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Children as migrants and refugees – a double vulnerable group in need of special protection.

Introduction

Children who are forced to leave their homes and seek "their fortune" in an unknown, uncertain and perhaps even hostile new country can basically be divided into three main categories – refugees and migrants, and victims of trafficking. These all share some basic features, but even so they also have some significant differences.

As refugees children are especially vulnerable when they are "unaccompanied minors" for the rather obvious reason that they are separated from their families and thus exposed to the traumas and problems that refugees encounter without the support of adults. One only has to remember how it was to be separated from one's parents even in a safe environment as a child to imagine the ordeal that these children face. This paper will analyse how refugee children are protected in international law. It will also examine where protection fails – one problem that can be detected is that children are looked upon as refugee children first and only as children second. In other words, the basic needs of every child have to be fulfilled before these children are considered as "refugees". It will be contemplated how such an approach might be feasible and necessary in order to obtain genuine protection of refugee children in conformity with the spirit of the 1951 Refugee Convention and the Convention on the Rights of the Child.

Children who migrate are just as vulnerable as refugee children – in some cases even more so. This paper will examine which international instruments protect migrant children and how, it will also consider how this protection can be improved. It seems obvious that children in vulnerable situations require special attention and special care – reality is often brutally different. How can we assure that these young and fragile human beings are offered the special protection they require?

The problems these two groups of children encounter are often very similar. Some problems are however truly in common. The paper will first treat the problems specific for refugee children then move on to problems related to migrant children and end up by considering the problems common to both groups. Even with this division, overlaps

cannot be avoided since many problems refugees come across today in the form of very restricted asylum laws are related to immigration.
Victims of trafficking are perhaps even more vulnerable because they are subject to different kinds of abuse at the end of their journey. Much national legislation focuses on punishing the traffickers, but it is important to remember that these children need help and should be treated as victims not as perpetrators. In the Mediterranean Region the Italian legislation is rather advanced and that is why it has been chosen as an example of national legislation in this paper.
The focus of this paper will be on children who are unaccompanied – both when talking about refugees and migrants since this group is clearly the most vulnerable one having no support. It is also the most vulnerable group because many international instruments grant some kind of "family protection" but fail to consider the child when it is alone.
The focus of the paper will be on international legal instruments, and thus rather theoretical. However when working with human rights it seems imperative to keep in mind that theory should apply to reality, the reality considered here is the Mediterranean one, but naturally the international instruments obviously apply globally.
A last premise will be, that when considering how to protect children and how to improve existing instruments and implementation, children should be the focus. It is neither border controls, the fight against terrorist or immigration policies that should condition children's well being – but their special needs as children. We might be discussing categories and cases, paragraphs and articles – but first and foremost we are doing that because we are talking about children. Innocent human beings that should remain so for as long as possible.

1. Refugee Children

More than half of the world's refugees and displaced persons are young people under the age of 18.[1] Children who are forced to flee their country are even more vulnerable than adults in the same situation, for quite obvious reasons they are more fragile and need basic care – they are also more fragile because international law does not specifically take into consideration their special needs. It will be examined here how international law protects children, and how this protection can be rendered more appropriate and better suited to children's particular situation.

1.1 The 1951 Refugee Convention

Refugee children are among the most vulnerable children in the world – and thus among the most vulnerable human beings in the world. They have suffered war or persecution in their countries of origin, but many continue to suffer human rights abuses in their country of refuge – or of asylum if this is granted. Even if about half of the world's refugee population is made up of children their special protection and needs are most often overlooked. A case illustrating this is that looking for children in the Refugee convention from 1951 may turn out to be a futile task and much the same can be said for a scrutiny of the theoretical literature on refugee protection, children are mentioned on a

[1] Crisp p 1

dozen pages as a subcategory of "special groups". This is by no means the fault of the authors, but the by-product of the fact that children do not occupy a special place in international refugee protection, even if their situation is unique. The dominant interpretations of the Convention's refugee definition reflect an adult male norm, excluding cases deviating too much from that norm. These deviating and thus excluded cases include those involving children.[2] Children travelling across international borders, perhaps separated from their families and without any kind of network sustaining them, remain exposed to diverse forms of exploitation and human rights abuse, be it labour exploitation, physical abuse, sexual violence and exploitation, detention and not least the denial of their basic right to be children. These denials are considered further below; the analyses starts by examining how the legal framework related to the protection of refugees protects children, and when it fails to do so.

The 1951 Convention does no more than recommend measures to ensure family unity (in the Final Act of the Conference that adopted the Convention) and protection and provide for at least primary education.[3] Quite clearly this is inadequate as a legal basis for the special protection of children's needs. The principle of assuring family unity is respected by most states even if it was never truly incorporated into the Convention. This principle ensures that when the "head of the family" meets the criteria of the refugee definition, the dependants are granted refugee status too. Importantly the principle applies also when the family has been separated during flight and thus at the reunification children will automatically benefit from the refugee status of their parents – or head of family. Obviously a problem arises when a child arrives unaccompanied – even if reunification will happen the child may find itself in a highly uncertain situation during the time pending reunification, in this period the child must be assured its basic rights. It is also problematic that since reunification is by no means certain, the child may be required to establish its status independent of the status of the family, thus experiencing the lack of protection examined immediately below.

Flight from one's country of origin often results in the separation of families. The family plays a fundamental role in the protection, care and well-being of children and separation from the family is naturally devastating for refugee children. Separated children, be they unaccompanied or separated from their primary caregiver face a greater risk of sexual exploitation and abuse, military recruitment, child labour, denial of access to education and basic assistance and detention.[4] Moreover they are, when they arrive at their country of destination, in risk of refoulement since the criteria for giving refugee status actually work against children when unaccompanied.

Children encounter a first legal barrier when their status as refugees is to be determined. First of all it may be difficult to ascertain the facts of the child's case because a child, even more than an adult, can have difficulty articulating what circumstances made him or her leave the country of origin. Moreover it is possible that the child was sent away by parents who feared for its safety, thus not having a clear picture of the circumstances that led to its departure. This of course is relevant for unaccompanied minors in particular, when children are with their families there are other problems that emerge, these will be

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[2] Eva Nykanen p 316

[3] Goodwin-Gill p. 257, art 22 of the Refugee Convention regarding education

[4] UNHCR: Global Consultations on International Protection 4th Meeting. Refugee Children. April 2002 EC/GC/02/9, paragraph 4

treated later in this paper. To be recognised as a refugee one needs to prove a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion in accordance with art. 1A(2) of the 1951 Convention. The phrase "well-founded fear of persecution" is central for the definition[5] – and thus for the refugee claiming protection. The subjective element in the definition requires an evaluation of the person's statement and not only a judgement of the situation prevailing in the state of origin.[6] To obtain refugee status it is not enough to feel genuine fear, this feeling has to be well founded, and this means that the state of mind of the claimant must be supported by an objective situation. Both the subjective and the objective element must be taken into consideration when determining the status of a person applying for refugee status.[7] [the objective element predominates in the case law in most developed countries] The definition is actually rather strict since it rules out all other reasons for leaving ones home other than the well-founded fear of persecution, even if other reasons such as famine, natural disasters and war may all be valid. However, it is important when determining the status of the applicant to take into consideration the objective situation in the country of origin in its whole. The subjective aspect is harder to evaluate. Several objective aspects can help determine if the subjective requirement is fulfilled: family and personal background, membership of particular groups, personal experience – everything that may serve to indicate the predominant motive for the fear.[8] One important feature, especially in the case of children, is that considerations can extend to non-personal experiences, what has happened to friends and relatives and other members of the same racial or social group may very well show that the applicant's fear is well-founded. Also the laws of the country of origin and their application are relevant in determining well-founded fear. In some cases it has been established that members of certain groups by definition should be considered individually as refugees, even if the general principle is that refugee status is given on an individual basis. In these cases, each member of the group is *prima facie* considered a refugee – in these situations it is obvious that children also benefit from this status and thus the problem of deciding whether the fear is well-founded or not becomes superfluous – these cases however are the exception rather than the rule and apart from these special cases each applicant much show good reason why he or she individually fears persecution.[9]

It will be difficult for a child – even more than for an adult – to prove that his or her fear is well founded. Obviously objective facts can be of use, but the child has the difficult task of disproving the assumption that children are not sufficiently mature to feel well-founded fear. The subjective approach is particularly harmful to unaccompanied minors, who almost *a priori* are assumed not to be able to feel well-founded fear. Adolescents may fare slightly better since it can be presupposed that they are capable of rationally feeling well-founded fear based on the situation in their country of origin. Children who arrive unaccompanied in their country of destination thus face the legal barrier of not being presumed capable of feeling well-founded fear. The UNHCR Guidelines state that a child over 16 may be assumed to be able to feel well founded fear, but a younger child may be

[5] UNHCR Handbook on the Procedures and Criteria for Determining Refugee Status 1988.
[6] ibid.
[7] ibid.
[8] ibid.
[9] ibid

presumed not to be able to do so.[10] This rather rigid division is modified by stressing that the degree of the child's mental development and maturity is important when applying the criteria. Despite this modification the Handbook obscure the fact that even a very young child may have and may be able to establish a well-founded fear.[11] However it is damaging to children's cases that they run the risk of being a priori considered not capable of feeling well-founded fear. Even if this in certain cases and to a certain extent may be true. A child may have a more confused impression of why he or she is fleeing, of why he or she is feeling scared, of why the situation in the home country is frightening. A child may not necessarily be aware that it is the belonging to a certain race or social group that puts it at risk of persecution. This lack of "understanding" of the situation in which the child finds itself and from which it has fled, potentially rob the child of the special protection to which he or she is entitled.

