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**Regional Conference on «Migration of unaccompanied minors:  
acting in the best interests of the child»**

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**RECEPTION OF UNACCOMPANIED FOREIGN MINORS  
IN ITALY**

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## Importance and Limits of Definitions

According to the Italian legislation a ‘non-accompanied foreign minor’ is “a minor who does not possess the Italian citizenship or that of another EU Member State, he/she has not applied for asylum,<sup>1</sup> he/she is present on any grounds, on the Italian territory without the assistance and the legal representation of his/her parents or other legally responsible adults in accordance with the Italian law”<sup>2</sup>

One of the main characteristics of the legislation concerning non-accompanied foreign minors is that they cannot be expelled, except in the interests of public safety and national security and for the protection of public order - in these cases the Juvenile Court is competent for adopting the expulsion order - or if he/she wishes to follow his/her parent or guardian, who has to be expelled.<sup>3</sup> Moreover, non-accompanied foreign minors, who have not applied for asylum, can only be repatriated through a special form of ‘assisted repatriation’ (see below).

With regard to the definition, two remarks have to be made. Firstly, the expression “without the assistance and the legal representation of his/her parents” does not mean that a non-accompanied foreign minor is an abandoned child: a minor not accompanied by his/her parents is not abandoned if, for instance, is assisted by relatives within the fourth degree of kinship, who are morally and materially able to take care for him/her, even if they do not have the legal custody of him/her. Likewise, a minor, who lives with his/her parents, can be in a state of abandonment in case of neglect or abuse on the part of his/her parents.

Secondly, according to the above definition, in addition to minors who are completely alone, minors who also live with adults others than their parents, but who are not their legal guardians or do not have the custody of him/her on a legal basis, should be regarded as non-accompanied minors.

However, in this case there is a problem of interpretation concerning the status of minors, who live with relatives within the fourth degree of kinship (brothers, uncles, cousins, etc), who do not have the legal custody or are not their legal guardians (*de facto* custody).

In particular, some argue that minors living with relatives within the fourth degree of kinship without a formal decree of guardianship, should not be considered as ‘non-accompanied minors’ because they have been implicitly and legitimately placed by their parents under the custody of other members of their families. This interpretation is based on the assumption that

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<sup>1</sup> It has been noted with concern that very few foreign minors apply for asylum mainly for lack of adequate information by the competent authorities and lack of a comprehensive legislation on asylum. See, Working Group on the Convention of the Rights of the Child, First Report on the Convention of the Rights of the Child in Italy, 2004-2005, note 8.

<sup>2</sup> Art.1 (2) Rules of the Committee for Foreign Minors, Decree of the President of the Council of Ministers (DPCM) No. 535/99.

<sup>3</sup> In case of expulsion, the minor cannot be detained in Temporary Detention Centres (*Centri di permanenza temporanea*), unless this is required to guarantee the unity of the family.

under the Italian law the custody of a minor by consent<sup>4</sup> does not require the formal consent by the minors' parents if the consent can be inferred otherwise.<sup>5</sup>

In the legal practice, there have been cases supporting both interpretations: cases in which some Juvenile Courts have formally assigned the legal custody to a relative within the fourth degree of kinship by arguing that without the formal consent of the parents there is no custody by consent; and there are cases, in which, on the contrary, some Juvenile Courts have declared their inability to decide because it has been recognised that the custody based on the parents' consent - even if not formally expressed - is valid.<sup>6</sup>

According to the Committee for Foreign Minors (hereinafter "the Committee"), the main public body in charge of the overall status and treatment of non-accompanied foreign minors, 'accompanied minors' should be considered as under the custody of a relative within the third degree of kinship but *on the basis of a formal decision* by the competent authorities, while the others should be considered as 'non-accompanied minors'.<sup>7</sup>

Therefore, if a minor lives with his/her brother or an uncle but this person does not have the legal custody of him/her because the minor's parents had not expressed a formal consent to the custody, then he/she should be considered a 'non-accompanied minor'.

The Police authorities (*Questura*) have always supported this broad definition and have thus always reported to the Committee for Foreign Minors the presence of a minor in the event of a lack of formal custody. The Committee has not declared its incompetence in these cases, and has extended the scope of application of the legislation concerning non-accompanied foreign minors to these cases as well.

### **The Problem of Statistical Data**

The quality of available data has greatly improved since 2000 when the task to collect data on non-accompanied foreign minors was given to the Committee for Foreign Minors. According to the law, all foreign non-accompanied minors must be reported to this central administrative body, which collects and analyses the data at the national level.

Obviously, this does not mean that the data collected by the Committee corresponds to all non-accompanied minors effectively present in Italy. Many minors are not known to the authorities because they are in an irregular situation: either they have entered Italy illegally or they have fled from the communities or institutes where they were accommodated.

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<sup>4</sup> Art.4, Law No. 184/83 on the Right of a Child to a Family.

<sup>5</sup> Art.9(4) of the Law No. 184/83 determines an obligation to communicate to the authorities the custody solely in case of a custody of a minor to relatives other than those within the fourth degree of kinship. It has to be noted that the custody by consent arranged by the local social services, in case of lack of formal consent by the parents, can be obtained in the practice in various forms : 1) the tutelary judge nominates a guardian (art. 343 ss Civil code), who then gives the consent to the custody; 2) the consent for the custody can be expressed by the institute of public assistance or, more often, by the local administration as the legal minor's guardian (art. 402 civil code).

<sup>6</sup> Elena Rozzi (ed.) *„I minori stranieri non accompagnati – Schede sugli aspetti giuridici”*, September 2002, p.13.

<sup>7</sup> Guidelines of the Committee for Foreign Minors, 2003.

Moreover, many minors live with relatives, who for various reasons do not report them to the authorities, or, sometimes, the competent authorities have knowledge of them but they do not reported them to the Committee for Foreign Minors because of the problems of interpretation of the definition of non-accompanied minors, as dicussed above.

As of September 2004, 7.440 minors have been reported to the Committee, of whom 1.557 had a regular residence permit and 5.833 did not have a valid residence permit.<sup>8</sup>

The most frequent countries of origin are: Albania (almost 30%), Morocco (approx. 20%) and Rumania (almost 20%).

