

**The evaluation of the best interests of the child
in the choice between remaining in the host country and repatriation:
a reflection based on the Convention on the Rights of the Child**

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1) The principle of the “best interests of the child”

1.1) The “best interests of the child” as the general criterion in the choice between remaining in the host country and repatriation

The choice of whether the separated child should be repatriated or stay in the host country is an extremely complex and delicate question. In particular, the question requires even greater reflection in the case of children who are not asylum seekers or refugees.

On the basis of the Convention on the Rights of the Child, the general criterion which must guide this choice (like all actions regarding children) is the principle of the “best interests of the child”, on the basis of which “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” (Convention on the Rights of the Child, art. 3).

Consequently, the decision whether the child should remain in the host country or be repatriated should be taken on the basis of what is considered, case by case, to correspond to the best interests of each single child.

All other considerations, e.g. the control of clandestine immigration, should be secondary compared with the “best interests of the child”.

In this sense, the Resolution of the Council of the European Union on unaccompanied minors who are nationals of third countries (June 1997) is not fully consistent with the Convention, seeing that even if it includes minimum guarantees, it states that the child should be repatriated whenever possible, without referring specifically to the principle of the best interests of the child¹: “[...] Whereas the unauthorized presence in the territory of Member States of unaccompanied minors who are not regarded as refugees must be temporary, with Member States endeavouring to cooperate among themselves and with the third countries of origin to return the minor to his country of origin or to a third country prepared to accept him, without jeopardizing his safety, in order to find, whenever possible, the persons responsible for the minor, and to reunite him with such persons; [...]” (preamble).

The European Council Resolution is to be seen more within the framework of norms aiming to regulate clandestine immigration than that of the protection of children: the “matters of common interest” quoted in the preamble, which account for the adoption of a measure on the European level, refer firstly to the need “to combat unauthorized immigration and residence by nationals of third countries on the territory of Member States” and only secondly, and far less incisively, to the protection of unaccompanied children.²

Having established, then, that the general criterion should be the principle of the “best interests of the child”, it is necessary to solve the problem of what the expression “best interests of the child” means exactly, and how they are to be evaluated.

¹ The Resolution limits itself to recalling the principle of the “best interests of the child” as a general principle laid down by the Convention on the Rights of the Child, but it does not make any explicit reference to it in the parts in which it speaks specifically of repatriation.

² “Having regard to the Treaty on European Union, and in particular Article K.1 thereof, Whereas, pursuant to Article K.1 (3) (a), (b) and (c) of the Treaty, the conditions of entry of, and residence by, nationals of third countries on the territory of Member States and measures to combat unauthorized immigration and residence by nationals of third countries on the territory of Member States constitute matters of common interest; Whereas Article K.1 (1) of the Treaty provides that asylum policy is to be regarded as a matter of common interest for the Member States; Whereas third-country minors sometimes enter and stay in the territory of Member States without being accompanied by a responsible person and without obtaining the necessary authorization; Whereas unaccompanied minors who are nationals of third countries can be the victims of facilitators, and it is important for Member States to cooperate in combating such form of facilitating; Whereas unaccompanied minors who are nationals of third countries generally are in a vulnerable situation requiring special safeguards and care; Whereas recognition of the vulnerable situation of unaccompanied minors in the territory of Member States justifies the laying down of common principles for dealing with such situations;” (Resolution of the Council of the European Union on unaccompanied minors who are nationals of third countries, preamble)

1.2) The indeterminacy of the concept of “best interests of the child” and the need to define certain criteria of evaluation

The concept of “best interests of the child” is extremely wide-ranging and vague, it is not defined by rigid criteria, such as to allow us to bear in mind all the particularities of each single child: "It is clear that the criterion of "the interests of the child" cannot lead to the creation of stereotypes that are valid for all situations, seeing that they are closely linked to the peculiar nature of each specific case; they must necessarily be subject to change in time, on the basis of the special requirements and maturity of a concrete historical and sociological reality (for example, the situation of a child in an industrialised society, where the requirements of autonomy are greater and more widely felt, is one thing, but the situation in a more traditional society, where primary relationships are very much alive and present, is quite another); they must undoubtedly be evaluated in relation to the age of the subject (a sixteen-year-old boy's interests are completely different from those of an infant); they are closely connected with the past situation of the child, the way he or she has reacted to it, and the links that have been created [...], they can without doubt be linked with the characteristics of individual personalities, the aspirations and qualities of the subject, and the resources that he or she may dispose of."³

As a result of this broad range of application and vagueness, the notion of “best interests of the child” has been widely criticised. It is sometimes claimed that the best interests of the child constitute a vague, indeterminate concept which may open the way, at the moment of their interpretation, to ideologically marked positions and theories, thus becoming a "magic notion" (Carbonier); or else that the concept of the best interests of the child "risks turning into an empty tautology, a mere external embellishment of the argument. It has contributed, in its own way, to the considerable (and sometimes rather dangerous) enlargement of the sphere of discretionality of juvenile court judges" (Dogliotti); this concept is still criticised for "having fulfilled up to now a kind of buffer function; a sort of discretionary passepartout, in the name of which contrasting decisions are adopted daily [...], based on subjectivism and discretionality" (Dosi).⁴

But other scholars answer this criticism by defending the value of the concept of the best interests of the child: "Nobody can deny that the concept of "the interests of the child” is vague, and that its meaning has not been clearly defined once and for all by the legislator: but this is simply the necessary price to pay whenever - as the law requires - we desire to bring the judges' decisions into line with the achievement of better living conditions, not for a generic type of child, but for specific children for whom decisions have to be adopted, with their unique personalities, their real requirements, their different levels of maturity, their individual resources, their experience and their own capacity for establishing relationships" (Moro)⁵.

If, then, we accept the idea of the best interests of the child, with all its vagueness, as the instrument which can best guarantee the implementation of the rights of the child, the problem arises of the need to define certain criteria on which to base the evaluation of these interests: "Criticising the concept of the child's interests (...) without trying to develop better criteria, even if they are not binding, for the interpretation of the real contents of these interests in the individual legal cases – is to my mind a culturally and socially harmful operation (...). There is a different, and real problem of trying to reduce the risks of arbitrary, misleading interpretations of the principle of the best interests of the child, thus radically overcoming the dangers of connections between the interpretation and ideological prejudices or highly personal visions of life which influence, with a certain frequency, the judges' determination of the best interests of the child in specific cases".⁶

This necessity becomes even more important if we consider not only the decisions of the magistrates, but also those of the administrative bodies, which play a fundamental role in the experience of an unaccompanied foreign child, and which, on the basis of art. 3 of the Convention on the Rights of the Child, are likewise to ground their decisions on an evaluation of the best interests of the child.

³ A. C. Moro, *Diritti del minore e nozione di interesse*, in *Cittadini in crescita* 2-3/2000.

⁴ M. Dogliotti, *Che cosa è l'interesse del minore*, in "Il diritto di famiglia e delle persone", 1992; G. Dosi, *Dall'interesse ai diritti del minore: alcune riflessioni*, in "Il diritto di famiglia e delle persone", 1995.

⁵ A. C. Moro, *Diritti del minore e nozione di interesse*, in *Cittadini in crescita* 2-3/2000.

⁶ A. C. Moro, *Diritti del minore e nozione di interesse*, in *Cittadini in crescita* 2-3/2000.

While magistrates are (at least in theory and tendentially) not influenced by political orientations, the administrative bodies, who are responsible for issuing residence permits, for children's assistance, and in some countries, for the choice between repatriation and remaining in the host country, are strongly influenced by their political orientation.

