## 2. The UN Convention on the Rights of the Child

As known, the Convention on the Right of the Child (CRC), adopted at universal level in 1989<sup>29</sup>, is the main treaty specifically dedicated to the protection of the human rights of children, and it is no coincidence that this legal instrument is usually considered the *Magna Charta* of the Child<sup>30</sup>.

<sup>23</sup> See CCPR Committee (2007), Communication No. 1143/2003, *El Dernawi v. Libyan Arab Jamahiriya*, CCPR/C/90/D1143/2002.

<sup>24</sup> *Ibid.*, para. 3.2.

<sup>25</sup> *Ibid.*, para. 6.3.

<sup>26</sup> *Ibid.* para. 7.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*, para. 8. Emphasis added.

<sup>29</sup> The CRC was adopted by the General Assembly Resolution 44/25 of 20 November 1989 and entered into force on 2 September 1990 (within a year of its adoption). The CRC has been ratified by 196 States (data available at: <https://treaties.un.org>. Last access: October 2017). This ranks the Convention among the list of the UN international human right treaties with the highest number of ratifications. As known, the CRC has been integrated by two additional Protocols, adopted in 2000 (see the General Assembly Resolution 54/263 of 25 May 2000), concerning the involvement of children in armed conflicts and the trafficking of children, child prostitution and child pornography. A third Protocol was adopted in 2011 (see infra note 56). On the Convention there is a wide bibliography; see, among others, S. DETRICK, *The United Nations Convention on the Rights of the Child: A Guide to the “travaux préparatoires”*, Dordrecht, Boston, London, 1992; ID., *A Commentary on the United Nations Convention on the Rights of the Child*, The Hague, 1999; M. R. SAULLE, *La Convenzione dei diritti del minore e l’ordinamento italiano*, Napoli, 1994; M. R. SAULLE, F. KOJANEC, *The Rights of the Child: International Instruments*, Napoli, 1995; W. VANDENHOLE, *The Convention on the Rights of the Child*, in F. GOMEZ ISA, K. DE FEYTER (eds.), *International Human Rights Law in a Global Context*, Bilbao, 2009; S. MARCHISIO, *La Convenzione ONU sui diritti del fanciullo quale Magna Carta internazionale*, in R. CADIN, L. MANCA, V. R. PELLEGRINI (eds.), *I minori stranieri in Italia*. Atti del Convegno in memoria di Maria Rita Saulle e Lê Quyên Ngô Đình, Roma, 2014, pp. 43-56; C. NEIRINCK, M. BRUGGEMAN (sous la direction de), *La Convention internationale des droits de l’enfant (CIDE): une convention particulière*, Paris, 2014;

<sup>30</sup> See in this regard, S. MARCHISIO, *La Convenzione ONU sui diritti del fanciullo quale Magna Carta internazionale*, op. cit., p. 56.

The rights and freedoms protected by the CRC include, *inter alia*, the rights to life, name, nationality, registration after birth, privacy, education, social security and freedom of thought, conscience, religion and association. In other words, the treaty contains all human rights, in accordance with the fundamental principle of interdependence and indivisibility of human rights<sup>31</sup>. The CRC also endorses the well-known and more important principle of the best interest of the child (Art. 3)<sup>32</sup>, previously included in the former (and legally non-binding) 1959 UN Declaration of the Rights of the Child<sup>33</sup>. This principle, codified in other regional treaties on the protection of the child<sup>34</sup> and also recalled by the jurisprudence of some regional human rights courts, is especially relevant to the analytical purpose of this study<sup>35</sup>. As recently noted by the monitoring body of the treaty, the Committee on the Rights of the Child (CRC Committee), “[w]hen the child’s relations with his or her parents are interrupted by migration (of the parents without the child, or of the child without his or her parents), *preservation of the family unity should be taken into account when assessing the best interest of the child in decisions on family reunification*”<sup>36</sup>.

Having said this, it should also be noted that, unlike previous UN legal instruments, the CRC contains specific references to family reunification. In this respect, Art. 10 is of particular significance: some commentators have noted that this is an “innovative” rule<sup>37</sup>. It must be read in conjunction with other conventional rules, in particular with Art. 2, para. 1 (concerning the principle of non-discrimination<sup>38</sup>), Art. 9, para. 1, (aimed to protect, in general terms, the family

<sup>31</sup> This principle was introduced by the United Nations General Assembly since 1950 (See Resolution 421 (V) of 4 December 1950) and reaffirmed in 1993 (see the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, para. 5).

<sup>32</sup> For an analysis of this principle see, among others, J. WOLF, *The Concept of the ‘Best interest, in Terms of the UN Convention on the Rights of the Child*, in M. FREEMAN, P. VEERMAN (eds.), *The Ideologies of Children’s Rights*, Dordrecht, 1992, pp. 125 ff.; S. DETRICK, *A Commentary on the United Nations Convention on the Rights of the Child*, The Hague, 1999, pp. 85-99; C. FOCARELLI, *La Convenzione sui diritti del fanciullo e il concetto di “best interest of the child”*, in *Rivista di diritto internazionale*, 2010, pp. 981-993 and more recently E. SUTHERLAND, L.A. BARNES MACFARLANE (eds.), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interest, Welfare and Well-being*, Cambridge, 2016.

<sup>33</sup> Adopted by the UN General Assembly Resolution 1386 (XIV) of 20 November 1959.

<sup>34</sup> At regional level, see, for instance, the African Charter on the Rights and Welfare of the Child, adopted by the Assembly of Heads of State and Governments of the Organization of African Unity (today African Union) on 11 July 1990, entered into force on 29 November 1999 (Art. 4) and the European Convention on the Exercise of the Children’s Rights, adopted by the Committee of Ministers of the Council of Europe on 25 January 1996, entered into force on 1 July 2000 (Art. 6).

<sup>35</sup> At domestic level, it is interesting to note that in some countries the best interest of the child is explicitly enshrined, as general principle, in the Constitution. That is the case, for instance, in Kenya, South Africa and Venezuela. Art. 53, para. 2, of the Constitution of Kenya states that “A child’s best interests are of paramount importance in every matter concerning the child”. An analogous provision has been included in the 1996 South African Constitution (see Art. 28, para. 2). Again, according to Art. 78 of the Constitution of Venezuela “[t]he State, families and society shall guarantee full protection and an absolute priority, taking into account their best interest in actions and decisions concerning them [children and adolescents]”. For an analysis of this national practice, with reference to South Africa, see E. BONTHUYIS, *The Best interest of Children in the South African Constitution*, in *International Journal of Law, Policy and the Family*, 2006, pp. 23-43.

<sup>36</sup> CRC Committee, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1). Emphasis added.

<sup>37</sup> S. DETRICK, *A Commentary on the United Nations Convention on the Rights of the Child*, *op.cit.*, p. 185.

<sup>38</sup> Similarly to other international legal instruments, Art. 2, para. 1, contains a non-exhaustive list of ground of discrimination prohibited. It provides that “States Parties shall respect and ensure the rights set forth in the [...] Convention to each child within their jurisdiction without discrimination of any kind, irrespective of child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status”. In this respect, it is important to note that, at universal level, the CRC is one of the few international legal instruments that expressly include disability in the list of prohibited grounds for discrimination. As stressed by the CRC Committee in its General Comment No. 9, the insertion can be explained “[...] by the fact that children with disabilities

unity<sup>39</sup>) and Art. 12 (concerning the right of the child to be heard)<sup>40</sup>. According to the aforementioned Art. 9, para.1, “States parties shall ensure that a child not be separated from his or her parents against their will [...]”.