Table 1 – **Country of origin**

<b>Country</b>	Tot. Reported Minors as of September 2004	
	<b>No.</b>	<b>%</b>
Albania	2.122	28,5
Morocco	1.602	21,5
Rumania	1.462	19,6
Others*	2.254	30,2
<b>Total</b>	<b>7.440</b>	<b>100</b>

Source: Committee for Foreign Minors

With regard to the age, most foreign minors reported are teenagers, between the age of 14 and 17.

Table 2 - **Age**

Age of Minors as of September 2004	%
14-17	84,6
5-16	13,8
0-4	1,6

Source : Committee for Foreign Minors

Among the reported foreign minors, a great majority are male:

Table 3 - **Gender**

<b>Gender</b>	<b>%</b>
Male	83.1
Female	16,9

Source : Committee for Foreign Minors

<sup>8</sup> Caritas, *Dossier Statistico Immigrazione*, XIV Report, 2004.

\* Among the others, Former Yugoslavia, Bangladesh, Turkey, Algeria, Iraq, Moldova, China.

Also the above data are not reliable because the number of female minors is probably further underestimated: for instance, minors rescued from prostitution rackets can obtain a special residence permit for social protection (*permesso di soggiorno per protezione sociale*) and they do not fall under the jurisdiction of the Committee for Foreign Minors.<sup>9</sup>

Most minors are reported from Northern Italy (Lombardia-20,9%, Piemonte-11%), but also from the Centre (Lazio-13 %) and Southern Italy (Apulien-11%). Many minors reported from regions of south of Italy are often reported upon their arrival by boat but then they move to wealthier regions of Northern Italy.

Table 5 - **Actual situation**

<b>Actual situation</b>	<b>%.</b>
Under custody of private persons	51,7
Placed in public or private structures	39,8
Untraceable*	8,5

Source : Committee for Foreign Minors

### **Profile of Minors and their Families**

For a minor the difficult socio-economic conditions existing in the countries of origin, the scarcity of services, infrastructures, education and vocational training, job opportunities and, in general, and a lack of promising future prospects, are among the main motivations that lead him/her to leave the country of origin. Social unrest and endemic conflicts in the country of origin, in particular for those coming from Albania, but also from Kosovo and Maghreb countries, are other noteworthy grounds for migration.

Likewise, the fascination for the European way of life and its wealth - as witnessed by many migrants of the same country or presented, though often distorted, by the media - influence the minor's decision to migrate.

The typical case of a non-accompanied foreign minor present in Italy is that of an Albanian boy between 16-18 years of age, stemming from a poor family, usually from the countryside or that has recently moved to a town. He has fulfilled compulsory education, but he does not want to continue with his studies. His parents agree that higher education is not worthwhile and supported his wish to find a better life in Italy. He is acquainted with many other Albanians, who went to Italy and returned wealthy or send money to their families that ensured them a comfortable life. Often, the entire family has accepted the idea of incurring debt or to sell their cattle to pay for the travel cost for him. Usually, the travel is by boat, arranged by criminal

<sup>9</sup> Art. 18 of the Law No. 286/98 Consolidate Act on Migration.

\* With regard to the untraceable minors, one can formulate different hypotheses: from the most optimistic - a voluntary return to their country of origin - to the less optimistic - irregular residence, involvement in sexual exploitation or trade with human beings.

organisations. Sometimes, the arrival in Italy is fortuitous: many minors would have preferred to move to Germany or the United Kingdom, where integration policies are thought to be more generous.<sup>10</sup>

According to recent data, most minors today as compared to the past, are generally more motivated to get involved in integration projects, they possess higher levels of education, display greater interest in vocational training, and have more information on job opportunities.<sup>11</sup>

## **Main Legal Sources**

The legal framework pertaining to the status and protection of non-accompanied foreign minors is composed by legal norms on minors (such as, the UN Convention on the Rights of the Child, the Italian Civil Code, the Law No. 184/83 on guardianship and adoption), by provisions on migration (such as the Consolidate Act No. 286/98, its subsequent amendments and implementing regulation No. 394/99), and by specific regulations on non-accompanied foreign minors (such as the Rule of the Committee of Ministers No. 535/99).

Below is reported a brief overview of these international and domestic provisions:

### International Treaties ratified by Italy

- 1) The UN Convention on the Rights of the Child (1989) (hereinafter “the UN Convention”) was ratified by Italy with the Law No. 176/91. The Convention establishes main principles that member states must introduce into their domestic legal systems and that must guide the adoption of every judicial and administrative measure concerning minors;
- 2) The Luxembourg Convention (1980) and the Hague Convention (1980), on legal custody and repatriation measures, were ratified by Italy with Law No. 64/94. In particular, the Law provides that “the decisions concerning the repatriation requests by foreign authorities must be taken by the Juvenile Court where the minor resides”;
- 3) The European Convention on the Children’s Rights (1996) was ratified by Italy by Law No.77/03. This CoE Convention aims at strengthening the protection and respect of the rights of the child;
- 4) EU Directive 2003/9/CE (2003) on the minimum rules related to asylum seekers. This directive provides, *inter alia*, that member states must adopt, as soon as possible, measures aimed at arranging the legal representation of non-accompanied foreign minors.

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<sup>10</sup> International Social Service, *Report on the Programme undertaken by the International Social Service in Italy and Albania - 1998-1999*, Roma, January 2000, p. 36.

<sup>11</sup> Province of Bolzano/Bozen, Social Service Department, *Non-accompanied Foreign Minors*, Workshop of 23 April 2004.

### Domestic legislation and regulations

- 1) Italian Constitution: a special concern for minors is reflected in various provisions: art. 2 – on general human rights, art.3 - non-discrimination clause , art.29 – family rights, art.30 – parental responsibilities, art.31- support to the family, art. 37 - minor’s labour);
- 2) Consolidated Act on Migration and Asylum (Law No. 286/98): this law expressly prohibits the expulsion of a minor; it has created a special residence permit for minors; it has established the Committee for Foreign Minors with an exclusive competence on decisions concerning repatriation or integration of non-accompanied foreign minors. This law was subsequently amended by the so-called Bossi-Fini law (Law No. 189/02) that includes provisions on the treatment of minors under custody once they come of age;
- 3) Law No. 184/83 on the Right of the Minor to a Family, as amended by Law No. 476/98, includes provisions on adoption and foster placement;
- 4) Law No. 119/93 on the change of personal data for those cooperating with the authorities (judiciary and police);
- 5) Civil Code (art. 343 and ss and art. 403) on the custody and urgent measures for the protection of minors;
- 6) Decree of the President of the Council of Ministers (DPCM) No. 535/99 on the definition of non-accompanied foreign minors, repatriation measures and tasks of the Committee for Foreign Minors.
- 7) Memorandum of 31 November 2000 by the Home Office on the special residence permit for minors and on the types of activities that the holders are entitled to perform;
- 8) Guidelines of the Committee for Foreign Minors of 11 January 2001 that define the criteria for evaluating the best interest of a minor in case of repatriation;
- 9) Guidelines of the Committee for Foreign Minors, 2003, on the identification of non-accompanied foreign minors and on the family inquiries in the country of origin.