The circumstances in the country of origin obviously will have to be given a great weight in these cases, but even when there is doubt about whether this situation may de facto be sufficient grounds to establish well-founded fear, the fact that the child is away from home – probably even rather far away – should in itself be given weights to the fact that either the child or the child's parents fear for the child's safety. In the case of unaccompanied minors, the benefit of the doubt given the refugee claimant should have a certain weight in determining the child's status.[12]

In many countries separated children are routinely denied entry or detained by border officials or immigration officials and given no opportunity to seek asylum.[13] This denial of rights has two aspects: first the denial of applying for asylum, which obviously puts the child in danger of refoulement, second, the harm that detention may cause the child. Children should not only be given the opportunity to seek asylum, but should actively be guided in the asylum process. It cannot be expected that children know how to move in the administrative system that may lead to their recognition as refugees, often even adults do not know the mechanisms working for or against them, and children are clearly in an inferior position having no previous experience of dealing with a formalised system of this kind. Children should have someone at their side helping them applying for asylum and informing them about their rights. These persons should take into consideration the special needs of the child and the particularly vulnerable situation in which it finds itself. It should also be taken into consideration that children may express themselves in a different way than adults, and thus the persons assigned to assist children should have special education particularly oriented towards dealing with children.

The lack of special provisions protecting children in the asylum-seeking process is a serious gap in their protection. Children's particularly exposed position should be taken into account on every level of the asylum-seeking process. At the level strictly relating to the 1951 Convention, that is when determining the legal status of the child, it is imperative that the child's lack of maturity does not count against it, but that the case is examined carefully, and in case of doubt this should benefit the child. It is important that

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[10] UNCHR Handbook paragraph 214

[11] Nykanen p 318

[12] Ibid.

[13] UNHCR Global Consultation on International Protection 4th Meeting. "Refugee Children" April 2002 EC/GC/02/9, paragraph 6.

the child is at the centre of the process, that is to say, the process should be seen from the child's point of view so that the special needs and rights of the child are taken into consideration throughout the process. An example may be that the child's language and way of expressing itself may differ to a great extent from the way in which an adult may express him or herself. This should never count against the child, who other than language barriers may have "age-barriers" to fight too. If the child's particular situation is not taken into consideration and counted in favour of the child, there is an elevated risk that the rule of non-refoulement as determined in art. 33 of the 1951 Convention will be violated more often in case of refugee children – when unaccompanied – than in the case of adults. Surely the particularly vulnerable position in which the child finds itself cannot count against it. For children the burden of proving well-founded fear of prosecution may be inappropriate if the particular situation of the child is taken into account, therefore in case of hesitation as to the credibility of the child's story, or as to the possibility that the child is capable of feeling well-founded fear, the burden of proof should not lie upon the child in case there is some hesitation regarding the credibility of the child's story, but the child should benefit from a generous application of the principle of the benefit of the doubt, which all asylum seekers are supposed to be given.[14] In children's cases it would be sensible to set the threshold of the benefit of the doubt even "lower" in the sense that the requirement of proof and of credibility is lowered in order not to disregard the particular difficulties of the child.

Naturally the child may also have left for reasons outside the scope of the Refugee Convention and thus be categorised as a migrant and not a refugee, in between these "categories" lies the possibility of being granted subsidiary protection, such as e.g. temporary protection or humanitarian protection. Art 63.2(a) of the Treaty establishing the European Community established that *states should grant temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection.* Further the Dublin II Regulation art 15 establishes that states *may* bring together family members on humanitarian grounds.[15] Again the reunification is conditioned upon existing family ties in the country of origin, which may not always be in the favour of the child. The core of granting subsidiary protection is to avoid sending people who are in need of protection, but who do not fall

[14] Refugee Children: Guidelines on Protection and Care. UNHCR 1994. p 43

[15] Article 15

1. Any Member State, even where it is not responsible under the criteria set out in this Regulation, may bring together family members, as well as other dependent relatives, on humanitarian grounds based in particular on family or cultural considerations. In this case that Member State shall, at the request of another Member State, examine the application for asylum of the person concerned. The persons concerned must consent. 2. In cases in which the person concerned is dependent on the assistance of the other on account of pregnancy or a new-born child, serious illness, severe handicap or old age, Member States shall normally keep or bring together the asylum seeker with another relative present in the territory of one of the Member States, provided that family ties existed in the country of origin. 3. If the asylum seeker is an unaccompanied minor who has a relative or relatives in another Member State who can take care of him or her, Member States shall if possible unite the minor with his or her relative or relatives, unless this is not in the best interests of the minor. 4. Where the Member State thus approached accedes to the request, responsibility for examining the application shall be transferred to it. 5. The conditions and procedures for implementing this Article including, where appropriate, conciliation mechanisms for settling differences between Member States concerning the need to unite the persons in question, or the place where this should be done, shall be adopted in accordance with the procedure referred to in Article 27(2).

within the definition of the Refugee Convention, back to human rights abuse and insecurity. In case it is possible to reunite a child who does not qualify as a Convention Refugee with a family member, this option should be considered favourably whenever it is in the best interest of the child. In any case the child's special needs and fundamental human rights should at all times be protected. Human rights standards protect these children as human beings. Refugee protection is a special protection and a special recognition of a particular status, but even if this is not granted, basic human rights should always be respected. The Refugee Convention grants special protection to those who have been forced to leave their homes under certain conditions, Conventions relating to migrants protect persons who, without being refugees, have left their homes to live in other states. These instruments thus grant a particular protection to persons in movement over international boarders (in case of Internally Displaced Persons, a category not treated here, to persons who have been forced to move but within the borders of their state of origin).
General human rights instruments offer protection to all – whether migrants, refugees or citizens. Thus three layers of protection should apply to these children, the first because they are human beings, the second because they are human beings in a particularly vulnerable situation, and the third, as provided for in the Convention on the Rights of the Child, because they are children. Provisions in the CRC and in general human rights instruments thus cover both refugee and migrant children, who in many cases face the same problems.

1.1. The EU legal framework

Children who become refugees have often experienced acute physical hardship and psychological trauma even before they set out on the journey leading them to exile.[16] When dealing with these children, it should be imperative to consider that the start of their journey was spurred by violations of their human rights and consequently the end should be different.
The restricted application of the international instruments by EU states does not alleviate children's situation. With the continuing restrictions on the possibility of becoming a legal migrant, more and more people will naturally turn to irregular migration or try to obtain refugee status[17]. This in turn leads to the perception that every refugee knocking on our door is a "social security hungry parasite" with no right to any kind of protection, and that we will be better off removing him or her from the territory as soon and as quickly as possible. Thus the fear of migrants using up our – naturally very sparse – resources does lead to restrictions on the granting of refugee status, applying new concepts such as safe third countries, first country of asylum, internal flight alternatives, etc. When the concept of safe third countries, first laid down in the Dublin Convention article 3(5) and now to be found with the same wording in the Dublin II Regulation, which has replaced the Dublin Convention, in article 3(3),[18] comes into play it carries

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[16] Crisp p 3.
[17] De Jong p. 691
[18] Art. 3(3) of the Dublin II Regulations: "Any Member State shall retain the right, pursuant to its national laws, to send an applicant for asylum to a third State, in compliance with the provisions of the Geneva Convention, as amended by the New York Protocol." The only change from the Dublin Convention article 3(5) is the addition of the words "as ammended by the New York Protocol" The New York Protocol from 1967 extends the geographical scope of the

with it the danger, that every one of the persons coming from a so-called safe country will not have his or her case examined on an individual basis, since it is assumed that no well-founded fear can be felt when arriving from a country, that *per se* is defined as safe[19]. This is clearly evidenced when taking into consideration one of the prime motives for implementing the principle of safe third country – the facilitation of the scrutiny of manifestly unfounded claims, which, when using this principle, can be speeded up rather effectively[20]. The individualistic approach to determining refugee status is thus replaced by a collective one – sending people back – partly in an effort to reduce the influx of refugees partly in an effort to make the procedures more effective and avoid bottle-necks[21]. This EU approach seems particularly odd when one considers the fact, that many developing countries use the collective approach in *accepting* refugees[22]. A great danger that arises applying the safe state concept is, that it may only be so long before third countries (that is, non member states) start applying the same principle, seeing that Europe does not take its fair share of the burden. Thus leaving refugees with no flight alternative, or leaving a relatively small number of countries with all the problems[23]. All in all, this approach tends to build up the walls around Europe to extreme heights. In the Euro-Mediterranean region this implies that the southern Mediterranean countries may be forced to either accept a large number of refugees in accordance with international standards, or that also these countries may start using restrictive standards and concepts effectively negating the rights of refugees to be granted asylum. These measures affect all asylum seekers alike; children suffer particular problems because they may live for a long time in a legal limbo when states try to establish exactly where the claimant should apply for asylum. During this time the child is deprived of many of the rights laid down in the CRC – in many cases the right to education, especially if there is a continued sending back and forth, the right to health, social security, and to an adequate standard of living.

The Dublin II Regulation, which came into force in September 2003, establish in article 6 that;

Where the applicant for asylum is an unaccompanied minor, the Member State responsible for examining the application shall be that where a member of his or her family is legally present, provided that this is in the best interest of the minor. In the absence of a family member, the Member State responsible for examining the application shall be that where the minor has lodged his or her application for asylum.

This special attention towards unaccompanied minors does somehow alleviate children's situation since it guarantees that someone will evaluate the claim of asylum. However in accordance with art 2(i)[24] the child can only obtain reunification with a relative of these

Convention, and the addition of it in the Dublin Regulations seems to have little practical relevance, since the Protocol was in force also at the drafting of the Dublin Convention, and it must have been understood that it was to be applied.

[19] Noll, Vedsted-Hansen p. 396

[20] The key to Europe p. 74

[21] De Jong p 692

[22] ibid.

[23] ibid.

[24] Art 2(i) "family members" means insofar as the family already existed in the country of origin, the following members of the applicant's family who are present in the territory of the Member States: (i) the spouse of the asylum seeker or his or her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens; (ii) the minor children of couples referred to in point (i) or of the applicant, on condition that they are unmarried and dependent and regardless of whether they were born in or out of wedlock or adopted as defined under the national law; (iii) the father, mother or guardian when the applicant or refugee is a minor and unmarried (iv) other persons to whom the

used to live together in the country of origin. It would be recommendable that reunification was possible in any case where this is in the best interest of the child, regardless of former cohabitation.[25]

Also the concept of "first country of asylum" endangers refugee children's rights. It has been alleged that this principle can be derived from art. 31 of the 1951 Convention concerning the obligation of states not to impose penalties on refugees entering illegally into the country "…coming directly from a territory where their life or freedom was threatened". Nevertheless the purpose of art 31 is to give states the possibility to lay down penal sanctions for illegal entry, not to give states the possibility of reject their international responsibilities.[26] Often refugees do not come directly from their country of origin to the country in which they seek asylum, but travel through a variety of countries. The practice of first country of asylum is to send the applicant back to the country preceding the one in which the request is presented. This often leads to a sequence of "returns" leaving the refugee with no country willing to take the responsibility for their claim.[27] This may in its turn lead to a breach of the principle of non-refoulment since all states interpret their responsibilities in the light of self-interest. And with no rules on responsibilities in these cases the refugee is virtually lost[28]. Article 13 of the Dublin II Regulation reaffirms this principle stating that:

Where no Member State responsible for examining the application for asylum can be designated on the basis of the criteria listed in this Regulation, the first Member State with which the application for asylum was lodged shall be responsible for examining it.