The subsequent Art. 10, para. 1, provides a general obligation whereby “[...] the application 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*”<sup>41</sup>. As can be observed, the wording of the first sentence is too vague and it could be interpreted as a reflection of the States' cautious – some might say timorous – approach to immigration issues; a literal interpretation of the provision would lead to the conclusion that it does not explicitly recognize the right to family reunification<sup>42</sup>. In fact, however, this provision places on States parties several specific procedural obligations regulating the treatment or examination of requests that concern family reunification. For instance, the obligation to deal with a request in an “expeditious manner” means that national authorities, when assessing cases of family reunification, must be able to come to a decision within a reasonable timeframe and without undue delay. This procedural obligation is wholly understandable considering the imperative to provide effective and immediate protection to minors due to their vulnerability. In a comparative key, it is worth noting that a more detailed and specific provision was included at regional level: according to Art. 5, para. 4 of the European Union Directive on the right to family reunification, adopted in 2003<sup>43</sup>, “[t]he competent authorities of the member States shall give the person, who has submitted the application, written notification of the decision as soon as possible and in any event no later than nine months from the date on which the application was lodged”.

Unfortunately, in spite of these remarkable provisions, the length of family reunification procedures is still very much a matter of concern. It is no coincidence that the UNHCR, on the

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belong to one of the most vulnerable groups of children”. See CRC Committee, General Comment No. 9 (2006): The Right of Children with Disabilities, para. 8.

<sup>39</sup> According to the provision “States parties shall ensure that a child not be separated from his or her parents against their will [...]”.

<sup>40</sup> According to Art. 12 “1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, *the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child* [included those concerning the family reunification], either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law”. Emphasis added. States parties' obligations under this rule have been clarified by the CRC Committee in its General Comment No. 12 (See CRC Committee, General Comment No. 12 (2009) on the right of the child to be heard). For details and analysis of this right see O. PORCHIA, *Gli strumenti sovranazionali in materia di ascolto del minore*, in *Diritti umani e diritto internazionale*, 2012, pp. 79-99; A. PARKERS, *Children and International Human Rights Law: The Right of the Child to be Heard*, London, 2013.

<sup>41</sup> Emphasis added.

<sup>42</sup> This interpretation is confirmed by UNICEF. See the *Implementation Handbook for the Convention on the Rights of the Child*, Third ed., Geneva, 2007, p. 135.

<sup>43</sup> See Council Directive 2003/86 of 22 September 2003 on the right to family reunification (OJ L 251 of 3 October 2003). For a commentary on this Directive see, among others, N. JOUANT, *Harmonisation du droit au regroupement familial dans l'Union européenne*, in *Revue du droit des étrangers*, 2003, pp. 539-546; N. COLACINO, *Il diritto al ricongiungimento familiare e la disciplina introdotta dalla Direttiva 2003/86/CE*, in M. R. SAULLE (ed.), *L'Europa tra Costituzione, Asilo e Migrazione*, Napoli, 2004, pp. 133-150; H. SCHNEIDER, A. WIESBROCK, *The Council Directive on Family Reunification: Establishing Proper Rights for Third Country Nationals?* In H. SCHNEIDER (ed.), *Migration, Integration and Citizenship: A Challenge for the Europe's Future*, volume II, *The Position of Third Country Nationals in Europe*, Maastricht, 2005, pp. 35-70; R. PALLADINO, *Il ricongiungimento familiare nell'ordinamento europeo*, Bari, 2012, pp. 143-180.



basis of a report drawn by some practitioners, recently lamented that procedures in some States could “often [be] lasting several years”<sup>44</sup>.

For the sake of completeness, it must be pointed out that all the procedural obligations imposed by the conventional rule under examination have been reaffirmed by the CRC Committee in its General Comment No. 6, devoted to the protection of unaccompanied and separate children<sup>45</sup>. Returning now to the analysis of Art. 10, para. 1 of the CRC, in addition to the above considerations, it seems clear that the whole national procedure governing the assessment of family reunification requests must respect the aforementioned principle of the best interest of the child, even in the absence of any direct reference to such principle in the provision. Anyway, as outlined earlier, the consensus is towards a rule of general application in favour of the child. The CRC Committee explained in its General Comment No. 14 that the “child’s best interests is a threefold concept [...]”<sup>46</sup> and in particular it stated that the best interest of the child is “(a) A substantial right [...] (b) A fundamental, interpretative principle [and finally] (c) A rule of procedure [...]”<sup>47</sup>. On this last point, the monitoring body specifies that “whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned”<sup>48</sup>. This is, for instance, the case with decisions concerning family reunification, as explicitly stated by the CRC Committee in this General Comment and in line with the aforementioned General Comment No. 6<sup>49</sup>.

As we continue our discussion of Art. 10, para. 1, it is important to note that another general legal obligation was included in the second part of the provision: in fact, States parties are required to ensure that “the submission of [...] a request [of family reunification] shall entail no adverse consequences for the applicants and for the members of the family”. This provision was likely inserted due to the occurrence of national practices of intimidation (as reported by some commentators) against persons who decide to submit an application to leave their country, whether for family reunification or for other purposes<sup>50</sup>; it can therefore be regarded as a safety mechanism designed to avoid and prevent intimidations or reprisals being inflicted upon the individuals involved in the reunification procedure.

From a legal perspective, under the above-mentioned provision there is a general and negative obligation of non-interference in the exercise of family reunification.

Lastly, the right of the child to maintain “personal relations and direct contacts with both parents” when residing in different countries is guaranteed by the subsequent para. 2 of Art. 10, as well as the right of the child and his or her parents “to leave any country, including their own, and to enter their own country”. The specific right to leave any country is not a novelty, since similar

<sup>44</sup> UNHCR, *Family Reunification in Europe*, October 2015, p. 3.

<sup>45</sup> CRC Committee, General Comment No. 6 (2005) on the treatment of unaccompanied and separate children outside their country of origin, para. 83.

<sup>46</sup> See CRC Committee, General Comment No. 14 (2013), cit., para. 6.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> See CRC Committee, General Comment No. 6 (2005), cit., para. 83.

<sup>50</sup> On this point see S. DETRICK, *A Commentary on the United Nations Convention on the Rights of the Child*, *op. cit.*, p. 194.

provisions were already included in the UDHR<sup>51</sup> and in the ICCPR<sup>52</sup>. In this respect, we should note that the exercise of this right is not absolute: in conformity with the aforementioned ICCPR<sup>53</sup>, the provision under consideration sets out some restrictions, which should be imposed by law and for specific aims<sup>54</sup>.

In order to give a full picture, a further noteworthy reference to family reunification is found in Art. 22, para. 2 of the CRC, which concerns refugee children and, in short, places upon States a duty to provide co-operation “in any efforts by the United Nations and other competent intergovernmental or, with the consent of the State concerned, non-governmental organizations to protect and assist such a child and trace the parents or other members of the family of unaccompanied refugee children in order to obtain information necessary for reunification with his family”<sup>55</sup>.