### **Principles and Structures**

With the entry into force of the UN Convention on the Rights of the Child by Law No. 176/91, all provisions of this international treaty became part of the Italian legal system, including the main guiding principle in this field, namely the best interest of the child.<sup>12</sup> This principle is particularly relevant when there is a gap in the legislation or a problem of interpretation.

An important corollary of this principle is that the ties of the child with his/her natural family must be always protected and strengthened. The natural family is in fact the main setting in which a child should grow up and develop his/her potentialities.<sup>13</sup> The state thus has the obligation to intervene with appropriate measures when the natural family has not, for instance, sufficient means to take care for the child.

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<sup>12</sup> Art.3 of the UN Convention on the Rights of the Child.

<sup>13</sup> See also, Art. 147 Civil Code; Art. 30 Italian Constitution; Art. 1 Law No. 184/83.

With regard to non-accompanied foreign minor, the legislation foresees a special mechanism of protection that differentiates non-accompanied minors from other illegal foreigners present on Italian territory. The main features of this legislation are a special mechanism of repatriation (*rimpatrio assistito*),<sup>14</sup> and the creation of an *ad hoc* body, the Committee for Foreign Minors, an administrative body established within the Department for Social Affairs at the Presidency of the Council of Ministers (*Presidenza del consiglio dei ministri*).<sup>15</sup>

The main task of the Committee is to monitor the status and condition of non-accompanied foreign minors present on Italian territory and to coordinate the activities of all actors involved (public bodies, private organisations, and so on). Moreover, the Committee is responsible for collecting the data on foreign non-accompanied minors, verifying their status, initiating inquiries into the minors' family members, ordering the repatriation of the minor when the conditions are in place, arranging agreements and programmes with other public bodies and NGOs aiming at the repatriation and/or integration of non-accompanied foreign minors.

The Committee comprised of representatives from the Ministry of Foreign Affairs, Justice, Home Office, Department for Social Affairs at the Presidency of the Council of Ministers (*Presidenza del consiglio dei ministri*), two representatives from the National Association of Italian Municipalities (ANCI), one representative from the Union of the Italian Provinces (UPI), a UNHCR representative, and two representatives from the most relevant organisations active in this field.

### **Mechanism of Protection**

Although in principle the mechanism of protection established by law might seem rather simple and clear, in reality, its implementation raises many uncertainties about the interpretation of relevant laws and regulations.

The mechanism of protection begins when a minor is found by the police or when he/she spontaneously approaches a public office that then has the duty to report him/her to the local police headquarters (*Questura*).<sup>16</sup> Here, the identity of the minor concerned, his/her age, the presence of any family members in Italy, grounds for entry on the Italian territory, and any other useful information to delineate his/her overall situation is verified.

The identification of the minor is carried out by the police with the assistance of the Embassies or Consulates of the (most probable) country of origin. Foreign minors often have documents, for instance a passport, where only the year of birth is reported. In this case, the authorities usually indicate as date of birth the fictitious date of 31 December of the year indicated on the document. In case of doubts about the minor's identity, nationality or age, the

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<sup>14</sup> Art. 33 (bis) Consolidate Act No. 286/98.

<sup>15</sup> See, Law No. 40/1998; Art.33(1) Consolidate Act No. 286/1998; Decree of the President of the Council of Ministers (DPCM) No. 535/99.

<sup>16</sup> Note that the possibility to refuse a minor at the border or immediately after his entry is not expressly excluded by law, even in case he/she has been temporarily admitted on the Italian territory for an emergency situation. However, when a foreign minor, who is not accompanied by his/her parents or a relative within the fourth degree of kinship, is found on the Italian territory (because he/she has been admitted or detained temporarily), the Italian state is under the responsibility to guarantee an adequate protection in accordance to the minor's best interest rule.

Police, while respecting the dignity of the minor, can take identification photos and fingerprint. However, when the nationality or age of the minor are still in doubt, especially in the case of minors who are almost of age, the authorities must apply the benefit of the doubt in accordance with the best interest rule.<sup>17</sup>

Subsequently, various public bodies are informed: the Committee for Foreign Minors, the Juvenile Court and the tutelary judge, who will appoint a legal guardian, and, if the child is below 14 years of age, the Commission for international adoptions. As seen, the Committee for Foreign Affairs has established a data bank where personal data, nationality, physical condition, means of subsistence, educational/professional qualifications, temporary address and plans for the future of all reported foreign non-accompanied minors are collected.<sup>18</sup>

After having informed all competent bodies about the presence of a foreign non-accompanied minor, the local Police headquarters issue a special residence permit for minors (*permesso di soggiorno per minore età*) that allows the holder access to various services (health, school, training, and so on) (see below).<sup>19</sup>

After this initial phase, the minor is placed in a community of first reception (*comunità di prima accoglienza*), where he/she will remain, in principle, for a maximum period of 3 months. During this period he/she is put under 'observation': his/her overall situation is analysed, an educational/professional project is formulated together with him/her, he/she begins to familiarise with the Italian school system and Italian language.

The Committee meanwhile assesses whether the conditions for a sustainable assisted repatriation or for a foster placement exist. According to the Italian law, the guardianship (*affidamento*) due to a *temporary* difficulty of the minor's family, falls under the competence of the social services in case of consent by parents or guardian (*affidamento consensuale*), in the case of non-consent it falls, instead, under the competence of the Juvenile Court (*affidamento giudiziale*).<sup>20</sup> This type of guardianship (*affidamento*) can be arranged by another family, preferably where other minors live, or by a single person, or alternatively in a family-like community or finally by a public or private institution.<sup>21</sup>

The Police issue in this case a residence permit on custody grounds that allows the minor to study, do training and, when legally possible, to work. The advantage of this permit in comparison to the permit for minors is that once the minor has come of age, he/she can convert this permit into a new residence permit on study or employment, while the permit for minors is not convertible (see below).

