Capítulo XI
Detention conditions of immigrants minors in Spain: for whom the bell talls?

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I. Situation of illegal immigrant minors in Spain under a context of economic crisis as reported by independent NGOs concerned

The figures are appalling: The number of foreigners who acquired Spanish citizenship increased every year between 1997 and 2007 (except between 1999 and 2000). More than 71,000 foreigners became Spanish citizens in 2007. More than 7,600 new applications for asylum were made in 2007, 44.6 percent higher than in 2006 (5,297) but substantially lower than in 1993 when about 12,600 asylum applications –the highest in nearly three decades- were submitted. In 2008, only 4,517 new applications for asylum were made in Spain (41.06 percent lower than in 2007). Only half of them were tramitted by authorities with a final record of 151 people having granted refugee status[253]. It is estimated that more than one million people live and

253 *http://www.151mas1.org* visited on 1st July 2010.

work in Spain illegally, thousands in two of Spain's most important industries: agriculture and construction[254]. No wonder that with the current economic crisis one of two Spaniards, 46 per cent see immigration as a serious threat, according to a 2008 poll by the *Real Instituto El Cano* Think Tank.

In effect, the economic crisis has hit Spain especially hard. The unemployment levels are the highest in European Union, only behind Latvia, reaching 17.36 per cent in the first quarter of 2009 and 18.40 in the early 2010. Figures are even more alarming for the immigrant population: the National Statistics Institute reports that for the same period of 2009 unemployment among immigrants grew to a staggering 28.39 percent. No figures for 2010 are at disposal yet. As it has already said, in September 2008 Spain introduced its Voluntary Return Plan, criticized by many immigrants' organizations. Under the plan, immigrants who are collecting unemployment benefits could receive their payments in two lump sums if they return to their countries and renounce their Spanish residency. While the Government has invested in advertising campaigns, so far the response from immigrants has been low.

Immigrants considered "illegal aliens" in Spain include also those asking for international protection and asylum. According to the latest report of the *Comisión Española de Ayuda al Refugiado (CEAR)* in 2010[255], an independent non Governmental Organisation, in 2009 the number of applications of asylum seekers admitted by Spanish Authorities slightly fell down as regards 2008 (from 49.97% to 49.22%)[256]. Similarly to happened in 2008, in 2009 up to 1513 contes-

254 BBC News "Spain launches immigrant amnesty" in *http://news.bbc.co.uk/2/hi/europe/4242411.stm* visited on 1st July 2010.

255 CEAR: *La situación de las personas refugiadas en España. Informe 2010.* P. 62. Available in *http://www.cear.es* visited the 1st July 2010.

256 By nationality, citizens form Niger are the bigest group (581 asylum applications, 426 of them rejected); in the second group are applications from citizens from Ivory Coast (345, 176 of them rejected); the third group is that of Colombians (147 asylum applications, 133 of them rejected).

tations against the refusal to grant asylum status were introduced by applicants before the *Juzgados Centrales de lo Contencioso-Administrativo* in Madrid with the appalling result of 1430 resolutions contrary to complainants and 83 resolutions estimating the complainants' views.

Spain's new laws would make things harder for those undocumented workers already here. It has recently passed an Act 12/2009, of 30th October, Regulating the right to Asylum and to subsidiary protection[257] –according to Directives 2003/86/EC of 22nd September; Directive 2004/83/EC, of 29th April, and Directive 2005/857/EC of 1st December. This bill, among other things, make it more difficult for immigrants to reunite with their families –particularly imposes restrictions on parents joining their immigrant children in Spain-, imposes fines on those who assist undocumented immigrants and increase the maximum allowed detention time from 40 to 60 days. The latest Act passed on this matter is the Ley Orgánica 2/2009, 11.12.2009, *de reforma de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social*[258].

The context above described has provoked international concern in Non Governmental Organizations for the situation of illegal migrants in Spain. Thus, in its World Report 2009, *Human Rights Watch* said about Spain, among other things, the following:

> "The Spanish Ombudsman confirmed reports of ill-treatment and criticized inadequate care facilities for unaccompanied migrant children in the Canary Island. The Spanish government continued to push for the return of unaccompanied children to Senegal and Morocco without adequate safeguards. More than two dozen court decisions blocked children's repa-

257 Ley 12/2009, 30.10.2009, *reguladora del derecho de asilo y de la protección subsidiaria*. BOE 263 of 31st October 2009, pp. 90860 to 90884.