As anticipated, in line with other UN human rights treaties, the CRC provides for a monitoring mechanism based on the activity of a Committee of independent experts – the aforementioned CRC Committee. Up to 2014, the CRC Committee would only monitor the implementation of the treaty and the two Optional Protocols by examining reports submitted by States parties. However, following the entry into force in 2014 of the new Optional Protocol aimed to strengthen monitoring procedures, in addition to the reporting procedure the CRC Committee is also entitled, *inter alia*, to receive and examine individual communication submitted by or on behalf of individuals or groups of individuals claiming to be victims of a violation of any of the rights set out in the CRC and in the 2000 Optional Protocols<sup>56</sup>.

At the time of writing, the CRC Committee has received only four individual communications, none of which concern family reunification. However, as explained, the Committee has had ample opportunity to evaluate national legal practices in this respect through its main reporting procedure. In some Concluding Observations, for instance, the monitoring body expressed concerns about restrictions on family reunification of unaccompanied and separate refugee children and therefore invited the State party concerned to review its asylum policy<sup>57</sup>; in other Concluding Observations the CRC Committee specifically pointed out that “the procedures for

<sup>51</sup> See Art. 13, para. 2. It stipulates that “Everyone has the right to leave any country, including his own, and to return to his country”.

<sup>52</sup> See Art. 12, para. 2.

<sup>53</sup> See Art. 12, para. 3.

<sup>54</sup> The final phrase of the Art. 10, para. 2, stipulates that “[t]he right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order, public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the [...] Convention”.

<sup>55</sup> For a detailed analysis of the provision see again S. DETRICK, *A Commentary on the United Nations Convention on the Rights of the Child*, *op. cit.*, p. 361 ff.

<sup>56</sup> See the third Optional Protocol on a communication procedure, approved, partly under impulse from the civil society, by the General Assembly Resolution 66/138 of 19 December 2011. Unfortunately, at the time of writing (October 2017), the Protocol has only been ratified by 36 States. This data is hardly surprising, as it reflects a certain reluctance of States to accept international monitoring mechanisms that extend beyond mere State reporting procedures. For a detailed analysis of the Protocol see, among others, G. DE BECO, *The Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure: Good News?*, in *Human Rights Law Review*, 2013, pp. 367-387; O. FERRAJOLO, *Ricorsi individuali (ma non collettivi) al Comitato per i diritti del bambino nel Protocollo del 2011 alla Convenzione di New York*, in *Scritti in memoria di Maria Rita Saulle*, Napoli, 2014, pp. 595-619; I. INGRAVALLO, *La tutela internazionale dei minori dopo l'entrata in vigore del terzo Protocollo opzionale alla Convenzione del 1989*, in *La Comunità internazionale*, 2014, pp. 341-357.

<sup>57</sup> See CRC Committee (2016), Concluding Observations, United Kingdom of Great Britain and Northern Ireland, CRC/C/GBR/CO/5), para. 76.

family reunification [were] not physically and economically accessible for many asylum seekers and refugees and [were] overly demanding in terms of requirements for documentation and physical verification of applicants”<sup>58</sup>. The monitoring body therefore advised the State party “to take all necessary measures to safeguard the principle of the family unity for refugees and their children”<sup>59</sup> and in particular, to make “[...] administrative requirements for family reunification more flexible and affordable”<sup>60</sup>.

In conclusion, this overview of the practice demonstrates that the CRC Committee exercised its monitoring activities in a broad manner, making very precise observations on procedural and substantial aspects of the national practices governing the recognition of family reunification.

## **II. Family reunification in the international legal instruments concerning refugees and migrants.**

Having now examined the international legal instruments concerning human rights in general, the following pages will focus on the current legal framework of family reunification, in the light of the main instruments specifically aimed to protect refugees and migrants.

### **1. The 1951 Geneva Convention relating to the Status of Refugees and the Standard-Setting Role of the UNHCR Executive Committee. Introductory Observations on the General Practice Concerning the Adoption of Conclusions and their Legal Impact**

By general agreement, the main legal point of reference with regards to refugees is the 1951 Geneva Convention on the Status of Refugees, as amended by the 1967 Optional Protocol<sup>61</sup>. The Geneva Convention contains a universal definition of refugees and, more specifically, it protects their rights: as some commentators have noted, the Convention is “[...] the first

<sup>58</sup> See CRC Committee (2016), Concluding Observations, Bulgaria, CRC/C/BGR/CO/3-5), para. 50, let. f).

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> At the time of writing (October 2017) the Convention and the Protocol have been ratified by 145 respectively 146 States. The United States ratified the Protocol but not the Convention. For an overview on the Convention and more generally on the international protection of refugees see, among others, N. ROBINSON, *Convention Relating to the Status of Refugees. Its History, Contents and Interpretation*, New York, 1953; F. DURANTE, *Tutela internazionale dei rifugiati e diritti dell'uomo*, in *Studi in onore di G. Sperduti*, Milano, 1984, pp. 557-568; L. HENKIN, *Refugees and their Human Rights*, in *Fordham International Law Journal*, 1994-1995, pp. 1079-1081; M. R. SAULLE, *La Convenzione di Ginevra sullo status dei rifugiati*, Roma, 2002; J. C. HATHAWAY, *The Rights of Refugees under International Law*, Cambridge, 2005; G. S. GOODWIN-GILL, J. MCADAM, *The Refugee in International Law*, 3<sup>rd</sup> ed., Oxford, 2007; G. S. GOODWIN-GILL, P. WECKEL, *Protection des migrants et des réfugiés aux XXI<sup>e</sup> siècle, aspects de droit international*, Leiden, Boston, 2015. The importance of such international legal instruments has been reaffirmed also by the recent New York Declaration for Refugees and Migrants of 19 September 2016 (see para. 65). As known, this Declaration is a historic document adopted at the end of the first world Summit, hosted by the United Nations General Assembly, to address large movements of refugees and migrants. In general, the document contains State commitments that apply to both refugees and migrants, and separate commitments for refugees and for migrants. Moreover, it provides for the adoption in 2018 of a Global Compact on Refugees and a Global Compact for safe, orderly and regular migration. On this Declaration see generally, V. TÜRK, M. GARLIK, *From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee response Framework and a Global Compact on Refugees*, in *International Journal of Refugee Law*, 2016, pp. 656-678.

agreement which covers every aspect of life [...]”<sup>62</sup> of refugees and in particular it ensures “a minimum standard of rights”<sup>63</sup> for them (for instance, the right to association, access to the Court, freedom of movement). Nevertheless, this legal instrument does not contain any specific provision concerning the right to family reunification or the right to family unity. In this respect, the importance of the unity of family (and, implicitly, the right to family reunification) were underlined in the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, adopted on 25 July 1951<sup>64</sup>. Although it is not a treaty, nor is it legally binding, this document is undoubtedly relevant for several reasons. Firstly, by referencing the definition of family contained in the UDHR, the Final Act explicitly affirms that the “the unity of the family, [defined as] the natural and fundamental group unity of the society, *is an essential right of the refugees*”<sup>65</sup>. Secondly, it contains some general recommendations to States, chiefly the exhortation to “[...] take the necessary measures for the protection of the refugee’s family, especially in the view to: (1) ensuring that the unity of the refugee’s family is maintained particularly where the head of the family has fulfilled the necessary conditions for admission to a particular country; (2) the protection of refugees who are minors, in particular unaccompanied children and girls [...]”. As mentioned earlier, the document is not technically binding but it may be seen as one of the first expressions of a common stance of States on the issue of family reunification.

