



Degree Program in International Relations

Course of Security Law and Constitutional Protection

Unaccompanied and Separated Minors in European
Migration Law: Between Constitutional Guarantees and
Practical Challenges

Prof. Elena Griglio

SUPERVISOR

Prof. Alfonso Giordano

CO-SUPERVISOR

Rebecca Nicolosi (657172)

CANDIDATE

Academic Year 2024/2025

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ABSTRACT

This thesis aims to analyze the protection of unaccompanied and separated minors within the European Union migration framework, from both a legal and a practical standpoint. In particular, this work dissects the safeguards for the vulnerable category of migrant minors through the interplay between the domestic, European and international dimensions. Particular consideration is attributed to the normative apparatus on the matter, stemming from pivotal instruments such as the UN Convention on the Rights of the Child and the European Convention on Human Rights. Additional attention is addressed to the impact of recent developments, represented by the adoption of the 2024 Pact on Migration and Asylum, in order to understand the current approach and potential future outcomes. This framework is further completed by the analysis of landmark judgments by the European Court of Human Rights, whose jurisprudence has shaped Member States' behavior toward the fragile category of migrant minors. According to the examination of EU primary and secondary legislation, alongside the observed persistent difficulties in its implementation, this work depicts a dichotomous scenario. On the one hand, the study showcases the progress achieved in the recognition of the vulnerability and rights of unaccompanied and separated minors. On the other, it punctuates the fragmented and often inconsistent practices among Member States, particularly in the facets of reception, guardianship, age assessment and detention of migrant minors. The research observes the presence of a robust normative framework, but significant obstacles persist in its implementation, hindering an effective protection of unaccompanied and separated minors in the EU. The main reason for this shortcoming is to be found in the constant tension between migration control and child protection obligations. In this sense, the protection of children as children, irrespective of their migration status, risks being overlooked in favor of security-oriented logics adopted by Member States. This thesis concludes that a child-centered approach, which prioritizes the best interests of the child in all migration procedures is necessary to reaffirm the role of the European Union as a beacon for the respect of fundamental rights, especially in relation to the vulnerable category of unaccompanied and separated minors.

Abbreviations

CEAS – Common European Asylum System

CRC – Convention on the Rights of the Child

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

EEC – European Economic Community

EU – European Union

FRA – European Union Agency for Fundamental Rights

MS – Member States

TEU – Treaty on European Union

TFEU – Treaty on the Functioning of the European Union

UNCRC – UN Committee on the Rights of the Child

UNHCR – United Nations High Commissioner for Refugees

INTRODUCTION

Since the birth of Europe as a unified collectivity of States, the issue of migration has always represented a pivotal matter, both at the national and regional level. Over the course of decades, the European Economic Community and, subsequently, the European Union, have adopted an enormously wide plethora of legislation, Directives, Regulations, and Treaties specifically directed toward the correct management of such a complex and widespread phenomenon. As a matter of fact, Europe has always been a continent of immigration, but the challenges faced by States and the European Union have gradually created a climate of aversion toward the migration phenomenon. In this sense, migration has been too often interpreted as an emergency issue to solve, rather than a structural process to manage that intertwines social, economic, civil, and political profiles, exacerbated by the outbreak of globalization.

Within this multifaceted context, an issue of primary importance in recent decades is represented by the involvement of children in international migration toward Europe. Migrant children are a particularly vulnerable category of migrants, especially when they are traveling alone or become separated from their family during the journey. Nowadays, the migration of unaccompanied and separated minors in Europe has become a regular phenomenon that requires a prompt normative response by States and the EU institutions. In fact, the presence of migrant minors raises a series of questions that transcend border management or asylum procedures, touching upon the fundamental pillars of human rights, child protection, and the responsibilities of States and international institutions toward this fragile category.

Unaccompanied or separated children in migration often endure dramatic circumstances at every stage of their journey. After managing to escape from armed conflicts, political instability, poverty, environmental degradation to reunite with family members living abroad, migrant children find themselves in front of tremendous and cruel challenges, which do not stop once they reach European soil. Notwithstanding the perils of the voyage itself, migrant children in Europe are confronted with an ambiguous environment, oscillating between protection and neglect. This duplicity reflects the contrast between the legal and moral imperative to safeguard the best interests of the child, enshrined in numerous international treaties and documents, and the nature of migration policies, recently oriented toward control, deterrence and national defense.

In order to properly address this widespread phenomenon, a dense network of legal instruments has been developed over time, both at the European and international levels. Moving from the 1951 Refugee Convention and its 1967 Protocol, the ratification by all EU Member States of the 1989 United Nations Convention on the Rights of the Child has solidified a shared, universal recognition of minors' rights, notwithstanding their migration status. Within the specific European

Union framework, the chronological development of the Common European Asylum System and the consequent legislative reforms have progressively integrated specific norms and guarantees targeted toward unaccompanied and separated minors, with the ultimate goal of harmonizing reception standards and ensuring procedural guarantees. Such evolution is further reflected by the latest normative development, represented by the adoption of the 2024 EU Pact on Migration and Asylum which, notwithstanding its positive objectives, still contains numerous flaws and legal voids that risk to jeopardize the protection of migrant children. Moreover, the alignment to EU practices is still extremely uneven and fragmented between Member States, reluctant to cede an excessive amount of sovereignty to the supranational power on a matter intended as potentially dangerous for their internal security. This disparity, yet to be solved, continues to produce gaps in legislative implementation, eventually resulting in tensions between migration control and child protection.

An extremely relevant role on the matter has been solved by the European Court of Human Rights. Through the development of its jurisprudence and a series of landmark judgements, the Court has attentively overseen practices like the detention of minors, inadequate reception conditions, and the substantial lack of effective procedural safeguards. Over time, the ECtHR has reaffirmed its role of protector of human rights by interpreting and ensuring a correct implementation of the ECHR. With this aim, the Court has trying to expose and solve the most relevant discrepancies between normative provisions and practical realities. Thus, the Court's jurisprudence serves as an invaluable lens to sincerely assess the state of protection of unaccompanied and separated migrant children in Europe, alongside the chronological evolution of the guarantees on the matter.

Within this complex framework, this thesis aims at exploring the intersection between legal guarantees and practical challenges in the treatment of unaccompanied and separated minors within the European Union migration system. The work analyzes the international and European legislative frameworks, traces their evolution, and observes key case studies from the ECtHR, in order to finally shed light on both the advances that have been conquered and the obstacles that persist on the matter. In this sense, the research question aims at determining whether the European Union legal order has succeeded in reconciling its thorough commitment to child protection with the everlasting demands of migration management, an issue which does not appear to be finding a close solution.

The adopted methodology for this work intertwines the dimensions of legal frameworks, practical challenges and judicial responses, in order to comprehensively evaluate the mechanism of protection of unaccompanied and separated minors in the EU migration system. Overall, the research is almost exclusively qualitative, aside from brief quantitative observations in the first section. Moreover, the research adopts a comparative perspective, encompassing the differences in implementation of EU laws and obligations throughout Member States, especially in the sectors of

age assessment, detention, and reception standards. In fact, notwithstanding the primary focus on the EU legal order, a comparative approach is essential to understand the flaws and issues of the mechanism. Finally, this work adopts both a normative and analytical viewpoint, describing and evaluating existing legal practices but also intertwining them with fundamental principles of child protection and human rights.

This thesis will follow a three-chapter repartition, structured as follows: Chapter I introduces the migration phenomenon in the European framework, analyzing its relevance and social, economic and political impact. Moreover, the chapter examines the structural deficiencies of the EU migration management, with a final focus on the evolution of the legislative framework on the matter. Subsequently, Chapter II will delve precisely into the issue of unaccompanied and separated minors entering the European territory, representing the core of this work. In this sense, this section will investigate the criticalities related to every step of the migration journey of minors travelling alone. Furthermore, a thorough observation of the normative apparatus on both the European and international levels will be drawn, shedding a light on its shortcomings in view of the 2024 Pact on Migration and Asylum. Finally, Chapter III will shift the attention toward the role of the European Court of Human Rights in ensuring the protection of unaccompanied and separated minors. With this goal, the analysis will be supported by relevant case law, especially the cases *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* of 2006 and *A.T and Others v. Italy* of 2023, useful to understand the impact of the Court's jurisprudence on EU Member States. As a final point, a comprehensive conclusion will summarize the relevant observations of this work, trying to give an answer to the driving research question of the thesis.

CHAPTER I

The Complexity of Migration Policies in the European Union

The European Union is a pivotal hub of global migration flows where legal frameworks, humanitarian responsibilities, and political tensions intersect. It is a prosperous environment full of economic opportunities and human rights safeguards to individuals living in precarious situations and seeking for stability. Geographically positioned amidst regions of origin, transit, and destination, the EU is a magnet to potential migrants. Over time, the steady increase in migration toward the EU has prompted national and European policymakers to find an optimal solution to this multifaceted and pressing phenomenon. In 2023 alone, 4.3 million immigrants entered the EU from non-EU countries¹, alongside approximately 2 million migrants annually crossing European borders over the last few years. Despite being a major destination for migrants, the EU migration policy remains fragmented, reflecting diverging priorities among its Member States.

1. The European Union as a Controversial Migration Hub

Given the significance of migration within the EU, policymaking in this field has become the subject of polarized political debates at both national and supranational levels. Several Member States, particularly those located in proximity to EU borders, have undergone significant transformations in their socio-economic, cultural, and demographic composition. However, a defined European-centered policy framework on migration is still lacking. A major reason can be found in the interference of migration policies with national security, an area that Member States remain reluctant to cede to European institutions for various reasons. Furthermore, Member States are not equally affected by migration, with frontier countries being more exposed to constant flows of migrants, thereby bearing disproportionate responsibilities in managing arrivals and providing initial reception and assistance. In such a divergent environment, the development of a common and coordinated policy at the supranational level appears quite challenging. To be able to correctly navigate in such an intricate scenario, a preliminary analysis of how the European legal framework disciplines the issue of migration is necessary, an aspect that will be further assessed over the course of this work².

Considering EU law, provisions on migration are primarily situated in Title V, Chapter 2 of the Treaty on the Functioning of the European Union, which concerns border checks, asylum, and immigration. Precisely, article 78 of the TFEU establishes that the Union is tasked with developing a common policy on asylum, subsidiary protection, and temporary protection for any third-country

¹ Eurostat, *Migration to and from the EU*, 2025. https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Migration_to_and_from_the_EU.

² See Chapter I, par. 4.

national applying for international protection, in accordance with the 1951 Geneva Convention and the 1967 Protocol relating to the status of refugees, and other relevant treaties. Moreover, Paragraph 3 allows the Council to adopt provisional measures for the benefit of the Member States confronted by emergency situations characterized by a sudden inflow of foreign nationals. Subsequently, article 79 displays the establishment of a common immigration policy to ensure an efficient management of migration flows and a fair treatment of third-country nationals, preventing illegal immigration and trafficking of human beings³. Under article 80, the policies set out in Chapter 2, as well as their implementation, shall be governed by the principle of solidarity and fair sharing of responsibility between the Member States.

That said, the notions of solidarity and fair sharing of responsibility are not clearly defined in EU law. It can be inferred that they require cooperation between MS in pursuit of collective interests. However, the extent of these goals or the standards necessary to meet them, are not specified. For solidarity and sharing of responsibility to be effective, complementary legislative or policy measures might be required. Also, a successful collective decision-making system would entail considerable financial investment from all the participants.

Such a cooperative framework would imply a fair distribution of the burdens related to immigration and asylum policy, but quantifying fairness is far from being easy. Each Member State would prioritize its domestic interests, which might not necessarily align with EU policy goals. Therefore, policymaking in these areas requires a double scrutiny: first, establishing whether or not Union measures are truly required in this particular field (given the national-oriented stance by EU Member States). Secondly, determining whether Member States can implement them by themselves or whether additional solidarity measures could be necessary⁴. The Member States' expected loyalty in implementing EU policy appears not to be sufficient on this matter; hence, if solidarity is needed, a stronger Union action may be required.

1.1 Efforts Toward Modernization of the EU Migration System

Over the course of time, the EU has tried to put forward centralized policies to govern mobility toward and within its borders, in an attempt to establish an integrated multicultural environment. At first, the European response to immigration focused on creating free movement within the Union, hardening external borders. Such intent was formalized in 1985, with the Schengen Agreement establishing a borderless union to issue common policies on immigration and asylum. Over the years, the EU has prioritized the integration of non-European migrants as part of its migration agenda, aiming to give

³ TFEU, art. 49.

⁴ European Parliament Directorate General for Internal Policies, *The Implementation of Article 80 TFEU*, 2011.

immigrants a status that resembles the economic, social, and political rights, opportunities, and overall treatment to those of EU citizens. Starting from 1999, the Tampere Programme developed a rights-based model of integration with a set of rights approximately analogous to those of EU citizens, even endorsing the possibility of obtaining the nationality of the host Member State. After the entry into force of the Treaty of Lisbon on 1 December 2009, specific competence on immigration was formally conferred to the EU. Furthermore, other remarkable documents have shaped the EU migration framework, namely the European Convention on Human Rights (1953) and the Charter of Fundamental Rights of the European Union (2000).