Again this article is supposed to establish who has the responsibility for examining a claim for refugee status, but in practice it may have the direct opposite effect, turning the legal question from the matter in concern (protecting the individual refugee) to a question of establishing responsibilities among states. Internally in the EU this practice may provide some tension since it is quite feasible that states such as Italy and Spain will end up with more refugees than Denmark or Sweden. This could be an internal EU problem, but it does leave open the possibility that such countries may further restrict their asylum policies and once more the refugee is the real loser. The use of safe third country/first country of asylum carries with it an extensive lack of solidarity. Refugees are send back (and forth) to countries, without consideration for those countries' capacities to (re)admit what is likely to be a large number of refugees, or for their capacity for granting asylum seekers access to adequate refugee determination procedures.[29] There is evidence to suggest that in several European states unaccompanied children seeking protection face great difficulty in gaining access to a country. An important reason why relatively few separated children gain access to asylum procedures in Europe is the establishment by states in recent years of a growing range of measures

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applicant is related and who used to live in the same home in the country of origin or if one of the persons concerned is dependent on the other.

[25] ECRE: Comments on the Proposal for a Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national (Brussels, 26.07.2001, COM(2001)447 final, 2001/0182(CNS)) p. 7

[26] Vevstad p. 239

[27] Vevstad p. 230, Goodwin-Gill p 91

[28] Goodwin-Gill p.91

[29] Vevstad p. 251

which makes it difficult to reach EU territory. For example, visa regimes, gate and preboarding checks, and carrier liability legislation have been introduced widely.[30]
The European standard legislation on refugees seems to mirror the idea that all problems come from abroad – what we could call the meteorological explanation: the bad weather always comes from another country, blowing in from the south or similar. Very often it also seems that even if there is quite a lot of talk about Euro-Mediterranean cooperation and agreements, the European refugee policy tends to overlook the fact that Europe is not alone in the world with this problem and simply constructing the walls around Europe until we can no longer see over them, might not be the most sensible approach in the long-term. Naturally, European rules and restrictions hurt all refugees and not only children. In the Euro-Mediterranean region the restrictive European legislation on asylum may have rather grave consequences. First of all because it forces the Southern Mediterranean countries to either restrict their policies too or to accept a greater number of refugees – a burden they may not be able to manage economically. This may lead to a higher degree of violations of the principle of non-refoulement of refugees, a problem affecting all refugees. However unaccompanied minors are in even greater danger, first of all because existing international protection does not consider their special situation sufficiently, secondly because the most vulnerable and weak are always the first and hardest affected when violations occur, thirdly because the restrictive legislation, and application of previous legislation – again – does not consider the particular situation of minors, therefore rendering an already precarious situation even worse.
It is significantly more difficult to enter the EU as a refugee than it is to enter a country in the south of the Mediterranean. This is both due to the restrictive application of the Refugee Convention in the Union and the restrictive EU legislation itself. On the other hand the southern Mediterranean countries, which are members of the Organisation of African Unity adopt a broader definition of refugees. For children, the most important difference is that the well-founded fear requirement is abandoned. However if there is no burden-sharing within the region it might well be the case that the southern Mediterranean countries will have to tighten their legislation.
Considering children's special situation the principles that separated children seeking protection should never be refused entry or returned at the point of entry and that when such children seek asylum they must have access to the normal refugee status determination procedure (accelerated procedures should not be applied to children), should be established.[31]
On a more positive note the ECHR obviously offers a certain degree of protection, especially article 3, which has been interpreted by the European Court of Human Rights to include a prohibition on extradition and expulsion where substantial grounds can be shown for believing that the person concerned faces a real risk of torture or inhuman or degrading treatment or punishment.[32] This protection is wider than the protection

[30] Ruxton p 36
[31] Ruxton p 8
[32] As established by the European Court of Human Rights in the *Soering* Case (Soering vs. the UK 1989), where the Court stated that *the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether*

against refoulement in the Refugee Convention because it is not linked to the refugee's (migrant's) civil or political status and is not conditioned upon the person's behaviour.[33] This protection is important to children who no longer need to establish a connection between the eventual ill treatment and his or her civil or political status, a task which is particularly difficult for children due to their perceived lack of ability to be persecuted for what they are and what they do.[34] However, there are also problems with this provision. Even if the assessment of the level of risk is objective (and thus in favour of children in comparison with the Refugee Convention, where a subjective element makes it difficult for children to prove their well-founded fear), the actual application depends on how the objective circumstances are evaluated. If the level of proof is high it may be difficult for children to meet these requirements, especially if the risk of ill treatment is required to be individual.[35] The final protection of child refugees under art 3 of the ECHR thus depends on how strictly the provision is interpreted. Previous decisions indicate that there is room for taking into account the special situation of the child. Personal characteristics such as age of the victim may, according to the court itself, be taken into account. However even if the Court shows itself willing to use this potential safety net to fill the protection gap that the Refugee Convention leaves open when it comes to children, it cannot grant asylum and will leave children in a legal limbo.[36]

1.2. The Convention on the Rights of the Child

The basic needs and rights of young refugees are no different from those of young people living within their own countries and communities. But the circumstances in which they find themselves are particularly hazardous.[37] Therefore it is necessary to consider these children's particular needs. The CRC considers child refugees in its art. 22 stating that
"State Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other

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under general international law, under the Convention or otherwise. In so far as any liability under the $ Convention is or may be incurred, it is liability incurred by the extraditing q Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.
And in Chalal vs. the UK 1996, where the court pronounced that: *Article 3 (art. 3) enshrines one of the most fundamental values of democratic society. The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4 (P1, P4), Article 3 (art. 3) makes no provision for exceptions and no derogation from it is permissible under Article 15 (art. 15) even in the event of a public emergency threatening the life of the. The prohibition provided by Article 3 (art. 3) against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 (art. 3) if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 (art. 3) is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees*
The principle has been affirmed several times more – also in Cruz Varas vs. Sweden 1991 where the court extended the principle to be valid in cases of expulsion and not only on extradition (paragraph. 69-70) and in the Viljarajah and others vs. the UK 1991 also regarding expulsion.

[33] Contrary to the Refugee Convention, art. 1A(2), 1F and 33.

[34] Eva Nykanen p 339

[35] Eva Nykanen p 341

[36] Eva Nykanen p. 345

[37] Crisp p 3

person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

This admittedly does not expressly take into consideration the gap in the Refugee Convention and thus does not expressly fill this gap, however when the underlying principle of the Convention that "child refugees are children first and refugees second"[38] is truly respected the CRC obviously does offer a substantial improvement in the protection of child refugees. Moreover the second paragraph of the article assures that unaccompanied minors are entitled to special protection and assistance provided by the state – or rather they are entitled to the same protection as other children who are entitled to this assistance.

Even if the definition of refugees has not been enlarged, as one might have wished for, the Convention provides equality in the enjoyment of their applicable rights both for children recognised as refugees and for children seeking asylum.[39] This should in principle guarantee that while children might find themselves in a legal limbo when their status is being determined, their basic rights as children are respected at all times.

Further the provisions of the CRC can be divided into four categories: the provision for the needs of the child, the protection of children from harmful acts and practices, the participation of children in decisions affecting them and the prevention of harm to children.[40] This approach differs from the traditional interpretation of what a child refugee looks like. The child is no longer only a dependent person but the CRC recognises both the vulnerability and the capacity of the child. In this light the protection of refugee children is significantly improved.

The principle of the child's "best interest", derived from article 3 of the CRC is applicable to state asylum policies. It requires that the impact on children of the development, administration and resourcing of government policy must be assessed and the interest of children must be a "primary consideration".[41] This principle clearly recognises that the child is an agent and has rights.[42] Alongside this principle, exists the principle of the child's right to participate in decisions affecting him or her, CRC article 12. This right needs special attention, because it is far from automatically respected by asking the child what it wants. In refugee procedures it is crucial that people encountering these children are trained to involve children and that the environment is "child friendly". Otherwise child participation remains a right only on paper. Also the evolving capacities of the child constitute an important principle recognising that children's needs vary between children and according to their personal capacities. It is essential that a comprehensive assessment of the "child's best interest" is included in both national legislation and practice and – in the Euro-Mediterranean context – in EU legislation. These principles of interpretation, together with the child's right to be heard, should apply to all considerations involving children, including refugee status determination.[43]

[38] Eva Nykanen p 319
[39] Van Bueren p 362
[40] Eva Nykanen p 319
[41] Ruxton p 6
[42] Eva Nykanen p 322
[43] Eva Nykanen p 320

However it is in general unsatisfactory that the CRC does not provide an adequate basis for promoting durable solutions for refugee children.[44] It is crucial that it is taken into consideration that children continue their growth and development both during the process of determining their status and when recognised as refugees. Often a durable solution to refugee problems, particularly return to the country of origin in conditions of security, takes time to materialise.[45] In this period children are again in a particularly vulnerable situation. It is important that children's special needs – especially of – education are at all times respected. But also that they are in general treated with respect and dignity because their character will be framed during this period and they are naturally particularly fragile. States often find it necessary to deny any form of resident status, express or implied, to those whom they have given refugee status.[46] This means that refugees can have practical problems obtaining protection of their civil and social-economic rights. It is important that children's needs are not lost in an eventual legal limbo or chaos in this period.