258 BOE 299 of 12th December 2009, pp. 104986 to 105031.

triation because the repatriation decisions did not comply with Spanish or international law."[259]

In the same way, in the *European Social Watch Report 2009: "Migrants in Europe as Development Actors: Between Hope and Vulnerability"*, after presenting a general view on Detention Centres in Europe[260], it is dedicated specific attention to Spain for its externalisation of Migration and Asylum Policies throughout the Nouadhibou Detention Centre in Mauritania where migrants' basic human rights are dangerously threatened[261].

II. International Obligations for Spain as regards treatment of illegal immigrant minors

To the purposes of these pages, I wish to mention two pieces of relevant international law binding Spain. The former is example of the so called soft law, whereas the latter ones would correspond to hard law, under the distinction made by Professor Prospèr WEIL[262]. The piece of soft International Law which should be taken into consideration by Spanish Authorities when dealing with illegal immigrant children is the General Comment No. 6 (2005) *Treatment of unaccompanied and separated children outside their country of origin.* In this document, can be considered of particular relevance for Spain paragraphs 12-17 (Legal obligations of States parties for all unac-

259 Human Rights Watch, World Report 2009 – Spain, 14 January 2009, available at *http://www.unhcr.org/refworld/docid/49705.html* visited on 1st July 2010.

260 VASALLO PALEOLOGO, F.: "Detention Centres. An Unjust and Ineffective Policy", pp. 23-24, in *European Social Watch Report 2009: Migrants in Europe as Development Actors: Between hope and vulnerability.*

261 Spanish Commission for Refugee Aid (CEAR): "Spain: the Externalisation of Migration and Asylum Policies. The Nouadhibou Detention Centre", in *European Social Watch Report 2009: Migrants in Europe as Development Actors: Between hope and vulnerability, op. cit.*, pp. 76-77.

262 WEIL, P.: "Towards Relative Normativity in International Law?" *American Journal of International Law*, 1983, Vol. 77, pp. 413-442.

companied or separated children in their territory and measures for their implementation), 19-22 (Best-interest of the child as a primary consideration in the search for short and long-term solutions), 39-40 (Care and accommodation arrangements), 61-63 (Prevention of deprivation of liberty and treatment in cases thereof) and 79- 94 (Family reunification, return and other forms of durable solutions). As far as *hard International Law* binding Spain, the *Convention on the Rights of the Child* of 20 November 1989[263], have four relevant dispositions at this regards (Articles 3, 10, 22 and 37). Nevertheless, it is undoubtedly the European Convention on Human Rights the most important legal text in this sense. As a contracting State in the European Convention of Human Rights, Spain has a general obligation of making effective those rights and freedom enounced in this International instrument for the protections of human rights. Furthermore, this obligation is to be accomplished in the terms provided by the own European Convention, namely, according to its Article 1[264]. Since the Foreigners Law 8/2000 was introduced in Spain some years ago, we has criticized distinction introduced by Spanish legislator in many of its Articles between foreigners with or without legal residence in Spain for then enjoying some fundamental rights, some of then even with a cover under the European Convention of Human Rights[265]. In these and other contributions I coherently defended the violation of European Convention by Spanish Authorities enacting this Foreigners Law on the basis of distinction made between legal and illegal residents in Spain. In my opinion rights granted in the European

263 Ratified by Spain by publication in Official Journal (BOE) Number 313 of 31st December 1990.

264 "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention."

265 See GARCÍA SAN JOSÉ, D.: "Alcance de las obligaciones internacionales asumidas por los Estados Europeos en materia de derechos y libertades de los nacionales y extranjeros a la luz del Artículo 1 del Convenio Europeo para la protección de los derechos y libertades fundamentales", in SÁNCHEZ-RODAS, C. (Coord.): *Migrantes y Derecho*, Laborum, 2006, pp. 49-64.