By implication of these provisions, both the EU and national actions had to comply with the fundamental values of human dignity, freedom, equality, and principles of non-discrimination and tolerance. In addition, EU directives generally conceded a tangible right to family reunification, a long-term residence status after five years of residence, along with a series of guarantees to foster integration for students and researchers, and highly qualified workers. In more recent times, the EU has also shown a prompt response to humanitarian crises such as the Russian-Ukrainian War. After the Russian military invasion of Ukraine, on March 4th, 2022, the Council adopted a unanimous decision activating for the first time the mechanism provided for by article 5 of the Temporary Protection Directive 2001/55/EC⁵. This measure aimed to protect all Ukrainian refugees and people covered by international protection residing in Ukraine, as well as their family members. In short, the protection encompassed a series of rights regarding accommodation, assistance in terms of social welfare, medical care, free movement within the Union, and access to the labor market⁶.

Despite certain ameliorations, the pluralist model originally envisioned has never been concretely implemented. Instead, it was attenuated by a series of legislative instruments that progressively weakened the originally intended shared approach to migration, reinforcing Member States' sovereignty instead. This evolution reflected a broader trend toward restriction, whereby the Union's commitment to integration and diversity has been gradually subordinated to concerns over security, national identity, and domestic political pressures.

1.2 The Risks of the EU Migration Policy's Fragmentation

The EU framework confers a decisive role to national governments in the practical management of migration challenges; thus, domestic interests aimed at safeguarding internal security and national integrity are often prioritized. On the one hand, governments welcome immigrants as a worthwhile labor force, providing an economic boost. Furthermore, the cultural and social enrichment is highly

⁵ Dir. EC 55/2001, art.5: "The Council Decision shall have the effect of introducing temporary protection for the displaced persons to which it refers, in all the Member States, in accordance with the provisions of this Directive [...]"

⁶ T. Straubhaar, K.F. Zimmermann, *Toward a European migration policy*. Popul Res Policy Rev, 1993, Volume 12, pp. 225–241.

appreciated as it offers valuable diversity, creating a multi-ethnic environment. On the other hand, immigration is often restricted due to national security reasons whenever migration flows are perceived as a threat to national order and stability. Likewise, there are contrasting visions even with refugees. The prompt EU response to the Ukrainian war was certainly affected by the critical circumstances, but a determinant variable was the cultural similarity to EU citizens, making Ukrainian refugees more “desirable” in light of their better integration prospects, intended as better “suitability” for civic and cultural assimilation. By contrast, welcoming individuals fleeing war, persecution, poverty, and destitution from different regions of the world could be influenced by nationally-oriented biases⁷. This behavior is far from being intended as an ineffective reaction to global crises, since the European Union remains a haven for thousands of human lives at risk. However, the Member States have been controlling migration through a process of selection, giving prominence to economic and safety interests, and encouraging externalization practices as well as return schemes.

Furthermore, the EU migration framework has been forged by a series of other policies. Above all, the noteworthy Dublin Regulation (2003) created a defective system⁸. The first entry rule has put an extremely large number of migrants in the hands of a few countries. Therefore, the capacities and resources of border countries are strained to the limit, making migration challenges unbearable.

In addition, the dangers of EU border crossing are extreme, especially via the Mediterranean route, which qualifies as the global border region with the highest mortality rate. In 2014, around 3,200 migrants died while attempting to cross the Mediterranean. In 2015, the numbers had risen to approximately 3,800. By the end of 2016, over 5000 migrants had perished or disappeared. According to IOM, in 2024, 2,452 deaths have been documented in the Mediterranean Sea⁹. While it is not the largest annual rate, the need for adequate rescue systems as well as safe and regular migration routes is pressing. Due to the dearth of official sources, the actual numbers of deaths and disappearances are likely to be much higher. It is undeniable that thousands of people continue to be victims of unsafe conditions and risky journeys to reach the EU territory. On top of that, inadequate infrastructure upon arrival and potential exploitation by smuggling networks aggravate an already precarious situation, placing migrants at even greater risk.

At this point, there is little doubt that the EU’s normative appeal and the extent to which it can present itself as a harborage have been heavily compromised. However, recent developments are providing hope for a trend reversal. For example, the New Pact on Asylum and Immigration entered into force on June 11th, 2024, aims to bring new solutions to harmonize asylum procedures and ensure

⁷ International Centre for Migration Policy Development, *Migrants, Minorities and Employment: Exclusion, Discrimination and Anti-Discrimination in 15 Member States of the European Union*, 2003.

⁸ See Chapter I, Section 4.3.

⁹ International Organization for Migration, *2024 is Deadliest Year on Record for Migrants, New IOM Data Reveals*, 2025 <https://www.iom.int/news/2024-deadliest-year-record-migrants-new-iom-data-reveals>.

fair burden-sharing between members¹⁰. On the whole, the EU is an extremely controversial pole of migration flows. Despite the enduring efforts to establish effective migration policies, the reality unravels significant inconsistencies. Not only are responsibilities unevenly distributed, but Member States also refrain from entrusting the Union with a more dominant role. In the absence of a defined shared approach, the protection of the most vulnerable migrants might be put at risk. At present, the European Union stands as a critical nexus of migration flows, where the maintenance of security poses a constitutional challenge to the safeguarding of fundamental rights.

2. Migration Flows and EU Governance: Impact and Challenges

Migration in the European Union is a sensitive topic within the public debate and policy-making. Indeed, the legislative agenda of all EU Member States has been significantly impacted by migration flows, providing new challenges to tackle and opportunities to seize. Beyond the cultural diversity, the Old Continent has significantly benefited from the demographic contribution and support to the productive capacities of receiving economies provided by migratory dynamics¹¹. This section is going to retrace how migration has acquired relevance in the European framework and what criticalities emerged in its management.

Throughout the 19th and early 20th centuries, Europe established itself primarily as an area of emigration, rather than one of immigration, but the situation rapidly shifted in the aftermath of World War II. In the immediate postwar period (1945-1975), a first wave of post-colonial and labor migrants entered the European perimeter, succeeded by an influx of family migrants from the mid-1970s onwards. The following decades were characterized by massive arrivals of asylum applicants, while a final influx of employment-related migration, especially involving highly skilled migrants, spread during the 1990s¹². As a result of such a grand incoming injection of individuals, the foreign-born population in the (at the time) 15 EU Member States, plus Switzerland and Liechtenstein, quadrupled, shifting from roughly 3.7 million (1.3% of the total population) in 1950, to more than 16 million (4.5% of the total population) in 1990.

From a normative standpoint, the European Economic Community (EEC) took the first step toward the recognition of the importance of migration with the adoption of the 1986 Single European Act. The Act established a single market for the EEC, allowing free movement of people, goods, services, and capital within its borders. This created an incentive to install stronger cooperation in the area of justice and home affairs, hence reflecting on migration and asylum policy. While migration

¹⁰ European Policy Centre, *The New Pact: A vital step for an effective and humane EU migration policy*, Brussels, 2024. <https://www.epc.eu/publication/The-New-Pact-A-vital-step-for-an-effective-and-humane-EU-migration-po-582a50/>

¹¹ R. Gropas, A. Triandafyllidou, *European Immigration: A Sourcebook*, 2007, ch. 31, pp. 389-400

¹² H. Schneider, *Migration, Integration and Citizenship: A Challenge for Europe's future*, Vol. I., Maastricht, 2005.

had already obtained significant relevance within the European agenda, policies regulating the entry and residence of third-country migrants emerged only with the 1992 Treaty of Maastricht. Since that moment, especially with the Treaty of Lisbon in 2009, the EU has enacted several common policies on migration-related areas.

Despite these Europe-wide trends, the migration experience of each Member State has been profoundly distinct, with notable differences concerning the size, nature, and composition of their immigration flows. Several states, such as Italy, Greece, Spain, Portugal, the Czech Republic, Finland, and Ireland, were predominant emigration countries before turning to key destination countries for immigrants. In 2010, more than 75% of the total foreigners within the EU resided in only five member states, namely Germany, Spain, the UK, Italy, and France¹³. Other States, such as Hungary, Slovenia, Denmark, and Sweden, have also witnessed inflows of immigrants, but in much smaller amounts. As a result, each State has adopted a unique approach to regulate the admission and integration of migrants into their societal tissue. Integration policies spread in a plethora of solutions, ranging from the forced assimilation of migrants (France) to multiculturalism (the Netherlands, Sweden) and segregationism (Germany, Austria)¹⁴. Furthermore, Member States have always been hesitant about addressing these policies jointly, as they are deemed to be matters belonging to national competence. Although it has been argued that such a discrepancy no longer makes sense in the modern EU, the heterogeneous approach to migration and asylum led to the perception that the development of a common EU immigration policy was not feasible, let alone desirable.

On the contrary, the progressive rise in migrant influxes exposed the failure of *ad hoc* responses, making the need for enhanced cooperation extremely pressing. While migration dynamics constantly fluctuate, the significant scale of migration flows has remained steady, and policymakers must find a way to comply with a phenomenon of such magnitude.

In more recent times, migration has been repeatedly brought to the forefront, especially in relation to external events with severe repercussions on migration fluxes. A paramount example can be identified in the Arab Spring, a series of protests that started in Tunisia in 2010 and later spread across much of the Arab world. The resulting unrest, particularly in Syria, Libya, Iraq, and Afghanistan, led to a large-scale displacement and a consequent migration crisis, with many fleeing across the Mediterranean to seek refuge in the EU. The European Border and Coast Guard Agency, commonly known as Frontex, estimates that the number of unauthorized crossings on different routes across the Mediterranean, the Western Balkans, and Greece–Albania was about 10,000 per year from

¹³ K. Vasileva, *Population and Social Conditions*, 2011.

¹⁴ C. Joppke, *Immigrants and Civic Integration in Western Europe* in K. Banting and others, *Belonging? Diversity, Recognition and Shared Citizenship in Canada*, Institute for Research on Public Policy, 2006.

2009 to 2013 before rising to 1.82 million in 2015¹⁵. The main entry points to the EU were Greece, Italy, Malta, Hungary, Croatia, Slovenia, and Bulgaria. In 2015, the main peaks were registered in the Eastern and Central Mediterranean routes, with more than one million refugees entering Europe to escape from war and political turmoil¹⁶.

To respond to the crisis, the EU introduced an array of legislative instruments, including bilateral agreements with third countries, paired with financial support. Some key examples are the EU-Turkey Statement in 2016, the reinforced mandate and increased budget of Frontex through new regulations in 2016 and 2019¹⁷, and the creation of the EU Asylum Agency with Regulation 2021/2303 (replacing the European Asylum Support Office). Despite encouraging steps, the aftermath of the 2015 migration crisis has revealed an inadequate system incapable of managing high-level flows. Since that moment, migration has assumed ever greater prominence; however, the lack of political coordination, coupled with meager infrastructure, has frequently jeopardized the safety of migrants. Consequently, as it happened in the crisis, migration fluxes risk turning into a humanitarian emergency, undermining the EU's cohesion and further exposing its structural vulnerabilities in such a central issue.

2.1 Irregular Migration and the Growth of Smuggling Networks

The 2015 European migrant crisis marked the beginning of an enduring challenge, which has broken down into several other issues. In particular, the precarious status of EU borders has been exacerbated by smuggling networks, exposing migrants to a multitude of risks and abuses. Migrant smuggling is an extremely profitable enterprise, which, according to Europol, affects more than 90% of the irregular migrants either during their journey or at their arrival in the Union¹⁸.

While there was a decrease in irregular border crossing during the COVID-19 pandemic in 2020 (due to the global paralysis and inability to move), an uptick in arrivals was registered in 2021, and a further increase in 2022¹⁹. Moreover, as mentioned in the previous section, Russia's war against Ukraine forced the largest displacement of people in Europe since World War II, with 4 million receiving temporary protection²⁰. Therefore, the unforeseen scale of arrivals took up all the borders' resources, allowing migrant smuggling to become the fastest-growing market for organized crime in

¹⁵ T. Hatton, *European asylum policy before and after the migration crisis*, 2020, p. 5.

¹⁶ S. Panebianco, *Border Crises and Human Mobility in the Mediterranean Global South*, 2022, ch.1, pp. 9-12.

¹⁷ L. Gerded, G. Nemeth, *A Comprehensive Approach to the Management of Migration Toward Europe* in T. Jäger, *Zeitschrift für Außen- und Sicherheitspolitik*, Vol. 18, Springer Nature, 2025, pp. 85-114.

¹⁸ European Parliament Research Service, *Understanding EU Action against Migrant Smuggling*, 2023.

¹⁹ European Union Agency for Asylum, *Situation at the EU External Borders and Migration Routes in EASO Asylum Report 2021*, 2022.

²⁰ Eurostat, *Temporary protection for 4.31 Million People in June*, 2025.

the Balkan and Mediterranean region²¹. Overall, the number of people reaching Europe via the Central Mediterranean or the Western Balkan routes in 2022 has increased respectively by 51% and 136%, according to FRONTEX, with a total of 330,000 irregular entries. Unexpectedly, 2024 saw a significant reduction in irregular border crossings, which, as reported by Frontex, is largely due to intensified EU and partner cooperation against smuggling networks²².

Within irregular migration schemes, migrants are desperately at the mercy of criminals, who persuade their victims with false promises and abuse them through extortion, violence, exploitation, blackmail, and homicide. This mechanism is even more active for particularly vulnerable migrants, such as minors, whose desire to migrate and extreme precariousness represent the backbone of the smuggling business, ensuring its continuing success and tremendous profits²³. In addition, migrants' reliance on smuggling networks might entail involvement in other forms of serious and organized crime, including terrorism, trafficking of human beings, and money laundering.

In the absence of advanced control over border crossings and proper safeguards to ensure legitimate migration procedures, the safety and well-being of these individuals are far beyond the EU's capacities. The overwhelming migratory pressure creates, therefore, a defective system incapable of handling sustained flows, where criminal networks take advantage of its shortcomings, making it even more ineffective.