It is crucial that children's rights, both as refugees and as children, are at all times safeguarded. This includes their right to access the territory to seek asylum, a right that should perhaps be facilitated for children since today it may be more difficult for them than for adults. It includes the right to guardianship, one of the most important ways to ensure that an unaccompanied child's best interests are defended is through the immediate appointment of a guardian.[47] It includes suitable accommodation and freedom from detention, access to the full asylum procedure and legal representation. Further it is the obligation of the state (and the right of the child) to try to trace the child's family, contact these family members and, if it is in the child's best interest, to ensure family reunification. Obviously at the most basic level the right to health, education and social assistance should be respected and promoted. Even where the asylum determination turns out to be negative, an unaccompanied minor should not be returned to his/her country of origin if it is not certain that it is in the best interest of the child, there are parents/guardians or government care-takers who can provide care upon arrival, and if it is assured that the child's situation is properly monitored after arrival.[48]

2. *Migrant Children*

The international law protecting migrants in most cases focuses on the "traditional migrant" – that is the male adult migrant. Women and children are most often overlooked. Even if children suffer violations of their rights in a particular migration context there is neither an individual international instrument protecting them, nor sufficient specific protection in the existing instrument protecting children. Even if the CRC does apply to all children, migrants and refugees as well as others, specific protection is needed for these children who have left home. It is quite obvious that this group need special attention and protection – a fact that the existence of particular instruments protecting other migrants sustains. Migrant children fall into a gap between

[44] Goodwin-Gill: Protecting the Human Rights of Refugee Children p 98
[45] Ibid p 100
[46] Ibid p 105
[47] ECRE position paper on refugee children, paragraph 18, www.ecre.org/positions/children.shtml
[48] ECRE position paper on refugee children, paragraph 42, www.ecre.org/positions/children.shtml

the CRC and Conventions protecting persons moving across international boarders, be they refugees or migrants. Guidelines from UNHCR and documents from organisations such as the IOM do exist on how to treat children in these particular situations, however a special legal framework aimed at protection of these precise categories of children – or this precise category of refugees and migrants – needs to be adopted to give legal force to the special protection of child migrants and refugees. From the CRC and onwards we have learned to think of children as persons having *rights* and not only needs. It is essential and of utmost urgency that both refugee children and migrant children are given particular rights corresponding to their particular situation.

The Mediterranean is both a sea that divides and a sea that unites. The disparity between north and south is the obvious, and understandable, direct reason for the immigration flow from south to north. This flow is clearly a point of strain because of the pressure it creates from south to north. The receiving countries, which are part of the European Union, have an evident problem when they try to – if they try to – reconcile human rights protection of the newcomers and protection of their borders against the "hordes" of invading "foreigners". Most of the countries on the north shore of the Mediterranean have been transformed from countries of emigration into countries of immigration in a relatively short period of time but the recent memory of being immigrants does not seem to affect neither populations nor governments very much. The Mediterranean also unites. The thousands of years of history that join these countries cannot but influence present day choices. And links between countries in the south and countries in the north influence migrants' choices, when they decide where to go. However this unifying element is rarely invoked and when discussing immigration – at least in the receiving countries – one senses that the "problems" of immigration are more present than an approach of finding common grounds and dialogue. The European Union has in most of its legislation chosen the road of "Fortress Europe" – as briefly touched upon above with regard to its response to asylum seekers.

Basically migrant's rights are human rights and children's rights are migrant children's rights. This should signify that migrant children enjoy the same protection that national children enjoy when they arrive in their destination country. Most children's rights are social rights and economical – right to education, right to health, right to family life, right to play. In some cases violations may extend to children's civil rights – right to life in the most extreme cases, infringements on the prohibition of torture and, especially, ill treatment. The strict immigration laws in most EU countries have definitely not improved children's human rights protection. In the Mediterranean the consequences of these restrictions are most clearly seen – or are given most media attention – when the attempt to reach the northern shores fail. The dangers of travelling in unsafe boats crossing the Mediterranean are highlighted when these attempts end in tragedy. When these attempts succeed, children are often much more vulnerable than adults. The harsh migration laws do nothing to improve children's situation, on the contrary; for border control authorities enforcing these laws on children can be easier than on adults. A Human Rights Watch report on the treatment of migrant children in Spain and Morocco – respectively their country of destination and origin – demonstrates how law enforcement entities do not at all respect children's rights. Even if national Spanish law guarantees unaccompanied foreign children care and protection on the same basis as Spanish children, including the right to education, health care, temporary residence status and

protection from repatriation when this would put the child in danger, in accordance with the CRC, local enforcement officials disregard these provisions and arbitrarily deny children their basic rights.[49] Further, when returned to Morocco these children are beaten and ill treated by the Moroccan police who will release them onto the streets, and will only intervene when children are suspected to be criminals. Here it is obvious that harsh migration laws in the Mediterranean region not only damage human rights but also that a closer cooperation between the Euro-Mediterranean states would benefit these children. A cooperation that ensured repatriation only when there is a family who looks after the child would be advisable and so would residential centres in both countries that can take care of these children when the family cannot. The problem seems to be, according to HRW, that the Spanish police actually might be violating these children's rights in an effort to drive them back to their country of origin.

Another problem in the north of the Mediterranean is that immigration and crime often have been linked together by various governments and/or politicians. The automatic assumption that a migrant is a criminal has done nothing to improve migrant's human rights. This image is reinforced by the fact that clandestine migration is very pronounced in the Mediterranean.[50] However clandestine immigrants, of whom an increasing number are women and children, live in extremely dangerous and inhumane conditions, and are deprived of their fundamental social rights and human dignity.[51] When the European Union restricts lawful migration the measures affect those most in need of protection who are in search of practical solutions to the destitution and inequalities in their home countries, in the south of the Mediterranean.

As with refugees the objective of the EU's Common Immigration Policy is to manage migration flows by a coordinated approach, which takes into account the economic and demographic situation of the EU. This reflects the widely acknowledged failings of restrictive national immigration policies since the 1970s, and increasing recognition of the needs of European employers for additional workers in certain sectors and regions and the pressures of an ageing population. Even the Council of Europe has in its Recommendation 1449 recognised that the restrictions on lawful migration actually increase the likelihood of people entering Europe illegally and that illegal immigration in the Mediterranean has increased since the early 1990s, suggesting that the action taken to date has been of limited effect.[52] However this recognition is poorly reflected in national or EU legislation.

Increasing resources have been mobilised to fight illegal migration, and in particular to combat trafficking and smuggling. The Tampere European Council in October 1999 agreed on the components for a EU Immigration Policy, including (in addition to the Common Asylum Policy) a comprehensive approach to the management of migratory flows,[53] fair treatment for third-country nationals[54], and the development of partnerships with countries of origin.[55] These EU regulations can be welcomed because they try to establish legal channels of migration into the Union – normally rules on migration

[49] Nowhere to turn p 41-45
[50] Recommendation 1449 (2000) - Clandestine migration from the south of the Mediterranean into Europe
[51] As recognised in Art. 3 of Recommendation 1449
[52] Art. 10 of Recommendation 1449
[53] Tampere European council 15 and 16 October 1999 Presidency conclusions, article 11
[54] Tampere European council 15 and 16 October 1999 Presidency conclusions, section III
[55] Tampere European council 15 and 16 October 1999 Presidency conclusions, article 26

concern how best to restrict access, but they focus strongly on the need for labour in the Union, favouring the needs of the member States but not considering the needs of migrants and states of origin. The focus on "useful" labour migration also downgrades the attention on protection of groups of migrants who do not exactly fit the need for a workforce in the Member States. Obviously children fall into this last category. In fact in the European legal framework the only directives relating specifically to children are those concerned with trafficking, which will be discussed immediately below, and smuggling.[56] As mentioned above it is hard for children to come into contact with the asylum system because of the strict rules and because of the fact that they have no one to guide them. For children who enter illegally into the European Union conditions are extremely hard as they lack any form of status protection.[57] It is a general feature that states tend not to extend human rights protection to illegal immigrants.[58] For children, this distinction is extremely harsh since it infringes children's basic rights. Moreover, this lack of protection leaves them more vulnerable to exploitation and harsh conditions, such as life on the streets without any kind of protection. A significant problem in this context is that children who enter a state "helped" by smugglers often fall victim to the struggle against smuggling that many states wage. It is important to remember that even if these children enter the country illegally they are minors and should be granted protection of their basic rights as such pending a sustainable solution to their situation. Countries in the north of the Mediterranean in particular struggle against smuggling on an almost daily basis – their frontiers being the outer limits of the European Union they might be tempted to put the effort against smugglers before the protection of the immigrants' human rights. Obviously combating smugglers is an important task – especially as they are taking terrible advantage of personal disasters and needs, but in this struggle it is equally important to protect those in need.

Migration "management" can obviously be facilitated by collaboration with the MENA countries, a collaboration that is increasing. However, toughening up controls on both sides will have no effect on reducing illegal migration if a dialogue on respect for human rights is not conducted at the same time. The European Union cannot expect people to "stay put" just because border control in countries of origin are working with border controls in countries of destination. People flee human rights abuses, and if the European Union is to maintain credibility, and if it really wants to succeed in managing migration flows, it will have to focus not only on police enforcement of migration laws, but also on enforcement of human rights, and dialogue in the Mediterranean.

The basic problem is that there are no specific rules protecting migrant children because traditionally the migrant was an adult male searching for work in a new and foreign country. It is therefore crucial to accept – and to enforce – that migrant children are

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[56] Tampere European Council 15 and 16 october 1999 Presidency conclusions, Green Paper On a Community Return Policy on Illegal Residents Brussels, 10.04.2002 COM(2002) 175 final, Council Framework Decision 2002/629/JHA of 19 July 2002, Council Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent Council doc. 8694/04.

[57] ibid.

[58] The 1990 UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, which came into force on 1 July 2003 extends basic human rights to documented and undocumented migrants

children before they are migrants and thus their rights, as they are found in the CRC, should be protected at all times. It is however definitely a lacuna in the international protection system that we do not have particular protection of children. Especially their right to education and health should be protected with particular care and so should their right to leisure and play – even if this might seem as one of the more luxury rights, we need to remember that to grow up as functioning adults these children need to have a childhood. If we do not protect children's human rights we cannot expect them to grow up into persons who in their turn will protect and promote human rights.

3. Victims of trafficking

3.1 International legal framework

Children who have fallen victims to traffickers have special needs because they, other than being children on the move, have been exposed to different degrees of abuse.