Convention of Human Rights must be considered under the general obligation upon contracting States in Article 1. Even if Spanish Authorities would have invoked Article 14 of the European Convention in case they had been brought before the European Court of Human Rights regarding the implementation of Foreigners Law 8/2000, this would have been useless since the European Control always has to be done from the perspective of the European Convention itself. So, hardly would had been justified such distinction introduced by Spanish Authorities on the basis of legal and illegal residence if Article 1 of the European Convention makes irrelevant such condition for enjoying the rights it enounces in benefit of anyone under jurisdiction of a Contracting State. To sum up, adapting the title of a famous work of GARCÍA MARQUEZ, we concluded that Foreigners Law 8/2000 was a "chronicle of an unlawfulness announced" on the basis of the case-law of the European Court of Human Rights and its doctrine of useful effect of the Convention, the dynamic and teleological interpretation of its dispositions and its subsequent strict European supervision controlling reasons invoked by States which should be reasonable and sufficient in order to pass such European control.[266]

The previous facts referred aim to support a new critics we make to the Spanish Authorities' policy in the context of illegal immigrants as regards treatment conferred to illegal immigrant children. Up to present no complaint has been introduced against Spanish Authorities before the European Convention[267] concerning treatment conferred to illegal immigrant children, but having factual basis for

266 The Constitutional Court of Spain in its judgment 236/2007 (Grand Chamber), of 7th November, declared contrary to Spanish Constitution some provisions of Act 8/2000, namely, those Article who made a distinction on the basis of legal or illegal residence of foreigners in Spain for enjoying collective social rights. Later, judgment 259/2007 of 19th December and judgments Nos. 260 to 265, all of them of 20th December, confirmed the thesis we had been persistently defending, together with other colleagues since 2001 to 2006.

267 Which is not surprising considering the impasse of almost four years our Constitutional Tribunal shows at present because it had to resolve the question of the *Estatuto de Autonomía para Cataluña*, and it is affecting all other complaints

such complaints, my view is that sooner than later Spain will be denounced before the European Court at this regards and it will be probably declared to have violated the European Convention on Human Rights. To support this gross statement I consider recent news appeared in Spanish journals, of different ideological approaches, denouncing facts by police authorities in obedience of the Home Office (Ministerio del Interior) directives against illegal immigrant children which according to the *ratio decidendi* of consistent jurisprudence of the European Court of Human Rights violate Spain's obligations under this international instrument[268]. Furthermore, having had access to the provisional 3rd and 4th periodic reports Spain has to defend at the Committee on the Rights of the Child in its 55th session from 13 September to 1 October, 2010[269], nothing suggests this prediction is exceeding the reality because in the full text we miss a sincere self-critic and a will to put remedy from the Executive to dysfunctions denounced by press and by independent International Non Governmental Organisations as *American Watch*.

by individuals as precondition for introducing an application before the European Court of Human Rights.

268 Spanish journals from very different ideological approach has recently denounced cases of deportation of unaccompanied minors or the police refuse to allowing them entrance in Spain, even being accompanied by a direct relative, on the excuse they lack the administrative requirement of "a letter of invitation": ADN, 28/02/2009: "Madre paraguaya denuncia deportación hijo menor desde aeropuerto Barajas"; LA VANGUARDIA, 16/06/2009: "Un juez paraliza la repatriación de un niño de 3 años sin visado"; EL PAÍS, 24/09/2009: "Un niño de siete años pasa dos días en la sala de tránsito de Barajas"; LA VOZ DE GALICIA, 25/09/2009: "Un juez permite la entrada en España del niño de siete años que fue retenido en Barajas"; EL MUNDO, 30/09/2009: "El Gobierno, obligado a repatriar a un menor". This news are only in the late 2009.

269 Document CRC/C/ESP/3-4 in *http://www2.ohchr.org/english/bodies/crc/crcs55.htm* visited on the 1st July 2010.

III. Specific analysis of the European Court's case-law: *case Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (Chamber judgment of 12.10.2006) and *case Musskhadzhiyeva and others v. Belgium* (Chamber judgment of 19.1.2010)

Both cases have similarities and some differences. Basically, both cases concern illegal immigrant children unaccompanied in the former, accompanied in the latter, who were deported to their country of origin or to a country in transit, from the "Transit Centre 127 bis" in Belgium. In both cases, facts complained of by applicants lead the European Court to unanimously declare the responsibility of Belgium for having violated the European Convention of Human Rights.