Furthermore, while juvenile court judges are sensitive, in view of their training and their task, to the logic of the "best interests of the child", the administrative bodies, on the contrary, especially those that are directed by the Ministry for Home Affairs, inevitably respond also to other kinds of logic, in particular to that of the fight against clandestine immigration. This leads to a considerable increase in the risks of "ideological prejudices that influence the determination of the best interests of the child in specific cases".

While it is important, therefore, in general to establish interpretative criteria that can guide the evaluation of the interests of the child, this is even more necessary in the case of foreign children.

1.3) The Convention on the Rights of the Child: the holistic approach and the general principles

In order to establish criteria of interpretation that can guide us in the evaluation of the best interests of the child, we shall have to refer to the general principles governing the rights of children, as laid down by the Constitution and by the law in each country, and, in particular, by the Convention on the Rights of the Child, which represents the normative framework as regards the rights of children.

Let us try, then, to analyse, in the light of the Convention on the Rights of the Child, which criteria should be taken into consideration in the evaluation of the best interests of the child, in the choice between remaining in the host country and repatriation.

In the interpretation of the Convention, we will follow the interpretations and the indications supplied by the Committee for the Rights of the Child, the United Nations Committee based in Geneva that has the task of monitoring the implementation of the Convention.

In the Implementation Handbook for the Convention on the Rights of the Child published by UNICEF, we read: "The Working Group drafting the Convention did not discuss any further definition of "best interests", and the Committee on the Rights of the Child has not as yet attempted to propose criteria by which the best interests of the child should be judged in general or in relation to particular circumstances, apart from emphasizing that the general values and principles of the Convention should be applied to the context in question. The Committee has repeatedly stressed that the Convention should be considered as a whole and has emphasized its interrelationships, in particular between those articles it has elevated to the status of general principles (articles 2,3,6 and 12). Thus, the principles of non-discrimination, maximum survival and development, and respect for the views of the child must all be relevant to determining what the best interests of a child are in a particular situation, as well as to determining the best interests of children as a group. And consideration of best interests must embrace both short- and long-term considerations of the child. Any interpretation of best interests must be consistent with the spirit of the entire Convention – and in particular with its emphasis on the child as an individual with views and feelings of his or her own, and the child as the subject of civil and political rights as well as special protections [...] The Committee has stressed that the principle should be applied along with the other general principles in all those instances in which the Convention does not set a precise standard."⁷

A first fundamental indication provided by the Committee on the Rights of the Child as regards the interpretation of the Convention is that "the Convention is indivisible and its articles are interrelated": the interpretation of the rights of the child, then, must be based on a "holistic", overall approach; there is no hierarchy among the rights that it lays down, such that the guarantee of a particular right should prevail over the guarantee of the others.

Secondly, the Committee for the Rights of the Child has identified four principles as underlying or general principles, which have a significance in the consideration of all the other rights laid down by the Convention.

These principles are:

⁷ UNICEF, Implementation Handbook for the Convention on the Rights of the Child, Ginevra, 1998, p. 40.

- the right to non-discrimination: “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.” (art. 2)⁸;
- the principle of the best interests of the child (art. 3);
- the right to maximum survival and development: “States Parties shall ensure to the maximum extent possible the survival and development of the child.” (art. 6);
- the right to participation: “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.” (art. 12).

These four principles are (according to the interpretation that the Geneva Committee provides) closely interconnected. In particular, as indicated by the Committee, the principle of the best interests of the child must be interpreted “in the light of” the other three principles, considering them as underlying principles “by means of which” the best interests of the child are to be evaluated: “the principles of non-discrimination, maximum survival and development, and respect for the views of the child must all be relevant to determining what the best interests of a child are in a particular situation”.

The evaluation of the best interests of the child, then, cannot be separated from a consideration of the opportunities to exercise the right to maximum survival and development, the right to participation and the right to non-discrimination.

The maximum protection of the rights of the child is achieved, of course, when all the rights laid down in the Convention on the Rights of the Child are successfully guaranteed. However, in real situations, it often happens that the respect of a specific right implies the lack of respect of another right.

On the basis of the two above-quoted indications of the Committee about the correct interpretation of the Convention, in these cases it will be necessary:

- to evaluate in the specific situation which solution best corresponds to the interests of the child, trying to achieve an optimal balance between the various rights in question: considering a particular right (for example, the right to family unity) as the supreme right to which all other rights are always to be subordinated is not a correct application of the Convention;
- always to consider the other three general principles in the evaluation of the best interests of the child: the right to maximum survival and development, the right to non-discrimination, and the right to participation.

⁸ “Art. 2 underlines that all the rights laid down by the Convention on the Rights of the Child must be applied to all the children present in the State, including [...] those who are there illegally”: UNICEF, Implementation Handbook for the Convention on the Rights of the Child, Geneva, 1998, p. 26.

2) Certain rights that are particularly significant in the choice between remaining in the host country and repatriation

Having established these initial fundamental indications, we may consider which of the rights laid down by the Convention on the Rights of the Child are particularly significant in the choice between staying in the host country and repatriation.

We may subdivide these rights into six groups:

1. the right to life and to protection from abandonment and violence;
2. the right to family unity;
3. the economic and social rights, that is to say, the right to a standard of living adequate for the child's development, the right to health, to education, to leisure, etc.;
4. the right to participation;
5. the right to receive guidance from one's own family in the exercise of the rights recognized by CRC;
6. the right to maintain one's cultural identity, and implicitly, to live in one's country of origin.

2.1) The right to life and protection: situations “at risk” and situations “not at risk”

The Convention on the Rights of the Child establishes that the child has the right:

- to life and maximum survival (art. 6);
- to protection in cases where the child has no family (art. 20 and 22): “A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.” (art. 20); “In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.” (art. 22);
- to protection from violence, abuse, and negligence (art. 19); if parents maltreat or neglect a child, the State may decide to separate the child from his or her parents, in the best interest of the child: “States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interest of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents [...]” (art. 9);
- to protection from economic exploitation (art. 32), from sexual exploitation (art. 34), from all other forms of exploitation (art. 36), and from sale and trafficking (art. 35);
- to protection from torture and deprivation of liberty (art. 37) and from direct involvement in armed conflicts (art. 38).

As regards separated children, we can make an initial fundamental distinction between:

- situations “at risk”, that is to say, situations in which if the child were repatriated, he would be exposed to the risk of persecution, involvement in conflicts, abandonment or maltreatment and abuse, implying a violation of the rights to life and protection;
- situations “not at risk”, in which repatriation would not involve these risks.

In situations “at risk”, although the decision cannot be defined by rigid criteria, seeing that it must always be based on an evaluation of the specific case and a holistic approach to the rights of the child, we can state that in general, and tendentially, it is more likely to correspond to the best interests of the child if he or she remains in the host country rather than being repatriated.

Firstly, let us consider situations in which there are no members of the family or authorities in the country of origin who are willing to accept responsibility for the child following repatriation. In these cases, in accordance with articles 20 and 22 of the Convention, the State is obliged to adopt measures to protect the child, and therefore in general cannot order his or her repatriation.⁹

⁹ The legitimacy of repatriation which is not ordered for the purpose of reuniting the family, but to entrust the child to the authorities of his or her country of origin is discussed below (par. 2.7).