2.2 The Impact on the European Union Budget

Another relevant point to consider is the impact of migration on the European Union's budget. Among other priorities, a substantial amount of EU funds is allocated to address migration-related challenges. Notably, the upsurge in asylum applications from 2015 onward is reflected in the EU financial instruments, which have skyrocketed and have been maintained at elevated levels ever since. In recent times, the 2021-2027 long-term budget²⁴, adopted in 2020, was influenced by several unforeseen emergencies, including the Russia-Ukraine war and the Middle East conflict²⁵. These events have increased the economic burden on the EU to uphold migration flows efficiently. Within these pressing scenarios, the EU's capacities have been stretched to the limit, often hampering an optimal allocation of resources.

²¹ T. Bezlov, D. Kocani, A. Rusev, *Borderline: Impact of the Ukraine war on migrant smuggling in Southeastern Europe*, Center for the Study of Democracy, 2023. <https://globalinitiative.net/analysis/ukraine-war-impact-migrant-smuggling-south-eastern-europe/#:~:text=While%20the%20unforeseen%20scale%20of,the%20Western%20Balkan%20route%20soared>

²² European Commission, *EU sees 38% drop in irregular border crossings in 2024*, 2025. https://home-affairs.ec.europa.eu/news/eu-sees-38-drop-irregular-border-crossings-2024-2025-01-24_en

²³ E. Broekaert, I. Derluyn, *On the Way to a Better Future: Belgium as Transit Country for Trafficking and Smuggling of Unaccompanied Minors* in *International Migration*, Vol. 43, Issue 4, pp. 31-56, 2005.

²⁴ European Commission, *2021-2027 long-term EU budget & NextGenerationEU* https://commission.europa.eu/strategy-and-policy/eu-budget/long-term-eu-budget/2021-2027/whats-new_en.

²⁵ J. Pisani-Ferry, *The economic policy consequences of the war*, Bruegel Blog, 2022. <https://www.bruegel.org/blog-post/economic-policy-consequences-war>

In June 2023, to ensure that the EU can continue to attain its key objectives, the European Commission proposed to strengthen the EU's long-term budget. Two years later, the EU has allocated a total of EUR 4,791 billion for Migration and Border Management²⁶, increasing funds by €3 billion compared to the initial proposal. The funding is mainly intended for Member States, third countries, NGOs, UN institutions, or EU Agencies such as Frontex²⁷ to improve asylum procedures, combat the causes of migration, and foster integration programs or border protection.

With these provisions, national authorities, in collaboration with decentralized agencies, should be able to provide additional support and assist the numerous migrants and refugees throughout their migration experience. Despite the efforts, several migrants continue to encounter economic hardship and insufficient support from the European countries after their entry in the EU, especially in hotspot areas where infrastructure and resources are scarce. Many struggle to access the job market due to high unemployment rates or bureaucratic delays in the recognition of their qualifications. Additionally, administrative and cultural barriers obstruct access to welfare, education, and healthcare. The ongoing European housing crisis adds another layer of complexity to these issues, resulting in overcrowded and unsafe living conditions and, in the worst cases, homelessness. Although progress has been made, considerable challenges remain as migrants are likely to experience both institutional and interpersonal discrimination, which further undermines their attempts to achieve socio-economic inclusion.

While the EU budget provides a collective framework to support migrants and manage migration flows, individual MS often channel their contributions strategically, reflecting national priorities that can complement or diverge from EU-wide objectives. A shared tendency on this regard is to outsource border protection to third countries, committing national funds to this purpose. One example is the EU Trust Fund for Africa. This financial instrument was adopted to address the root causes of irregular migration and forced displacement in Africa in order to manage migration better²⁸. Countries with particularly restrictive immigration policies, such as Hungary or Poland, have contributed heavily to this fund to demonstrate their ability to act and enhance their international reputation. Other countries direct their contributions based on strategic interests: France, for instance, concentrates its efforts in the Sahel region, while Italy prioritizes cooperation with Libya.

²⁶ European Commission, *EU annual budget 2025: pursuing our political priorities and addressing crises*, 2024. https://ec.europa.eu/commission/presscorner/detail/en/ip_24_5866

²⁷ The European Border and Coast Guard Agency, commonly known as Frontex, is an agency of the European Union established in 2004 and headquartered in Warsaw. It supports EU and Schengen countries in the management of the EU's external borders. It is a rare example of uniformed law enforcement service within the EU that is actively engaged in border control activities, sharing intelligence and knowledge to fight irregular migration and cross-border crime.

²⁸ EU Trust Fund for Africa. https://trust-fund-for-africa.europa.eu/index_en

2.3 Political Outcomes of Migration Flows

Given migration's relevance within the European context, it inevitably occupies a prominent place in the political arena across all EU countries. Political views on the matter are clearly split between left-wing parties, which tend to support migration flows, and right-wing parties that carry a firm resistance to immigration. In recent decades, right-wing parties have marked one of the most significant political developments across advanced democracies. These parties have gained ground in different national legislatures and even entered governing coalitions in some countries. A prominent example is Italy, where the right-wing leader Giorgia Meloni presides over a country marked by significant exposure to migratory pressures, economic instability, and the long-term impact of austerity measures.

In broad terms, immigration policy in the EU has been substantially influenced by the right-wing discourse, which often reflects the overall public perception. The tendency is quite clear: EU citizens lean toward restrictive immigration policies, possibly due to concerns of a cultural or economic nature, such as the integrity of national identity or the labor market competition²⁹. While there have been examples of solidarity toward migrants, hostility often emerges in xenophobic movements and in claims of various European politicians about multiculturalism as a failed policy³⁰. This is particularly evident in Southern European countries such as Italy and Greece, where economic hardship and fragile welfare systems obstruct adequate support even for their citizens. Here, competition over jobs and access to financial assistance can heighten social tensions, often fueling negative attitudes toward migrants³¹.

As a result, national policymakers increasingly frame migration as a threat to the citizens' security and welfare, rather than as a natural and enriching phenomenon. Such perception and behavior are translated into the enactment of restrictive regulations toward immigration and punishments toward irregular migrants, whose fundamental rights are more frequently curbed or ignored.

Migration clearly holds utmost importance in the European Union's political agenda, yet the current policy framework reveals numerous criticalities. Not only does it lack efficient cooperation between Member States, but it is aggravated by the association between migration and national security, a domain hardly ceded to supranational control. Strengthening dialogue with national institutions is therefore essential to harmonize regulations and alleviate the disproportionate economic, social, and humanitarian burden borne by frontline countries. If the European system is

²⁹S.H. Dehdari, *Understanding the role of immigration and economic factors in boosting support for far-right political parties*, Washington Center for Equitable Growth, 2020. <https://equitablegrowth.org/understanding-the-role-of-immigration-and-economic-factors-in-boosting-support-for-far-right-political-parties/>

³⁰J.R. Bowen, *Europeans Against Multiculturalism*, Boston Review, 2011. <https://www.bostonreview.net/articles/john-r-bowen-european-multiculturalism-islam/>

³¹I. Giglioli, *Migration, Austerity, and Crisis at the Periphery of Europe*, Othering and Belonging, 2020. <https://www.otheringandbelonging.org/migration-austerity-and-crisis-at-the-periphery-of-europe/>

functionally reformed, migration could finally be canalized into the opportunity it represents both for the Union and its Member States. However, should the status quo persist, the scale of the migration phenomenon may trigger a severe deterioration in the short term.

3. EU's Attractiveness to Potential Immigrants: Perception and Reality

This section will examine the features that make the EU an attractive destination for potential migrants. In doing so, a strong focus will be placed on the clear discrepancy between the perception of the European Union as a safe harbor and the actual living conditions faced by migrants after having reached the EU. According to the standard theory of migration, an individual will move to a new location if the expected utility of moving is higher than the expected utility of staying in the country of origin. Thus, it is assumed that migration is worthwhile when the expected return outweighs the costs of migration, both financial and psychological (such as giving up proximity to family and/or social relations).³² Yet, this raises a deeper inquiry: do the benefits of migration to the European Union genuinely justify these costs? In other words, do migrants ultimately experience a net gain that compensates for the significant challenges they must endure?

3.1 Reasons for Migration Toward the EU

To assess whether the aforementioned challenges are offset by tangible advantages, it is necessary to examine the key elements that compel migrants to leave and drive them to the EU. First of all, most migrants are pushed by political insecurity caused by civil wars, oppressive regimes, fear of prosecution, or grave violations of human rights occurring in their country of origin. In 2022, of the 384,245 asylum seekers granted protection status in the EU, more than a quarter came from war-torn Syria, with Afghanistan and Venezuela in second and third place, respectively³³. Nevertheless, people who leave their country are not always fleeing danger. The decision to migrate can be rooted in economic hardship and lack of welfare opportunities. In addition, some migrants might consider access to better-quality education as a determining factor. Others might be motivated by family reunification with relatives or friends who are already living abroad. More recently, another variable of increasing relevance has become climate change, which has exacerbated extreme weather events, making several environments uninhabitable.

Therefore, it can be assumed that the disparate adversities in the country of origin leave migrants with little or no viable alternatives other than migrating elsewhere. Within this critical

³² F. Gubert, J. Senne, *Is the European Union attractive for potential migrants? An investigation of migration intentions across the world*, Paris, 2015, p.7.

³³ European Parliament, *Exploring Migration Causes: Why People Migrate*, 2024.

https://www.europarl.europa.eu/pdfs/news/expert/2020/7/story/20200624STO81906/20200624STO81906_en.pdf

context, the EU appears to be a sanctuary of safety, protection, and economic stability. The prospect of a non-belligerent environment, characterized by border openness, generally stable economic conditions, advanced educational systems, and, to a large extent, a minimal danger of climate calamities, definitely represents a pull factor to potential migrants. Additionally, historical colonial or cultural ties between several countries of origin and certain EU Member States (e.g. France in the Sub-Saharan and North African region) enhance the appeal of the EU as a destination. Lastly, the EU's geographical position, particularly its proximity to the Central Mediterranean Route, which is one of the biggest migration routes in the world, reinforces its accessibility for many migrants, especially those fleeing perilous conditions and seeking the nearest viable refuge³⁴.

3.2 Structural Deficiencies in the EU Migration and Asylum System

The high expectations of migrants do not always find concrete realization upon arrival in any of the EU Member States. The perilous journeys undertaken, particularly from North Africa, the Middle East, and the Western Balkans, often terminate in reception sites incapable of dispensing adequate protection and assistance. The typical picture is an utterly overwhelmed system in charge of an enormous volume of individuals with scarce or even no resources at all.

While most migrants intend to seek asylum elsewhere in the European Union, the Dublin System—the EU's guiding asylum policy—ties them to the country of first arrival. Even though further discussion will be provided, it is useful to briefly examine the core of this paramount regulation in EU law. Essentially, the Dublin Regulation defines a hierarchical set of criteria for determining the Member State responsible for assessing an asylum application³⁵. The primary criterion is the country of first entry, rendering outer-border countries extremely vulnerable to a myriad of asylum applications, which often outnumber the State's capacity. Consequently, the exigencies of migrants are unlikely to be met, causing human rights to be either consistently violated or simply ignored.

The shortcomings of the Dublin Regulation are particularly visible in southern European countries, namely Italy, Spain, and Greece, being the closest entryway to Europe from North Africa and the Middle East. These countries, already strained by the consequences of the Eurozone crisis, struggle to cope with a surge of irregular migrants and asylum seekers. Their infrastructures and economies are already compromised, further aggravated by austerity measures imposed by the

³⁴ M. Luche, *Managing "Mixed" Migration to the EU: The Challenge of Sharing Responsibility to Protect Refugees in the 21st Century*, Munich, 2025, pp. 9-14.

³⁵ Reg. EU 2013/604

European Commission, the European Central Bank, and the International Monetary Fund³⁶. With massive unemployment and national debt, these countries are hardly able to uphold the economic and social security of their citizens, proving them unfit to provide adequate shelter, food, housing, and basic needs to the influx of migrants and asylum seekers crossing their borders.

On this matter, the UN Committee on the Elimination of Racial Discrimination expressed concern about the difficulties that migrants and asylum seekers face in accessing accommodation, especially in certain European countries. For example, in France, during an on-site visit at makeshift camps in Calais and Grande-Synthe (December 2020), the National Consultative Commission on Human Rights (CNCDDH) reported the living conditions as undignified, inhumane, and unacceptable. The CNCDDH found that migrants' access to essential services was insufficient, with no effective access to primary resources³⁷. In addition, the report mentioned systematic expulsion of migrants coupled with a disproportionate use of force by state agents. In the Netherlands, the congestion of the emergency reception forced hundreds to sleep outside the Ter Apel registration center³⁸. A similar situation occurred in the Pournana center in Cyprus, where several migrants stayed in tents, with no lighting, heating, or sewage disposal system³⁹. In Greece and Spain, many people could not be accommodated in the respective reception systems while waiting for months to register their asylum applications. Further risks include sexual and gender-based violence that many migrants, especially minors, can encounter in such unsafe environments.

This widespread negligence has caused a serious regression in the respect of fundamental human rights protected both by national constitutions and international and supranational instruments, such as the European Convention on Human Rights or the Charter of Fundamental Rights of the European Union. To monitor the situation, the European Union Agency for Fundamental Rights (FRA) has been issuing an annual Fundamental Rights Report to check the MS compliance with fundamental rights in their legal and practical responses to migrants, asylum seekers, and refugees.