In case of *permanent* difficulty or impediment by the minor's family or in the case of the lack of a natural family, for instance, the death of family members, the guardianship (*tutela*) falls

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<sup>17</sup> Art.6 Law No. 286/98 and Guidelines of the Committee for Foreign Minors, 2003.

<sup>18</sup> Although foreign minors temporarily present in Italy through special programmes of solidarity (such as those launched after the Chernobyl disaster) are not included under the definition of non-accompanied minors, the Committee keeps a record on them.

<sup>19</sup> Art. 28 Law No. 349/99, Art. 25 Law No. 189/02.

<sup>20</sup> Art.4 (2) of the Law No. 184/83 and art.20 (1) (3) and ss of the Civil Code.

<sup>21</sup> Art.2(1)(2) of the Law No. 184/83 on the Right of the Minor to a Family.

under the competence of the tutelary judge within the ordinary tribunal (*giudice tutelare presso il tribunale ordinario*). In this case the minor is under the legal guardianship of the tutelary judge, who places the minor under the care of the local social services by issuing a decree of guardianship (*decreto di tutela*).

As in many instances related to the legislation on non-accompanied minors, in this context as well there are controversies and contradictory interpretations on whether the *stable distance* from the natural family, as in the case of non-accompanied foreign minors, falls under the former (*affidamento*) or the latter (*tutela*) type of guardianship. As a consequence of this lack of clarity in the legislation, the Police often issue a simple resident permit for minors instead of a residence permit on family or custody grounds that allows the holder to work and convert it). Unfortunately, the only feasible solution is to lodge a complaint before the judiciary while waiting for a law that will clarify this issue.

As discussed earlier, a non-accompanied foreign minor is not necessarily an abandoned child. Only in case of child abandonment, namely in the case of lack of assistance of a permanent character not due to *force majeure*, the Juvenile Court declares a minor available for adoption (*stato di adottabilità*).

In the practice, however, it happens very often that a foreign non-accompanied minor is treated as an abandoned child. The main difference, as seen earlier, is that in the latter case the competence no longer falls under the Committee for Foreign Minors but under the Juvenile Court that applies a different legislation.<sup>22</sup> The overlapping competence between these two bodies represents one of the most troubling and uncertain aspects related to the treatment and protection of non-accompanied foreign minors.

### **Repatriation Procedure**

The family reunion in the country of origin through the repatriation procedure (*rimpatrio assistito*) is a priority for the authorities when the natural family is willing and able to assume responsibility once again of the minor. A sustainable repatriation is a repatriation based on the results of a special inquiry conducted in the country of origin followed by an evaluation of the circumstances of each individual case. In the case of repatriation assistance is provided until the family is reunited or placement under the custody of the authorities of the country of origin is completed and an educational/professional project is proposed to the minor concerned.

The guiding principle in deciding whether to repatriate a foreign minor is always the best interest of the minor concerned and the need to guarantee the unity of the natural family. As seen, the repatriation of a foreign non-accompanied minor can only be decided once the Committee has concluded an inquiry on the minor's family in the country of origin and on the situation of the country of origin itself. The Committee initiates the inquiry within 60 days from the date in which the minor has been reported; in carrying out the inquiry in the country of origin the Committee is assisted by the International Social Services (Albania, Morocco, Moldavia and Rumania), and a number of NGOs, such as the Italian Consortium of Solidarity (ICS) (Albania,

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<sup>22</sup> Law No. 184/83 on the Right of the Minor to a Family.

Rumania, Moldova, Macedonia, Bosnia, Serbia and Kosovo), the International Voluntary Service for Development (VIS), the Association of Children' Friends (AIBI).

If a minor is apparently abandoned the inquiry should continue for at least two years; the minor can then be declared as abandoned and can be adopted.

In comparison with an ordinary expulsion order, in addition to the inquiry of the Committee and the need to guarantee the best interest of the child, a sustainable repatriation does not lead to a prohibition of re-entry in Italy.

During the inquiry, the competent social workers collect the minor's views about the possibility to be repatriated: the minor's opinion is not, however, binding (see below).

Once the inquiry is concluded, the Committee decides whether it is in the best interest of the minor to be repatriated or to remain in Italy. In the former case, the Committee informs the Juvenile Court that issues a sort of 'clearance' (*nullaosta*) to the repatriation procedure, except in case of criminal pending suits. Afterwards, the Committee orders to the competent 'public administration' to carry out the repatriation: no further details are provided.<sup>23</sup> In the practice the repatriation is carried out by the Police (in case of forced repatriation), the social services and/or the NGO, which has conducted the inquiry in the country of origin.

It is relevant to note that there have been recent cases of repatriation conducted forcibly by the police forces against the will of the minor. These cases appeared to be *de facto* deprivation of the minor's liberty that, according to the Italian Constitution, should be under the exclusive jurisdiction of the judiciary.<sup>24</sup> However, the legislation on non-accompanied foreign minors assigns the competence over the repatriation order to the Committee, thus an administrative body, and limits the jurisdiction of the judiciary to a 'clearance' to the repatriation procedure for lack of criminal pending suits.<sup>25</sup> In this regard, it has been argued<sup>26</sup> that the fact that the Committee is the only body responsible for assessing the best interest of the child raises some constitutional problems: firstly, as an administrative body, the Committee is also guided by the principle of good administration that leads it to take into account the interest of the Public Administration, the relations with other states and the budget of the local authorities in charge of the minor. Secondly, the Constitutional Court has always recognised the jurisdiction of the Juvenile Courts over one of the basic constitutional principles, namely the 'protection of children and youth'.<sup>27</sup> The competence of the Committee should thus be limited to the mere enforcement of decision adopted by the Juvenile Courts. Therefore, many argue that the exclusive competence of the

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<sup>23</sup> Rules of the Committee for Foreign Minors, Decree of the President of the Council of Ministers (DPCM) No. 535/99.

<sup>24</sup> Art. 13 Italian Constitution.

<sup>25</sup> Artt. 32 and 33 Consolidate Act No. 286/98 and Decree of the President of the Council of Ministers (DPCM) No. 535/99.