Consistently with this, the Resolution of the Council of the European Union on unaccompanied minors who are nationals of third countries, establishes that: “1. Where a minor is not allowed to prolong his stay in a Member State, the Member State concerned may only return the minor to his country of origin or a third country prepared to accept him, if on arrival therein - depending on his needs in the light of age and degree of independence - adequate reception and care are available. This can be provided by parents or other adults who take care of the child, or by governmental or non-governmental bodies. 2. As long as return under these conditions is not possible, Member States should in principle make it possible for the minor to remain in their territory.” (Resolution of the Council of the European Union on unaccompanied minors, art. 5).

Secondly, there are situations in which the repatriated child would be exposed to the risk of persecution, involvement in conflicts, etc.

The norms that regulate the prohibition of expulsion (the principle of non-refoulement) laid down by the Convention of the United Nations relating to the status of refugees of 1951, also apply to repatriation: “No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” (UN Convention relating to the status of refugees, art. 33).

This limitation is underlined also by the Resolution of the Council of the European Union on unaccompanied minors: “In any case, a minor may not be returned to a third country where this return would be contrary to the Convention relating to the status of refugees, the European Convention on Human Rights and Fundamental Freedoms or the Convention against Torture and other Cruel, Inhuman or Degrading treatment or Punishment or the Convention on the Rights of the Child, without prejudice to any reservations which Member States may have tabled when ratifying it, or the Protocols to these Conventions.” (Resolution of the Council of the European Union on unaccompanied minors, art. 5.4)

A child should not be repatriated also if he or she comes from a country that is affected by conflict, natural disasters or other particularly serious events that can be dangerous for the child.

Lastly, there are situations in which the investigations in the country of origin reveal that the parents are guilty of abuse and maltreatment of the child, or are responsible for negligence, or for selling the child.

In these cases, which are dealt with in art. 9 of the Convention on the Rights of the Child, the national laws regarding limitations or loss of parental authority must be applied: consequently, in these situations, repatriation can generally not be imposed for the purposes of reuniting the child with parents who have lost their parental authority.¹⁰

In situations “not at risk”, on the contrary, in which repatriation does not involve a violation of the child's rights to life and to protection, the evaluation becomes more complicated.

For these situations, there are no specific norms regarding repatriation (as there are, on the contrary, in cases where there are no members of the family or authorities of the country of origin who are prepared to accept responsibility for the child), or norms that can be applied by analogy (as in cases of a risk of persecution).

Nevertheless, the choice of criteria to be used is not left to the discretionality of the body responsible for deciding between repatriation and remaining in the host country, seeing that this body will in all cases have to apply the Convention on the Rights of the Child, and must make reference, in order to evaluate the best interests of the child, to the rights laid down in it, adopting a holistic approach and bearing in mind the three other general principles of non-discrimination, participation, and maximum survival and development.

2.2) The right to family unity

The right of the child to live in his or her own family of origin, which should provide for his maintenance and education, and favour his development, is a fundamental right of the child, and is one of the rights by means of which the general principle of the child's right to development is achieved.

¹⁰ On the contrary, the problem arises of whether repatriation can be ordered for the purpose of entrusting the child to the authorities of his or her country of origin: the question is discussed below (par. 2.7.).

- “Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community; Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding, [...]” (Convention on the Rights of the Child, preamble);
- “The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.” (art. 7);
- “States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.” (art. 8);
- “States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.” (art. 9);
- “In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner.” (art. 10);
- “States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.” (art. 18);
- “For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.” (art. 22.2);
- “The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.” (art. 27.2)

On the basis of the general principle of non-discrimination, laid down in art. 2 of the Convention, the child's right to family unity must be respected without any discrimination.

In particular, in the case of separated children, it is clear that the conditions of poverty of the family may become a factor that entails the separation of the child from his or her family, implying a discrimination of these children with respect to the right to family unity. It is the duty of the State to take steps in order to remove this discrimination, and support the family so that they are able to provide for the maintenance and the development of the child:

- “For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.” (art. 18.2);
- “States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.” (art. 27.3)

In the interpretation of the right to family unity, lastly, it is necessary to bear in mind, as general principles, the principle of the best interests of the child, and the child's right to participation: living together with his or her family is a *right* of the child, not a duty, and the implementation of this right must always tend towards the best interests of the child, and cannot be separated from a consideration of the child's opinion, in accordance with his or her age and maturity. “It should, however, be noted that family

reunification should not be used as a justification for acting against the child's best interests. Children may not wish to be reunited with their family or the family may refuse them (for example if they have to return to the country of origin). As article 9 provides, separation from families may be necessary in the child's best interests.”¹¹

“The point at which this right [that is to say, the right of the child to be brought up by his or her parents, as laid down by art. 7 of the Convention] becomes most problematic is perhaps when children themselves decide that they would rather not be cared for by parents, although parents and State do not support this. Among the many thousands of homeless children in all countries, there are those who fall into this category – children who have, in effect, voted with their feet. States need flexible, child-centred procedures where runaway children are concerned. Any automatic return of such children to parents without investigation of the reasons why they ran away and without provision of alternative measures of care, for example, is in conflict with the provisions and principles of the Convention”.¹²

“The child's right not to be separated from parents against their will [...] The words “against their will” refer either to the parents' will or to the parents' and the child's will together.”¹³

2.3) The economic and social rights

If the child's right to maximum survival and development is to be guaranteed, a series of other rights must be guaranteed, which in turn are laid down by the Convention on the Rights of the Child, including¹⁴:

- the right to an adequate standard of living: “States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.” (art. 27);
- the right to health: “ States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.” (art. 24);
- the right to education: “States Parties recognize the right of the child to education and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) Make primary education compulsory and available free to all; (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child [...]” (art. 28);
- the right to social security: “States Parties shall recognize for every child the right to benefit from social security, including social insurance” (art. 26);
- the right to leisure: “States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities [...]” (art. 31);
- the right to protection from economic exploitation: “States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.” (art. 32)¹⁵

In the Implementation Handbook for the Convention on the Rights of the Child we read: “The Committee on the Rights of the Child has emphasized that it sees child development as a holistic concept, embracing the whole Convention. In the Guidelines for Periodic Reports, it asks States to describe measures taken ‘to create an environment conducive to ensuring to the maximum extent possible the survival and development of the child, including physical, mental, spiritual, moral, psychological and social development [...]’. Many of the obligations of the Convention, including in particular those related to health, adequate standard of

¹¹ UNICEF, Implementation Handbook for the Convention on the Rights of the Child, Ginevra, 1998, p. 287.

¹² UNICEF, Implementation Handbook for the Convention on the Rights of the Child, Ginevra, 1998, p. 107.

¹³ UNICEF, Implementation Handbook for the Convention on the Rights of the Child, Ginevra, 1998, p. 121.

¹⁴ The articles reported here are only the most significant for the question of the choice between staying in the host country and repatriation: it is clear that this list does not include exhaustively all the rights that must be satisfied in order to fully guarantee the right to maximum survival and development.