3.3 Criticalities and Failures of the EU External Frontiers

The EU's image as a safe place has been further tarnished by systemic violations at its external frontiers. Infringements include the abandonment of individuals at borders or in distress at sea, pushbacks and physical violence, and both legal and practical barriers to accessing asylum

³⁶ For example, the *Troika*, a consortium of three institutions, namely the European Commission, the European Central Bank and the International Monetary Fund that played a central role in managing the eurozone sovereign debt crisis by providing bailout programs for struggling EU member states.

³⁷ French National Consultative Commission on Human Rights, *National Report on the situation of human rights of migrants at the borders*, Brussels, 2021. <https://ennhri.org/wp-content/uploads/2021/05/Executive-Summary-French-National-Report-CNCDDH.pdf>.

³⁸ M. MacGregor, *Dutch authorities move asylum seekers camped outside Ter Apel center*, InfoMigrants, 2022. <https://www.infomigrants.net/en/post/42911/dutch-authorities-move-asylum-seekers-camped-outside-ter-apel-center>.

³⁹ European Council on Refugees and Exiles, *Conditions in Reception Facilities: Cyprus*, 2025. <https://asylumineurope.org/reports/country/cyprus/reception-conditions/housing/conditions-reception-facilities/>.

procedures. Indeed, many migrants perish at sea or go missing in their attempt to reach European shores, and those who do arrive frequently face life-threatening conditions or even death.

Between 2014 and February 2023, 26,089 people died or went missing while trying to cross the Mediterranean Sea. On average, this means approximately eight people each day⁴⁰. In 2024 only, the FRA's Fundamental Rights Report registered 3,642 individuals⁴¹. The newest Report of June 2025 highlighted that, despite the new EU asylum and migration rules, human rights violations and lack of adequate search and rescue operations persist. Compliance with the respect for the right to life at borders has also preoccupied the European Court of Human Rights (ECtHR), which in 2019 issued three important judgments against Greece, Croatia and Hungary, clarifying aspects of the right to life under article 2 of the European Convention on Human Rights (ECHR) in relation to migrants' deaths at borders and failure to take all reasonable measures in the event of a shipwreck.

Other breaches of fundamental human rights include deprivation of liberty and de facto detention, which are employed as tools to reassert national order in such unstable circumstances. According to EU human rights law, Member States should perform an individual examination, with due process guarantees, when ordering immigration-related detention. The purpose of this examination is to assess whether deprivation of liberty is necessary and proportionate in each case. Nevertheless, automatic detention of all irregular arrivals without examining its necessity and proportionality continues to be performed. For example, the 2024 Report to the Greek government by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) found that the Greek authorities have not taken sufficient steps to address serious deficiencies in their reception systems. In fact, migrants are still held in prison-like conditions even in the absence of proven criminal offences, resulting in an unlawful deprivation of their liberty⁴².

In addition, immigrants tend to face discrimination and obstacles while they endeavor to integrate into the country of destination. Legal and practical obstacles in the asylum processing are common, further delaying the start of the integration process. Access to employment, housing, social welfare, and education is hardly provided to third-country nationals entering the EU. Linguistic barriers and cultural differences add to the overall discomfort. As a consequence, not only are migrants unable to obtain financial stability, but cultural and social integration is severely hindered, worsening the status of newcomers.

⁴⁰ European Union Agency for Fundamental Rights, *Asylum and Migration: Progress Achieved and Remaining Challenges*, Publications Office of the European Union, Luxembourg, 2023. https://fra.europa.eu/sites/default/files/fra_uploads/fra-2023-asylum-migration-progress-challenges_en.pdf

⁴¹ European Union Agency for Fundamental Rights, *Fundamental Rights Report*, Publications Office of the European Union, Luxembourg, 2025. https://fra.europa.eu/sites/default/files/fra_uploads/fra-2025-fundamental-rights-report-2025_en.pdf

⁴² European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Report to the Greek Government on the visit to Greece*, Strasbourg, 2023.

On the whole, the promise of a better life in the European Union stands in contrast to the severe realities faced by migrants upon their arrival. Among insufficient reception conditions, failed integration and systemic violations of rights, migrants often encounter renewed hardships within the very borders they had hoped would provide safety. This discrepancy prompts an inquiry into the EU's capacity to tackle migratory challenges effectively, given the significant gap between the values it upholds and the ongoing practical occurrences. Therefore, before lauding the EU as a destination for refuge and opportunities, it is crucial to critically evaluate its migration policies and their implementation to ascertain whether they genuinely reflect its foundational values.

4. The Evolution of the Legislative Framework on Migration Policies

Migration policies gradually emerged in the European legislative framework with the formation of the Westphalian nation-state and its attempt to control the movement of populations⁴³. Policy making in this realm aimed at exercising control over vital workforce arriving and departing from a given state. Over time, the global population has become increasingly mobile, resulting in the growth and diversification of migration policy. The EU has gradually incorporated an array of policy instruments implemented by state and non-state actors to address the political, social, and economic objectives of migration. In addition, migration policies have also evolved as part of the European integration process, whereby Member States have progressively created a free movement environment and harmonized asylum and reception practices⁴⁴. A mention must be addressed also to the institutional developments at the EU level, since an increasing number of supranational actors began to take part in the policy process, such as different Directorates General of the European Commission, decentralized agencies like the European Union Agency for Asylum or Frontex, or international organizations like the International Organization for Migration (IOM) or the Office of the United Nations High Commissioner for Refugees (UNHCR).

The last point to consider is the influence of international law in the protection of migrants, refugees, and asylum seekers' human rights, that must be guaranteed at all times in the management of migration dynamics. For instance, the Convention Relating to the Status of Refugees (commonly known as the 1951 Geneva Convention) established the principle of *non-refoulement*, which became a cornerstone of asylum and international refugee law. As defined by the IOM Glossary on Migration, the principle of *non-refoulement* is "the prohibition for States to extradite, deport, expel, or otherwise return a person to a country where his or her life or freedom would be threatened, or where there are substantial grounds for believing that he or she would risk being subjected to torture or other cruel,

⁴³ J. Torpey, *Coming and Going: On the State Monopolization of the Legitimate "Means of Movement"* in American Sociological Association, *Sociological Theory*, Vol. 16, No. 3, 1998, pp. 239-259.

⁴⁴ A. Geddes, *The Politics of European Union Migration Governance* in *Journal of Common Market Studies*, Vol. 56, 2018, pp. 120-130.

inhuman and degrading treatment or punishment, or would be in danger of being subjected to enforced disappearance, or of suffering another irreparable harm”⁴⁵. This principle is inscribed in the wider protection offered by international human rights law, and it is explicitly included in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁴⁶ (CAT) and the International Convention for the Protection of All Persons from Enforced Disappearance⁴⁷ (ICPPED). Although these documents were all adopted under the auspices of the United Nations, the first was ratified by all EU Member States, and while the other two have not been universally adopted within the EU, their core principles are reflected in the European Convention on Human Rights.

The multi-faceted configuration that the EU migration system has evolved into encompasses action on multiple levels, prompting policies at both the European and national levels. The latter, primarily managed by Member States, is entangled with national sovereignty. Indeed, as migratory pressures have intensified, migration has started to be framed as a potential threat to national security, economic stability, and socio-cultural cohesion, areas where MS prefer to maintain a dominant role. As clarified by article 4 of TFEU, migration policy falls within the area of Freedom, Security and Justice, which belongs to the shared competences between the EU and the Member States. To explain, article 2 of TFEU asserts that in areas of shared competence, both can legislate and adopt legally binding acts in that area. Precisely, the Member States shall exercise their competences to the extent that the Union has not exercised its competence or has decided to cease exercising its competence. However, balancing the need for a common approach with the diverse interests of individual Member States has often led to a systematic discrepancy in the legislative framework.

Overall, the policy process regarding migration has become significantly more complex than in the past. The initial path envisioning a common system has clearly shifted toward a more diversified approach, but the intent to develop a solid and unified European migration policy is still present. Yet, given the multitude of actors involved, the current situation exposes disagreements on border control, asylum procedures, burden-sharing, and the integration process of migrants.

At present conditions, the EU’s capacity is stretched to its limits in the attempt to effectively manage migratory pressures, leading to a weakened system mainly relying on a few outer-border countries. Consequently, although the normative setting does offer constitutional and international guarantees against human rights violations, practice often reveals systematic breaches and insufficient remedies, especially for vulnerable categories.

⁴⁵ International Organization for Migration, *IML Information Note on The Principle of Non-Refoulement*, 2023.

https://www.iom.int/sites/g/files/tmzbd12616/files/our_work/ICP/IML/2023-updated-impl-information-note-on-non-refoulement.pdf

⁴⁶ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, art. 3

⁴⁷ International Convention for the Protection of All Persons from Enforced Disappearance, 2006, art. 16

This section will explore the key stages of the evolution of migration policies, from the Treaty of Amsterdam to policy trends in the aftermath of the 2015 Migration Crisis. Particular attention will be devoted to relevant legal instruments and principles governing migration dynamics, such as the Dublin Regulation and the principle of *non-refoulement*, critically assessing their strengths and limitations in practical implementation. Understanding the broader framework serves to contextualize the core focus of the present thesis: the protection of migrant and unaccompanied minors within EU migration law. To this purpose, the subsequent chapter will be entirely dedicated to minors, evaluating to what extent the current legal architecture provides effective protection throughout the European migration system.

4.1 Key Steps on Migration Policies: from the Treaty of Amsterdam to the Treaty of Lisbon

The EU has been a major migration hub since the aftermath of World War II, but it was not until the establishment of the Single European Act (SEA) in 1986 that immigration entered the EU agenda as a shared policy issue. By enabling a borderless area based on the free movement of goods, persons, services, and capital, policymakers were prompted to develop common policies on migration-related areas to ensure a coordinated response to this growing phenomenon.

Only a year before, the Schengen Agreement was signed by seven states, namely France, West Germany, Belgium, the Netherlands, and Luxembourg, aiming to reduce internal border controls. This goal was pursued through a system of shared visa policies and asylum applications. Furthermore, the system would support the creation of the Schengen Information System to guarantee a constant exchange of information between law enforcement and judicial institutions of different countries. Actually, the Schengen Agreement did not enter into force until 1995. Shortly after its adoption, Italy, Spain, Portugal and Greece had joined the original members, with Austria, Denmark, Finland, Iceland, Norway and Sweden following soon after. In the following years, the Schengen Area extended to most EU countries and today it is composed of 29 countries, of which 25 are members of the European Union.

The introduction of the SEA and Schengen coincided with the political revolutions against communist regimes that broke out in Central and Eastern Europe, drastically increasing the number of people escaping to the EU. In light of these developments, the Luxembourg European Council of June 1991 reaffirmed an urgent need for greater EU competence on immigration policy issues and enhanced harmonization between measures on asylum, immigration, and aliens⁴⁸.

The Maastricht Treaty, signed in 1992, qualified asylum policy, rules for crossing and controlling external borders, and immigration policy (conditions of entry, movement, residence,

⁴⁸ European Commission, *Conclusions of the Luxembourg European Council*, 1991, Annex I.

family reunification, employment of foreigners, prevention of unauthorized immigration) as matters of “common interest”⁴⁹. Even so, migration was not regulated by the regular EU decision-making structure. Instead, it was assembled under the Third Pillar of the Maastricht Treaty, which was not subject to supranational decision-making⁵⁰. In other words, migration issues remained within the competence of Member States, and it was characterized by unanimous decision-making in the Council and an absence of parliamentary and judicial control.

A turning point in the harmonization of European migration policy was the Treaty of Amsterdam, which entered into force in 1999. The Treaty of Amsterdam transferred the Schengen framework from the intergovernmental Third Pillar mentioned above to the supranational First Pillar. In this way, the EU institutions obtained the power to adopt binding laws on migration dynamics. In detail, article 67 of Title IV of the Treaty allows the drafting of legal provisions on the matter through a specific institutional mechanism: a transnational five-year period following the entry into force of the Treaty with a shared right to initiative of the Commission and Member States and unanimous decision by the Council upon consultation with Parliament⁵¹. Also, the Court of Justice gained jurisdiction in specific instances. In this way, the Treaty of Amsterdam established a clear legal basis for the development of a common European migration and asylum policy in the following years.

Shortly thereafter, the European Council held an extraordinary meeting in Tampere on the area of freedom, security, and justice. On this occasion, the heads of state and government reaffirmed the importance of a shared policy in this area, focusing on four milestones, namely (1) a common European asylum and migration policy; (2) a genuine European area of justice; (3) a unionwide fight against crime; (4) stronger external action.

As a result of the meeting, the 1999 Tampere Conclusions⁵² effectively referred for the first time to the concept of a Common European Asylum System (CEAS), clarifying that it was a shared opinion within the European Council to “work toward establishing a Common European Asylum System, based on the full and inclusive application of the [Refugee] Convention and its Protocol⁵³”. In its original formulation, the CEAS was intended to directly regulate several aspects of the discipline of asylum in the EU, extending far beyond the aspects managed by the Refugee Convention. Indeed, the System should have included for main provisions in the short term: a clear and workable determination of the State responsible for the examination of an asylum application; common standards for a fair and efficient asylum procedure between MS; common minimum

⁴⁹ A. Wiesbrock, *The Evolution of EU Migration Policies: Toward a Balanced, Comprehensive, and Common Approach*, in D.J. Besharov, M.H. Lopez, *Adjusting to a World in Motion: Trends in Global Migration and Migration Policy*, International Policy Exchange, New York, 2016, ch. 8, pp. 159-187.