Trafficking in children is a violation of a number of articles of the CRC. It is a violation of the child's right to play art. 31, to education art. 28/29, to health art. 24, to family life art. 9 it is a violation of the right to be protected against exploitation (from economic exploitation art.32; and from sexual exploitation art. 34), the child's right to life art.6.1, the right to survival and development art 6.2, the right to protection (from discrimination and punishment, art. 2.2, and from physical or mental violence, art.19.1 CRC), and the right to participation art.12.

The explicit protection against trafficking is found in art. 35: "*States Parties shall take all appropriate, national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form*". The article does not elaborate the terms but the words "for any purpose or in any form" suggest that it is to be interpreted broadly. The responsibility for taking measures to avoid trafficking is placed clearly on the state which implies state responsibility if it does not succeed in prosecuting offenders, thus making the international obligation applicable at the "trafficker-level".[59]

Trafficking in human beings is not just illegal trade or commerce as is the case with the arms trade or drug trafficking, it is modern day slavery because it is always connected to the exploitation and confinement of the persons involved in one type of forced work or another. Slavery is prohibited by the ICCPR art. 8 and is, according to the Rome Statute art. 7, a crime against humanity and punishable in accordance with international law. Art. 7.2(c) of the Rome Statute defines trafficking as a component of slavery and thus a crime against humanity. The ICC statute defines "enslavement" as meaning "the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children" thus it explicitly recognises trafficking in persons as a "crime against humanity" – the problem arises when recognising that such crimes can only be prosecuted by the ICC when "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of that act" calling into mind that the ICC was born in the context of International Humanitarian Law. The "widespread" concept has been defined as "massive, frequent, large-scale action carried

[59] This principle is clearly stated in the Second Protocol to the CRC art 3 that provides that States Parties shall ensure the definition of the following acts as a crime, irrespective of whether they are committed domestically or trans-nationally, on an individual or organised basis – this will be discussed immediatedly below

out collectively with considerable seriousness and directed against a multiplicity of victims"[60] Systematic was defined as "thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources".[61] To qualify as a crime against humanity an act must meet one of the following two standards: thoroughly organised or directed towards a substantial number of victims. An individual may be prosecuted for a crime against humanity if his act was of an organised nature or committed against a number of victims.[62] Offenders not falling within these standards will be prosecuted in accordance with national law and international instruments enforced by national legislation. It is however a problem that some offenders may escape these definitions because the crime is not a "crime against humanity" according to the ICC. If we really want to fight trafficking we need to arrive at a point where traffickers can be prosecuted wherever they may be caught, in accordance with the basic rules on crimes against humanity found in International Humanitarian Law.

Most legislation (international and national) refers to trafficking of "women and children" because these two groups are the most vulnerable to trafficking and exploitation. It would however be advisable if it were recognised in a very explicit manner that children need special protection, different from that offered to women, especially upon liberation. There is a need for education and for care, it is also necessary to take into consideration that social security and migration rules rarely apply to children if they do not have a guardian. Thus even if "women and children" are similar because they are vulnerable they are different because their needs and rights are different even if they are treated under the same legislation.

The UN Convention against Trans-national Organised Crime establishes a base for an international legal regime to fight crime including trafficking in children. In particular, Article 24 of the Convention addresses the protection of witnesses[63] and Article 25 of the Convention covers assistance to and protection of victims.[64] This however would be meaningless if it stood alone, and the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, called the Palermo Protocol supplementing the UN Convention against Trans-national Organised Crime, contains the most comprehensive legal definition of 'human trafficking' under international law.[65] The definition of trafficking is found in art. 3:

a. 'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or

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[60] Criminal Tribune for Rwanda, Prosecutor v. Akayesu, Judgements ICTR-96-4-T from Sep. 1998

[61] ibid.

[62] Mattar, Mohamed Y: The International Criminal Court (ICC) Becomes a Reality: When Will the Court Prosecute The First Trafficking in Persons Case? http://www.protectionproject.org/commentary/icc.htm

[63] "Each State Party shall take appropriate measures within its means to provide effective protection from potential retaliation or intimidation of witnesses in criminal proceedings who give testimony concerning offences covered by this Convention and, as appropriate, for their relatives and other persons close to them. (…) 4. The provisions of this article shall also apply to victims insofar as they are witnesses."

[64] "1. Each State Party shall take appropriate measures within its means to provide assistance and protection to victims of offences covered by this Convention, in particular in cases of threat of retaliation or intimidation.(…) "

[65] Review of initiatives to combat trafficking… p. 11

receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery.
b. The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant when any of the means set forth in subparagraph (a) has been used.
c. The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered ' trafficking in persons' even if this does not involve any of the means set forth in Paragraph (a) of this article"
d. Child shall mean any person under eighteen years of age.

As can be seen paragraph c includes special protection for children. The Protocol contains an important distinction between "smuggling" and "trafficking" that can be very useful when remembering that smuggling of migrants and trafficking in human beings are two different concepts that should be challenged in different ways. It also contains the extremely important provision that children never can consent to be trafficked – adults have to show that their consent occurred by reason of threat, force, abduction, deception or abuse of power, in order to be considered victims and not illegal immigrants, but in relation to children any consent will be irrelevant no matter how it was obtained.
The Palermo Protocol was adopted (December 15th 2000)[66] because the parties were "Concerned that, in the absence of such an instrument, persons who are vulnerable to trafficking will not be sufficiently protected".[67] It is true that the Protocol and the Convention against Trans-national Organised Crime offer a tool to punish traffickers. But it is also true that without enforcement by state parties and a focus on victims (as the protocol rightly urges) the victims of trafficking remain at risk. Art. 8.6 of the Protocol calls on state parties to establish policies, programmes and other measures to prevent and combat trafficking and to protect victims – especially women and children from re-victimisation. It also stresses the need to address the root causes of trafficking such as poverty, underdevelopment and lack of equal opportunities and states are asked to dissuade the demand that fosters trafficking and exploitation by way of education, and social and cultural measures (art. 9.5).
Obviously when discussing trafficking in children this Protocol, together with the Second Optional Protocol to the CRC on the sale of children, child prostitution and child pornography, are the most significant international instruments. The CRC Second Protocol has been ratified by 50 states and has entered into force as part of the CRC for these countries. It helps clarify art. 35 of the CRC in its Art. 2, defining the sale of children as "… *any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration."* A very important article in this Protocol is Art. 3 that provides that States Parties shall ensure the definition of the following acts as a crime, irrespective of whether they are committed domestically or trans-nationally,

[66] Entered into force 25 December 2003, in accordance with article 17, Signatories: 117, Parties: 64. Quite a lot of the Mediterranean (and EU) States still need to ratify the protocol (Belgium, Finland, Germany, Greece, Ireland, Italy, Liechtenstein, Luxembourg, The Netherlands, the UK, Iran (not even signed), Saudi Arabia, Kuwait (not even signed), Lebanon, Libya, Morocco (not even signed), Syria, Former Republic of Yugoslavia.
[67] Preamble to the Protocol

on an individual or organised basis: *Offering, delivering or accepting, by whatever means, a child for the purpose of Sexual exploitation of the child; Transfer of organs of the child for profit; Engagement of the child in forced labour*. Thereby the CRC Protocol extends jurisdiction over adults involved in the "sale" of children and it strengthens existing CRC provisions regarding the sexual exploitation of minors. The protocol does not refer directly to child *trafficking*, but as can be seen many forms of trafficking fit into the definition of "sale of children", and it must be borne in mind that very often the purpose for which children are sold coincide with the purpose for which they are trafficked thus falling within the scope of art. 2. Again States have to undertake all efforts to prevent or eliminate child trafficking on the basis of the CRC, and they can be held accountable for not doing so.[68] These two protocols can be used together as guidelines for what national legislation should look like, and they can be used to hold states accountable for failures to enforce legislation against trafficking.

3.2 A Mediterranean case - Italy

Most national legislation against trafficking is enacted as part of the penal code rather than as a separate comprehensive act, and within this context trafficking is prohibited mainly as a prostitution-related activity[69] or in connection with illegal immigration. It is necessary to enact legislation against trafficking not only as criminal law but also as a combination between this and rules protecting women and children, so that the shift from treating trafficked persons as criminals to treating them as victims[70] can be combined with more effective enforcement of the punitive part directed towards the traffickers.

The Italian national legislation on trafficking has been chosen as the only example of national legislation in this paper, because it represents a rather avant-garde example, especially because it takes into consideration the victims' position and the trans-national aspect. Italy ratified the CRC second Optional Protocol on the 9th of May 2002. Trafficking was defined in Art. 2 of the Legislative Decree 113/99 as a new criminal market consisting of the recruitment, unlawful transfer and later introduction mainly for profit, of one or more individuals from the territory of one State to another, or within the same State (…) Such transfer may be followed by activities aimed at the sexual or economic exploitation of the migrants, brought about through force, fear or fraud. This activity is then divided into "smuggling" and "trafficking", with different law enforcement organs and different rules to deal with the problems.[71] An important law regarding sexual exploitation and

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[68] The monitoring body is the Committee on the Rights of the Child. The Committee on the Rights of the Child is the body that monitors how well States are meeting their obligations under the Convention on the Rights of the Child. When a country ratifies the Convention, it assumes a legal obligation to implement the rights recognized in the treaty. In order to monitor the compliance with these obligation State Parties should submit reports initially two years after joining and then every five years to the Committee stating what progress and what problems there might be regarding to the respect and implementation of the Rights of Children. In addition to the government report, the Committee receives information on a country's human rights situation from other sources, including non-governmental organizations, UN agencies, other intergovernmental organizations, academic institutions and the press. In the light of all the information available, the Committee examines the report together with government representatives. Based on this dialogue, the Committee publishes its concerns and recommendations, referred to as "concluding observations"

[69] Mattar, Mohamed Y: A Comparative Analysis of the Anti-Trafficking Legislation in Foreign Countries: Towards a Comprehensive and Effective Legal Response to Combating Trafficking in Persons . p. 1

[70] Ibid. p 3.