¹⁵ The right to be protected from economic exploitation is included among the economic and social rights as well as among the rights of protection, privileging here a consideration of the context of poverty which often gives rise to the exploitation of children's work, compared with the consideration of the responsibility of those who exploit them (in the following quotation, by Moro, we find the same interpretation).

living, education, and leisure and play (articles 24, 27, 28, 29 and 31) are relevant to ensuring the maximum development of the child.”¹⁶; “Article 27 recognizes that such development cannot be divorced from the child's living conditions. By listing the different components of full development –physical, mental, spiritual, moral and social – article 27 makes it clear that an adequate standard of living is not just limited to the basics of food, clothing and housing, important though these are.”¹⁷

The implementation of these rights – which may be defined as “economic and social rights” – largely depends on the economic and social context in which the child lives: “[The Convention on the Rights of the Child] has also recognised a series of social rights, that is to say, the rights to education, to work, to health, to social security, to leisure, to protection from all forms of exploitation [...]. Social rights are those rights which can be applied not only in cases of their violation by a specific subject, but also, or rather above all, with respect to a community organised as a State and its various territorial components. These rights are connected with fundamental needs of the personality, which may not be respected, not because a specific subject fails in the task of respecting them, but because particular situations may make it difficult to enjoy them to the full. While the classic rights of civil freedom are rooted in the concept of “natural freedom”, social rights find their theoretical justification in the different concept of “liberation” from certain forms of deprivation, and therefore they have the purpose of creating an effective synthesis between freedom and equality, ensuring identical opportunities for everybody, and thus an equality that is no longer formal, but substantial.”¹⁸

On the basis of the general principle of non-discrimination, also economic and social rights must be guaranteed for all children who fall under the State’s jurisdiction, without any discrimination. This implies that in the consideration of the economic and social conditions in the original environment, different “standards” cannot be adopted: in other words, it cannot be considered “normal” that a minor from the mountains of Albania or Morocco should have a much lower standard of living, limited opportunities of health assistance, education, etc.

This does not mean that the host country should guarantee, on the basis of the Convention, to “all Third World children” a standard of living equal to that of its own citizens, seeing that this obligation exists only for children who fall under the jurisdiction of the State, and therefore only for children who are on its territory.

2.4) The contradiction between the right to family unity and economic and social rights

In the case of separated children coming from very poor environments, there is a clear contradiction between the right to family unity and economic and social rights (the right to a standard of living adequate for the child’s development, the rights to health, to education, to social security, to leisure, to protection from economic exploitation, etc.).

In these cases, because of the gap between the poverty of the country of origin and the well-being of the European host country, the economic and social rights will generally be more respected if the minor remains in the host country, rather than being repatriated. But this involves the permanent separation of the child from his or her family, and therefore a violation of the child's right to family unity. Unless the family, in turn, emigrates to the host country: the reunification of the family can be achieved either in the country of origin or in the host country, and we would like to recall that art. 10 of the Convention states that: “applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner”.

If, however, the family stays in the country of origin, there is a clear contradiction between different rights laid down by the Convention: if the minor stays in the host country, his or her economic and social rights will be better guaranteed, but the right to family unity will be violated; vice versa, if the minor is repatriated, his or her right to family unity will be respected, but the economic and social rights will be guaranteed much less.

¹⁶ UNICEF, Implementation Handbook for the Convention on the Rights of the Child, Ginevra, 1998, p. 94.

¹⁷ UNICEF, Implementation Handbook for the Convention on the Rights of the Child, Ginevra, 1998, p. 355-6.

¹⁸ A. C. Moro, Diritti del minore e nozione di interesse, in Cittadini in crescita 2-3/2000.

This contradiction, deriving from the marked inequality between rich countries and poor countries, cannot be solved simplistically, by regularly assigning the priority to the right to family unity or to the economic and social rights: it is to be faced in all its complexity, always maintaining a holistic approach to the consideration of the rights of the child, and bearing in mind the three principles of non-discrimination, participation, and maximum survival and development.

In order to evaluate the interests of the child in the choice between staying in the host country or repatriation, then, it will be necessary to take into consideration not only his or her right to family unity, but also the opportunities to exercise the economic and social rights: consequently, it will be necessary to consider the opportunities of health assistance, education, training, work, social security, etc. that are available in the country of origin and in the host country.

Vice versa, remaining in the host country cannot be considered to always correspond to the best interests of the child (on the basis of the consideration that the opportunities of well-being, health assistance, education, etc. are greater than in the country of origin), but the child's right to family unity should also be taken into consideration.

The assessment must be made case by case (on the basis of the child's age and maturity, the child's will, the family's will, the economic and social conditions of the country of origin, the possibilities of integration into the host country, etc.) whether for the individual child it is better to be reunited with his or her family and live in a poorer country, surrounded by the affection of his or her family, or to live separated from his or her family, but in a context which offers greater opportunities of well-being, health assistance, education, work, etc.

Of course, the age and maturity of the child are crucial factors in the consideration of the relative importance to be assigned respectively to the right to family unity and the opportunity to exercise the economic and social rights. With respect to the level of maturity, it will also be necessary to bear in mind the different socio-cultural models of transition to adulthood and the different conceptions of adolescence: the importance of living with one's own family compared, for example, with the opportunity to work, is very different for a child who comes from a country where boys start working at the age of 12, and at the age of 14 they already feel grown-up, with the responsibility of having to contribute to the supporting the family, with respect to a child who lives in a country where boys live at home with their parents, and are maintained by them up to the age of 30.

The need to consider the sense of autonomy of children is also underlined in the Implementation Handbook for the Convention on the Rights of the Child: "Today, most projects offering assistance to "street children" take a more considered and careful approach, looking both at the children's need to maintain relationships with their families and communities, and at the children's own sense of independence and self-reliance. Such projects increasingly advocate and support the principles of the Convention, which uphold children's autonomy as individuals and their civil rights (such as in articles 5, 12-16, 19, 29 and 32) and those which support the child's family (articles 5, 9, 18, 26, 27 and 30)".¹⁹

The fundamental factors at the basis of the contradiction between the child's right to family unity and the economic and social rights are the conditions of poverty of the family and of the wider context of the origins of the child.

With respect to the conditions of poverty of the family, the Convention on the Rights of the Child recognises the possibility that the parents may not have sufficient economic resources to guarantee the standard of living adequate for the child's development: "The parent(s) or others responsible for the child have the primary responsibility to secure, *within their abilities and financial capacities*, the conditions of living necessary for the child's development." (art. 27, co. 2)

In cases where parents do not possess the means to provide for the maintenance and the development of the child, the State must supply them with assistance and support (Convention on the Rights of the Child, art. 18. 2 and art. 27.3).

Here, too, however, the Convention on the Rights of the Child recognises the possibility that the State may not dispose of sufficient resources to respect this duty:

- "States Parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures *to the maximum extent of*

¹⁹ UNICEF, Implementation Handbook for the Convention on the Rights of the Child, Ginevra, 1998, p. 263.

their available resources and, where needed, within the framework of international co-operation.” (art. 4);

- “States Parties, *in accordance with national conditions and within their means*, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.” (art. 27. 3).

The impossibility for the family to guarantee the adequate standard of living for the child's development, and the failure of the child's State of origin to take action, or the insufficient nature of such action, to support the family – a problem that is particularly widespread in poor countries – determine the conditions, in many cases, which lead the child to leave his or her family to go and look for a job and better living conditions in another country.

Some States' laws – such as Italian law – establish that the conditions of poverty of the parents cannot be an obstacle to the child's exercise of the right to live with his or her own family, and that the State should provide support to the family. It is interesting to note that these measures represent an extremely important step forward for the respect of the rights of Italian children, but they risk turning into a “boomerang” for separated children. The indigent Italian family, which belongs to a rich society like the Italian one, will receive support from the State, in order to succeed in providing adequately for the minor, who will thus have his or her right to live with the family protected, independently of the economic and social conditions of the family itself.

For separated children, on the contrary, these norms are referred to in order to support the idea that economic conditions should not be considered in the choice between repatriation and remaining in Italy: the conditions of poverty cannot be a reason for the child to remain in Italy, separated from his or her parents.

This position, however, does not take into consideration the fact that these families live in poor countries, and that in general, therefore, they do not succeed in obtaining sufficient economic support from their State; and above all, it ignores the fact that it is the more general conditions of the country that hinder a satisfactory level of life and opportunities of development.