Unlike the other UN international instruments discussed above, the Convention does not provide for the appointment of a body of experts tasked to monitor its implementation. However, a crucial role in this context has been played by the UNHCR<sup>66</sup>, the permanent body established by the General Assembly in 1950<sup>67</sup> for the specific purpose of promoting and protecting the rights of refugees<sup>68</sup>. Within this institutional framework, of particular relevance is the practice of the UNHCR’s Executive Committee (commonly known as ExCom)<sup>69</sup> through the adoption of the so-called Conclusions. Generally speaking, these constitute a specific

<sup>62</sup> See N. ROBINSON, *Convention Relating to the Status of Refugees. Its History, Contents and Interpretation, op.cit.*, p. 6.

<sup>63</sup> *Ibid.*, p. 10.

<sup>64</sup> The Final Act is available at: [www.unhcr.org](http://www.unhcr.org).

<sup>65</sup> Emphasis added.

<sup>66</sup> The UNHCR has the duty to supervise the Convention. This is formally recognized by the Art. 35, para. 1, of the 1951 Geneva Convention according to which “The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations, which may be succeed it, in the exercise of its functions, and *shall in particular facilitate its duty of supervising the application of the provisions of this Convention*”. Emphasis added.

<sup>67</sup> The Statute was adopted by the General Assembly Resolution 428 (V) of 14 December 1950. Initially, the UNHCR was established with a temporary mandate (renewable). Since 2003 it became a permanent body (See General Assembly Resolution 58/153 of 22 December 2003). For a comprehensive account on the UNHCR and its activity see, among others, P. VAN KRIEKEN, *The High Commissioner for Refugees and Stateless Persons*, in *Netherlands International Law Review*, 1979, pp. 24-36; V. TURK, *The Role of UNHCR in the Development of International Refugee Law*, in F. NICHOLSON, P. TWOMEY (eds.), *Refugee Rights and Realities: Evolving International Concepts and Regimes*, Cambridge, 1999, pp. 153-174; M. R. SAULLE, *Alto Commissariato delle Nazioni Unite per i Rifugiati (ACNUR)*, in *Enc. Dir.*, IV aggiornamento, Milano, 2002, pp. 1-7; C. LEWIS, *UNHCR’s Contribution to the Development of International Refugee Law: Its Foundation and Evolution*, in *International Journal of Refugee Law*, 2005, pp. 67-90; E. FELLER, A. KLUG, *Refugees, United Nations High Commissioner for (UNHCR)*, in *Max Planck Encyclopedia of Public International Law*, 2013; J. C. SIMEON (ed. by), *The UNHCR and the Supervision of International Refugee Law*, Cambridge, 2013.

<sup>68</sup> Over time the mandate of the UNHCR was expanded to include, for example, asylum seekers and stateless persons.

<sup>69</sup> The ExCom was established in 1958 by the United Nations Economic and Social Council (see Resolution 672 (XXV) of 30 April 1958), under a specific request of the General Assembly (see Resolution 1166 (XII) of 26 November 1957). Generally speaking, it is a consultative body, composed by representatives of the UN Member States or members of any specialized agencies, elected by the aforementioned Council.



typology of non-binding acts, adopted by *consensus*<sup>70</sup>, by which the ExCom expresses its point of view and its concerns, and also formulates recommendations on the protection of refugees and asylum seekers. In spite of their legal nature as soft law acts<sup>71</sup>, the Conclusions are not devoid of efficacy: they unquestionably carry significant political and moral weight and in this respect they may be considered one of the fundamental normative reference points for all States<sup>72</sup>, although we should also underline that State practice does not always conform to the Conclusions. As regards their content, the Conclusions are quite heterogeneous: in general terms they aim to cover all aspects of the life of persons in need of international protection – for instance, access to the procedure, cessation of refugee status, access to adequate housing, and non-refoulement<sup>73</sup>.

### 1.1. More Specifically: The Conclusions Relating to Family Reunification

Since 1975, the ExCom has also adopted several Conclusions relating to family unity and reunification. The role of the UNHCR in this context is clearly outlined in its Conclusion No. 9, which specifies that the body has a “co-ordinating role [...] with a view to promoting the reunion of separated refugees families through appropriate interventions with Governments [...]”<sup>74</sup>.

At this point we should clarify that an in-depth analysis of the content of all pertinent Conclusions is beyond the scope of this article: instead, in the following pages we will aim to provide a general overview of the most salient Conclusions adopted so far, in order to illustrate the main strategies of the body in promoting and protecting family reunification.

First of all, since its first Conclusions, the ExCom has acknowledged the “fundamental importance of the principle of family reunion”<sup>75</sup> and affirmed that “in keeping with the fundamental principles of family unity, members of refugee families should be given every opportunity to be reunited [...]”<sup>76</sup>.

In other Conclusions, it has specified the categories of family members eligible for reunification (for instance, spouses, minors or dependant children). In this regard, it is worth noting that States authorities are encouraged to apply “liberal criteria in identifying family members”<sup>77</sup>. This

<sup>70</sup> For some remarks on the drafting process see M. FRESIA, *Building Consensus within UNHCR’s Executive Committee: Global Refugee Norms in the Making*, in *Journal of Refugee Studies*, 2014, pp. 515-533 and also A. CORKERY, *The Contribution of the UNHCR Executive Committee to the Development of International Refugee Law*, in *Australian International Law Jour.*, 2006, pp. 97-127, especially, pp. 113-115.

<sup>71</sup> For an in-depth analysis of their status in international law see, among others, J. SZTUCKI, *The Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme*, in *International Journal of Refugee Law*, 1989, pp. 285-318 and A. CORKERY, *The Contribution of the UNHCR Executive Committee to the Development of International Refugee Law*, *op. cit.*, p. 107 ff.

<sup>72</sup> Conclusions are generally aimed to influence the conduct of States but in several instances the ExCom also addressed its Recommendations to non-State actors, such as Non-Governmental Organizations.

<sup>73</sup> The Conclusions are reproduced by the UNHCR in the following document, UNHCR, *A Thematic Compilation of Executive Committee Conclusions*, 7<sup>th</sup> edition, June 2014.

<sup>74</sup> See UNHCR Executive Committee, Conclusion on Family Reunion, No. 9 (XXVIII)-1977, para. b.

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

<sup>76</sup> See UNHCR Executive Committee, General Conclusion on International Protection, No. 1 (XXVI)-1975, para. f.

<sup>77</sup> UNHCR Executive Committee, Conclusion on Family Reunification, No. 24 (XXXII)- 1981, para.5

remarkably flexible approach has been reiterated in several occasions<sup>78</sup> and its importance has been further highlighted, more recently, by the UNHCR in its aforementioned position paper on “Family Reunification in Europe”<sup>79</sup>.

Moreover, in some of its Conclusions the ExCom has adopted specific recommendations on the national procedures governing the assessment of refugees' family reunification requests. In this context, for instance, it has reiterated the general obligation included in Art. 10, para. 1 of the CRC, according to which all requests must be processed “in a positive and humanitarian spirit, and without undue delay”<sup>80</sup>. It has also adopted specific recommendations aimed to resolve the problematic issue of documenting family links. On this topic, since 1981 the ExCom has stated that “[w]hen deciding on family reunification, the absence of documentary proof of the formal validity of a marriage or a filiation of children should not per se considered as an impediment”<sup>81</sup>. This is, without a doubt, a very important procedural guideline<sup>82</sup>; unfortunately, although the ExCom has suggested specific ways to address the problem, an overview of current practice reveals that the issue is far from resolved. According to the UNHCR, in fact, difficulties with providing evidence of family links continue to be one of the main obstacles to family reunification<sup>83</sup>.