⁵⁰ European Parliament, *The Maastricht and Amsterdam Treaties*, 2025. https://www.europarl.europa.eu/ftu/pdf/en/FTU_1.1.3.pdf

⁵¹ EEC Treaty, art. 67.

⁵² European Parliament, *Presidency Conclusions*, Tampere, 1999.

⁵³ *Ibid.*, par. 13.

conditions of the reception of asylum seekers throughout the EU; and the approximation of rules on the recognition and content of the refugee status. Moreover, the CEAS was also intended to include measures on subsidiary forms of protection. On the occasion of the Tampere Conclusions, the European Council also stressed the importance of consulting international organizations such as the UNHCR in matters regarding asylum. Paving the way to the first phase of the CEAS, the Tampere Conclusions were based on the commitment to adopt a common procedure and a uniform refugee status, effective throughout the Union. In addition, they emphasized the necessity to adopt rules on subsidiary and temporary protection for displaced persons based on solidarity between Member States.

Accordingly, the EU enacted several measures with particular attention to determining which Member State is responsible for processing a non-European asylum application (replacing the 1990 Dublin Convention). To support asylum procedures, the Eurodac database was established to store fingerprint data. Further provisions concerned the conditions of entry and residence of legal and illegal immigrants, the definition of minimum standards of reception, the status of refugees and related procedures, the qualification for international protection and the nature of the protection granted, and lastly, the procedures for granting and withdrawing refugee status.

The Treaty of Nice in 2003 enriched the EU legislation in the field of migration policy. The main documents of this stage were the Dublin II Regulation⁵⁴, which replaced the previous one in all EU Member States except Denmark, and the 2005 Hague Programme, which highlighted the need for cooperation in the protection of migrants under the 1951 Geneva Convention but also focused on settling migration flows, particularly in relation to the fight against cross-border crime⁵⁵.

In November 2004, the Hague Programme had called for additional instruments and measures to be adopted by the end of 2010, highlighting the EU's ambition to go beyond minimum shared standards in migration policy. This aim was achieved by the 2009 Treaty of Lisbon that inserted the area of freedom, security, and justice in Title V of the TFEU. The Lisbon Treaty put an end to the so-called "pillar structure" bringing all justice and home affairs matters together. With this change, decisions are primarily adopted jointly by the Council and the European Parliament through the ordinary legislative procedure, with qualified majority voting serving as the prevailing rule. Under Title V, the Commission obtained exclusive right of legislative initiative, and the ECJ eventually received full jurisdiction in respect of almost all matters of justice and home affairs.

After these improvements, the EU has consistently enacted five-year programs to enrich its immigration and asylum legal framework. Gradually, EU policies have acquired a security-based

⁵⁴ Reg. EC 2003/343.

⁵⁵ M. Gladysz, V. Sychov, *The Influence of the Migration Crisis of 2015 on the EU Migration Policy in Studia Europejskie – Studies in European Affairs*, Vol. 24, Issue 3, 2020, p. 14.

orientation, shifting the focus to combating irregular migration, deterrence, and border controls. The aftermath of the terrorist attacks in New York on September 11, 2001, the attacks in Madrid on March 11, 2003, and the major unrest due to the Arab Spring in 2010 clearly played a major role in the adoption of more restrictive norms. Indeed, the Stockholm Programme adopted by the European Council for the years 2010-2014 emphasized the need to tackle security concerns while ensuring respect for fundamental rights and freedoms. With this final purpose, it aimed at combating illegal immigration, cross-border crime, and maintaining a high level of security.

4.2 Policy Developments after the 2015 Migration Crisis

The aftermath of the Treaty of Lisbon unfolded during the 2008 financial crisis and the 2015 migration crisis, which had immediate outcomes in EU migration policy. Given the widespread economic hardship, EU Member States were more reluctant to extend cooperation on migration issues. Yet, the intensity of the migration influx, and especially the plight of thousands of migrants risking their lives to cross EU borders, has exposed the limitations of unilateral responses, urging the need for a stronger collective strategy. In May 2015, the European Commission published the European Agenda on Migration to address both the immediate and the long-term challenges to manage migration more effectively. This renewed framework focused on four pillars: the reduction of the incentives for irregular migration, border management, a strong common asylum policy to be implemented coherently, and a new policy on legal migration⁵⁶. Overall, it provided humanitarian responses to emergencies and displayed the way forward for future improvements. To this end, the operational capacity of Frontex was expanded through Regulation 2016/1624 of the European Parliament and Council, which renamed it as the European Border and Coast Guard Agency (although it continues to be commonly referred to as Frontex).

Consequently, the EU Heads of State and Government agreed on several urgent actions, including the deployment of the Frontex-coordinated operations Triton and Poseidon, to be implemented respectively in the Mediterranean and Aegean Sea to control irregular migration and tackle cross-border crime. With this final purpose, these operations also tried to restore the level of maritime intervention previously provided by the ‘Mare Nostrum’ operation launched by the Italian government in 2013.

The new framework was strengthened in October 2015, when the European Commission announced the establishment of several ‘hotspots’ in Italy and Greece where the joint action of the European Asylum Support Office (EASO), Frontex, and Europol would assist the authorities of

⁵⁶ European Commission, *Managing migration better in all aspects: A European Agenda on Migration*, 2015. https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_15_4956/IP_15_4956_EN.pdf

frontline EU Member States bearing a disproportionate burden⁵⁷. The core idea was to have the three agencies work complementarily, with EASO helping to swiftly process asylum cases, Frontex supporting the return of irregular migrants, and Europol assisting the host Member State with investigations to dismantle the smuggling and trafficking networks⁵⁸.

Notwithstanding the far-reaching commitment by European and national institutions, the migratory pressure exceeded the available resources to provide sufficient support. The Dublin system was often ignored in the Mediterranean area, countries on the EU's Southern and Eastern borders essentially became transit countries, often neglecting even to register migrants traveling through. Border controls shifted inwards, and six out of the 22 Schengen members had reintroduced border controls by March 2016. Striving to tackle migration effectively, the EU and its Member States have diversified their migration policy tools, both within their borders and beyond. As migration has risen to the top of both domestic agendas and foreign affairs, the 'external dimension' of migration policy has gained salience⁵⁹. The EU adopted an externalization approach through traditional agreements or soft law measures with third countries to deter the influx of migrants, refugees, and asylum seekers⁶⁰. This approach involves the engagement with countries of origin and transit to outsource border controls, asylum processing, and return operations. Starting with the EU-Turkey Action Plan and EU-Turkey Statement in 2015 and 2016, continuing with the EU-Tunisia Memorandum of Understanding in 2023, and then the EU-Mauritania Joint Declaration and EU-Egypt Strategic and Comprehensive Partnership in 2024, externalization within the EU migration policy has gradually gained predominance among EU policymakers.

Although a detailed examination of all agreements exceeds the scope of this study, they all converge around an important aspect: the diffusion of responsibility that complicates accountability when human rights abuses occur. As the EU cedes control to external actors, it diminishes its own authority and influence, thereby weakening its position on the global stage⁶¹. In addition, the agreements with third countries rarely contain criteria demanding respect for the right to non-discrimination and *non-refoulement*, or safeguards against unlawful and arbitrary detention⁶².

⁵⁷ Directorate General for Internal Policies, *Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and of Greece*, Brussels, 2017, ch. 3.

⁵⁸ F. Willermain, *The European Agenda on Migration, One Year on. The EU Response to the Crisis Has Produced Some Results, but Will Hardly Pass Another Solidarity Test*, Royal Institute for International Relations, Brussels, 2016. https://www.egmontinstitute.be/app/uploads/2016/10/IEMed_MedYearBook2016_Europe-Migration-Agenda_Fabian_Willermain.pdf

⁵⁹ M. Gladyshev, V. Syrov, *The Influence of the Migration Crisis of 2015 on the EU Migration Policy* in *Studia Europejskie – Studies in European Affairs*, Vol. 24, Issue 3, 2020.

⁶⁰ Z. Raptis, *Rethinking Solutions: The Role of Third-Country Agreements in Europe's Migration Crisis*, Hellenic Foundation for European and Foreign Policy, Athens, 2025.

⁶¹ S.F. Nicolosi, *Externalization of Migration Controls: A Taxonomy of Practices and Their Implications in International and European Law* in *Netherlands International Law Review*, Vol. 71, 2024, pp. 1-20.

⁶² F. Cetti, *Border Controls in Europe: Policies and Practices Outside the Law* in *State Crime Journal*, Vol. 3, No. 1, 2014, pp. 4-28.

Therefore, the actual benefits of outsourcing migration control must be balanced with an increased risk of human rights violations, heightened vulnerability to coercion, and the legitimization of a dangerous deterrence-focused stance on migration control. Overall, as the will of the States to reduce the number of migrants is often done at the expense of fundamental rights, externalization should not be considered a long-term solution.

4.3 Other Relevant Legal Instruments and Principles in Migration and Asylum Policy

A comprehensive understanding of the EU's migration and asylum framework requires a final section dedicated to two significant legal instruments and core principles that have shaped the Union's approach.

The first is the principle of *non-refoulement* contained in the 1951 Convention relating to the Status of the Refugees (commonly referred as the 1951 Geneva Convention). This principle has become a cornerstone of the protection system for refugees and asylum seekers at the global level. Although the Convention is an international treaty adopted under the United Nations framework and is therefore not formally part of EU law, it has been individually ratified by all EU Member States. The principle of *non-refoulement* is also reflected in EU primary law, notably in article 19(2) of the Charter of Fundamental Rights of the European Union⁶³ and in article 78(1) of the Treaty on the Functioning of the European Union⁶⁴. Furthermore, the principle is indirectly incorporated in EU law through secondary legislation, such as the Qualification Directive (2011/95)⁶⁵ and the Asylum Procedure Directive (2013/32)⁶⁶, thereby reinforcing its legal authority within the EU acquis. The second is the Dublin Regulation, an internal provision focusing on the criteria to determine responsibility for asylum claims. Generally, responsibility is assigned to the country of first entry, leading to disproportionate pressure on border countries and significant deficiencies in migration and asylum management.

This section will first analyze the constitutional implications of the principle of *non-refoulement* expressed in the 1951 Geneva Convention, focusing on its application within EU migration policy. Secondly, it will examine the evolution from the 1997 Dublin Convention to the 2013 Dublin Regulation, highlighting the various reforms applied to enhance its efficiency.

⁶³ CFREU, art. 19(2): "No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment".

⁶⁴ TFEU, art. 78(1): "The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties".

⁶⁵ Dir. EU 2011/95, art. 21(1): "Member States shall respect the principle of *non-refoulement* in accordance with their international obligations".

⁶⁶ Dir. EU 2013/32, Annex I: "Respect for the *non-refoulement* principle in accordance with the Geneva Convention".

4.3.1 The Principle of *Non-Refoulement* and its Implications within the EU Framework

The principle of *non-refoulement* has been defined in many international refugee instruments, both at the universal and regional levels. At the universal level, the most important provision in this respect is article 33 of the 1951 Convention relating to the Status of the Refugees⁶⁷, which holds that: “No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” This principle represents the foundation of the refugees’ protection system, embodying a humanitarian obligation to be universally respected. Under international human rights law, *non-refoulement* is included in various instruments. In particular, it is explicitly expressed in article 3 of the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) and article 16 of the International Convention for the Protection of All Persons from Enforced Disappearances (ICPPED).

At the regional level, particularly within the European framework, the principle is enshrined in article 19 of the Charter of Fundamental Rights of the European Union which reflects its core idea. Specifically, the article affirms that refoulement is prohibited whenever there is a serious risk of death penalty, torture or other inhuman or degrading treatment or punishment. In addition, although the ECHR does not explicitly mention the prohibition of *refoulement*, the principle is traditionally inferred from the text of article 3 of the Convention concerning the prohibition of torture and inhuman or degrading treatment or punishment. Likewise, the jurisprudence of the European Court of Human Rights has repeatedly interpreted article 3 to guarantee a high level of protection for refugees who risk or have been exposed to *refoulement*.

On the whole, the inclusion of the principle of *non-refoulement* in various international instruments, which have been ratified by a very high number of States, and its general recognition as a cornerstone principle of both refugee and human rights law, has led to its acceptance as a norm of customary international law.

With regards to its application, the principle of *non-refoulement* applies to every person subject to a state’s jurisdiction, including all migrants, irrespective of their status and regardless of whether the person has entered the State regularly or not⁶⁸. Accordingly, although States have sovereignty to manage their borders and to regulate the entry, stay, and exit from within their territory, they must fulfill their obligations with regard to the protection of all individuals within their jurisdiction, irrespective of their migration status. Therefore, it can be assumed that States cannot

⁶⁷ The 1951 Refugee Convention was approved at a special United Nations conference on 28 July 1951, and it is currently ratified by 143 States. It provides the most comprehensive codification of the rights of refugees at the international level, underpinning paramount principles such as non-discrimination, non-penalization and non-refoulement.

⁶⁸ International Organization for Migration, *IML Information Note on The Principle of Non-Refoulement*, 2023.

https://www.iom.int/sites/g/files/tmzbd12616/files/our_work/ICP/IML/2023-updated-impl-information-note-on-non-refoulement.pdf

push back any individual at their borders, as they would be considered under their control. Alternative solutions, such as the referral of an individual to a safe third country or the provision of effective protection outside the territory of the host State (for example in a state's embassy), may be considered in accordance with the aforementioned international obligations.

In view of this legal configuration, the European Union does not appear to fully guarantee the effectiveness of the principle, notwithstanding its affirmation in various texts of Union law, but also in instruments of international law (of which EU Member States are parties). Indeed, it can be observed that the principle has encountered a decline in its practical implementation, particularly since the 2015 Migration crisis.