<sup>26</sup> Joseph Moyersoen "*L'evoluzione della normativa sui minori stranieri non accompagnati*", in *Cittadini in crescita*, 2002, p.16-17; Elena Rozzi, "*I minori stranieri non accompagnati e irregolari, tra accoglienza e rimpatrio. Aspetti giuridici*", IRES, April 2001; Walter Citti, "*I minori stranieri non accompagnati tra tutela in Italia e rimpatrio*", Giuffr , 2000.

<sup>27</sup> Art. 31 Italian Constitution. See among the others, Constitutional Court, Judgment No. 78, 22 February 1989.

Committee over the assessment of the best interest of the minor in the case of repatriation is not fully in line with the Italian Constitution.<sup>28</sup>

The criteria followed by the Committee in deciding whether to repatriate a minor or not are not clearly established by law and by the Committee itself. Obviously, the Committee must order the repatriation of the minor if this is specifically requested by his/her parents or his/her legal guardian, or when there is evidence that his/her parents have disagreed with his/her idea to migrate (flight from home, etc.).

According to the current practice of the Committee, a minor cannot be repatriated if the repatriation represents a serious risk for the minor: for instance, if it is not possible to identify in the country of origin either family members or authorities willing or able to take the minor in charge, or if the parents have committed serious acts of neglect or abuse against the minor, or if the minor's country of origin is in a state of war, he/she can be persecuted, or, for instance, in the case of the Albanian minors, if he/she risks becoming a victim of a traditional form of revenge.

In order to fully respect the UN Convention on the Rights of the Child other factors should be taken into account, for instance the minor's opinion – the minor concerned has indeed the right to express his/her views and these views must be taken into consideration, depending on his/her age and his/her maturity, the willingness of his/her family to take him/her in charge, the opportunities (educational, training, assistance, etc) existing in the country of origin and in Italy. According to the Committee, the poor economic conditions of the family and the country of origin should not be taken into account, except in extremely severe cases.

The factors mentioned above should not be taken into consideration in a rigid manner, but should guide the Committee on a case by case basis in order to find a solution that better guarantees the best interest of the minor concerned. It is thus essential that the Committee receives from competent bodies all relevant information pertaining to the minor through in-depth and up-to-date reports. In the practice, however, due to a lack of clear and specific criteria to assess the best interest of the minor, most repatriation orders are justified referring simply to the primary interest of the family unity.

In case the Committee decides that it is not in the interest of the minor to be repatriated, it issues a non-repatriation decree (*non luogo a provvedere al rimpatrio*), informs the Juvenile Court and the Social Services for the guardianship, and requests the competent public and private bodies<sup>29</sup> to formulate an integration project of a least two years.<sup>30</sup> The Police (*Questura*) issue a residence permit on custody grounds (*permesso di soggiorno per affidamento*).

The repatriation order can be appealed before the Regional Administrative Court (TAR)<sup>31</sup>: in this context as well, the jurisdiction is no longer of the Juvenile Courts, but of an administrative judicial body. This provision is currently under litigation before the Constitutional

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<sup>28</sup> Joseph Moyersoen, *supra* note 26.

<sup>29</sup> Private bodies must be active at the national level in the social integration of foreigners and listed in a register established in the office of the Presidency of the Council of Ministers.

<sup>30</sup> Art. 25 Law No. 189/2002.

<sup>31</sup> Art. 33 (2 bis) Consolidate Act No. 286/98.

Court for the alleged breach of the principle of equality between foreign minors: those, who have received a repatriation order, and those, who have been authorised to stay in Italy or have received an expulsion order.<sup>32</sup>

During the appeal procedure, the minor can intervene through his/her legal guardian or, alternatively, his/her parents, who must forward the power of attorney to the minor's lawyer. In the case of a minor without a legal guardian, the Committee "in case of necessity" can inform the tutelary judge, who will then appoint a provisional legal guardian.<sup>33</sup>

### **Typology of Residence Permits and Legal Status of Foreign Minors**

The legislation pertaining to the residence permit, which has important repercussions on the minor's status and his/her rights and, in particular, on the possibility to remain in Italy once he/she has come of age, is extremely incoherent and confused.

As seen earlier, all foreign non-accompanied minors have the right to obtain a special residence permit for minors (*permesso di soggiorno per minore età*). This type of permit is a residual solution in cases where it is not possible to issue another kind of permit (on custody, family, study grounds, etc.). The Committee for Foreign Minors has clarified that this is a provisional permit, which is issued while the authorities carry out the inquiry on the minor's family and decide on his/her repatriation.<sup>34</sup>

A Memorandum of the Home Office (2000) has stated that, in general, the permit for minors does not allow the holder to work and cannot be converted into a permit on study or work grounds once the holder comes of age. The permit for minors expires when the minor comes of age.<sup>35</sup>

It is clear that if a minor is unable to obtain a residence permit once he/she comes of age, even if he/she has been involved in serious integration projects, there is the actual risk that he/she will remain in Italy in an irregular situation.

In this regard, many argue that the prohibition to work for the holders of a residence permit for minors is not in accordance with the law.<sup>36</sup> In fact, the main legislation in this context does not specify which types of activities the holder of a residence permit for minors is allowed to perform.<sup>37</sup> Moreover, according to the Italian Constitution, the legal status of a foreigner is regulated by law according to international norms and treaties. As a consequence, the interpretation of relevant domestic legislation cannot be based on simple memorandums of the Home Office, but should be based on main international norms, in particular the minor's best interest rule enshrined in the UN Convention of the Rights of the Child, ratified by Italy by Law No. 176/91.

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<sup>32</sup> See, Decree by the Tribunal of Vercelli, 7 June 2002.

<sup>33</sup> Art. 3(6) of the Regulation included in the DPCM No. 535/99.

<sup>34</sup> Memorandum of 14 October 2002 by the Committee for Foreign Minors.

<sup>35</sup> Memorandum of 31 November 2000 by the Home Office.

<sup>36</sup> Elena Rozzi, *supra* note 6, p. 24.

<sup>37</sup> Law No. 349/99 and Law No. 189/02.

Many argue that the UN Convention is not relevant in this context because it contains provisions pertaining to the rights of persons under age, while the problem of the conversion of a residence permit refers to persons of age. However, the possibility to plan for the future is extremely important for minors: even if the conversion of a residence permit will take place once the minor comes of age, it is evident that this has enormous relevance while he/she is under age. Indeed, if a minor is not sure whether his/her residence permit will be renewed once he/she comes of age, any integration projects will be worthless. And in fact, as a result of this uncertainty many minors prefer becoming illegal aliens (*clandestini*), with the risk of exploitation and/or involvement in criminal activities, although they were involved in serious educational and professional projects.