Aside from these procedural regulatory measures, no less relevant are the recommendations aimed to facilitate the integration of family members in the host country. In some Conclusions, the ExCom has highlighted the need to fast-track the integration of refugee families<sup>84</sup>: more specifically, it has suggested that “[...] joining close family members should in principle be granted the same legal status and facilities as the head of the family who has been formally recognized as a refugee”<sup>85</sup>.

Lastly, systematic attention has been drawn to the protection of vulnerable groups such as children, including those with disabilities<sup>86</sup> and, in particular, unaccompanied minors<sup>87</sup>. In fact, since 1981 the ExCom has adopted recommendations aimed to encourage States to establish and

<sup>78</sup> See, for instance, UNHCR Executive Committee, Conclusion on the Protection of the Refugee's Family, No. 88 (L)-1999, para. b, sub-para. (ii).

<sup>79</sup> See UNHCR, Family Reunification in Europe, cit.

<sup>80</sup> See UNHCR Executive Committee, Conclusion on International Protection, No. 85 (XLIX)-1998, para. w.

<sup>81</sup> See UNHCR Executive Committee, Conclusion on Family Reunification, No. 24 (XXXII), cit. para. 6.

<sup>82</sup> On this point, it appears opportune to remember that a specific obligation was included in the mentioned Council Directive 2003/86. The Art. 11, para. 2, stipulates that “Where a refugee cannot provide official documentary evidence of the family relationship, the Member States [of the European Union] shall take into account other evidence, to be assessed, in accordance with national law, of the existence of such relationship”. In any case, the second part of the provision, in line with the ExCom's practice, provides that “*A decision rejecting an application may not be based solely on the fact that documentary evidence is lacking*”. Emphasis added

<sup>83</sup> See UNHCR, Family Reunification in Europe, cit.

<sup>84</sup> See UNHCR Executive Committee, Conclusion No. 24 (XXXII), cit., para. 8 and also UNHCR Executive Committee, Conclusion on Local Integration, No. 104 (LVI) - 2005, para. iv.

<sup>85</sup> See UNHCR Executive Committee, Conclusion No. 24 (XXXII), cit., para. 8.

<sup>86</sup> See UNHCR Executive Committee, Conclusion on Refugees with disabilities protected and assisted by the UNHCR, No. 110 (LXI) – 2010.

<sup>87</sup> For a survey of unaccompanied minors in international law see, among others, E. D. PASK, *Unaccompanied Refugee and Displaced Children; Jurisdiction, Decision-Making and Representation*, in *International Journal of Refugee Law*, 1989, pp. 199-219; F. LENZERINI, *La protezione dei minori stranieri non accompagnati nel diritto internazionale*, in R. PISILLO MAZZESCHI, P. PUSTORINO, A. VIVIANI (a cura di), *Diritti umani degli immigrati: tutela della famiglia e dei minori*, Napoli, 2010, pp. 271-295; and more recently A. CRESCENZI, *Unaccompanied Minors in International Law*, in ROSSKOPF (ed.), *Unaccompanied Minors in International, European and National Law*, Berlin, 2016, pp. 29-39.

strengthen their protection, a practice that has consolidated in the last few decades, as the phenomenon has taken on ever-increasing proportions<sup>88</sup>. From an overview of the various Conclusions, it emerges that the attention of States has been addressed on three different but related points. Firstly, States are urged to make any effort necessary “to trace the parents or other close relatives of unaccompanied minors before their resettlement”<sup>89</sup>. Secondly, the adoption of a refugee children “should only be considered when all feasible steps for family tracing and reunification have been exhausted”<sup>90</sup>. Thirdly, the national decision-makers always have to take into account the fundamental principle of the best interest of the child<sup>91</sup>. From the substantial point of view, it is evident that these international standards are in line with the CRC and the practice of the CRC Committee on the treatment of unaccompanied minors<sup>92</sup>.

## **2. The International Convention on the Protection of the Rights of All Migrants Workers and Members of their Families (ICMW). A Missed Opportunity to Strengthen the Protection of Family Reunification at Universal Level**

The ICMW was adopted in 1990 after lengthy negotiations<sup>93</sup> and its subsequent entry into force took over ten years. In fact, following the deposit of the 20th ratification or accession, the ICMW only entered into force, according to Art. 87, para. 1, on 1 July 2003<sup>94</sup>. As known, one of the main characteristics of this international legal instrument is that it applies to all migrants, regardless of their status: therefore, the ICMW aims to protect both irregular and regular migrants.

Unlike the 1951 Geneva Convention relating to the Status of Refugees, the ICMW contains a specific reference to family reunification in its Art. 44. In particular, this reference is included in

<sup>88</sup> Recent statistical data at regional level, more specifically in the European Union context, is particularly impressive. The highest number of unaccompanied minors asylum seekers has been recorded in 2015 (almost 96,500). The number was down to 63,300 in 2016 but it continues to be high, especially when compared with the general trend of the previous years. In 2016, the European country with the highest number of unaccompanied minors asylum seekers is Germany, followed by Italy, Austria, the United Kingdom, Bulgaria, Greece and Sweden. For more details about the reported data see EUROSTAT, Newsrelease No. 80 /2017 of 11 May 2017.

<sup>89</sup> See UNHCR Executive Committee, Conclusion No. 24 (XXXII), cit., para. 7. In this respect, see also the UNHCR Executive Committee, Conclusion on Children at Risk, No. 107 (LVIII) – 2007, para. h, subpara. iii. For an overview of the drafting process of this latter Conclusion see M. FRESIA, *Building Consensus within UNHCR’s Executive Committee: Global Refugee Norms in the Making*, op. cit.

<sup>90</sup> UNHCR Executive Committee, Conclusion No. 88 (L), cit., para. c.

<sup>91</sup> *Ibid.* and UNHCR Executive Committee Conclusion No. 107 (LVIII), quoted, para. h, subpara. iii.

<sup>92</sup> See CRC Committee, General Comment No. 6 (2005), cit., para. 91.

<sup>93</sup> See General Assembly Resolution 45/158 of 18 December 1990. On this Convention see generally, G. CELLAMARE, *La Convenzione delle Nazioni Unite sulla protezione dei diritti di tutti i lavoratori e dei membri della loro famiglia*, in *Rivista di diritto internazionale*, 1992, pp. 861-875; A. EGGERS, *Recent Developments in Human Rights: The International Convention on the Protection of All Migrants Workers and Members of their Family*, in *German Yearbook of International Law*, 1992, pp. 429-437; R. BARATTA, *La Convenzione delle Nazioni Unite sulla protezione dei lavoratori migranti: quali ostacoli all’adesione dei Paesi di ricezione dei flussi migratori?*, in *Rivista di diritto internazionale*, 2003, pp. 764 ss; R. CHOLEWINSKI, P. DE GUCHTENEIRE, A. PECOUD (eds.), *Migrations and Human Rights: The United Nations Convention on Migrant Workers’ Rights*, Cambridge, 2009; L. S. BOSNIAK, *Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Worker’s Convention*, in V. CHETAIL, *International Law and Migration*, Volume II; Cheltenham, UK, Northampton, MA, USA, 2016, pp. 28-58.