As previously mentioned, States are increasingly leaning toward an externalization of migration policy. This implies a resort to mechanisms that allow them to deport migrants to a recognized "safe third-country" or "safe country of origin", with the aim, among others, of no longer being bound by the principle of *non-refoulement*. The recognition is a matter of national law; thus, each member state can define the list of third countries that it considers safe. This practice results in indirect *refoulement*, insofar as States put the burden of examining an application for international protection on another State, once the application has been submitted on its own territory⁶⁹. In doing so, the primary responsibility of the state in which the claim is lodged to provide protection is not respected. Consequently, asylum seekers can be expelled to places where the likelihood of harm to their life or freedom on any grounds of the Geneva Convention is considerably higher.

However, States must consider several criteria before defining a third country as 'safe', hence able to take responsibility for examining the application. According to article 38 (1) of the Directive 2013/32, the third country must have a connection with the applicant, respect the principle of *non-refoulement*, and allow the applicant to be granted refugee status and protection in compliance with the Geneva Convention. In addition, the implementation of the concept of "safe third country" is subject to an individual examination of the respect of these criteria for each asylum seeker and shall not be considered in general terms⁷⁰.

A noteworthy example is the classification of Turkey as a safe third country declared by the Greek Council of State following the EU-Turkey joint statement of 17 March 2016 to reduce migration fluxes via the Greek islands. The declaration established that migrants from Turkey who are present on European territory but are not in need of international protection are to be readmitted to Turkish territory. In exchange, the EU would have granted the liberalization of EU visa

⁶⁹ N. Jeanty, *How Effective Is the Principle of Non-Refoulement in Europe Today?* Generation for Rights Over the World, 2022. https://www.growthinktank.org/wp-content/uploads/2022/01/How-effective-is-the-principle-of-non-refoulement-in-Europe-today_.pdf

⁷⁰ Dir. EU 2013/32, art. 38(1).

requirements for Turkish citizens, financial aid, and a resettlement programme for Syrians from Turkey to the EU⁷¹.

Nevertheless, organizations such as Amnesty International and Human Rights Watch have provided evidence that Turkey has breached the principle of *non-refoulement* to a large extent by deporting Syrians back to Syria, shooting at Syrians who wanted to enter the country, and returning hundreds of asylum seekers to Afghanistan, Iraq and Syria without due access to asylum or to an effective remedy. Furthermore, no independent organization was tasked to monitor the human rights situation of returned individuals, allegedly leading to additional violations.

The effectiveness of the principle of *non-refoulement* has also been undermined by other migration agreements. This is notably the case of the agreements concluded between Italy and Libya. It is important to highlight that while Libya has signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted in December 1984 by the General Assembly of the United Nations), it has not signed the 1951 Geneva Convention. The principle of *non-refoulement* is therefore not recognized, nor does any legislation exist recognizing refugee status in Libya.

Particular attention is addressed to the 2017 agreements that set up “temporary reception camps” to receive migrants intercepted and returned to Libyan territory after having crossed it. Over 25,000 migrants have been forcefully returned to Libya, where they face poor reception conditions, arbitrary detention and unnecessary widespread violence⁷². In this context, Italy has been highly criticized for having delegated asylum practices to a country that clearly does not respect *non-refoulement* standards under European and international law.

In practice, the principle of *non-refoulement* appears to be continuously weakened on multiple fronts. The EU prefers to allocate much higher resources to border management, rather than improving refugee protection within and outside its borders. This stance is also pursued by Member States that outsource migration tasks to an alleged “safe-third country” so as to deter inflows and safeguard national security and cultural integrity. Therefore, the common European asylum policy has seen a radical departure from the commitment made in Tampere in 1999, which aimed to establish a shared policy based on the full application of the Geneva Convention, in order to ensure that adequate protection is always guaranteed.

⁷¹ Revue Migrations Forcées, *The EU-Turkey Deal : What Happens to People Who Return to Turkey ?* 2017. <https://www.fmreview.org/fr/resettlement/tunaboynu-alpes/>

⁷² J. Caye, *Refoulements illicites vers la Libye, comment punir les Etats responsables?* 2020. <https://blogs.letemps.ch/jasmine-caye/2020/08/20/refoulements-illicites-vers-la-libye-comment-punir-les-etats-responsables/>

4.3.2 The Dublin System: Objectives and Reforms

The Dublin system is currently based on the Dublin III Regulation (Regulation 604/2013) and governs the allocation of responsibility for asylum applications among 32 States, the 28 EU Member States plus the four EFTA “associate” States (namely Iceland, Liechtenstein, Norway, and Switzerland). Although its legal foundations and geographical scope have changed over time, its basic features have remained essentially the same. The principal aim of the system is to guarantee that every third-country national seeking asylum in the Dublin area has swift access to status determination, while preventing each asylum seeker from pursuing multiple claims in several MS.

The first paramount document of the Dublin System is the Dublin Convention. The Convention was negotiated in 1990, taking the form of an intergovernmental treaty signed by the 12 Member States of the European Economic Community and entered into force on 1 September 1997. It was a response to the implementation of the Schengen Agreement, which had led to the abolition of internal border controls between participating states. Within a borderless area, asylum seekers could easily move around borders, which gave rise to disputes over responsibility for processing their applications. Therefore, the Convention aimed at facilitating the responsibility-allocation and the processing of applications through established criteria. In addition, two other important purposes were: (1) to prevent delay in protection in case no Member State claimed responsibility and (2) to eradicate the possibility of “asylum shopping”, which refers to asylum seekers applying for asylum in the country perceived as the most favorable⁷³.

Despite the established goals, the Dublin Convention soon revealed structural flaws. It created an overwhelming disparity between reception systems across the EU, with frontier countries being significantly disadvantaged. The limited implementation of the Dublin criteria failed to create a truly harmonized and efficient European policy. Moreover, the system completely bypassed the relevance of the applicants’ preferences regarding their country of destination, where they might have social or economic links that would facilitate integration⁷⁴.

In 2003, the Dublin Regulation 243/2003 (Dublin II) replaced the Convention. All EU Member States, except Denmark, acceded to Dublin II. The Regulation was enacted to accelerate the determination of responsibility, in order to ensure that all asylum claims received substantive examination. To this purpose, it introduced the use of Eurodac (established by the Council Regulation 2725/2000), which is a database of fingerprints of asylum applicants who have entered the Schengen Area⁷⁵. Essentially, Dublin II redefined the hierarchy of criteria for responsibility, prioritizing family

⁷³ J. Mitchell, *The Dublin regulation and systemic flaws*, University of San Diego, San Diego, 2016, p. 295.

⁷⁴ K. Hailbronner, D. Thym, *Legal Framework for EU Asylum Policy* in K. Hailbronner, D. Thym, *EU Immigration and Asylum Law. Commentary*, 2nd edition, 2016, pp. 1023-1053.

⁷⁵ Reg. EU 2003/243.

unit, particularly to strengthen guarantees for minor migrants; followed by legal residence status, and the country of first entry, with the overarching aim to distribute responsibility more fairly. The objective criteria are to be applied in the order in which they are presented in the Regulation and on the basis of the situation existing when the asylum seeker first lodged his/her application with a Member State.

Particular attention should be paid to the first criterion as it concerns unaccompanied minors, to whom the following chapter is utterly dedicated. Within the Dublin II framework, article 6 of the Dublin II Regulation assesses that the Member State that should take responsibility for an unaccompanied minor is the one in which a family member of the latter resides, provided that this is in the best interest of the minor. In the absence of a family member, the asylum claim will be determined in the country where the minor applied. Yet, as it will be analyzed in Chapter 2, practical protection substantially detaches from legal provisions. Minors have been refused asylum and returned to their original country or to a so-called safe-third country⁷⁶, the classification of which is entirely subject to the discretion of each Member State.

The Dublin II Regulation was thereafter supplanted by Regulation 604/2013, commonly known as the Dublin III Regulation, which became effective in January 2014. This Regulation clarified the hierarchy of criteria and established a warning mechanism against potential deficiencies within Member States' asylum systems. The most important novelty was the prohibition of the transfer of asylum seekers to states with "systemic flaws," in their asylum and reception conditions that could expose the applicant to a risk of inhuman or degrading treatment.

In this context, a State may choose *not* to transfer an applicant to the responsible state and claim responsibility over the application, or it may request that another state take charge of the applicant based on family reunification or humanitarian grounds, even when it would not otherwise be responsible under the Dublin criteria. However, under article 17 of the Dublin III, these discretionary clauses are precluded to the extent that the state called to take responsibility could expose the applicant to a risk of inhuman or degrading treatment, given certain systemic flaws in its asylum and reception procedure⁷⁷.

This exception to the Dublin criteria, codified for the first time in Dublin III, stems from the ECtHR and ECJ jurisprudence. Both courts have held that a Member State's ability to transfer an asylum seeker under the Dublin Regulation is not absolute when such transfer would violate the state's *non-refoulement* obligation⁷⁸. This obligation, enshrined in the Treaty on the Functioning of the European Union, in the Charter of Fundamental Rights of the European Union, and in the

⁷⁶ UNHCR, *The Dublin II Regulation: A UNHCR Discussion Paper*, Brussels, 2006.

⁷⁷ Reg. EU 2013/604, art. 17.

⁷⁸ F. Maiani, *The Reform of the Dublin III Regulation*, Directorate-General for Internal Policies, Brussels, 2016.

European Convention on Human Rights, prohibits sending individuals to countries where they would face serious harm.

Other amendments included an extension of the scope of “family members” to include married minor children and their parents. It was also specified that a third-state, in order to be held responsible for an application, must be “a safe third country” as defined by the laws on asylum procedures. Lastly, procedural rights such as right to information and to a personal interview have been added.

Despite the adjustments, the Dublin legal framework still presents weaknesses in its implementation, resulting in overall inefficiency. The increasing number of migrants, especially in the aftermath of the 2015 migration crisis, placed the system under an unbearable pressure and compromised its ability to provide adequate protection. The main cause of failure is connected to the allocation-schemes which inherently entail an unfair distribution and neglect of the asylum seekers’ requests. Besides the different likelihood of being the country of first-entry, Member States do not have common standards of reception and significantly vary in resources to invest in asylum protection. Likewise, cooperation among MS remains scarce, especially in terms of financial aid and administrative resources. In this context, in-depth security checks, externalization policies and a meticulous bureaucracy aggravate the system’s efficiency at the expense of the asylum seekers⁷⁹.

Due to these issues, on May 4, 2016, the European Commission promoted three proposals to reform the asylum and reception system. One of the proposals (henceforth the Dublin IV proposal) intended to amend the Dublin System, enhancing its performance. Among the amendments, the Commission envisaged the creation of a corrective allocation mechanism. This mechanism would aim at rendering the burden-sharing fairer among the Member States. In detail, if one country receives applications exceeding 150% of its reference number, all further new applicants will be relocated to another EU country. The reference number is based on two criteria with equal weighting: population size and GDP⁸⁰. A Member State can temporarily opt out of the reallocation; in that case, a solidarity contribution of €250 000 per applicant would have to be paid to the Member State to which the person is allocated instead.

In addition, the recast entailed new admissibility assessments to be conducted before the Dublin criteria are applied. The Regulation seeks to establish an obligation (not a possibility) for the Member State of application to check whether an application is inadmissible, on the grounds that the applicant comes from a first country of asylum or a safe third country. This new obligation would reinforce the EU’s approach of relying on third countries to curb irregular movement⁸¹.

⁷⁹ S. Fratzske, *Not Adding Up: The Fading Promise of Europe’s Dublin System*, Migration Policy Institute, Brussels, 2015.

⁸⁰ T. Tubakovic, *The Dublin IV Recast: A Missed Opportunity*, Refugee Research Online, 2016.

⁸¹ *Ibid.*

Regarding human rights protection, the Dublin IV proposal included enhancements in certain areas, whereas others would face either regression or maintain the same unsatisfactory level. For example, the proposal encompassed stronger guarantees concerning asylum detention and its compatibility with the right to liberty and security, as well as the prohibition of torture, inhuman or degrading treatment, particularly with respect to transfers of vulnerable asylum seekers (i.e. unaccompanied minors)⁸². However, assessments based on individual circumstances are left outside the Dublin system, despite their growing recognition in the jurisprudence of the ECtHR.

On the whole, the Dublin IV Proposal was rejected by the same Member States asking for a reform of the status quo. Such a controversial response can be rooted in the widespread fear that the system would remain unchanged in the long term, particularly during periods of high migration flows. Hence, the proposal raised concerns over human rights, given the failure of past similar mechanisms. Additionally, the solidarity contribution was perceived as a means to favor wealthier countries, rather than promoting a genuine sharing of responsibility⁸³. As a consequence, the proposal eventually failed to reach a joint agreement with countries.

At present, the Dublin system remains in constant evolution, reflecting the tensions between national interests, shared responsibility, and human rights obligations. The failure of the Dublin IV proposal underscores the difficulty of achieving consensus within the EU on migration and asylum governance, especially in times of increased migratory pressure. Moving forward, any sustainable reform will require a genuine commitment to solidarity in order to establish a real harmonized approach to protection standards and uphold the fundamental rights at the core of the Common European Asylum System.

⁸² B. Cuckovic, M. Lukic Radovic, *Dublin IV Regulation, The Solidarity Principle and Protection of Human Rights – Step(S) Forward or Backward?* In *Eu Law in Context – Adjustment to Membership and Challenges of the Enlargement*, 2018.