In the *case Mubilanzila Mayeka and Kaniki Mitunga versus Belgium*, the principal facts are the following: the applicants, Ms Pulchérie Mubilanzila Mayeka and her daughter Tabitha Kaniki Mitunga, are Congolese nationals who ere born in 1970 and 1997 respectively. They now live in Montreal (Canada). The application relates to Tabitha's detention for a period of nearly two months and her subsequent removal to her country of origin. Ms Mubilanzila Mayeka arrived in Canada in September 2000, where she was granted refugee status in July 2001 and obtained indefinite leave to remain in March 2003. After being granted asylum, she asked her brother, a Dutch national living in the Netherlands, to collect Tabitha, who was then five years old, from the Democratic Republic of the Congo and to look after her until she was able to join her in Canada. On 18 August 2002, shortly after arriving at Brussels airport, Tabitha was detained in Transit Centre No. 127 because she did not have the necessary documents to enter Belgium. The uncle who had accompanied her to Belgium returned to the Netherlands. On the same day a lawyer was appointed by the Belgian authorities to assist Tabitha. On 27 August 2002 an application for asylum that had been lodged on behalf of Tabitha was declared inadmissible by the Belgian Aliens Office.

Its decision was upheld by the Commissioner-General for Refugees and Stateless Persons on 25 September 2002. On 26 September 2002 Tabitha's lawyer asked the Aliens Office to place Tabitha in the care of foster parents, but did not receive a reply.

On 16 October 2002 the chambre de conseil of the Brussels Court of First Instance held that Tabitha's detention was incompatible with the New York Convention on the Rights of the Child and ordered her immediate release. On the same day the Office of the High Commissioner for Refugees sought permission from the Aliens Office for Tabitha to remain in Belgium while her application for a Canadian visa was being processed and explained that her mother had obtained refugee status in Canada. The following day, 17 October 2002, Tabitha was removed to the Democratic Republic of Congo. She was accompanied by a social worker from Transit Centre No. 127 who placed her in the care of the police at the airport. On board the aircraft she was looked after by an air hostess who had been specifically assigned to that task by the chief executive of the airline. She travelled with three Congolese adults who were also being deported. No members of her family were waiting for her when she arrived in the Democratic Republic of Congo. On the same day, Ms Mubilanzila Mayeka rang Transit Centre No. 127 and asked to speak to her daughter, but was informed that she had been deported. At the end of October 2002 Tabitha joined her mother in Canada following the intervention of the Belgian and Canadian Prime Ministers.

In the *case Muskhadzhiyeva and others versus Belgium*, the principal facts are the following: the applicants, Aina Mukhadzhiyeva, born in 1966, and her four children Alik, Liana, Khadizha and Louisa (respectively aged seven months, three and a half years, five and seven years at the material time) are Russian nationals of Chechen origin and live in a refugee camp in Debak-Podkowa Lesna (Poland). Having fled from Grozny in Chechnya they eventually arrived in Belgium on 11 October 2006, where they sought asylum. As they had spent some time in Poland, the Polish authorities agreed to take charge of them,

and accordingly, the Belgian authorities on 21 December 2006 issued a decision refusing them permission to stay in Belgium and ordering them to leave the country. The Aliens Office summoned the applicants, who had left their accommodation centre, in order to serve the decision on them. On 22 December 2006 they were placed in a closed transit centre run by the Aliens Office near Brussels airport, known as "Transit Centre 127 bis", where aliens (single adults or families) were held pending their removal from the country. Several independent reports drawn up in recent years have highlighted the unsuitability of the centre in question for housing children.

A request to release the applicants was rejected by the Brussels Court of First Instance on 5 January 2007 and again by the Brussels Court of Appeal on 23 January 2007. Between those two decisions the organisation "Médecins sans frontières" carried out a psychological examination of the applicants and found that the children in particular –and especially Khadizha- were showing serious psychological and psycho traumatic symptoms and should be released to limit the damage. On 24 January 2007 the applicants were sent back to Poland. On the same day they lodged a cassation appeal. By a decision of 21 March 2007 the Court of Cassation found the appeal devoid of purpose as the applicants has already been removed from the country. A report drawn up by a psychologist in Poland on 27 March 2007 confirmed Khadizha's very critical psychological state and confirmed that the deterioration might have been caused by the detention in Belgium.