<sup>94</sup> Unfortunately, as of October 2017, the ICMW has only been ratified by 51 States; it is worth mentioning that no Member State of the European Union has so far ratified the Treaty.

Part IV of the Treaty, expressly devoted to the “Rights of Migrant Workers and Members of their Family who are Documented or in a Regular Situation”. On the basis of this initial consideration, it appears that the rule concerning family reunification only applies to regular migrants. However, both regular and irregular migrants are entitled to the right to family life; in fact, according to Art. 14 “No migrant worker or member of his or her family shall be subjected to arbitrary or unlawful interference with his or her privacy, family [...]. Each migrant worker and member of his or her family shall have the right to the protection of the law against such interference or attacks”.

An analysis of the rule concerning family reunification shows that it comprises three different but interrelated parts<sup>95</sup>. The wording of the first paragraph is similar to other international legal instruments and, more specifically, it reaffirms the concept of family “as natural and fundamental group unity of the society”. In this context, the provision explicitly imposes on States parties a general obligation to “take appropriate measures to ensure the protection of the unity of the families of migrant workers”. Along the line of Art. 23 of the ICCPR and the pertinent practice of the CCPR, it is quite evident that the provision is not self-executing.

More relevant to the purpose of this study is the subsequent paragraph 2, which contains a direct reference to family reunification. According to the provision, in fact, “States parties shall take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses or persons who have with the migrant worker a relationship that, according to the applicable law, produces effects equivalent to marriage, as well as with the minor dependent unmarried children”. A careful reading leads us to conclude that, first of all, much like the previous paragraph, the provision is not self-executing. In addition to this important and preliminary observation, we can also note that the provision affords States broad discretion in regulating family reunification, as confirmed by the wording of the provision, and in particular by the rather generic reference to “measures that [States] deem appropriate” to adopt for its implementation. Again, from the substantial point of view, the provision appears unsatisfactory, in that it provides a mere obligation “to facilitate” and not “to ensure” or “to guarantee” family reunification. There is little doubt that the wording chosen by the drafters ultimately weakens the scope of the obligation. Finally, unlike analogous international legal instruments containing an express reference to family reunification, the ICMW details the family members eligible for reunification. As anticipated, included are the spouses or “persons who have with the migrant worker a relationship that [...] produces effects equivalent to marriage” and minor, dependant, unmarried children. It is quite obvious that States retain a degree of discretion to extend the right to reunification to other family members beside those detailed by the provision. According to para. 3 of Art. 44, in fact, “States of employment, on humanitarian grounds, shall favourably consider granting equal treatment, as set forth in paragraph 2 [...] to

<sup>95</sup> In this case the pertinent rules concerning family reunification must also be read in conjunction with the principle of non discrimination endorsed by Art. 7 of the ICMW, which provides that “States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the [...] Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status”.



other family members of migrant workers”. In any case, in the same context, it is important to underline that States may also adopt more favourable rules, on the basis of the safeguard clause included in Art. 81, para. 1<sup>96</sup>.

Having described the content of the relevant provisions concerning family reunification, our attention must inevitably shift to the practice of the monitoring body of the Convention. The Committee of independent experts (so-called UN Committee on the Protection of the Rights of Migrants Workers and Members of their Family, CWM), similarly to other United Nations treaty bodies, is entitled to receive and examine periodic reports submitted by States parties. Under specific conditions, it may also receive and examine inter-State and individual complaints<sup>97</sup>; the latter competencies are facultative and subject to the deposit of a minimum of 10 declarations of acceptance by States parties. At the time of writing (October 2017), unfortunately, neither procedure is in force and, in fact, only few States have accepted the competence of the monitoring body<sup>98</sup>. Therefore, there have been no cases relevant to the implementation of the conventional rule governing family reunification.

Due to the facultative character of complaints procedures, the CMW may monitor the conduct of States parties only through the broader – and weaker – mechanism of the reporting procedure, which leads to the adoption of non-binding acts such as the “Concluding Observations”.

Within the context of treaty body practice, outside of these monitoring mechanisms, the CMW has had occasion to recall the States parties' obligations in the field of family reunification in its General Comment No. 1 devoted to migrant domestic workers<sup>99</sup>. In this General Comment, the monitoring body confirmed the application of Art. 44 only to regular migrants and reaffirmed the content of Art. 44, para. 2, although with a slightly different wording. In particular, it maintained that “States should take appropriate measures with regard to migrant domestic workers [...] to facilitate their reunification with their spouses and children [...]”<sup>100</sup>.

### III. The Practice of other United Nations human Rights bodies.

This overview of the universal normative framework would not be complete without a few brief considerations about the activities of other United Nations bodies mandated to promote and protect human rights. Unlike the monitoring bodies discussed above, the bodies under

<sup>96</sup> Art. 81, para.1, ICMW reads as follows: “1. Nothing in the [...] Convention shall affect more favourable rights or freedoms granted to migrant workers and members of their families by virtue of : (a) The law or practice of a State party; or (b) Any bilateral or multilateral treaty in force for the State party concerned”.

<sup>97</sup> See respectively, Artt. 76 and 77 of the ICMW.

<sup>98</sup> In line with the low number of ratifications, the inter-State complaint procedure was accepted by 5 States parties (El Salvador, Guatemala, Mexico, Turkey and Uruguay). The current status of the individual complaints procedure looks even gloomier, as only 2 States (Mexico and Uruguay) have deposited the declaration of acceptance. Data available at: <https://treaties.un.org> (last access: October 2017).

<sup>99</sup> See CMW General Comment No. 1 (2011) on migrant domestic workers. This term was defined by the CMW as follows: “[...] person who performs work within an employment relationship in or for other people’s private houses, whether or not residing in the household”. See *Ibid.*, para. 5.

<sup>100</sup> *Ibid.*, para. 55. From a careful reading of the sentence one cannot fail to notice that, incomprehensibly, the Committee uses the different wording “State should take” instead of “States shall take” as expressly provided by Art. 44, para. 2 of the ICMW.

consideration in the next paragraphs are not directly established by the human rights treaties. However, they play an analogous and equally important role in the development of human rights law at universal level, as well as in monitoring the States' compliance with international obligations and soft-law instruments.

### **1. The Contribution of the Human Rights Council to the Promotion of Family Reunification and the Practice of the Special Rapporteur on the Human Rights of Migrants**

As known, the Human Rights Council (HRC), created in 2006<sup>101</sup>, is the intergovernmental body which superseded the former Commission on Human Rights set up since the very first years of activity of the United Nations Organization.

The HRC is currently engaged in the promotion of family reunification, in particular through the adoption of non-binding acts, among which it is worth mentioning the Resolutions devoted to protecting unaccompanied migrant children. These international acts, all drafted using the same wording, share the common goal of encouraging all countries (countries of origin, transit and destination) “to facilitate” family reunification, considered “as an important objective to promote the welfare and the best interests of migrant children, including adolescents [...]”<sup>102</sup>. The reading of these Resolutions once again confirms the relevance of the principle of the best interest of the child, in line with the above-referred practice of United Nations treaty bodies. However, the approach taken by the Resolutions seems rather more cautious: by using the same terminology as the 1990 ICMW, the HRC merely invited States to “facilitate” family reunification. In this perspective, on the other hand, the HRC suggested detailed ways to achieve this goal: in particular, States are constantly called to respect due process, the pertinent provisions of the CRC and some of the obligations outlined in the 1963 Vienna Convention on Consular Relations concerning consular notification and access; the latter is seen as requisite “to provide child-friendly consular assistance, as appropriate, including legal assistance”<sup>103</sup>. A further look at the practice, on the other hand, shows that in other Resolutions the HRC took a much stronger stance: for instance, the Resolution concerning the human rights of migrant children urged States “to ensure that repatriation mechanisms allow for the identification and special protection of children, and [more specifically] that repatriation processes [...] take into account [...] the principles of the best interest of the child and non-refoulement, and family reunification”<sup>104</sup>.