These more general conditions cannot be modified significantly or in a brief period of time, either by possible measures of support granted by the Italian State to families, or by vocational training courses financed by Italy in the countries of origin, or by projects of community development carried out within the framework of international cooperation: processes of development require long periods of time, and depend on extremely complex factors which are only marginally influenced by international cooperation.

This does not absolutely mean that for all children coming from poor countries it in their best interests to remain in the host country: the economic and social rights should be only *one* of the criteria considered, along with the other criteria such as the right to family unity, the opinion of the child, the opinion of the parents etc.

2.5) The right to participation

The right to participation, or in other words, the child's right to express his or her views freely in all matters affecting him or her, and that those views are given due weight in accordance with the age and maturity of the child (art. 12) is one of the four general principles of the Convention on the Rights of the Child, and is of particular significance in the question of the criteria of evaluation of the best interests of the child, in the choice between remaining in the host country and repatriation.

“The Committee on the Rights of Child asserted early on the status of article 12 as a general principle of fundamental importance relevant to all aspects of implementation of the Convention of the Rights of the Child and to the interpretation of all other articles. [...] The Committee has constantly underlined that the child must be considered to be an active subject possessing rights. [...]”²⁰

As we have already seen, the Committee for the Rights of the Child establishes a close connection between the principle of the best interests of the child and the right to participation. This close connection is

²⁰ UNICEF, Implementation Handbook for the Convention on the Rights of the Child, Ginevra, 1998, p. 145.

shown also by the fact that “When originally introduced during the drafting of the Convention on the Rights of Child, the proposal that children should have a right to be heard in judicial and administrative proceedings was linked to the best interests principle [...] but it was then moved to take a more logical place with the overall participation principle in what was to become article 12”.²¹

Only if the best interests of the child are evaluated while guaranteeing the child's right to participation (and also, as we shall see in the next section, that of his parents) it is possible to overcome a paternalistic conception of this idea, and to allow it to truly become an instrument to guarantee the rights of the child: “In order to succeed in truly identifying the interests of the child (going beyond the stereotypes and the ever-present temptations of omnipotence of the judge) it is also necessary that the whole legal procedure should not be inquisitorial in character, but should allow a truly complete discussion between the parties. [...] It is important to ensure the participation, not merely on the formal level, of all the parties interested in the procedural debate, because this alone will allow truths to emerge from the discussion, which might otherwise not transpire, and a judgement to be formed in a less approximate and unilateral manner, as to what the best interests of the child may be in that situation. [...] It should also be underlined that when the expression 'the participation of the parties' is used, this does not refer only to adult parties: the child must also be present in all the proceedings, with the chance to make his or her voice heard, and to have his or her observations and requests taken into consideration. He or she will have the chance, if sufficiently mature, to be listened to, and to express freely his or her own evaluation of the situation and expectations; the minor should, however, be represented in the discussion by an adult figure capable of following the development of the procedure, intervening to point out what really corresponds to the best interests of the child, and if necessary impugning a sentence that, in the name of the interests of the child, in reality secretly protects the interests of adults, or fails to appreciate, or tramples down, the fundamental interests of the weak subject.”²²

The right to participation must be applied in every legal or administrative procedure, including those that refer to immigration: “The principles of article 12(1) and (2) should be applied in all immigration procedures including asylum-seeking, in relation to articles 10 and 22”.²³

In the procedure of choosing between remaining in the host country and repatriation, then, in order to respect the child's right to participation fully, he or she must not only be questioned about his or her preference between repatriation and staying in the host country, but his or her will must be taken into consideration by the deciding body (in accordance with the child's age and maturity) for the purposes of evaluating which solution most corresponds to his or her best interests.

This does not mean that the child's consent is always necessary for a repatriation order, seeing that the right to participation is not the same thing as the right to self-determination: “the rights of the child set out in the two paragraphs of article 12 do not in themselves amount to a right to self-determination, but to involvement in decision-making.”²⁴

There may undoubtedly be situations in which the body responsible for deciding between remaining in the host country and repatriation will conclude that a particular choice is in the best interests of the child, even if the latter disagrees: e.g. for some children who are involved with criminal networks in the host country, for whom repatriation means being separated from these networks, this solution may well be in the best interests of the child, even if he or she is totally opposed to repatriation.

2.6) The right to parental guidance and the evaluation of the opinion of the parents

In deciding whether it is in the best interests of the child to be repatriated or to stay in the host country, due consideration must be given to the opinions expressed on the subject by the parents or other relatives.

Firstly, the will of the parents will undoubtedly be considered in the evaluation of the interests of the minor, seeing that what they believe to be best for their child, the responsibilities that they assign to him or

²¹ UNICEF, Implementation Handbook for the Convention on the Rights of the Child, Ginevra, 1998, p. 150.

²² A. C. Moro, Diritti del minore e nozione di interesse, in Cittadini in crescita 2-3/2000.

²³ UNICEF, Implementation Handbook for the Convention on the Rights of the Child, Ginevra, 1998, p. 163.

²⁴ UNICEF, Implementation Handbook for the Convention on the Rights of the Child, Ginevra, 1998, p. 145.

her, and their expectations are aspects that have a crucial importance for the child from the psychological point of view, and the formation of his or her identity.

Secondly, a consideration of the will of the parents corresponds to a concrete implementation of art. 5 of the Convention on the Rights of the Child, on the basis of which “States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.”

The problem arises here, of course, of the violation of the laws on immigration: that is to say, the parent must give the child guidance for the legitimate exercise of the rights recognised by the Convention, while if the parent encourages the child to emigrate clandestinely, thus inciting the child to violate the law, this orientation cannot be considered as included among the parent's rights and duties guaranteed by Art. 5.

Leaving aside this question here, which would open up an extremely complex problem, let us consider not the parent's advice to emigrate clandestinely, but only the opinion that is in favour of the child's permanence in the host country rather than repatriation, a situation which, following the issue of a residence permit (for asylum seekers or for minors), is not a violation of the law.

This distinction, which may appear to be artificial, on the contrary has a foundation of reality in many cases: many boys decide to emigrate autonomously, and are not encouraged at all by their parents, who, indeed, initially oppose their idea; however, once the child is in the host country, these same parents almost always say that they prefer that their child should stay there, and not be repatriated.

One crucial question to be faced is whether the fact that the parents express their preference for the child to remain in the host country corresponds to a correct exercise of their parental authority, or whether, on the contrary, they are failing to perform their duties. In the former case, the parents' will should be taken into consideration in the evaluation of the choice between repatriation and staying in the host country; in the latter case, instead, two hypotheses are possible: either the decision is taken not to give importance to the parents' will, and to repatriate the minor, in contrast with the preferences expressed by the parents; or, in more serious cases, in which parents refuse to take the child back into their home, it will have to be sentenced that they have lost their parental authority.

The problem is particularly important in cases of very poor families, who live in situations which offer the child very little opportunity for education, work, assistance, etc.: in these cases, can it be considered a correct exercise of parental authority if parents prefer their child to stay in the host country?

Let us try to examine this question, once again in the light of the Convention on the Rights of the Child.

Parents have the duty of providing for the maintenance, upbringing and education of the child and his or her development: in general, then, if they do not provide for this, they fail in the duties connected with their parental authority:

- “States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.” (art. 3.2);
- “States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.” (art. 18);
- “The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development. (art. 27. 2);

As we have already seen, however, the Convention on the Rights of the Child expressly recognises the possibility that the parents may not succeed in guaranteeing the necessary conditions for the child's development (art. 27. 2).