It is evident that the prohibition to convert a residence permit for minors is not inspired by the minor's best interest rule, but rather by a strict and repressive policy of migration control.

It is interesting to note that, in contrast to the 2000 Memorandum of the Home Office, some Provincial Councils, such as Turin and Bolzano/Bozen, have allowed holders of residence permits for minors to perform work activities in the framework of apprenticeships.<sup>38</sup>

In order to find a remedy to the difficult situations created by the prohibition to convert a residence permit for minors, some exceptions have been introduced in recent laws and regulations.<sup>39</sup>

Firstly, the recent law amending the legislation on migration foresees that a minor can obtain a residence permit on study or employment grounds, once he/she comes of age, if the following conditions are fulfilled:<sup>40</sup>

- the Committee has not issued a non-repatriation decree (*non luogo a provvedere al rimpatrio*);
- the minor has been living in Italy for at least 3 years, thus before the age of 15 years;
- the minor has followed, for at least 2 years, an integration project carried out by a public or private body active at national level and registered at the Office of the Presidency of the Council of Ministers - the Committee should assess the quality of these 'integration projects', but so far it has not yet adopted specific guidelines in this regard; eventually, the Police authorities, in charge of issuing the residence permits in these cases, will simply verify whether the minor has attended school or a vocational training course, or has worked under a work-training contract (*contratto di formazione-lavoro*);
- the minor has attended school or is enrolled at university or is employed in accordance with the law, or has signed a work contract;
- the minor has an accommodation.

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<sup>38</sup> Autonomous Province of Bolzano/Bozen, Provincial Council, Order of 17 September 2003.

<sup>39</sup> Obviously, those holding a residence permit for minors can also decide to return to the country of origin and re-enter in Italy by submitting a visa request on work or study grounds. It is essential, however, to verify that, if the minor had entered Italy illegally, is not inserted into one of the lists established under the Schengen Agreements because this would prevent any possibility to re-enter legally in Italy.

<sup>40</sup> Art.25 Law No. 189/02 amending the Consolidate Act No. 286/98 and the Decree of the President of the Council of Ministers (DPCM) No. 535/99.

Evidence of these requirements must be provided by appropriate documentation by the organisation in charge of the integration project.

This mechanism of conversion is probably the most interesting novelty introduced lately by law in this field.

Secondly, a 2001 Memorandum of the Home Office<sup>41</sup> states that even before the minor comes of age, he/she can convert a residence permit for minors into a residence permit on custody grounds if:

- he/she receives a decree of non repatriation (*non luogo a provvedere al rimpatrio*) by the Committee for Foreign Minors on the basis of the results of the inquiry conducted in the country of origin;
- he/she was placed under guardianship in another family, in a family-like community or in a public or private institution by the Juvenile Court or by the local Social Services and authorised by the Tutelary Judge.<sup>42</sup>

This type of residence permit allows the holder to work and can be converted into a residence permit on study, work or health grounds once the minor comes of age. In the practice, as the non-repatriation decree (*non luogo a provvedere al rimpatrio*) by the Committee is often issued few days before the minor reaches the age of 18, many local Police headquarters automatically issue a residence permit on custody grounds in these cases.

The Committee for Foreign Minors has welcomed this opportunity because it has admitted that the first mechanism of conversion - introduced by Law No. 189/02 - is rather limited in its scope of application: many minors, who cannot be repatriated, arrive in Italy when they are already between 17 and 18 years of age. As a result, the Committee can neither authorise a two-year integration project nor, for obvious reasons, requires evidence that they have been staying in Italy for at least 3 years.<sup>43</sup>

With regard to the second mechanism of conversion - introduced by the 2001 Home Office Memorandum – it has been argued that the requirement to obtain the approval by the Committee through the non-repatriation decree is devoid of legal basis.<sup>44</sup> In this respect, some Regional Administrative Courts have declared that the Police authorities have the exclusive competence for deciding on a case by case basis whether to issue a residence permit on study or employment grounds.<sup>45</sup> More clearly, the Tribunal of Turin has stated that a minor *has the* right to perform a working activity without the need to obtain an authorisation based on a discretionary evaluation of an administrative body, such as the Committee for Foreign Minors; the residence permits for minors that do not allow the holder to work were thus declared null and void.<sup>46</sup>

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<sup>41</sup> Memorandum of 9 April 2001 by the Home Office.

<sup>42</sup> Law No. 184/93 on the Right of the Minor to a Family.

<sup>43</sup> Memorandum of 14 October 2002 by the Committee for Foreign Minors.

<sup>44</sup> Joseph Moyersoen, *supra* note 26, p.22.

<sup>45</sup> TAR Emilia-Romagna, Section I, decree no.50, 23 may 2002; TAR Piemonte, Section II, judgment no. 952, 14 November 2001, TAR Toscana, Section I, judgment no. 880, 2002.

<sup>46</sup> Tribunal of Turin, Section VII, decree of 21 November 2001.

Minors placed - by the Juvenile Court or by the local Social Services and authorised by the Tutelary Judge<sup>47</sup> - under the guardianship of a foreigner legally resident in Italy, who lives together with the minor, are registered on the residence permit of this person until the age of 14; they, then, obtain a residence permit on family grounds.<sup>48</sup>

Many argue that the minors, who arrived in Italy when they were older than 14 years of age and thus they cannot be registered on the residence permit of their legal guardian, should obtain a residence permit on family grounds.<sup>49</sup> In these cases, however, the Police authorities often issue a residence permit for minors and not on family grounds, and thus, the only possibility to obtain a residence permit on family grounds is to lodge a complaint before the judiciary.

Finally, with regard to the minors under *de facto* – because there is no formal decree of guardianship - custody by a legally resident relative within the fourth degree of kinship, the law does not explicitly state that they can obtain a residence permit on study or work grounds once they come of age, unless they fulfil the requirements introduced by the recent amendments of the law on migration (3 years of staying in Italy, 2-year project, etc).