<sup>101</sup> See the General Assembly Resolution 60/251 of 15 March 2006. The bibliography relating to the HRC is quite wide. Among the most recent contributions see R. FREEDMAN, *The United Nations Human Rights Council: More of the Same?*, in *Wisconsin International Law Journal*, 2013, pp. 208-251; B. G. RAMCHARAN, *The Law, Policy and Politics of the UN Human Rights Council*, Leiden, Boston, 2015; J. GALLEN, *Between Rhetoric and Reality: Ten Years of the United Nations Human Rights Council*, in *Irish Studies in International Affairs*, 2016, pp. 1-19.

<sup>102</sup> Among the most recent Resolutions see Human Rights Council, Resolution 29/12 of 2 July 2015, para. 1; Resolution 33/7 of 29 September 2016, para. 1. Both Resolutions are entitled “Unaccompanied Migrant Children and Adolescents and Human Rights”.

<sup>103</sup> *Ibid.*

<sup>104</sup> See HRC Resolution 12/6 of 1 October 2009 on “Human Rights of Migrants: Migration and the Human Rights of the Child”, para. 3, lett. f). Emphasis added.

Before concluding this survey, within the same institutional framework we should also mention the Special Procedures<sup>105</sup>, chiefly the one related to the “Thematic Mandates”<sup>106</sup>. Of particular relevance to the purpose of the study is the activity of the Special Rapporteur on the Human Rights of Migrants. From an institutional point of view, the Special Rapporteur is a monocratic independent body, created in 1999 by the former Commission on Human Rights<sup>107</sup> and whose mandate has also been confirmed by the current HRC<sup>108</sup>. In general terms, this independent body’s<sup>109</sup> task is to promote and protect the rights of migrants in all countries, regardless of their ratification of the 1990 ICMW. The Special Rapporteur carries out these important tasks through a variety of instruments and in particular it may receive communications concerning violations of the human rights of migrants, conduct field visits (with the consent of the host State) and elaborate thematic reports.

Given these premises, an examination of the practice shows that the Special Rapporteur has had the opportunity to deal with the family reunification on several occasions, mainly as part of its reporting activity and on-site visits. Among the various general thematic reports adopted we may mention, for instance, the one devoted to the Protection of Children in the Context of Migration<sup>110</sup>. In terms of substance, it is a detailed document reviewing the international legal framework and in particular the main responsibilities of States in the promotion and protection of the rights of migrant children. Some paragraphs of the Report deal with family unity and reunification, specifically acknowledging the importance of national measures aimed to “promote family unity and facilitate the reunion of children with their parents in host countries”<sup>111</sup>. In this respect, it is also specified that such measures are necessary “to address adequately the special needs and the protection of children left behind”<sup>112</sup>. This last term was further clarified by the Special Rapporteur as being referred to “children raised in their home countries or in their countries of habitual residence who have been left behind by adult migrants responsible for them, such as one or both parents, extended family members, legal guardians or caregivers”<sup>113</sup>. Other paragraphs of the Report address the topic of unaccompanied minors: after stressing out the

<sup>105</sup> For a general overview of the United Nations Special Procedures see, among others, I. NIFOSI, *The UN Special Procedures in the Field of Human Rights*, Antwerpen, Oxford, 2005; H. CANTÚ RIVERA, *The Special Procedures of the Human Rights Council*, Cambridge, Antwerpen, Portland, 2015 and more recently A. NOLAN, R. FREEDMAN, T. MURPHY (eds.), *The United Nations Special Procedures System*, Leiden, 2017.

<sup>106</sup> The practice of the “Thematic Mandates” was introduced by the former Commission on Human Rights. See generally, M. T. KAMMINGA, *The Thematic Procedures of the UN Commission on Human Rights*, in *Netherlands International Law Review*, 1987, pp. 299-323; J. GUTTER, *Thematic Procedures of the United Nations Commission on Human Rights and International Law: In Search of a Sense of Community*, Antwerpen, Oxford, 2006.

<sup>107</sup> See Commission on Human Rights Resolution E/CN.4/RES/1999/44 of 27 April 1999.

<sup>108</sup> The Special Rapporteur is usually appointed for a renewable mandate of three years. The latest renewal was set forth by HRC Resolution A/HRC/RES/34721 of 24 March 2017.

<sup>109</sup> The Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council provides that “Mandate-holders exercise their functions on a personal basis, their responsibilities not being national but exclusively international” (Article 4, para. 1). More specifically, the subsequent para. 2, states that “When exercising their functions, the mandate-holders are entitled to privileges and immunities as provided for under relevant international instruments, including section 22 of article IV of the Convention on the Privileges and Immunities of the United Nations”. Such Code of Conduct was adopted, by *consensus*, by the Human Rights Council (see Resolution 5/2 of 18 June 2007).

<sup>110</sup> See Report, A/HRC/11/7 of 14 May 2009.

<sup>111</sup> *Ibid.*, para. 51.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*, para. 45.

greater condition of vulnerability of such minors, the Special Rapporteur expressly affirms that “the possibility of reunification in the country of destination [...] could [...] be considered”<sup>114</sup> among the protection measures suggested.

A reading of the Report, and particularly of the parts relating to the family reunification of minors, reveals that the Independent Expert has chosen the same approach taken by some Resolutions of the Human Rights Council. This is apparent from the wording of the Report and more specifically from its use, once again, of the verb “to facilitate” instead of “to guarantee” or “to ensure”.

No less important among the activities of the Special Rapporteur is the practice of country visits. This is a monitoring mechanism, common to other Thematic Mandate holders, that affords an opportunity to gain first-hand information about the treatment of migrants. The Special Rapporteur's first on-site visit took place in Canada in 2000; several other countries have since been visited, including South Africa, Japan, Senegal, Turkey, Malta and Italy. At the end of each visit, the Rapporteur routinely drafts a detailed report on the situation observed and, if appropriate, adopts specific recommendations. Moreover, the report contains a section detailing the degree of co-operation received from the national authorities during the visit of the Rapporteur. This is typically comprised in the first section of the report and aims to underline the importance of States co-operation throughout the course of the visit in ensuring the success of the enquiries.

Apart from these interesting and important practices, the Rapporteur has also occasionally raised the issue of family reunification and addressed recommendations to the State concerned. One notable example would be the Rapporteur's recent follow-up visit to Greece<sup>115</sup>, which took place from 12 to 16 May 2016. The final Report issued at the end of the visit specifies that the Rapporteur had the opportunity to meet a wide range of stakeholders (governmental representatives, civil society members and also, more importantly, the migrants themselves). In terms of substance, the Report contains two specific paragraphs relevant to the issue under consideration. In fact, the Rapporteur was informed during its visit of critical issues regarding the Dublin procedure, which is “often” lengthy<sup>116</sup>, to the point that “it may take 15 to 18 months for children to be reunited with their family members, due to DNA tests required by the receiving States”<sup>117</sup>. In this regard, the Rapporteur has taken a strong stand, clearly stating that this practice “is unacceptable”<sup>118</sup> and therefore issuing a specific recommendation to the State concerned which emphasizes the need to expedite family reunification procedures<sup>119</sup>.