[71] Unaccompanied Minors p. 55

"new forms of enslavement" is law 269/98[72] (which was welcomed by the Committee on the Rights of the Child in its report of March 2003). With specific regard to trafficking it provides that the punishment may range from six to 20 years of imprisonment, art. 9 (amendment to the then existing art. 601 of the Penal Code on trafficking and commerce of slaves). A very important provision is art. 10 on offences committed abroad by an Italian citizen or against an Italian citizen, or by a foreign citizen against an Italian citizen. As with the French law, this article establishes extraterritoriality, not only for sexual abuse, but also for trafficking. This is an extremely important signal that the Italian state means business, it is also very necessary because Italy is a gateway to Europe. Other countries should follow this example and include extraterritoriality in their legislation on the subject – and enforce it (as underlined by the Committee on the Rights of the Child in its report where, following its appreciation of law 269/98, it underlines the necessity of strengthening efforts to prevent and combat trafficking and to monitor the implementation of the law, including an adequate allocation of both financial and human resources).[73] The Penal Code has recently been further improved when it comes to fighting trafficking. In August 2003, the law on "sanctions against trafficking in persons", law 228/2003, amended articles 600, 601 and 602 (on enslavement, trafficking and commerce and acquisition of slaves), and the definition of trafficking is now in accordance with the one used in the Palermo Protocol, art. 3(a). An important point is that the prison sentence will be raised by one third to 50% if the offence harms minors or if it concerns prostitution or organ "donations". This is a very important sign and a useful weapon when offenders are brought to justice. Art. 601 has been amplified to include the definition found in art. 600 (analogous to art. 3(a) in the Palermo Protocol) and thus makes it very explicit that trafficking persons by means of threat or coercion or fraud mentioned in the previous article or trafficking persons already in a situation of enslavement or trafficking persons with the scope of exploiting them as described in art. 600 (which includes other forms of labour and not only prostitution) is punishable and looked upon very severely. The article is extremely important because it makes it crystal clear that trafficking and enslavement are joined and cannot be separated; it also constitutes a very potent weapon when traffickers are prosecuted. The minimum sentence has been raised from 6 to 8 years[74] and the sentence is even heavier if minors are involved. Art. 602 is a safety net and it considers every case that falls outside the definition of art. 601, but where someone buys or sells a person who finds him/herself in

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[72] "Norme contro lo sfruttamento della prostituzione, della pornografia, del turismo sessuale in danno di minori, quali nuove forme di riduzione in schiavitù"/"Regulations against the following new forms of slavery: abuse, prostitution, pornography amd sex turisme involving minors"

[73] Committee on the Rights of the Child. Thirty-second session 2003. Consideration of reports submitted by states parties under article 44 of the convention. Concluding observations: Italy. CRC/C/15/Add.198 18 March 2003 p 1 and 3

[74] This complies with article 3.2 of the EU Council Framework Decision 2002/629/JHA on combating trafficking in human beings of 19 July 2002 (OJ 2002 L 203/1), which determines that: Each Member State shall take the necessary measures to ensure that an offence referred to in Article 1 is punishable by terms of imprisonment with a maximum penalty that is not less than eight years where it has been committed in any of the following circumstances: a) the offence has deliberately or by gross negligence endangered the life of the victim, b) the offence has been committed against a victim who was particularly vulnerable.A victim shall be considered to have been particularly vulnerable at least when the victim was under the age of sexual majority under national law and the offence has been committed for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation,including pornography; c) (c)the offence has been committed by use of serious violence
or has caused particularly serious harm to the victim d) the offence has been committed within the framework of a criminal organisation as defined in Joint Action 98/733/ JHA,apart from the penalty level referred to therein.

a situation described in art. 600 the sentence is still 8 to twenty years. As can be seen the Italian legislation on this subject is extremely developed and potent. It is indeed a useful instrument against traffickers and should be copied by all receiving countries. When law enforcement works in these cases, the traffickers have little hope. In 2004 a report was presented by the Anti Mafia which showed that the total of cases againts presumed traffickers or smugglers was 9004 from the came into force with an annual average of 1800, on the total 2930 regarded trafficking and 6074 smuggling.[75] These figures tell us how many cases of trafficking/smuggling are discovered by the law enforcement at the point of entry into the territory – and thus understood and treated as smuggling even if they involve a subsequent exploitation of the victims, who are thus not protected.

An important provision for victims of trafficking is art. 18 of the Immigration law 286/98. This provides a renewable six-months permit to stay for victims of severe exploitation who are seen to be in danger after they have escaped from their exploiters.[76] When granted the Article 18 permit, one is obliged to take part in a social assistance and reintegration programme offered by various local NGOs and community projects. The victims are also afforded access to social services and educational institutions, enrolment with the State's employment bureau and are provided access to employment. Granting of the Article 18 permit is not tied to the person's willingness to take part in any legal proceedings against the trafficker. The permit is renewable after the initial six months for another year, either if the victim is assisting the prosecution, or enrolled in an education programme or employed at the date of expiration of the initial permit. Thus the Article 18 permit is not dependent upon the quality of the trafficked person's co-operation during investigation or prosecution, but dependent upon participation in a social assistance programme.[77] After the initial 18 month stay the victim may remain in Italy in accordance with art. 19 of law 285/98 depending on the contract of employment. This is also an important law because it focuses on the victim as *victim* and not as a guilty party in the crime. The emphasis on participation in a social program is of utmost importance because it gives the victim the possibility of becoming reintegrated into society and obtaining help to heal the psychological wounds. Art. 18 is the only article in European law that permits the victim to stay independently of his/her the willingness to testify against the traffickers. However, actual enforcement of the article undermines its high quality – only about 20-30% of the permits to stay are given to people on the basis of their participation in a social programme and victims are encouraged to testify in order to facilitate their obtaining the permit.[78] This is a classical example that even when the legislation is at a high level nothing is really obtained unless the enforcement is at a sufficiently high level too. Further there is a problem when migration laws become involved with trafficking cases; when unaccompanied minors enter Italy illegally they are asked to leave the country within 15 days, after which they may be deported, art. 13 286/98. There is no legal obligation that the police should inform these minors of art. 18 – even if they may have been trafficked, and are thus victims, not illegal immigrants. Other problems concern the protection of the victim when testifying – the identity of the victim is rarely kept from the traffickers, and there are practical problems such as obtaining the identity

[75] Rapporto DNA presentato al convegno organizzato dal Ministero della Giustizia, dal Dipartimento delle Pari Opportunità e dalla DNA - 4/5 giugno 2004 Roma
[76] Pearson p 145
[77] Pearson p 145
[78] Pearson p 150

documents required to obtain the art. 18 permit. Furthermore, there is a problem that art. 18 social programmes apply only to victims of sexual exploitation; those trafficked for economic exploitation are not covered. The 228/2003 law on trafficking of persons has provided for a special fund to be set apart for measures against trafficking, and this includes assistance programmes to help victims to be integrated and social protection as provided in art. 18 of the immigration law. Art. 13 of the law guarantees a special programme of assistance that ensures temporary adequate housing and medical attention. The Italian protection of trafficked and sexually exploited persons is a step in the right direction, especially with the improvements of August 2003, respecting many fundamental principles, but art. 18 of the immigration law still leaves some important questions. It is especially important that assistance to child victims is not conditional on the child's willingness to act as a witness, as recommended by UNICEF.[79] As a final remark it should be mentioned that law 228/2003 provides for effective prevention initiatives. In particular, it suggests that the Ministry of Foreign Affairs should take into consideration potential partner countries' fulfilment of their human rights obligations and should organise international meetings and campaigns within countries of origin in collaboration with the Ministry of Equal Opportunities. Law 228/2003 may prove to be one of the best national instruments we have seen so far – only time will show how it is enforced and implemented.

Laws on trafficking and victim protection may be of a high quality, the enforcement may even be so too, but if migration laws remain inflexible and immigration remains almost impossible, the fight against trafficking cannot be won.

In general national legislation mirrors the desire to punish traffickers but tends to undervalue the need to protect victims.

3.3. A case affecting the Mediterranean – the EU

On the European level the basic rights violated when a child is trafficked are naturally to be found in the European Convention on Human Rights: the right to life, prohibition of torture, inhumane or degrading treatment, art 3, prohibition of slavery and forced labour in art. 4, and the right to education art. 2 of the 1st protocol. Besides these fundamental rights the European Union adopted a Joint action in to combat trafficking in human beings and the sexual exploitation of children (Joint action 97/154/JHA). This requires that Member States ensure that trafficking and sexual exploitation are classified as criminal offences in national legislation and that the offenders are punished by *effective, proportionate and dissuasive criminal penalties*.[80] It further requires that each Member State takes the measures necessary to ensure appropriate *protection* for witnesses and appropriate *assistance* for victims and their families.[81] It also mentions that Member States

[79] UNICEF Guidelines for protection of the Rights of Children Victims of Trafficking in South-Eastern Europe , UNICEF 2003, paragraph 3.9.1

[80] Title II, A: "Each Member State shall review existing law and practice with a view to providing that: (a) the types of behaviour set out in Title I B are classified as criminal offences;
(b) these offences, and, with the exception of the possession referred to in Title I A (ii) (c), participation in or attempt to commit them, are punishable by effective, proportionate and dissuasive criminal penalties"

[81] Title II, F. "Each Member State shall take the measures necessary to ensure:
(a) appropriate protection for witnesses who provide information concerning the offences referred to in point A (a), (b) and (e), in accordance with, in particular, the Resolution of the Council of the European Union of 23 November 1995 on the protection of witnesses in the fight against organized crime. (b) appropriate assistance for victims and their families"

must take the necessary measures to ensure that immigration, social security and tax authorities give special attention to the problems concerning trafficking in human beings and the sexual exploitation of children and co-operate with the authorities responsible for investigating and punishing offences.[82] The Joint action thus recognises the need for a multi-disciplinary approach in order to combat trafficking.

This Joint action was replaced in 2002 by the Council Framework Decision 2002/629[83] which has as its objective to approximate the laws and regulations of Member States in the area of police and judicial co-operation in matters relating to trafficking and it emphasises the importance of criminalising trafficking and providing appropriate penalties and assistance to victims as foreseen by the Joint Action. This should be enforced by August 2004.