As far as the *res iudicata* in the *case of Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, the applicants had argued that Tabitha's detention and deportation violated Articles 3, 8 and 13 of the European Convention. As regards Article 3, the European Court of Human Rights noted that Tabitha, who was only five years old, was held in the same conditions as adults[270]. She was detained for almost two months in a centre that had initially been intended for adults, even

270 Paragraph 50 of the judgment of 12.10.2006.

though she was unaccompanied by her parents and no one had been assigned to look after her. No measures had been taken to ensure that she received proper counselling and educational assistance from a qualified person specially assigned to her. Indeed, the Belgian Government acknowledged that the place of detention was not adapted to her needs and that there had been no adequate structures in place at that time. Owing to her very young age, the European Court's view was that the fact she was an illegal alien in a foreign land, and that she was unaccompanied by her family from whom she had become separated and that she had been left to her own devices, Tabitha was in an extremely vulnerable situation[271].

The measures taken by the Belgian authorities were far from adequate in view of their obligation to take care of the child and the array of possibilities at their disposal. The conditions of detention had caused Tabitha considerable distress. The authorities who detained her could not have been unaware of the serious psychological effects that her detention in such conditions would have on her. In the Court's view, her detention demonstrated a lack of humanity to a degree that amounted to inhuman treatment[272]. The European Court therefore held that Tabitha's rights under Article 3 had been violated on account of her conditions of detention[273].

In order to see if Article 3 had also been violated by Tabitha's deportation, the European Court considered that the Belgian authorities had not sought to ensure that Tabitha would be properly looked after or had regard to the real situation she was likely to encounter when she returned to her country of origin. In view of the conditions of its implementation, her removal was bound to have caused her extreme anxiety and demonstrated such a total lack of humanity towards a very young, unaccompanied minor as to amount to inhuman treatment. The European Court further found that, by deport-

271 Paragraph 55 of the judgment of 12.10.2006.
272 Paragraph 58 of the judgment of 12.10.2006.
273 Paragraph 59 of the judgment of 12.10.2006.

ing Tabitha, Belgium had violated under its positive obligations to take requisite measures and preventive action. It therefore held that there had been a violation of Tabitha's rights under Article 3 on account of her deportation[274].

Concerning Article 8, the European Court firstly examined Tabitha's detention and secondly considered Tabitha's deportation. One of the consequences of Tabitha's detention was to separate her from her uncle, with the result that she had become an unaccompanied alien minor, a category in respect of which there was a legal void at that time. The detention had significantly delayed her reunion with her mother. The Court further noted that, far from assisting her reunion with her mother, the authorities' action had hindered it. Having been informed from the outset that Ms Mubilanzila Mayeka was in Canada, the Belgian authorities should have made detailed inquiries of the Canadian authorities in order to clarify the position and bring about an early reunion of mother and daughter[275]. Since there was no risk of Tabitha's seeking to evade the supervision of the Belgian authorities, her detention in a closed centre for adults served no purpose and other measures more conducive to the higher interest of the child guaranteed by Article 3 of the Convention on the Rights of the Child could have been taken[276]. Since Tabitha was an unaccompanied alien minor, Belgium was under an obligation to facilitate the reunion of the family[277]. So, in these circumstances, the European Court held that both applicants' rights under Article 8 had been violated.

As a second point, when Belgian Authorities deported Tabitha not only failed to facilitate her reunion with her mother, they also failed to ensure that she would be cared for on her arrival in Kinshasa. Accordingly, Belgium had failed to comply with its positive obligations and had disproportionately interfered with the applicants' rights to respect

274 Paragraphs 68-69 of the judgment of 12.10.2006.
275 Paragraph 82 of the judgment of 12.10.2006.
276 Paragraph 83 of the judgment of 12.10.2006.
277 Paragraph 85 of the judgment of 12.10.2006.

for their family life[278]. The European Court therefore held that both applicants' rights under Article 8 had also been violated on this point.