Although the Rapporteur does not have the power to adopt binding acts, its contribution cannot be underestimated, given its unique position as an independent expert. In this respect, what we can observe is that the adoption of its Recommendations and, more specifically, the publication

<sup>114</sup> *Ibid.*, para. 58.

<sup>115</sup> See Report of the Special Rapporteur on the human rights of migrants on his mission in Greece, A/HRC/35/25/Add.2 of 24 April 2017.

<sup>116</sup> *Ibid.*, para. 98.

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*, para. 147.



of the results of its investigative activity generates the kind of public pressure capable of influencing the conduct of States.

#### IV. Concluding Remarks

The analysis carried out in this study shows that family reunification, in the institutional framework of the United Nations, is regulated by heterogeneous sources comprising both hard and soft law instruments.

Within the former typology of acts, the ICCPR and the CRC undeniably constitute the main normative points of reference. As discussed in the previous paragraphs, while the ICCPR does not contain a specific rule on family reunification, the monitoring body of the treaty has provided a fundamental contribution in this field through its interpretative activity. In this respect, first, the analysis of CCPR's practice has shown that family reunification is indirectly protected by the Covenant. Notably, such analysis has further revealed that the concept of "family", enshrined in Art. 23 of the ICCPR, needs to be "understood broadly"<sup>120</sup> as it includes not only the marriage based relationships but, for instance, de facto family ties.

This wide and dynamic definition of family, equally reaffirmed by some regional human rights courts<sup>121</sup>, is crucial and it constitutes a benchmark for national policies relating to the identification of family members eligible for reunification. The definition of "family" is an important issue that has also been emphasized by the UNHCR Executive Committee in its Conclusions. In fact, as already noted in this survey, such body, in line with the mentioned practice, has consistently called upon States to apply "liberal criteria" in identifying family members "[...] with a view to promoting a comprehensive reunification of the family"<sup>122</sup>.

All this considered, it is undeniable, as one commentator explained, that we are dealing with matters that, generally speaking, are left to the competency of States<sup>123</sup>.

As a result, it is not surprising that often there is a lack of uniformity in domestic legislation and regulations. However, the CCPR has had the opportunity to clarify that "[...] when a group of persons is regarded as a family under the legislation and practice of a State, *it must be given the*

<sup>120</sup> See, i.e. CCPR Committee (1994), Communication No. 1179/2003, *Manuel Balaguer Santacana v. Spain*, CCPR/C/51/D417/1990, para. 10.2, CCPR Committee (1988), Communication No. 201/1985, *Hendricks v. The Netherlands*, CCPR/C/33/D/201/1985, para. 10.3. For further examples of the CCPR's approach see more recently CCPR Committee (2015), Communication No. 2279/2013, *Z. v. Australia*, CCPR/C/115/D2279/2013, para. 7.2.

<sup>121</sup> Within this specific context, the European Court of Human Rights has undoubtedly given a fundamental contribute through its evolutive jurisprudence relating to the interpretation of Art. 8 of the European Convention on Human Rights. For an overview on the concept of family in the light of the main international human rights instruments and the regional jurisprudence see, more recently, F. BANDA, J. EEKELAAR, *International Conceptions of the Family*, in *International & Comparative Law Quarterly*, 2017, pp. 833-862.

<sup>122</sup> UNHCR Executive Committee, Conclusion on Family Reunification, No. 24 (XXXII), cit. para. 5.

<sup>123</sup> On this point see more specifically R. K.M. SMITH, *Textbook on International Human Rights*, Oxford, 2016, p. 373. The State discretion in defining the notion of family was also reaffirmed by a recent and extensive Report of the United Nations High Commissioner for Human Rights entitled "Protection of family: contribution of the family to the realization of the right to an adequate standard of living for its members, particularly through its role in poverty eradication and achieving sustainable development", and submitted to the attention of the Human Rights Council (A/HRC/31/37, 15 January 2016, para. 26). It is more important to note that this Report, taking into account the practice of several monitoring bodies, specifies that such State discretion is not unlimited. Notably, it stated clearly that "[...] some forms of relation, such as *polygamy and child marriage are contrary to international human rights standards*" and therefore "should be prohibited" (emphasis added), *Ibid*.

*protection referred to in article 23*"<sup>124</sup>. As mentioned above, such protection includes family reunification.

Unlike the ICCPR, the CRC is directly relevant due to the inclusion of a specific reference to family reunification: a careful reading of this treaty, also in the light of the respective monitoring body's practice, has enabled us to identify its core principles and the main obligations on States parties, especially from a procedural point of view.

In this latter respect, among the central provisions of the CRC are obviously the principle of the best interest of the child and the requirement in Art. 10, para. 1, that States deal with a request of family reunification in an "expeditious manner"<sup>125</sup>.

The examination of the practice of the CRC Committee was especially relevant also for the identification of several criticalities occurred within some States, i.e. not economically accessible procedures or less flexible administrative requirements<sup>126</sup>. It is quite evident, that these criticalities constitute a serious legal and practical obstacle to family reunification. Therefore the monitoring body takes the opportunity (when reviewing the periodic report of States) to urge governments to introduce corrective measures at domestic level.

Lastly, the relevant legal framework is completed by the 1990 ICMW, although the latter has largely failed to achieve sufficient ratifications by States and the legal formulation of its relevant provisions appears frankly unsatisfactory. This last issue is particularly striking when one considers that this international legal instrument was adopted with the commendable and specific purpose to protect the rights of migrants and members of their families, as clearly stated in its title. Obviously, much more could have been done; however, at this point, any hopes for further developments in terms of protection rest upon the interpretative action of the CMW.

More generally, a common feature of all the aforementioned treaties is that the pertinent conventional rules are not self-executing, with the obvious exception of some CRC provisions incorporating key principles in favour of the child. Moreover, from a strictly legal point of view and in the light of the observations made in this study, some of these principles (such as the best interest of the child) can be regarded as forming part of customary international law<sup>127</sup>.

Finally, within the context of soft law acts, no less significant are the aforementioned Conclusions adopted by the UNHCR Executive Committee. These Conclusions are important for several reasons. Firstly, they are an expression of the *opinio iuris* of States, negotiated and adopted within the frame of an intergovernmental body. Secondly, as illustrated above, they introduce relevant rules both from the substantial and the procedural point of view, especially in the field of the family reunification of refugees. Lastly, but no less remarkably, these Conclusions are, in a certain sense, truly universal, as they apply to all States, regardless of whether or not they have ratified the 1951 Geneva Convention on the status of refugees.

<sup>124</sup> See CCPR Committee, General Comment No. 19 (1990), quoted, para. 2), emphasis added.

<sup>125</sup> On this specific point, the study has also shown that, generally speaking, the length of proceedings for family reunification is a common matter of concern of several UN monitoring bodies.

<sup>126</sup> See *infra*.

<sup>127</sup> On this regard, see also I. INGRAVALLO, *La tutela internazionale dei minori dopo l'entrata in vigore del terzo Protocollo opzionale alla Convenzione del 1989*, op. cit., p. 347; D. SUPAAT, *Establishing the Best Interests of the Child Rule as an International Custom*, in *International Journal of Business, Economic and Law*, 2014, pp. 109-114.