In these cases, the State should step in to support the family. But, once again, the Convention recognises the possibility that the State may not dispose of sufficient resources to respect this duty (art. 4 and art. 27. 3).

What happens, then, in cases in which parents do not have the “abilities and financial capacities” to provide for the maintenance and the development of the child, but the State in which they live “in accordance with national conditions and within [its] means” cannot provide them with the necessary

assistance and support to assure for the child “a standard of living adequate for the child's physical, mental, spiritual, moral and social development”?

As seen above, the Convention on the Rights of the Child expresses states that “The States Parties respect the responsibility, the right and the duty of parents, to give the [child], in a manner corresponding to the development of his abilities, an orientation and appropriate advice in order to exercise the rights that are recognised by the present Convention.” (art. 5).

Thus, in the case of very poor families who live in situations which offer very limited opportunities of education, work, assistance, etc., it cannot be excluded (bearing in mind the age and maturity of the child, as well as the conditions in which the child lives in the context of immigration) that the will expressed by the parents that their child should stay in the host country may be considered as a correct exercise of parental authority, since they believe that in a richer country, he or she will find it easier to achieve the standard of living adequate for his or her physical, mental, spiritual, moral and social development.

2.7) The right to maintain one's own cultural identity, and, implicitly, to live in one's country of origin

The Convention on the Rights of the Child does not explicitly establish the right to live in one's own country of origin.

This right may only be considered to be implicitly established by the Convention, in its articles regarding the maintenance of one's nationality and cultural identity and in the article concerning international adoptions.

Firstly, the Convention establishes the child's right to maintain his or her cultural identity, including nationality (art. 8) and the requirement that ethnic, religious, cultural and linguistic origin be taken into consideration in ordering measures of protection for children separated from their family environment (art. 20, co. 3):

- “Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child,” (preamble);
- “States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.” (art. 8);
- “Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.” (art. 20. 3)

Of course, these rights are generally guaranteed to a greater extent if the child is in his or her country of origin. However, this is not a necessary condition: the two articles quoted do not establish that the child must live in his or her country of origin, but that the State where the minor lives should ensure that he or she can maintain his or her national, religious, cultural, and linguistic identity.

Secondly, as regards international adoptions, the Convention establishes that: “[States Parties] recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin” (art. 21).

International adoptions are thus seen as the last resort, when adoption or custody is not possible in the country of origin. This may be seen as an implicit recognition of the child's right not to be eradicated from his country of origin, even if the two situations (that of an international adoption and that of children who have emigrated abroad) are different from several points of view, in particular because in the case of children who have emigrated, the separation from the country of origin has already taken place and it often corresponds to a family project.

Lastly, one article which is often referred to in order to sustain that children must live in their country of origin is art. 11, on the basis of which “States Parties shall take measures to combat the illicit transfer and non-return of children abroad”. This article, however, refers not to clandestine immigration, but to the international abduction of children, generally carried out by one of the parents, which is regulated by the

Convention on the civil aspects of international child abduction and by the European Convention on recognition and enforcement of decisions concerning custody of children and on restoration of custody of children: “The article [11] is primarily concerned with parental abductions or retention [...] Children may be abducted by one of the parents and are usually not permitted to return home, even when a previous judicial authority had already decided on the custody and place of residence of the child, as well as on the visiting rights of the parent with whom the child should no longer live.”²⁵

The right to live in one's country of origin, then, which is only implicitly confirmed by the Convention, will not be considered as a fundamental criterion in the evaluation of the best interests of the child between remaining in the host country and repatriation. It will be considered, however, but not with the same weight as the other criteria analysed above.

In particular, the fact that the Convention does not recognise the right to live in one's own country as a fundamental right of the child makes the legitimacy of repatriation questionable if its finality is not the reuniting of the family, but restitution to the authorities of the country of origin, or if the child will not return to live permanently with his or her family.

The legitimacy of repatriation for the purpose of restitution to the authorities of the country of origin is particularly questionable in cases where the child is placed in a foster family or in a family-type community in the host country, while in the country of origin he or she should be placed in an institution (for example, Albanian legislation does not contemplate foster placement): art. 20 of the Convention on the Rights of the Child is very clear in establishing that the State, in providing measures of protection to the child separated from his or her family environment, must privilege measures that imply the recreation of a family environment (such as foster placement or adoption), having recourse to institutions only as the last resort.

The second situation, in which the child does not return to live permanently with his or her family, is created, for example, in the cases of Albanian children who come from very poor, isolated mountain areas, and who move to a large town, after repatriation, to attend the vocational training courses included in the repatriation project. These children live in students' residences and go home quite seldom, given the difficulties of transport: in these cases it is difficult to sustain that repatriation really involves the reuniting of the family.

Both in cases of repatriation for the purposes of restitution to the authorities of the country of origin, and in cases where the child does not return, all the same, to live permanently with his or her family, it is sustained that repatriation corresponds to the best interests of the child, because in this way the right to live in one's country of origin is guaranteed. But as mentioned above, the consideration of this right must be a criterion which is not only balanced with other criteria (opportunities offered in the host country and in the country of origin, opinion of the child and of his or her parents, etc.), but it must have less weight than these, seeing that it is not a right explicitly laid down by the Convention.

²⁵ UNICEF, Implementation Handbook for the Convention on the Rights of the Child, Ginevra, 1998, p. 139.

3) The application of the criteria for the choice between staying in the host country and repatriation: some examples

3.1) The case of Italy

3.1.1) Responsibility: the Committee for Foreign Minors

In Italy the body that is responsible for deciding whether the child should be repatriated or stay in Italy is the Committee for Foreign Minors, a central administrative body attached to the Ministry of Labour and Welfare, whose general function is the defense of the foreign minors' rights.

This system surely makes easier that the decision on repatriation is taken in the best interests of the child, compared with the countries where the decision is taken by the Police or the by Immigration Office or by the Ministry of Home Affairs.

But, as the Committee for Foreign Minors is an administrative body mainly composed of Ministry workers, it is largely influenced by the orientation of the Government. Furthermore, the members of the Committee include not only representatives of the Ministry of Labour and Welfare, but also of the Ministries of Home Affairs, Foreign Affairs, and Justice: these Ministries are more inclined to favour policies of control than policies aiming to the best interests of the child.

There is thus a considerable risk that what prevails in the decisions of the Committee for Foreign Minors may be not so much the principle of the "best interests of the child", but rather a desire to control clandestine immigration.

A second problem is that the Committee for Foreign Minors is a central body, in Rome: this makes impossible that the Committee listens to the separated child about his opinion on repatriation directly, and therefore the right to participation of the child is not fully respected.

3.1.2) The criteria adopted by the Committee for Foreign Minors

In principle, the Committee for Foreign Minors decides whether the child should be repatriated or stay in Italy on the basis of what it considers is in the best interests of that child. The fact that the general criterion should be the best interests of the child, instead of the criteria established by the UN Convention relating to the status of refugees, makes easier that the decision on repatriation or staying is in fact taken in the best interests of the child. This system is surely more "child-friendly" and guarantees the children's rights much more than in the countries where separated children don't have any opportunity to stay in the host country different from applying for asylum.

Moreover, the Committee takes the decision on the basis of the social report made in the country of origin by one of the NGOs that have an agreement with the Committee (International Social Service etc.): the NGO traces the family, arranges a meeting with the parents, and assesses if there are opportunities of education, vocational training and work in the context of origin.

Then, if the Committee for Foreign Minors decides that the child should be repatriated, the NGO should organize the return project (vocational training, school enrollment etc.).