Article 1 defines trafficking in a clear and elaborate way than joint Action 154/97, much in line with the Parlermo Protocol.[84] Again the 2002 Framework Decision underlines the importancy of having effective and dissuasive criminal penalties and it sets the minimum penalty to eight years.[85] The Framewok Decision establishes rules on extraterritoriality regarding jurisdiction[86] which mean that a memeber state should establish their jurisdiction when an offence is commited on its territory, when it is commited by one of its nationals, or for the ebenfit of a legal person established within its territory. A problem may arise if a state chooses not to apply the extraterritorial rule, which is possible according to art. 6.2.[87] Art 6.3 in part remedies this gap stating that a *Member State which does not extradict its own nationals shall take the necessary measures to establish its jurisdiction over and to prosecute, where appropriate, an offence when it is commited by its own nationals outside its territroy.* These two provisions seem in part to be contradictory. At least it

[82] Title II, G. "Each Member State shall take the necessary measures to ensure that the services which are likely to have relevant experience in the context of the fight against trafficking in human beings and sexual exploitation of children, in particular the immigration, social security and tax authorities, give special attention to the problems connected with trafficking in human beings and sexual exploitation of children and, while respecting the internal law of the Member State, cooperate with the authorities responsible for investigation and punishment of the offences"

[83] Council Framework Decision 2002/269 article 9

[84] The Joint Action 154/97 defines trafficking in Title I, A (i) as *any behaviour which facilitates the entry into, transit through, residence in or exit from the territory of a Member State, for the purposes set out in point B (b) and (d); Point B (b) trafficking in persons other than children for gainful purposes with a view to their sexual exploitation under the conditions set out in paragraph (a)* (paragraph (a) stating that "sexually exploiting a person other than a child for gainful purposes, where:- use is made of coercion, in particular violence or threats, or- deceit is used, or - there is abuse of authority or other pressure, which is such that the person has no real and acceptable choice but to submit to the pressure or abuse involved") ; (d) *trafficking in children with a view to their sexual exploitation or abuse.*

The Joint Framework Decision from 2002 is much clearer stating in artilcle 1 that "*Each Member State shall take the necessary measures to ensure that the following acts are punishable: the recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person, where: (a) use is made of coercion, force or threat, including abduction, or (b) use is made of deceit or fraud, or*

(c) there is an abuse of authority or of a position of vulnerability, which is such that the person has no real and acceptable alternative but to submit to the abuse involved, or d) payments or benefits are given or received to achieve the consent of a person having control over another person for the purpose of exploitation of that person's labour or services, including at least forced or compulsory labour or services, slavery or practices similar to slavery or servitude, or for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including in pornography. 2. The consent of a victim of trafficking in human beings to the exploitation, intended or actual, shall be irrelevant where any of the means set forth in paragraph 1 have been used. 3. When the conduct referred to in paragraph 1 involves a child, it shall be a punishable trafficking offence even if none of the means set forth in paragraph 1 have been used. 4. For the purpose of this Framework Decision, 'child' shall mean any person below 18 years of age."

[85] Art. 3

[86] Art. 6

[87] Art 6.2 "A Member State may decide that it will not apply or that it will apply only in specific cases or circumstances, the jurisdiction rules set out in paragraph 1(b) and 18c) as far as the offence is commited outside it territory."

seems that states may opt out of following paragraph 1(c) regarding offences committed for the benefit of legal persons established in their territory. Regarding own nationals, it could be argued that states who extradict possible offenders do not need to establish jurisdiction over these, but in case they do not extradict there is an obligation to prosecute.

Also the Framework Decision underlines the importance of protecting the victims, it recognises that children are particularly vulnerable victims[88] and requires that children's families are assisted as well[89] especially should they apply Article 4 of Framework Decision 2001/220 on the standing of victims in criminal proceedings.[90] Especially Art 4.1(e) regarding information on how to obtain protection and Art 4.1(h) special arrangement available for non-residents to have their interests protected, may be used by victims of trafficking. It would however have been better if the Framework Decision had laid down more direct provisions for protection and especially active help to victims, but the recognistion of children as particularly vulnerable is a step in the right direction.

The Joint Action and the Framework Decision are important because they require Member States to *actually* enforce the legislation necessary to punish traffickers and protect victims. They are especially significant because they have their emphasis on the enforcement of the laws and adequate punishment of the offenders, combined with a certain assistance to the victims. The Council Framework Decision has lost an important point which had been include in the Joint Action: that is the importance of a multi-disciplinary approach to the problem and the important contribution immigration, social-security and tax agenicies may bring to thefight against trafficking. This approach should have been enlarged, not cut out, to include civil society organisations which could bring valuable information and know-how both when it comes to protecting victims and when it comes to prosectuting criminals.

On December 22, 2003 The Council adopted Framework Decision 2004/68 on combating sexual exploitation of children and child pornography, which also replaces the Joint Action from 1997 and compliments Frameworks Decision 2002/269, but obviously only when trafficking is combined with sexual exploitation. As with Framework Decision

[88] Art. 7.2

[89] Art. 7.3

[90] Article 4 Right to receive information:

"1. Each Member State shall ensure that victims in particular have access, as from their first contact with law enforcement agencies, by any means it deems appropriate and as far as possible in languages commonly understood, to information of relevance for the protection of their interests. Such information shall be at least as follows: (a) the type of services or organisations to which they can turn for support; (b) the type of support which they can obtain; (c) where and how they can report an offence; (d) procedures following such a report and their role in connection with such procedures; (e) how and under what conditions they can obtain protection; (f) to what extent and on what terms they have access to: (i) legal advice or (ii) legal aid, or (iii) any other sort of advice, if, in the cases envisaged in point (i) and (ii), they are entitled to receive it; (g) requirements for them to be entitled to compensation; (h) if they are resident in another State, any special arrangements available to them in order to protect their interests.

2. Each Member State shall ensure that victims who have expressed a wish to this effect are kept informed of: (a) the outcome of their complaint; (b) relevant factors enabling them, in the event of prosecution, to know the conduct of the criminal proceedings regarding the person prosecuted for offences concerning them, except in exceptional cases where the proper handling of the case may be adversely affected; (c) the court's sentence.

3. Member States shall take the necessary measures to ensure that, at least in cases where there might be danger to the victims, when the person prosecuted or sentenced for an offence is released, a decision may be taken to notify the victim if necessary.

4. In so far as a Member State forwards on its own initiative the information referred to in paragraphs 2 and 3, it must ensure that victims have the right not to receive it, unless communication thereof is compulsory under the terms of the relevant criminal proceedings.

2002/269 the protection of victims seem to be less emphasised than the prosecution and punishment of offender, in fact the articles concerning the protection of victims are identical from one Framework Decision to another[91] as are the articles regarding extraterritoriality.[92] Again it is obviously crucial to prosecute offenders and to have effective and dissuasive legislation[93] but it is likewise essential to establish effective assistance to victims.

In addition the EU Council has adopted a resolution on finding missing or sexually exploited children (2001/C 283/1) that may be useful, not so much when fighting traffickers but when helping the victims. It is particularly relevant because it encourages co-operation between authorities and civil society (art. 2), thus emphasising the necessity of not only having state agencies such as law enforcement or social agencies fighting to help victims, but to take into consideration the experiences of NGOs and private organisations that may have a different approach to finding children and may sometimes have more success in accessing them.

Further the Council has adopted a directive[94] on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities. This directive has one major weakness. Whether or not the permit will be issued is entirely dependent upon the victims' willingness *and* capacity to be a useful witness.[95] This is not sufficient when looking at the broader picture of fighting trafficking, or at the need to assist victims, because it does not focus on protecting and helping the victim but on prosecuting the offender without taking into consideration that even if this is vital, the victim's needs cannot be set aside to accomplish it. A positive aspect is that the directive provides that States should allow victims to work[96] (children to study)[97] and should provide medical and psychological care. Art 13 relating to minors have one postive aspect, which is that it requires states to take into consideration the best interest of the child, this maight require specific adaptions in terms of proceedure or, as mentioned in the article, an extension of the reflection period of 30 days which each victim has in order to decide whether to cooperate or not.[98] All in all this Directive is however, not satisfactory given the lack of focus on assisting victims and the tendency to set aside victims needs in order to catch and prosecute trafficker – two aspects that should not be separated or weighed against each other.

The already mentioned Tampere decisions from 1999 that are dedicated to the establishment of an Area of Freedom, Security and Justice have a serious flaw in that they confuse trafficking and illegal immigration (conclusion 22 and 23) treating them as if they were the same thing and disregarding the serious consequences of this. And instead of

[91] Art. 9 of Framework Decision 2004/68
[92] Art. 8 of Framework Decision 2004/68
[93] Art. 5 lays down an obligation to have criminal penalties of a maximum of at least between one and three years of imprisonment, which in certain aggravated circumstances should be raised to a maximum of at least between five and ten years of imprisonment.
[94] Doc. 14994/03, 17 December 2003, adopted by the Justice and Home Affairs Council on 29 April 2004, Council Doc. 8694/04 (Presse 123)
(http://europa.eu.int/rapid/pressReleasesAction.do?reference=PRES/04/123&format=HTML&aged=1&language=EN&guiLanguage=en
[95] Art. 10
[96] Art. 12
[97] Art. 13
[98] Art. 8

focusing on a combination of assistance to victims and repatriation they concentrate only on repatriation (conclusion 26).

3.4 The south of the Mediterranean – a brief overview

The situation in the MENA area is different from that of Southern Europe in more than one sense. It is true that the overall Shari'a lays a different basis for combating trafficking – it is however not true that just because Shari'a does not contain provisions against the trafficking and exploitation of children, or against sexual intercourse with minors, it is not included in the general spirit and message of the Prophet Mohamed that children are to be protected. Numerous scholars today advocate that Shari'a and Human Rights are completely compatible and as such protection of children is not outside the scope of Islamic law. The Shari'a covers every aspect of life, but the primary sources of the Islamic law (the Quran and the Hadiths) literally covers only part of human relations, and especially as time as changed inter-human relations are not covered by the primary sources and the jurisprudence developed in the Middle Ages.[99] The moral and spiritual message of Islam is one of compassion and equity, of love and protection of the weak. Islamic law contains principles of good government and human well-fare that resonate modern international human rights ideals, respect for justice, protection of human life and dignity are central principles inherent in the Shari'a.[100] Even if no express rule prohibits abuse and exploitation of children it seems clear that protecting the victims of trafficking, and punishing the traffickers fit in to this message and moral biddings. It has to be remembered that the original Shari'a dates back to the 7th century where it was actually very common in Europe to be married when you were about 12… so a lack of verses prohibiting sexual intercourse with a minor is not a sign that the Shari'a cannot be used to fight trafficking. What needs to be used is analogy and common sense when deducting from the eternal message of the Prophet that children are to be loved and protected.