Finally, concerning Article 5 of the European Convention, making also the distinction between detention and deportation of Tabitha, the European Court firstly said that Tabitha was detained in a closed centre intended for illegal foreign aliens in the same conditions as adults. Those conditions were not adapted to the position of extreme vulnerability in which she found herself as a result of her status as an unaccompanied alien minor. In those circumstances, the European Court considered that the Belgian legal system at the time and as it functioned in the case before it had not sufficiently protected her right to liberty[279]. Therefore, it had been a violation of Tabitha's rights under Article 5. The European Court also noted that the Belgian authorities had decided on the date of Tabitha's departure the day after she lodged her application to the chambre de conseil for release from detention, that is to say even before the chambre de conseil had ruled on it. They had not sought to reconsider the position at any stage. Moreover, the deportation had proceeded despite the fact that the 24 hour-period for an appeal by the public prosecutor had not expired and that a stay applied during that period. Tabitha's successful appeal against detention was thus rendered futile[280]. The European Court therefore held that Tabitha's rights under Article 5.4 had been violated and that no separate examination of the complaint under Article 13 was necessary.

As far as the *ratio decidendi* in the *case Musskhadzhiyeva and others v. Belgium*, relying on Article 3, Aina Muskhadzhiyeva and her children complained about the conditions of their detention in "Transit Centre 127 bis" for more than a month. Relying in particular on Article 5, paragraphs 1 and 4, they also complained that their detention had been unlawful and the remedy against it before the

278 Paragraph 90 of the judgment of 12.10.2006.
279 Paragraph 103 of the judgment of 12.10.2006.
280 Paragraph 113 of the judgment of 19.1.2010.

Court of Cassation ineffective, as they had been removed from the country before the court had reached a decision.

Examining first the fate of the four children, the European Court recalled that it had already found the detention of an unaccompanied minor in "Transit Centre 127 bis" contrary to Article 3 and that the extreme vulnerability of a child was paramount and took precedence over the status as an illegal alien[281]. It was true that in this case the four children were not separated from their mother, but that did not suffice to exempt the authorities from their obligation to protect the children[282]. They had nevertheless been held for over a month in a closed centre which was not designed to house children, as confirmed by several reports cited by the European Court. Referring also to the concern expressed by independent doctors about the children's state of health, the European Court found that there had been a violation of Article 3 in respect of the four children[283].

Concerning alleged violation of Article 5, paragraphs 1 and 4 of the European Convention as far the children, the European Court found violation of Article 5.1. The applicants were in a situation were it was in principle under the European Convention to place them in detention (the European Convention authorises the lawful arrest and detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition). Nevertheless, that did not mean that their detention was necessarily lawful. In so far the four children were kept in a closed centre designed for adults and ill-suited to their extreme vulnerability, even though they were accompanied by their mother, the Court found that there had been a violation of Article 5.1 in respect of the children[284].

The *Centros de Internamiento de Extranjeros (CIEs)* are very hermetic places aimed to management the expulsion of illegal immigrants out of Spain. They are dependant of the Ministry of Home Affairs[285]. CEAR and other NGOs have found many obstacles to get into these CIEs[286], maybe because according to its own research sources, one of any four persons in the CIEs would have valid reasons for introducing an asylum application, whereas in fact only one of any twenty persons in the CIEs really does it[287].

281 Paragraphs 55 and 56 of the judgment of 19.1.2010.
282 Paragraph 57 of the judgment of 19.1.2010.
283 Paragraphs 59 to 63 of the judgment of 19.1.2010.
284 Paragraphs 74 and 75 of the judgment of 19.1.2010.

The latest reform introduced by the Ley Orgánica 2/2009, 11.12.2009, *de reforma de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social,* enlarged the time illegal immigrants can be detained in these Centres from 40 to 60 days, for the only reason of lacking administrative authorization and regardless they had not committed any crime. Considering the situation of minors inside the CIEs, some object like pens and pencils are not allowed for security reasons[288]. So hardly children there confined alone or with their parents can do what children normally do: draw picture of their dreams.

The situation in transit zones in Spain incredibly is even worst than inside the CIES. This is the case, for example, of the persons applying for asylum in the international airport of Madrid Barajas. According to Article 22 of the Act 12/2009, of 30th October, Regulating the right to Asylum and to subsidiary protection, during the pe-

285 Notice that in Spain the policy of immigration is placed under the Ministry of Labour and Social Security.
286 See the report: *Situación de los centros de internamiento para extranjeros en España,* in *http://www.cear.es/informes/informe-CEAR-situacion-CIE.pdf* Other NOGs has made the same kind of complaints: *The conditions in centres for third country national (detention camps, open centres as well as transit centres and transit zones) with a particular focus on provisions and facilities for persons with special needs in the 25 EU Member States,* study made by STEPS Consulting Social for the European Parlament, December 2007. See also: *Centros de internamiento en España,* Asociación Pro Derechos de Andalucía APDHA, in *http://apdha.org/media/CIESoctubre.pdf*
287 *La situación de las personas refugiadas en España. Informe CEAR 2010, op. cit.,* p. 52.
288 *Ibidem,* p. 54.