These are very positive aspects of the Italian system, that help to carry out the objective that the choice between repatriation and staying in the host country is really taken in the best interests of the child .

But problems arise about the more specific criteria used by the Committee to evaluate the best interests of the child.

The present orientation of the Committee for Foreign Minors is tendentially to consider the option of repatriation as more in line with the best interests of the child rather than staying in Italy, in order to guarantee the child's right to live with his or her family, or at least in the country of origin.

In general, then, if the minor has a family in the country of origin that is prepared to accept him back with them, or if there are authorities in the country of origin that are prepared to accept the custody, the Committee should order the repatriation, except in cases in which repatriation entails serious risks for the child (this is obviously a tendential orientation, given that the Committee must always carry out an evaluation case by case).

According to the Committee for Foreign Minors, the conditions of poverty of the family and of the context of origin must not be considered in the evaluation of whether it corresponds more to the best interests of the child to be repatriated or to stay in Italy, except in very serious cases of poverty.

Furthermore, although both the child and the family must be consulted as regards their opinion about repatriation, it seems that the Committee does not substantially give any weight to the opposition to repatriation, either by the child or by the family. In several cases, the children are repatriated by the Police, against their will and against their parents' will (some parents menace the NGOs' workers to kill them if the child is repatriated).

It is not clear, lastly, whether, and to what extent, the integration of the minor into Italian society is considered.

The present orientation of the Committee for Foreign Minors does not allow a correct evaluation of the interests of the child, in accordance with the principles laid down by the Convention on the Rights of the Child.

Firstly, the decision to consider the right to family unity and the right to live in one's own country as the supreme rights to which all the other rights are substantially to be subordinated does not correspond to the indications supplied by the Committee for the Rights of the Child, on the basis of which the interpretation of the rights of the child must be based on a "holistic", overall approach, seeing that no hierarchy exists in the rights that are laid down in it, such that the respect of one right should always prevail over that of the others.

Secondly, the affirmation that conditions of poverty in the country of origin, the opportunities available for children and the conditions of integration into the host country should not be taken into consideration (apart from exceptional cases) goes against the indications of the Committee on the Rights of the Child, according to which the evaluation of the interests of the child must also consider, as a general principle, the right to the maximum survival and development, and therefore also the opportunities to exercise the economic and social rights (the right to a standard of living adequate for the child's development, the rights to health, education, etc.).

Furthermore, a failure to give due consideration to the opinion of the child as regards repatriation is a serious violation of the child's right to participation, which is a general principle of fundamental importance in the Convention.

A failure to consider the parents' opinion is not consistent with the right of the child to receive guidance from his or her family in the exercise of the rights recognized by the Convention.

Lastly, though implicitly present in the Convention, the right to live in one's own country is not explicitly mentioned, and cannot therefore be considered as a fundamental criterion in the same way as the other rights explicitly laid down by the Convention.

3.1.3) Some results of the return projects in Albania

A report²⁶ made by the International Social Service Italy analyzed a sample of 256 Albanian children repatriated between 1998 e 2000, in return projects managed by the International Social Service.

The International Social Service Italy works very well, doing social reports carefully, organizing return projects professionally, and doing follow-up of the projects: the causes of the partial failure of the return projects must absolutely not be attributed to the ISS, but to the general poor conditions of living, the lack of opportunities and, most of all, the lack of jobs in Albania.

Of the 256 repatriated children, only 54 (21% of the sample) accepted to enroll in the vocational courses proposed in the return project.

²⁶ Servizio Sociale Internazionale Sezione italiana, Istituto Psicanalitico per le Ricerche Sociali, *I minori albanesi non accompagnati – Una ricerca coordinata fra Italia e Albania*, Roma, 2001, pp. 35-51. The report was funded by the Italian Department for Social Affairs.

Tab. 1 – Children enrolled in vocational courses

	Children enrolled	Tot. repatriated	%
1998	33	139	24 %
1999	12	75	16 %
2000	9	41	22 %
Tot.	54	255	21 %

Source: International Social Service Italy

At the beginning of 2001 only 98 of the 256 repatriated children were still in Albania, while 155 children had emigrated again.

Some of the children repatriated during 1998 and 1999 were repatriated two or three times.

Tab. 2 – Children still in Albania / emigrated again

	n.	%
Still in Albania	98	38,3 %
Emigrated again	155	60,5 %
Data missing	3	1,2 %
Tot.	256	100 %

Source: International Social Service Italy

Most of the children that emigrated again, returned to Italy; other preferred destinations are UK and Greece.

Tab. 3 – Country where the children emigrated after repatriation

	n.	%
Italy	106	68%
UK	19	12%
Greece	12	8%
USA	2	1%
Australia	1	1%
Belgium	1	1%
Germany	1	1%
Switzerland	1	1%
Data missing	12	8%
Tot.	155	100%

Source: International Social Service Italy

Of the 54 children who enrolled in vocational courses, 29 (53,7%) are still in Albania, while 25 (46,3%) emigrated again.

Of these 29 children who attended vocational courses and remained in Albania, only 5 found a job.

Only one of the children who did not attend vocational courses and remained in Albania found a job.

Then, of the 256 children repatriated, only 6 found a job in Albania.

3.2) Case studies

3.2.1) The case of A.

A. is a 16-year-old Albanian boy, who comes from a mountain village in the area of Diber, one of the poorest areas of Albania. His family is composed of his father, his mother and five brothers all younger than him. They possess one hectare of land, which they cultivate by traditional techniques, and two cows. A.'s father works on their small plot of land, and occasionally finds jobs as a bricklayer; his mother is a housewife.

A. started to help his father in his work in the fields and as an assistant-bricklayer at the age of 12. He went to school until the age of 14; then, having finished his compulsory education, he stopped going to school, because he would have had to attend a secondary school in the main town, two hours away on foot,

and if he wanted to attend a training course, he would have had to move to Tirana, and he didn't have enough money to pay for the course and for accommodation in Tirana. A. would like to work, in order to make a contribution to the family balance, as is normal for a 15-year-old boy in Diber; but in the area of Diber, there is no work.

Many of his friends left for Italy. Some came back during their summer holidays, and told him about their experiences in Italy: they went to school, they took vocational training courses, they found a job, and they succeeded in sending some money home to their family.

A. could not see any future for himself in Diber, and decided to leave for Italy. His parents gave their consent, although they were afraid of the risks of the journey; they sold one of their two cows, and took out a loan to pay for the journey. A. took the rubber dinghy, paid 700 euros for the crossing, and landed on the Italian coast.

In Italy, A. was accommodated in a reception centre, and was enrolled in a school. After a few months, he chose to follow a vocational training course as a mechanic. At the end of the course, he was taken on by an artisan as an apprentice mechanic: he started to earn 800 euros a month, and succeeded in sending half of this to his parents.

In the meantime, the Committee for Foreign Minors asked the International Social Service to carry out an investigation on the family in Albania. The ISS workers contacted the family, which did not present any particular problems: there were no cases of abuse, alcoholism, or problems with the law; furthermore, although they were a very poor family, they were not starving.

A.'s parents explained the reasons that had led him to leave for Italy and said that they were definitely opposed to his return to Diber, because he could not go to school there, and there was no work, and they wanted him to find a future for himself in Italy. However, they confirmed that they were prepared to accept him back if he should be repatriated.

The ISS also assessed the possibilities of a project of assisted repatriation, evaluating the opportunities of education, training and work that were available: there are no secondary schools in the area, or vocational training centres, or firms that can offer a job.