⁸³ C. Hruschka, *Dublin is dead! Long live Dublin! The 4 May 2016 proposal of the European Commission*, Bielefeld, 2016. <https://eumigrationlawblog.eu/dublin-is-dead-long-live-dublin-the-4-may-2016-proposal-of-the-european-commission/>.

CHAPTER II

Unaccompanied Minors and Separated Child Migrants in The European Union

The considerable scale of migration phenomenon has posed a complex challenge for the EU, testing its capacity to respond effectively. Whereas at the political level the debate on possible solutions to mass immigration is still ongoing, the consequences of a tardy EU reaction, the weaknesses of the legal framework and the lack of cooperation between Member States have had an adverse impact on vulnerable groups, specifically unaccompanied minors. Despite the strong defense of human rights promoted by the EU, the protection offered to minor migrant has been inconsistent and often not adapted to children's needs. In fact, children should be treated as children first, regardless of their migration status. However, their significant vulnerability is often overlooked and negotiated at the mercy of national security interests.

Nowadays, children and youth migrating have become a recognized part of today's global migration flows. Nevertheless, the migration of minors is framed as a new area of concern in policy debates, resulting in an underrepresentation of a critical issue. Often, children in migration face traumatic experiences throughout their journey, arrival and stay in the EU. Besides the unsafe conditions of travel, they risk becoming victims of different forms of exploitation, possibly even including human trafficking or recruitment by criminal networks. Furthermore, their rights may also be undermined by the EU's failure to guarantee adequate reception conditions, access to asylum procedures and protection from arbitrary detention and inhuman treatment.

Given the unparalleled challenge endured by children in migration, EU policies have started addressing the various scenarios they might experience – both positive and negative. In fact, independent child migration is not necessarily a damaging experience, but rather a multifaceted phenomenon. Children can be actively involved in the decision-making process regarding their future, including the decision to continue their education, to work, or to combine both. Nonetheless, policy responses to support these minors are fragmented and inconsistent, and the lack of subject-specific expertise is a persisting problem.

Within this chapter, the EU system will be studied focusing on the protection and legal guarantees that it provides to unaccompanied and separated children involved in migration. Intending to contribute to a clearer understanding of this particularly vulnerable category of migrants, it will examine their legal status and display the fundamental rights and the substantial and procedural guarantees that shall be safeguarded within the European Union. To this end, potential flaws in the system will be highlighted, particularly in light of the recent Pact on Asylum and Migration, adopted

in 2024, whose objective is to ensure a more effective management of migration dynamics while strengthening safeguards for vulnerable groups, especially minors.

1. Legal Definitions and Categories: Unaccompanied Minors and Separated Children

To correctly address the current situation of minors within EU migration, it is first necessary to provide a clear definition of a child or minor under international law. For clarification purposes, these terms are generally considered synonyms. The most prominent definition is provided for by the Convention on the Rights of the Child (CRC), adopted by the United Nations on November 20th, 1989. The Convention explains the meaning of child in article 1 by stating that: “For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”.

On this basis, international instruments of soft law distinguish between two categories: unaccompanied minors and separate children. In particular, the General Comment No. 6 on the Treatment of Unaccompanied and Separated Children outside their Country of Origin (adopted by the UN Committee on the Rights of the Child in 2005) defines unaccompanied minors as: “children, as defined in article 1 of the Convention, who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.”⁸⁴ The document also defines separated children as “children, as defined in article 1 of the Convention, who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members.”⁸⁵ However, other adult family members are not necessarily able or suitable to assume responsibility for the care of the children. In practice, these two categories are generally treated equally and given the same protection and special assistance, if not otherwise specified. Such an undisputed application of the unaccompanied minors regime is rooted in the absence of a specialized framework for separated minors that properly defines their differentiated status and the precise nature and scope of the relationship between the minor and accompanying adult⁸⁶.

The EU aligns its policies and definitions with the guidelines and principles set out by instruments adopted within the United Nations. Although EU’s primary law does not explicitly define minors, the Charter of Fundamental Rights of the European Union devotes article 24 to children, recognizing that they are entitled to protection and that their best interests must be a primary

⁸⁴ CRC/GC/2005/6, par. 7.

⁸⁵ *Ibid*, par. 8.

⁸⁶ E.W. Petit De Gabriel, *Separated Minors or the Dilemma Between General and Individual Interest in Migration Law Compliance*, Jean Monnet Network on EU Law Enforcement, 2022.

consideration. Furthermore, all EU Member States are parties to the Convention on the Rights of the Child, hence bound to respect all the rights and principles set forth therein. In addition, precise definitions on this matter are provided within the legal instruments composing the Common European Asylum System.

In this framework, a minor is defined as a third-country national or stateless person below the age of 18 years. An unaccompanied minor is a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her, whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person. This definition also includes minors who are left unaccompanied after entering the territory of an EU Member State. Interestingly, the EU asylum acquis does not provide any definition for separated children; hence, the UNHCR's definition is the one that best clarifies this peculiar category.

Furthermore, under the CEAS, the assumption of being an unaccompanied child does not change if the child arrives on the territory of the MS together with an underage or adult sibling, an underage or adult partner/spouse, and/or any family member, relative or unrelated adults who are not responsible for them whether by law or by the practice of the MS concerned.

In addition to legal definitions for unaccompanied minors, the CEAS instruments also contain a range of substantial and procedural guarantees to be ensured to fulfill their special needs in light of their particular vulnerability. However, significant gaps remain in their practical implementation across Member States. As a matter of fact, there is differentiation even with respect to national definitions and recording practices concerning the age limit to be considered a minor and whether or not they are unaccompanied. The main difference regards the qualification of a minor through age assessment or self-claims. The former is the process by which authorities seek to establish the chronological age, or range of age, of a person to determine whether an individual is a child or not. The latter refers to a self-claim by an unaccompanied minor declaring that they are under the age of 18 and travelling without a responsible adult, but authorities have not confirmed their age or status. If the first approach is adopted, the risk of performing an incorrect age assessment is relatively high. As a result, minors may be deprived of the protection they are entitled to under the UN Convention on the Rights of the Child, as well as by the relevant regional and national instruments on the matter.

Another element of interest is the role of a guardian or legal representative in cases involving children travelling alone. In fact, in the absence of parents or primary caregiver, unaccompanied and separated minors should be appointed a guardian. The guardian's role and responsibilities have been comprehensively described at the United Nations level both in the CRC and in the General Comment No. 6 on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin. In these documents, the guardian is considered to be an independent person who safeguards the child's

best interests and general well-being, and to this effect complements the limited legal capacity of the child, when necessary, in the same way that parents do.

Similar definitions are provided by the EU legal framework, which recognizes the importance of guardianship and legal representation to promote the respect of the best interests of the child. Guardians are responsible for ensuring that the child's legal, social, medical, and psychological needs are met, in the child's best interests, during asylum and reception processes. Notably, in addition to the term 'guardian', the EU framework uses the terms 'legal' or 'other representative' and 'special representative' to describe the person appointed to assist and support unaccompanied children or children whose parents are precluded from exercising parental rights.

These legal distinctions are not merely semantic, as they entail specific safeguards a minor is entitled to. The following sections will explore the broad range of human rights challenges affecting unaccompanied and separated children in the context of migration. Characterized as being among the most vulnerable groups of migrants, unaccompanied and separated minors need respect, extensive assistance, and fulfillment of their fundamental rights. Under international law, these individuals are foremost seen and protected as children, rather than migrants. Therefore, the legal framework demands clear definitions to ensure that each minor involved in the migration process is granted the adequate protection they deserve.

2. The Precarious Status of Minors in the Context of Migration

Migration flows have experienced increasing numbers of children traveling alone or accompanied by their parents or their primary caregiver to flee from armed conflicts, oppression, or abuses of human rights. Recent estimates indicate that there are approximately 35.5 million international migrant children globally, and 17.5 million of them are child refugees or asylum seekers⁸⁷.

Europe is one of the primary destinations of migrant children, particularly those from regions experiencing conflict and instability like the Middle East, North Africa, and Sub-Saharan Africa, due to its geographical proximity and perceived opportunities. Data on child migrants are crucial to identify and address their needs, but currently present serious limitations due to high rates of illegal migration, inconsistent data collection, and different identification processes among EU Member States. This not only suggests that numbers are likely underestimated, but also that several undocumented minors remain largely invisible, hence excluded from protection mechanisms. In particular, those children arriving alone or without a responsible adult who do not enter an asylum claim, or who do not possess a visa and a regulated stay, seem to be invisible to data collection⁸⁸. For

⁸⁷ International Data Alliance for Children on the Move, *Data and Statistics for Children on the Move: Essential sources and good practices*, United Nations Children's Fund, New York, 2023.

⁸⁸ Global Migration Data Analysis Centre, *Child Migrants: How Little we Know*, IOM's Global Migration Data Analysis Center, Issue 10, 2017.

this reason, relatively accurate data on unaccompanied and separated minors is often related to asylum applicants or refugees.

According to Eurostat data, the share of first-time asylum applicants aged less than 18 years old in the total number of first-time asylum applicants was on average 28.9% over the period from 2014 to 2024, with a maximum value of 32.3% recorded in 2016 during the migration crisis. Over the same period, unaccompanied minors first-asylum applicants accounted for an average of 15.1%, with a maximum value of 24.5% recorded in 2015 and a minimum value of 7.5% in 2019. From 2016 onwards, a general downward trend was observed with a minimum value in 2020 (which may be mostly explained by the COVID-19 outbreak and the related introduction of movement restrictions and border closures). The number increased again from 2021 until 2023, with a slight decrease registered last year. In 2024, in fact, 234.670 first-time applicants aged less than 18 years were recorded; 15.9% were not accompanied. Within this number, Syrians and Afghans were by far the most represented citizenships of unaccompanied minors, with respectively 31.8% and 15.6% of the total⁸⁹.

These children are often alone, separated from their parents or their previous legal or customary primary caregiver and travel to Europe in search of better life opportunities to escape from harsh environments marked by deprivation or exploitation. In their journeys, both during and after migration, numerous threats might jeopardize their safety and their life. The scarcity of regular channels of migration increases the likelihood for unaccompanied or separated children to rely on smuggler networks to reach their desired destination. Besides the unsafe conditions of travel, they risk being engaged in sexual, economic or criminal exploitation and trafficking. Once they arrive, they might face discrimination and barriers to accessing basic needs like food, shelter, housing, health services and education. In certain situations, children are held in detention, which has devastating effects on their physical, emotional and psychological development⁹⁰.

With particular regard to children in precarious situations, the vulnerability of unaccompanied and separated minors is threefold. These children are indeed exposed to danger due to their minor age, their being migrants, and their being alone. It stands to reason that children are not as resilient as adults and are more susceptible to being hurt, as they have not yet reached physical or psychological maturity and lack experience in navigating society⁹¹. Moreover, the isolation from a protective family unit enhances the risk of disease and trauma in their growth. On the whole, given their vulnerability

⁸⁹ Eurostat, *Children in Migration - Asylum Applicants*, 2025. https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Children_in_migration_-_asylum_applicants.

⁹⁰ European Parliament, *Vulnerability of Unaccompanied and Separated Child Migrants*, Members' Research Question, 2024. [https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2024\)762339](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2024)762339).

⁹¹ UNICEF, *Vulnerabilities of migrant and forcibly displaced children* in International Organization for Migration, *Fatal Journeys Volume 4: Missing Migrant Children*, Geneva, 2019, ch. 2, p. 53. <https://data.unicef.org/resources/vulnerabilities-of-migrant-and-forcibly-displaced-children/>

rooted in their limited capacity for self-protection, their minimal experience in the world, and their consequential dependency on adults, they are more at risk of their freedoms and fundamental rights being infringed. For these reasons, children constitute a category of migrants that requires proper attention from both the legal and operational perspectives. In order to provide a comprehensive understanding of the challenges faced by minor migrants, it is useful to distinguish three critical phases of their migration experience: journey, arrival, and detention.

2.1 Reaching and Entering the EU

The first phase of the migration process is the journey to reach and enter the European Union, which is marked by extreme uncertainty and peril. Millions of children migrate across borders to join family members, flee from conflict and violence, or search for educational or employment opportunities and access to basic services. The scarcity of options for safe and legal mobility increases the likelihood that children take irregular migration pathways, relying on smugglers for their journey or migrating alone, which exposes them to highly unsafe travels and increases their vulnerability.

In 2020, more than 15,000 children were detected crossing the EU's external borders irregularly, and approximately 5,000 of them were unaccompanied by an adult responsible for them. Although the overall number of children found to be irregularly present in the EU decreased substantially in 2020, in 2022, the conflict in Ukraine and the subsequent mass displacement and chaos further deteriorated the situation⁹². Currently, there is a growing awareness that the clandestine movement of children is often invisible since accurate numbers remain unknown due to discrepancies in legal categories and complex bureaucratic practices. Nevertheless, it is possible to shed light on the uncertainties and challenges that unaccompanied minors face even before entering the European soil.