riod for knowing of its asylum application, the person concerned will stay confined in the dependencies available at the frontier for a time between 72 hours and 18 days. In the case of the airport of Madrid Barajas such dependencies are placed in a room in a module annexed to the Terminal 4. This room lacks windows to outside and it has not natural light not ventilation. Obviously, it also lacks any space at open air since the room is placed among the landing off roads of the airport[289]. Hardly one can imagine the noise they must bear day and night with hundred of planes taking off and landing over their heads. Only in 2009, Spanish Red Cross (Cruz Roja España) helped in this place 513 persons of age between 18-34; 115 minors accompanied by a relative and 22 unaccompanied minors.

IV. Taking action at European level: the Spanish Presidency of the European Union in 2010, its lights and shadows

Spain held the Presidency of the European Union during the first semester of 2010[290]. Among its preferences it was a global approach for a European Policy of integration for migrants[291], where it was paid particular attention to the situation of unaccompanied or separated minors. In this sense, as a success in the Spanish presidency of the European Union should be mentioned the starting out of the European Asylum Support Office, which is invited to monitor the issue of unaccompanied minors who are asylum applicants, particularly in the most affected states like Spain[292]. It should be mentioned also the

289 *Ibidem*, p. 71. As CEAR has denounced in its Report 2010, this closed environment has adverse consequences for adults and, especially for minors. They can not do physical exercise, play games or simply run, so their energy and anxiety are accumulated up to the point it exploits inside the room, creating conflicts among people from different age and nationality there confined.

290 *http://www.ue2010.es*

291 According to the Stockholm Programme, endorsed by the European Council on 10-11 December 2009 (17024/09)

292 See p. 5 of the *Action Plan on Unaccompanied Minors* (2010-2014). Communication from the Commission to the European Parliament and the Council, COM (2010)213 final, 6.5.2010.

Commission's Action Plan on Unaccompanied Minors (2010-2014) adopted on 6 May 2010, putting forward a common European Union approach based on the principle of the best interest of the child[293]. Thus, according to this Action Plan, wherever unaccompanied minors are detected, they should be separated from adults, to protect them and server relations with traffickers or smugglers and prevent (re)victimisation[294]. What is more, unaccompanied minors should always be placed in appropriate accomodation and treated in a manner that is fully compatible with their best interest. Consequently, where detention is exceptionally justified, it is to be used only as a measure of last resort, for the shortest appropriate period of time and taking into account the best interest of the child as a primary consideration[295].

Another important step advanced in the European Union during the Spanish Presidency are the conclusions on unaccompanied mi-

293 Thus, concerning the procedures at first encounter and standards of protection, the Action Plan on Unaccompanied Minors asserts (pp. 9-10): "The relevant European Union migration instruments already contain provisions on reinforced protection of unaccompanied minors. However these provisions are context-specific, in that they apply to asylum applicants, refugees, illegally-staying migrants and victims of trafficking in human beings. Moreover, they do not provide the same standards of reception and assistance. Also, in some Member States a specific difficulty arises in relation to border cases/transit zones (...)"

294 *Ibidem*. In the Commission words: "From the first encounter, attention to protection is paramount, as is early profiling of the type of minor, as it can help to identify the most vulnerable unaccompanied minors. Applying the different measures provided for by the legislation and bilding the trust are indispensable to gain useful information for identification and family tracing, ensuring that unaccompanied minors do not dissapear from care (...)"