The Committee for Foreign Minors asked the social services of the Italian town where A. was living to explain to him what "assisted repatriation" means, and to ask him if he preferred to stay in Italy or to go back to Albania. A. answered that he was totally opposed to the idea of going back to Albania; he wanted to stay in Italy, to study and find a job and help his family. The social workers explained to him that if he accepted repatriation, he could attend a vocational training course in Albania and receive some limited economic support: A. answered that what was missing in Albania was a job, and that financial support was of no use to him.

The Committee for Foreign Minors evaluated the social investigations carried out by the ISS: as the family did not present any particular problems and repatriation would not involve any risks for the child, they ordered him to be repatriated.

A. was picked up by the Italian police and taken to the airport, where he was put on a plane for Tirana. At Tirana, he was met by an ISS worker, who accompanied him home.

A. felt that he was a loser. He refused to attend the vocational training course at Tirana proposed by the ISS, and started helping his father in his work in the fields again.

One month later, he took another rubber dinghy and returned to Italy.

Did the Committee for Foreign Minors take a decision in A.'s "best interests"?

On the basis of the above reflections, the Committee should have borne in mind not only the fact that A. would not run any risks if he was repatriated, and that repatriation would allow the family to be reunited, but also a series of other aspects:

- A. was totally opposed to repatriation (so much so that this had to be performed by the police);
- A.'s family also expressed their refusal of repatriation, even if they confirmed that they were ready to accept him back;
- A. said that he wanted to study and find a job, so as to help to support his family; at Diber, however, there was no possibility of education or vocational training, and consequently A. would be forced to move to Tirana, far away from his parents; what's more, both at Diber and at Tirana, the work opportunities are very limited;

- In Italy A. was able to attend a school, and a vocational training course, and find a job that he liked, which allowed him to send some money home to his family.

If these factors had been considered as well, the decision would probably have been taken that it was in A.'s "best interests" to stay in Italy rather than being repatriated.

3.2.2) The case of M.

M. is a 14-year-old Moroccan boy, who comes from the town of Khouribga. He has got two brothers; his father is unemployed, and his mother is a housewife.

Many of M.'s friends left for Italy, and some came back during their summer holidays, narrating that they had gone to school, they had taken a training course, and that they were now working. Thus M. decided to leave. At the beginning, his parents opposed his decision, but then they gave their consent.

Thus M. gave up the final year of primary school, and left for Italy.

In Italy, he was given hospitality at the house of a distant uncle of his, who, however, asked him to pay for his board and lodging. As a result, M. started to sell paper handkerchiefs and cigarette lighters as a street hawker, to earn some money.

Life in Italy was very hard for M.: he had to stand out in the street all day, in the middle of the traffic; furthermore, he was often approached by older boys who offered him a "job" as a drug-pusher.

M. felt homesick, but did not want to go back because he would feel he was a loser, a "sissy" who couldn't cope by himself.

In the meantime, the Committee for Foreign Minors had started its investigations, and the social workers working for ISS in Morocco made contact with M.'s family. After hearing about the conditions in which their son was living, the parents said they would be happy if M. was repatriated; he could then finish primary school, and then follow a training course, maybe as a bricklayer, seeing that one of his father's brothers has a small building firm, where M. could carry out his apprenticeship.

The social workers in Italy asked M. if he agreed to the idea of going back home, but M. refused: he wanted to stay in Italy at all costs, and did not want to go back. The social workers explained to him that in Khouribga he would be able to attend a training course, and that in a few years, he might be able to come back to Italy as an adult. M. continued to refuse.

The Committee for Foreign Minors ordered his repatriation. In the end, M. accepted repatriation, albeit with highly mixed feelings. He was accompanied home.

In the months following his repatriation, M.'s parents enrolled him in the last year of primary school. Subsequently, M. attended a training course for bricklayers, financed by the repatriation project, and after this he carried out his apprenticeship with his uncle.

In this case, repatriation was probably the solution that was most in line with M.'s "best interests".

4) Conclusions

In conclusion, then, the evaluation of the best interests of the child between remaining in the host country and repatriation, in conformity with the principles of the Convention on the Rights of the Child, must be based on a consideration of the rights outlined by the Convention itself, following a holistic approach and bearing in mind the three general principles of the right to life and development, non-discrimination and participation.

A series of criteria should thus be considered, including:

- the risks that repatriation may involve for the child (right to life and protection from abandonment and violence);
- the opportunities of reuniting the family in the country of origin (right to family unity);
- the socio-economic conditions and the opportunities available to the minor in the country of origin and in the host country (economic and social rights);
- the will of the child (right to participation);
- the will of his or her family (right to receive guidance from one's own family);
- the age and maturity of the child.

As we have seen, these different criteria are partly in conflict, in the sense that satisfying one of these rights may involve the violation of another one: in particular, there may be a conflict between the right to family unity and the economic and social rights.

It must be assessed case by case (on the basis of the age and maturity of the minor, the will of the minor and of his or her family, and the opportunities available to him or her in the original situation and in the host country) which solution represents the optimal balance between the various rights in question, in order to achieve the “best interests of the child”.

The adoption of the general criterion of the “best interests of the child” and of these more specific criteria implies important consequences from the procedural point of view: if these criteria are to be fully respected, it will be necessary:

1. that the responsibility for deciding between repatriation and remaining in the host country be assigned to a body whose composition, functions and organization are such as to allow them to adopt, as their fundamental criterion, the “best interests of the child”, instead of other requirements such as the control of clandestine immigration, and to respect the child’s right to participation: this body must therefore

- have as its fundamental function the defense and promotion of children’s rights;
- be independent from the government: above all, it must not include among its members representatives of the Ministry for Home Affairs or the Ministry for Foreign Affairs;
- have local branches, in order to listen directly to the child about his opinion on repatriation or staying.

2. that children have the real possibility of freely expressing their own opinions, as regards their preference between staying in the host country or repatriation, their reasons for emigrating, their projects, their experience in the host country, and the conditions under which they would go back to their home country.

The social workers who interview the child must not have any interest (in particular of an economic nature) either in favouring or in hindering repatriation²⁷, and they must be adequately trained in listening to children, and in particular to foreign children.

The child's opinions must be listened to directly or referred in detail to the body responsible for deciding between repatriation and remaining in the host country, so that they become a real element in the decision-making.

3. that a rapid, detailed social investigation be carried out in the country of origin, in order to:

²⁷ In Italy, for example, as the costs of accommodation of foreign minors are charged to Communes, Commune workers may tend to favour a reduction in the number of foreign children that receive hospitality, and consequently to favour repatriation; vice versa, as the reception centres receive subsidies for each child accommodated, the workers in these centres may tend to discourage repatriation.

- trace the family and contact them, so as to understand the reasons for the child's emigration and the opinion of the members of the family as regards the choice between staying in the host country and repatriation, and to evaluate the family situation;
- verify that repatriation does not involve any risks for the child (risks of persecution, abandonment, abuse, etc.);
- evaluate the economic and social conditions and the opportunities of education, training, work, health assistance, etc. at the disposal of the child in his or her context of origin.

All these elements must be referred in full detail to the body responsible for deciding between repatriation and remaining in the host country, so that they become a real element in the decision-making.

4. that a social report be compiled on the conditions of integration of the child into the host country (kind of accommodation; school, training, work; psychological conditions, etc.).

The report should be compiled by social workers who are in contact with the child (workers in the reception centres, teachers, etc.) and should be sent to the body responsible for deciding between repatriation and remaining in the host country, so that it becomes a real element in the decision-making.

5. the decision between repatriation or staying in the host country is to be taken speedily, so as not to leave the child in a state of uncertainty which may have serious consequences for his or her process of development.