Many argue that the provisions pertaining to the registration of minors on the residence permit of their legal guardians and the issuing of a residence permit of family grounds after the age of 14, should apply to them by analogy.<sup>50</sup> However, also in these cases the Police authorities often do not issue a residence permit on study or work grounds once these minors are of age, and hence the only feasible solution for them is to lodge a legal complaint before the Regional Administrative Court (TAR).

Another type of residence permit is a permit for social protection (*permesso di soggiorno per protezione sociale*): this can be issued in the following cases:

- to those who have served a sentence for a crime committed while they were underage and have participated in a social integration programme;<sup>51</sup>
- to those who have been subject to severe forms of abuse or violence (prostitution, severe forms of labour exploitation, etc) and whose lives are in danger due to their attempts to escape from criminal organisations or due to the statements given during a trial.

The residence permit for social protection allows the holder to work and can be renewed once the minor comes of age.

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<sup>47</sup> The Constitutional Court, Judgment No. 198 of 5 June 2003, has stated that, contrary to the approach taken by many local Police headquarters, the situations of minors placed under guardianship by the Juvenile Court or by the local Social Services and authorised by the Tutelary Judge are equivalent with regard to the possibility to obtain a residence permit on family grounds.

<sup>48</sup> Art. 31 Law No. 286/98. The residence permit on custody and family grounds is inspired by the same logic: a residence permit on custody grounds is a specific type of residence permit on family grounds; as a result, the regulations pertaining to residence permit on family grounds – duration, possibility to convert it, rights connected – apply also to the residence permits on custody grounds. These permits allow the holder to work and to convert it into a residence permit on study or labour grounds once the holder comes of age.

<sup>49</sup> Elena Rozzi “*I diritti dei minori stranieri non accompagnati*”, Save the Children – Italia, January 2004, p.6.

<sup>50</sup> *Ibidem*

<sup>51</sup> In some municipalities, this type of residence permit is issued also to those who have served their sentence through measures other than detention.

Finally, foreign non-accompanied minors who apply for asylum receive a residence permit on asylum-seeking grounds; a special Commission for the recognition of refugee status will analyse his/her asylum request and will hear the minor and his/her legal guardian; afterwards, if the minor is granted refugee status, he/she will obtain a residence permit for asylum, otherwise the Commission can ask the Police to issue a residence permit on humanitarian grounds.

The residence permit on asylum-seeking grounds does not allow the holder to work, while the residence permit for asylum and the permit on humanitarian grounds do allow the holder to work; all types of permits can be renewed once the holder has come of age.

### **Rights of non-accompanied foreign minors**

Foreign minors holding any type of residence permit (for minors, on custody, family or health grounds, for social protection, for asylum seeking or for asylum) are automatically registered in the National Health Service and have access to all available services.

Foreign minors with no residence permits cannot be registered with the National Health Service, but nevertheless have access to all urgent or essential treatment, even those of a continuous nature, in case of sickness or accidents, and to the programmes of preventive treatments (vaccinations, etc).

The differential treatment between documented and undocumented minors is considered by many to be in contrast with the UN Convention on the Rights of the Child, which states that all minors, with no distinction, must have access to health services.<sup>52</sup>

All foreign minors, documented and undocumented, are under the obligation to attend school and thus have the right to be enrolled in school. This right refers to all types of schools and it is not limited to compulsory education. The registration procedure is the same as for Italian minors, and can be requested at any time during the school year. Foreign minors with no valid personal documents or undocumented are enrolled under condition, but they can attend any type of school and obtain valid final qualifications.

It is not clear whether foreign minors holding a residence permit for minors have the right to attend vocational training. The UN Convention on the Right of the Child, however, clearly states that vocational training must be accessible to all minors; therefore, provisions limiting access to vocational training to a given category of minors would be in breach of international norms.

As seen earlier, the right to work for those holding a residence permit for minors is neither clearly recognised nor excluded by law. Only a Home Office Memorandum (2000) has stated that a residence permit for minors does not allow the holder to work: as a consequence this type of permit is often issued by the Police with the stamp “not valid for working purposes” and many public employment agencies not only do not offer to the holders work contracts but also work-training contracts (*contratto di formazione-lavoro*).

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<sup>52</sup> Art. 24 of the UN Convention of the Rights of the Child.

With regard to the minors having a residence permit on custody, family, social protection, or asylum grounds, they can work under the same conditions as the Italian minors: minors can start working once they are 15 years of age and have concluded compulsory education.<sup>53</sup> Minors are required to fulfil their compulsory education until they come of age : this educational obligation can be fulfilled either at school, or through vocational training or apprenticeships. A minor can sign a work contract other than a contract of apprenticeship only if this does not prevent him/her from concluding his/her compulsory educational or vocational training.

## **Conclusions and Recommendations**

It is evident from the foregoing that the Italian legislation on the status and protection of non-accompanied foreign minors is rather unclear and incoherent. As a consequence, the judicial and administrative practice is extremely inconsistent and varies from a region to region or even from one town to another.

One of the main problems underlined in this present report is the regulation concerning the type of permit to be issued to a non-accompanied foreign minor. In particular, the residence permit for minors and the problems of interpretation concerning the possibility for the holder to work and to convert it into another type or permit once the holder has come of age, are among the thorniest issues in this regard.

The administrative practice in this context is absolutely confused and diversified: for instance, when confronted with the same situation, many local Police headquarters issue directly a residence permit on custody grounds; some require the decree on custody by the Juvenile Court before issuing a residence permit on custody grounds,; and finally, some others, even if the Juvenile Court has formally placed the minor under custody, issue a simple residence permit for minors awaiting the results of the family inquiry in the country of origin by the Committee.

Another set of problems are linked with the procedures regarding the choice between the minor's repatriation and his/her integration in Italy.

Firstly, a problem is given by the time-limit by which a decision between repatriation and integration must be taken. Until now, the inquiries on the minor's family in the country of origin and the decision on his/her possible repatriation have required excessively long periods of time – usually from 6 up to 12 months. As said earlier, on the basis of current legislation the inquiries must be initiated by the Committee within 60 days from the date in which the minor has been reported to the Committee and not immediately after it. Moreover, the law has not established a deadline for the procedure. However, it is extremely relevant that the decision on whether a minor is allowed to stay in Italy or has to be repatriated is taken rapidly. The identity and character of a minor is obviously more fragile than that of an adult, thus even a delay of a couple

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<sup>53</sup> Evidence that compulsory education has been concluded is that the minor has successfully finished his/her first year of high school or that the minor is 15 years of age and has attended 9 years of school education in the country of origin.

of months might create profound anguish and uncertainty on the minor, provoking serious psychological damage, and even inducing him/her to abandon ongoing integration projects and adopt deviant behaviour.