The application by the state of the Shari'a may in some cases prove an obstacle to combating trafficking because women and children who have been subject to forced prostitution fear that they will be punished for committing the crime of zina – sexual relationship outside the context of marriage. This however is contrary to the Quranic legislation stating that if a women (by analogy also a child – analogy being a recognised source of law) is compelled to prostitute herself she should not be punished (Quran, verse 24:33). It is necessary to underline also that according to Shari'a these are victims that should be protected – not punished.

The MENA poses different problems because of different customs; where prostitution and pornography is the main threat to children subject to commercial sexual exploitation in Europe it has been shown that children in this region are more subject to intra-familial violence and sexual abuse, genital mutilation of girls, premature marriage of girls and conscription of child soldiers.[101] Further, especially the United Arab Emirates is a destination country for children trafficked to work as camel jockeys, which involves

[99] Baderin p 78
[100] Ibid. p 82
[101] First Arab African Forum to discuss sexual exploitation of children, Rabat, Morocco, 24-26 October, 2001

extreme dangers and mistreatment.[102] Moreover, as far as trafficking is concerned, many of these countries are countries of origin and not of destination where in Europe most states are only countries of destination (and transit) (Algeria, Egypt, Iran, Iraq, Morocco, Oman, are countries of origin only whereas Qatar and Yemen are both countries of destination and origin), however some states in the MENA are also countries of destination (Bahrain, Jordan, Kuwait, Lebanon, Saudi Arabia, Israel, Libya, Tunisia and United Arab Emirates).[103] As may be inferred by the problems of exploitation listed above, trafficking and sexual exploitation in these countries is perhaps less connected than trafficking and exploitation in Europe (at least when considering destination countries). It is however very difficult to say with certainty what is the exact extent of this exploitation. Commercial Sexual Exploitation of Children is not easy to obtain information on – even less so than in Europe – because it touches on two very delicate matters – sex and religion. Child pornography and prostitution are probably quite limited in the Middle East and North Africa due to very strict punishments linked to these crimes.[104] If children fall victim to these crimes it is because they fall outside the legal framework, such as migrant workers not protected by the law – here the link with trafficking becomes visible again – or because they do not receive the legal protection they are entitled to because of their defenceless position e.g. native street-children or domestic workers.[105] Again one sees that it is the already vulnerable who are subject to exploitation. There should be no hindrance in adopting laws in the spirit of the Palermo Protocol (signed but not ratified by many MENA countries).[106] The main obstacle facing effective implementation is perhaps the difficulty in confronting the problem given the sensitivity of the issue. It must be remembered that even if sex is considered a very private matter (which it is to most Europeans too) the offence of exploiting children has nothing to do with the private sphere, and even if the vast majority of a population lives according to the spirit of the Shari'a some individuals may not. These individuals deserve to be punished just as a common thief would be– or actually not just as a common thief – but much more severely. Protecting children does not conflict with the Shari'a and neither does investigation to what extent exploitation is taking place in order to provide adequate protection. The national law in many of the MENA countries reflects this approach. In most countries (Bahrain, Kuwait, Morocco, Lebanon) a specific law against trafficking does not exist, but there are laws against slavery, forced labour, coercion, rape, assault, kidnapping, prostitution, pandering and the exploitation of prostitution by means of coercion or fraud. These laws may amount to effective remedies against trafficking, however to protect victims of trafficking, it would be preferable to have a separate act to prevent victims being treated as criminals because they have broken the law regarding immigration or prostitution. Other states have specific legislation against trafficking: Qatar, and the United Arab Emirates. These countries are also rather up front when it comes to protecting victims who are not jailed or prosecuted but provided with assistance and counselling. Algeria, Tunisia and Egypt constitute cases apart because there is a real difficulty in distinguishing smuggling from trafficking. However the focus

[102] The Migration-Trafficking nexus p 8
[103] www.helpsavekids.org/country2.html
[104] ECPAT newsletter 34/2001 North Africa and the Middle East
[105] ECPAT newsletter 34/2001 North Africa and the Middle East
[106] Signed by: Algeria, Egypt, (Israel), Lebanon, Lybia, Saudi Arabia, Tunisia, Ratified by: Algeria, Bahrain, Egypt, Tunisia. (Jordan, Kuwait, Iran, Iraq, Oman, Qatar, Yemen, and the United Arab Emirated have nor signed nor ratified)

on combating trafficking is rising. Saudi Arabia takes a special position because its law is the Shari'a (slavery has been outlawed since 1962 and prostitution is clearly forbidden, as is sex outside marriage), however specific Shari'a legislation on trafficking could be formulated by using analogy and consensus. The state works closely with its counterparts in the Philippines and Sri Lanka, the main labour supplying countries, to prevent trafficking, and regarding protection the state operates three shelters for abused or trafficked women.[107] Therefore, legislation to fight trafficking is not lacking altogether even if it may be considered a sensitive issue, but this needs to be followed up by active enforcement, investigation and help to the victims. In all these states it may be somewhat safe to affirm that it is not so much the lack of legislation, even if it would be opportune to improve this with specific trafficking acts – but of enforcement and investigation, which is the problem – like in Europe. A problem particular to the region is early marriages, sometimes combined with a commercial transaction. Such early marriages are not combined with trafficking, they are however an example of how parents and relatives sometimes force children into non-consensual sexual relations, perhaps even without being aware how much they hurt the child. This is a field where education in combination with legislation could make a difference. It has to be recognised that in strongly patriarchal societies women and children have little freedom which explains why extensive discrimination – that may lead to sexual exploitation – is not perceived as a serious violation of the girl's rights, also in this respect education of especially women and girls is extremely significant in the future fight against trafficking and Commercial Sexual Exploitation of Children.

4. Conclusion

On many issues children who seek asylum, child migrants and children who have been trafficked have the same needs and the same problems.
Migrant children, although they do not apply for protection, as child asylum seekers or refugees, or are not covered by the instruments that are available, have needs that are in practice very similar to those children who claim asylum. They need access to the territory, so that they are not confined to border waiting zones and summarily returned to the conditions from which they have fled.
Access to basic social and economic rights, such as good quality health care, housing, and education, is also essential. So is access to fair procedures, legal advice and support, and some form of residence status, and the possibility to make an asylum application and/or an application for residence. These considerations are actually valid for all three "categories" of children examined in this paper.
Refugee children have the right to special protection as refugees/asylum seekers and should from the asylum-seeking phase until a permanent settlement of their situation – whether it is resettlement in their country of origin or permanent residence in their country of asylum – be granted special attention as children. The protection granted to child refugees today is clearly wanting. The main objection is the difficulties children

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[107] All information on legislation in MENA countries from US Department of State: "Trafficking in Persons Report" Released by the Office to Monitor and Combat Trafficking in Persons
June 14, 2004. http://www.state.gov/g/tip/rls/tiprpt/2004/33195.htm

might have establishing their status as refugees. Also the lack of special measures assuring that children's human rights are protected throughout the refugee determination procedure leaves much to be desired. Harsh asylum procedures and regulations also affect children hard. It is necessary at all times that children are granted a guardian who will assist the child during the procedure. This paper has not examined the problem children face if they are granted permission to stay in their receiving country – obviously adequate facilities are needed to receive these children, adoption may in some cases be a solution. In every case the child's best interest has to be taken into careful consideration.

Migrant children are not entitled to the special protection refugee children can obtain. They have no special status. However it is important to emphasise that migrant children are entitled to have *all their human rights* respected. That includes adequate education, housing, heath care facilities, etc.

Victims of trafficking are in a particularly vulnerable position. It is important to emphasise the need to protect these children and offer them rehabilitation programmes so that they may overcome their trauma. It is especially important not to consider them as criminals and to punish them. Traffickers on the other hand need to be persecuted and punished, in this context it is imperative to advocate a trans-national punishment for a crime that knows no borders.

The crucial issue for children on the move – whether as legal or – in many cases – as irregular migrants, as asylum seekers or as victims of trafficking, is that we first of all see these children as children and only thereafter try to categorise them into other boxes. The CRC protects *every* child. The principle safeguarded in both the CRC and in the Refugee Convention of the right to family reunification must also be taken very seriously be national authorities – however even when this is not possible, or where it is not in the best interests of the child, arrangements must be made to protect the child's rights just the same. In many cases family reunion can take months or even years, during this period it is important that the child does not find itself in a situation where no one takes care of it, where its best interests are not protected, and where its fundamental rights are denied.

Obviously when considering children on the move the usual barrier of national sovereignty and the distinction between nationals and non-nationals comes into play. Again it is essential to enforce the principle of the CRC that children are children before they are anyone else – nationals or non-nationals. It would have been desirable that the CRC had included a more clear improvement of the Refugee Convention, clearly covering the gap in protection of refugee children, and also that it had a clear provision on migrant children – legal or irregular as the case may be. In that way these children's rights would have been protected, at least legally if not practically, without the need to resort to interpretations of the principles of the Refugee (or Geneva) Convention. It is clearly a gap in the protection of children that the CRC does not take into consideration that even if refugee/migrant children have the same basic needs and rights as their fellow citizen children who are protected in their own country, the former find themselves in a particularly unsafe situation and thus need particular protection.

The Mediterranean will continue to be an region with intense movements. For the time being the movements are spurred by the fact that the north is economically favoured in comparison with the south, but even if this situation were to change in the future the long history that connects the countries in the region guarantees a continued movement of

people from one country to another. Today many attempts to move are marked by obstacles and some times by tragedies, nevertheless families choose to send their children away, or to let them go, in search of a better life. To guarantee a future with mutual respect and understanding in this region, which in many aspects is not only the cradle of our civilisation but also where much of world politics are shaped today, even if it is not always in the hands of the citizens of the region, it is vital that we respect and protect our mutual human rights, and it is vital that we raise our children, not only teaching them to respect these rights too, but showing them that we respect *their* rights. Mutual recognition and respect can only be obtained if we show that we are willing to respect and protect also the children who are not ours, but nevertheless constitute our common future.

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