295 *Ibidem*. At this regards "The Commission will ensure that European Union legislation is correctly implemented and, on the basis of an impact assessment, evaluate whether it is necessary to introduce targeted amendments or a specific instrument setting down common standards on reception and assistance for all unaccompanied minors regarding guardian, legal representation, access to accomodation and care, initial interviews, education services and appropriate healthcare, etc."

nors adopted on 3 June 2010 by the Justice and Home Affairs Council meeting in Luxemburg with some important commitments as regards the reception and the procedural guarantees in the European Union:

> "(...)12. To encourage Member States to adopt a decision on the future of each unaccompanied minor within the shortest possible period of time taking into account the importance of finding durable solutions based on an individual assessment of the best interest of the child. These solutions could consist of return and reintegration in the country of origin or return, granting international protection status or granting other status according to national law of the Memeber States. (...) 18. To invite Member States to monitor the quality of care for unaccompanied minors in order to ensure that the best interest of the child is being represented throughout the decision-making process. 19. To call on the Commission to support an exchange of best practices on care arrangements for unaccompanied minors and develop guidelines and common curricula and training."[296]

296 Other agreements of the Council in this issue are equally relevant: "11. To invite the Commission to assess whether the EU legislation on unaccompanied minors offers them sufficient protection in order to ensure adequate standards on reception and procedural guarantees for all unaccompanied minors, regardless of whether they are asylum seekers, victims of trafficking or illegal migrants, to guarantee that minors are treated as such untill proven otherwise (...) 20. To call on the Commission and the Member States under the European Fund for the Integration of third country nationals and the European Refugee Fund, to strengthen unaccompanied minors-related actions, mainly in order to establish and improve reception facilities responding to the specific needs of minors, as well as measures for the developmentof appropriate integration actions. Likewise, to ask the Commission to reflect on how best to include the unaccompanied dimension in the next generation of financial instruments, as of 2014, in the field of migration management."

V. In conclusion

Spain has a serious problem of illegal immigration and, particularly, in the case of minors entering illegally in the country. It is a matter of European concern and thus, no wonder Spain has focus on it during its presidency of the European Union during the first semester of 2010. Intelligent enough, the Spanish Government has count on the coordination of Belgium and Hungry in this issue in order to keep on working on the same direction those who assume the presidency of the European Union after the Spanish presidency. In this sense, some achievements has been presented in previous pages: the European Asylum Support Office, the Commission's Action Plan on Unaccompanied Minors (2010-2014) adopted on 6 May 2010, putting forward a common European Union approach based on the principle of the best interest of the child, and the conclusions on unaccompanied minors adopted on 3 June 2010 by the Justice and Home Affairs Council meeting in Luxemburg.

Nevertheless there are some important obstacles in the road for which apparently solution must wait. In particular, European Union legislation does not provide for the appointment of a representative from a moment an unaccompanied minor is detected by authorities, namely before the relevant instruments are triggered. Representation is only explicitly stipulated for asylum applicants. Although important safeguards for unaccompanied minors are provided by the Return Directive 2008/115/EC, the Temporary Protection Directive 2001/55/EC and the Directive on Victims of Trafficking in Human Beings 2004/81/EC, a margin of interpretation is left to Member States. For example, in the matter of age assessment, a critical issue triggering a number of procedural and legal guarantees in relevant European Union legislation, variations among Member States as far as age assessment procedures and techniques concern on their reliability and proportionality. Thus, the Commission should promote a common approach (i.e. best practice guidelines) to age assessment

and family tracing including on how to address these issues in the context of appeals.

It is to be welcomed that the European Commission in its Action Plan on Unaccompanied Minors (2010-2014) asked for specific and promising measures to be adopted in benefit of unaccompanied minors in a context of illegal immigration in Europe. It is worrying, nevertheless, that not the European Commission, the Justice and Home Affairs Council, the conclusions of the Spanish Presidency of the European Union do not include a mere reference to the European Convention on Human Rights or to the significative European Court's case law on illegal immigrants minors, even though the 27 Member States of the European Union are also contracting parties in this instrument for protecting human rights in Europe. It may be the explanation for this amnesia.

Considering the particular situation of the *Centros de Internamiento de Extranjeros* and the way asylum applicants are confined in the transit zones –namely the international airport of Madrid Barajas, it is obvious under the case-law of the European Court of Human Rights here studied, that although up to present no complaint has been introduced against Spanish Authorities concerning treatment conferred to illegal immigrant children in these places, my view is that sooner than later Spain will be denounced before the European Court at this regards and it will be probably declared to have violated the European Convention on Human Rights. In conclusion, beautiful words, blooming promises and too many minors detained together with adults, in inhuman and degrading conditions as guilty of the sin of being illegal aliens in this creeping European fortress.