Moreover, while the competent authorities carry out the inquiry, the minor is accommodated in a community of first reception (*comunità di prima accoglienza*), where he/she remains eventually much longer than 3 months as established by law. The local authorities in charge of these structures are obviously concerned about the fate of these minors; however, on the one hand, they must wait for the decision of the Committee on repatriation or integration, on the other hand, the Committee must wait for the result of the family inquiry.<sup>54</sup>

In the practice, it happens that many minors come of age while no decision on their status has yet been taken by the Committee. According to the law, they should leave the country and return to their country of origin. However, this hypothesis is highly problematic, as it is improbable that these minors, now of age, accept peacefully to repatriate.<sup>55</sup> This aspect raises the problem of compulsory forms of repatriation. In addition, it is not clear which organs are responsible for carrying out the repatriation due to a gap in the legislation. These cases are decided on a discretionary basis by the local authorities and the result is an absolute incoherent and confusing policy in this context.

Secondly, the relevance of the minor's views towards the decision to repatriate or to integrate is another problematic aspect of the discipline on non-accompanied foreign minors. Indeed, the right to participate in the decision-making process leading to the repatriation or integration is among the main principles enshrined in the UN Convention on the Rights of the Child.<sup>56</sup> According to the Italian legislation, the local social services are responsible for collecting the minor's opinion on his/her possible repatriation and not the Juvenile Court or the Committee. The risk behind this procedure is that the local social services, always overburdened by financial problems, will tend to reduce the number of non-accompanied foreign minors to be integrated in their territory, and as a consequence, they will be more inclined to interpret the opinion of the minor as favouring his/her repatriation. A possible solution would be to ensure that the minor is heard by the Juvenile Court.

Finally, with regard to the possibility of lodging a compliant against the decision of the Committee, the following aspects can be raised: firstly, in order for the minor to be represented during the appeal procedure, it is always necessary that a legal guardian is appointed – however, as seen earlier, in case of *de facto* custody a legal guardian is not formally designated; secondly,

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<sup>54</sup> The local authorities also complain about the financial burdens due to the accommodation and integration of an increasing number of foreign minors placed under their responsibility.

<sup>55</sup> A survey conducted by the International Social Service (Italy) showed that out of 256 Albanian minors surveyed, who have been repatriated between 1998 and 2000, as of 2001 only 98 were still in Albania and only 6 (2%) had found a job. The relevant data is that 155 minors (60%) had migrated again, mostly to Italy. Some of them had been already repatriated two or three times.

<sup>56</sup> See art. 12 of the UN Convention on the Rights of the Child: “ 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. (1) “For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law”(2).

the appeal should be decided speedily and not leave the minor in anguish about his/her future. The Committee's decision is, however, an administrative act and thus the appeal must be lodged before the Regional Administrative Court, whose rulings are usually not rapidly adopted; thirdly, as the repatriation can have important consequences on the minor's life, the repatriation procedure should be 'frozen' and postponed until the final ruling is adopted.

According to some scholars,<sup>57</sup> the procedure that would better guarantee the 'best interest of the child' is a procedure whereby the decisions on the custody and on his/her repatriation/integration are separated and independent from each other. Current legislation provides instead that the custody of a non-accompanied foreign minor can be determined only after the Committee's decision.<sup>58</sup> Moreover, once the minor is placed under custody, a thorough evaluation on the possibility to repatriate the minor is no longer foreseen. Given that the decision between repatriation and integration is taken in order to guarantee the best interest of the child, it is not clear why a minor already placed under custody is disenfranchised of this opportunity.

In order to improve the mechanism of protection the Juvenile Court or the local social service should decide rapidly on the custody of the minor even before the final result of the Committee's inquiry: if, in light of the inquiry's results, the Committee decides that the minor should not be repatriated, then the custody can continue. If, on the contrary, the Committee decides that the minor should be repatriated because this is in his/her best interest, then the minor will be repatriated. In case the Committee decides for the repatriation although the family in the country of origin is not suitable, then the Juvenile Court and the social services should be still responsible for assessing whether the custody should continue or not. In this case, there might be potential conflict between the decisions taken by the Committee and the Juvenile Court: priority should be given, however, to the judicial authority.

This potential conflict is linked to a more general problem of coordination among the competent bodies due to the lack of clarity and coherence in the legislation. For instance, with regard to the duty to report the minor to the relevant bodies, a Memorandum of 14 April 2000 by the Home Office had established that the local Office of the Government (*Prefettura*) should collect with appropriate forms the data of all minors present on the territory. However, so far, the coordination does not seem to function properly, and thus the Committee continues to receive inconsistent data from a variety of public and private bodies.

Finally, with regard to the integration of foreign minors, there is a general scarcity of appropriate structures. The progressive increase in the number of foreign minors reported to the Committee has not been followed by an equivalent increase in the number of appropriate temporary and long-term communities for non-accompanied foreign minors. More funding should be thus allocated either at the regional level in Italy and in the countries of origin in order to tackle the roots of the phenomenon and enhance the integration policies in Italy and in the countries of origin in case of repatriation.

It is clear that the work of the social workers is particularly arduous: they have to solve the potential conflict between, on the one hand, the pressure that a minor has from his/her family,

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<sup>57</sup> Elena Rozzi, *supra* note 6, p. 11.

<sup>58</sup> Law No. 184/83.

which expects him/her to become immediately independent and support it financially, and, on the other hand, the attempt to convince the minor to accept an integration plan that includes studying or training and that is projected into the future, not in the immediate present. This difficult balancing task, coupled with the uncertainties, gaps and limitations existing in the legislation, hinders enormously the chances of developing veritable long-term integration plans for non-accompanied foreign minors.

In conclusion, Italian policy-making as well as public opinion must realise that migration is a stable and durable phenomenon in Italy as well as in the rest of Europe, and that the adoption of a comprehensive legislation on the status and treatment of non-accompanied foreign minors cannot be postponed any longer: a new law in this field should consolidate scattered norms, clarify uncertainties and doubts, and fill in the existing gaps in the current legislation, concurring in this way to reduce the local variations existing in the practice.