Several unaccompanied and separated minors embark on journeys that can last from weeks to months and are carried out in unsafe boats or overcrowded vehicles without any access to food, clean water, or medical care. Disconnected from family networks and completely dependent on smugglers, these children continuously face life-threatening conditions throughout their journey, both by sea and land. According to UNICEF, approximately 3,500 children have died or disappeared attempting to cross the Central Mediterranean route over the past 10 years⁹³, which is the equivalent of one child losing their life every day for a decade. While maritime fatalities are predominant, overland routes also present significant dangers, including deaths of children in overloaded trucks, cars, or trains in

⁹² European Parliament, *Children's rights in the EU in the light of the UN Convention on the Rights of the Child*, Members' Research Service, 2022. [https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2022\)738223](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2022)738223)

⁹³ UNICEF, *Approximately 3,500 children have died in the central Mediterranean over the past 10 years*, Geneva/New York, 2015. <https://www.unicef.org/eca/press-releases/approximately-3500-children-have-died-central-mediterranean-over-past-10-years>

the attempt to cross borders undetected. In many cases, especially when deaths occur at sea or in remote locations, the remains of the fatalities are never found. When they are, the lack of physical evidence can obstruct age identification. As a result, any death count is limited to an approximate estimation of the actual scale of this incessant tragedy.

Nearing the European external borders, challenges for these fragile individuals continue. Search-and-rescue operations frequently encounter operational and financial obstacles that delay disembarkation, thereby endangering the safety and physical integrity of the individuals on board. Migrants, including children, are stranded at sea for days in extremely precarious conditions, exposed to adverse weather and lacking essential care⁹⁴. Consequently, numerous children drown or perish due to dehydration, malnutrition, or health issues even before being granted access to the EU. For those who survive, criticalities persist on land, given that children must cope with the fear of being deported to authorities, language barriers, and social marginalization—factors that exacerbate the already traumatic nature of their migration experience⁹⁵.

Furthermore, children are also used by smugglers for different forms of exploitation. Migrant smuggling, a highly adaptive global criminal activity, is rapidly evolving into a key factor of irregular migration. Driven by poverty, social and political instability, as well as the limited availability of legal migration routes, migrant smuggling pushes people toward criminal networks to facilitate their unauthorized entry, transit or stay in the EU. Alternatively, among exploiters taking advantage of the children, are sometimes their own relatives who gain benefit in the form of social and/or family allowances. In fact, unaccompanied minors are sometimes sent as forerunners into the EU to trigger the family reunification process, although this process may turn into domestic servitude or other type of forced labor.

Due to the illegal paths taken by many children to reach the EU, the journey is often carried out with no safety measures or legal safeguards to appeal to. The loss of lives in the Mediterranean Sea, the Atlantic Ocean and the Western Balkan routes demonstrated the need for an assertive and urgent response from the EU to the life-threatening conditions minors are exposed to. In particular, over their migration experience, many children are subject to violence, harassment, or aggression at the hands of adults. Moreover, children who manage to enter the European soil often incur large debts to smugglers in return for being assisted in the illegal entrance. To settle these debts, children become victims of sexual exploitation, forced labor, or coercion into committing crimes⁹⁶. While certain

⁹⁴ European Union Agency for Fundamental Rights, *Children in Migration*, Publications Office of the European Union, Luxembourg, 2019. https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-children-in-migration_en.pdf

⁹⁵ International Organization for Migration, *Fatal Journeys Volume 4: Missing Migrant Children*, Geneva, 2019, ch. 1, p.4

⁹⁶ UNICEF, *Half a million children have risked exploitation as refugee and migrant crisis turns into big business for smugglers*, Geneva, 2016. <https://www.unicef.org/turkiye/en/press-releases/half-million-children-have-risked-exploitation-refugee-and-migrant-crisis-turns-big>

abuses are reported by both males and females, girls reported far more instances of trafficking, sexual exploitation, and forced prostitution both during their journey and after arrival.

The plethora of extensive risks that unaccompanied minors are exposed to in their migration experience is partially but undoubtedly due to the lack of rigidity of the bilateral agreements that European institutions sign with the countries of origin⁹⁷. As a matter of fact, neither of the counterparts is willing to assume responsibility for the migrants' conditions during their journey, hiding behind the "physical internationality" that the voyage assumes. While leaving their country of origin, transiting through international waters, and nearing European shores, in fact, migrants are left alone, unprotected by any respected norm and abandoned by institutions of both sides⁹⁸. This lack of responsibility, transparency, and will to assume control over such a tragic situation is obviously to be attributed to each counterpart. However, an advanced organization such as the EU, which rightfully takes pride in its thorough respect of human life and dignity, should not accept the toll of deaths of individuals at its external borders.

In summation, the perilous path that minors have to undertake in order to flee from violence, war, and other atrocities is riddled with extremely harsh challenges, which emerge even before arriving on the European shores. Children are forced to endure a spiral of violence and misery in continuation with the one they face in their country of origin, in the shallow hope that, at once, they will feel safe and protected in the European Union. Although EU authorities should take immediate action to diminish the threats to minors' lives, it is a common feature of many Member States' security policies to forsake any responsibility at this stage of migration. In other words, migrants who are physically still outside of the European borders do not represent a burden that the EU shall bear.

Having presented a brief but consistent overview of the dangers to which minors are exposed in their journey to the EU territory, the following paragraph will shift the focus to the second phase of the migration process. Specifically, it will delve into the risks, dangers, and vulnerabilities that characterize the moment of arrival and stay of unaccompanied and separated minors in the EU

2.2 Arrival in the EU

Upon arrival in the EU, unaccompanied and separated minors undergo several procedures regarding identification, age assessment and acceptance in the Member State of first entry. In this phase, many challenges may emerge in relation to the treatment received during the registration process, the conditions of reception facilities, and the special assistance that should be provided for children. If a

⁹⁷ C. Phuong, *Identifying States' Responsibilities toward Refugees and Asylum Seekers*, University of Newcastle, 2015. <https://esil-sedi.eu/wp-content/uploads/2018/04/Phuong.pdf>

⁹⁸ Y. Zarhloule, *Migrants at the Gate: Europe Tries to Curb Undocumented Migration*, Carnegie Endowment for International Peace, 2025. <https://carnegieendowment.org/research/2025/02/migrants-at-the-gate-europe-tries-to-curb-undocumented-migration?lang=en>

minor is eventually accepted in the responsible Member State, other challenges frequently arise concerning integration and inclusion into society from a social, educational and economic standpoint.

At first reception facilities, migrants go through initial screening and fingerprinting for identification. This procedure is essential for the application of asylum schemes and for data entry into the Eurodac system. It is of paramount importance that registration of a minor is performed correctly in order to provide the special protection and assistance measures children are entitled to. Nevertheless, issues regarding identity documents and age assessment are frequent. In many cases, unaccompanied and separated migrant children arrive in the EU without official documentation. This occurs either because it might have been lost over the course of their journey or because there are numerous countries that do not have proper systems to register births, along with other personal information. In other cases, even if the identity documents are available, the authorities of receiving countries do not take them into consideration. In such circumstances of absence or non-consideration of children's documents, migrant minors undergo domestic procedures for age assessment, which, numerous times, have proved to be detrimental to the protection of children's fundamental rights.

The non-consideration of children's identity documents stems from the fact that neither international nor European law establishes any duty to recognize certificates issued by countries of origin for countries of destination. Even though no such obligation exists, non-recognition of said documents has been challenged by the UN Committee on the Rights of the Child, which has repeatedly affirmed the inconsistency of said practice with human rights⁹⁹. This does not mean that receiving States are not allowed to perform age assessment procedures of migrant minors. In fact, this practice is necessary when reasonable doubts regarding age exist or in the absence of reliable documents. Nevertheless, these procedures should always be conducted in respect of the best interests of the child and in favor of the minority of the person, as affirmed by the presumption of minority principle (which affirms that a young person who presents themselves as a minor must be considered a minor until a final court ruling has been delivered)¹⁰⁰.

In the European framework, no common procedure to uniformly assess the age of children exists. Therefore, the specific methodology used to determine minority is a matter for domestic laws, which on this topic significantly differ from State to State. In some countries, this procedure is even regulated by non-binding guidelines, which can lead to arbitrary evaluation by immigration officers. The most common age-assessment methods involve intrusive medical tests, such as X-ray examinations or physical sexual maturity inspections. Both are deemed to be excessively intrusive

⁹⁹ A. Vettorel, *Challenges for the Protection of Migrant Children: The Right to Identity and the Age of Unaccompanied Minors Arriving at European Borders* in *European Journal of Migration and Law*, Vol. 26, 2024, pp. 502-526.

¹⁰⁰ European Economic and Social Committee, *The protection of unaccompanied migrant minors in Europe (own-initiative opinion)*, 2020.

and should be used only in a residual manner. In addition, the EASO has pointed out that radiation often has a margin of error of 2 years, which can severely affect the type of assistance provided to the alleged minor¹⁰¹. As for integral nude and genital inspections, they are considered to be in contrast with the right to dignity, integrity and privacy, and should be precluded for age assessment purposes.

Furthermore, the assessment procedures are frequently carried out without any assistance from a legal representative or by an interpreter. Frequently, the child is not clearly informed about the process and its consequences in a language and manner that they understand. As a result, the child is rarely in a position to provide his/her informed consent to the procedure. In addition, any procedure involving minor migrants should incorporate gender and cultural considerations, which might require differentiated treatments and privacy safeguards. Importantly, for cases in which an unaccompanied or separated minor refuses to take part in medical age testing, a decision to reject his or her asylum application should not be based solely on that refusal.

The EU has expressed concerns about the lack of a harmonized, holistic, and child-friendly model of age assessment and the consequences the different practices can have. For instance, the European Parliament Resolution 2018/2666 (issued on May 3rd, 2018) emphasized that reception procedures should be appropriate to the specific needs of the child and to their gender. Besides, the Council of Europe's Parliamentary Assembly (PACE) has addressed the situation of unaccompanied children in Europe in several resolutions. Some examples are Resolution 1810 (2011) "Unaccompanied children in Europe: issues of arrival, stay and return"¹⁰², Resolution 1996 (2014) "Migrant children: what rights at 18?"¹⁰³, and Resolution 2136 (2016) on harmonizing the protection of unaccompanied minors in Europe¹⁰⁴. In all documents, PACE called upon the European Union to adopt a common protocol for carrying out identification procedures in accordance with ethical, medical and legal principles in order to balance the divergent approaches and practices. Likewise, interest has been shown by the European bodies, particularly by the European Social and Economic Committee, in its opinion No. SOC/634 of 2020. As stated by the Committee, in the absence of a defined legal framework, the Member States face considerable difficulties in managing unaccompanied minors in compliance with the protection of the child that should be guaranteed¹⁰⁵.

¹⁰¹ European Union Agency for Fundamental Rights, *Age assessment and fingerprinting of children in asylum procedures*, Publications Office of the European Union, Luxembourg, 2018. https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-minimum-age-asylum-procedures_en.pdf

¹⁰² Parliamentary Assembly CoE, *Unaccompanied children in Europe: issues of arrival, stay and return*, 2011. <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17991&lang=EN>

¹⁰³ Parliamentary Assembly CoE, *Migrant children: what rights at 18?* 2014. <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20926&lang=en>

¹⁰⁴ Parliamentary Assembly CoE, *Harmonizing the protection of unaccompanied minors in Europe*, 2016. <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=23179>

¹⁰⁵ European Economic and Social Committee, *The protection of unaccompanied migrant minors in Europe (own-initiative opinion)*, 2020.

Within this framework, the chances of protection and assistance for minor migrants vary considerably from one country to another, thereby exposing them to serious violations of their rights. Certain procedures, notably those concerning identification and age assessment, can be traumatizing for children and may involve inhuman and degrading treatment. Also, if a child's age is disputed or if the child is pronounced an adult, immigration detention and removal are likely to become a reality. In such cases, the negative physical and psychological effects on children's health and development are far-reaching and lasting.

Beyond the issues concerning identification, migrant minors cope with a range of additional challenges that should be considered. A major problem across the EU, especially at hotspots in Italy and Greece, is the inadequacy of reception centers. The initial emergency care and assistance should temporarily provide essential goods such as water, food, and medical aid until durable solutions are found. For minors, these may include reunification with family (when possible) or custody by foster families. However, children often remain in hotspots for many weeks due to delays in transferring them to alternative government reception or care centers that should be better equipped for longer stays. Faced with continuous arrivals, reception facilities generally become severely overcrowded, marked by substandard living conditions and a significant shortage of child-specific housing options¹⁰⁶. Therefore, the widespread lack of reception capacity leads to reliance on emergency or unofficial accommodations, which raises significant concerns given the challenges in guaranteeing adequate reception conditions in such precarious settings.

This is particularly the case for the hotspot on the island of Lampedusa, which, in view of its official capacity of 389 places, has often accommodated much higher numbers of migrants in the course of 2022-2023, up to a maximum of over 3,200 people, 8 times its capacity, in February 2023. In this period, hundreds of men, women and children were forced to sleep outdoors at low temperatures. According to the Italian Association for Juridical Studies on Immigration (ASGI), which monitored and reported on situations of Italian hotspots, the center revealed serious shortages of food, clothing, running water, and power outages, causing severe health and hygiene issues¹⁰⁷. Likewise, the Greek hotspots present a similar situation. Testimonies gathered by the Greek Council for Refugees (GCR) from people living in the centers and civil society organizations revealed prison-like conditions, with children being held in enclosed environments situated in isolated areas that create a series of psychopathological consequences and reproduce social stigma¹⁰⁸. Minors are not

¹⁰⁶ The European Union Committee, *Children in crisis: unaccompanied migrant children in the EU*, House of Lords, 2017. <https://publications.parliament.uk/pa/ld201617/ldselect/lducom/34/34.pdf>

¹⁰⁷ ASGI, *Report Lampedusa 2022: le criticità*, Progetto InLimine, 2022. <https://www.asgi.it/inlimine/report-lampedusa-2022-le-criticita/>

¹⁰⁸ European Council on Refugees and Exiles, *Conditions in Reception Facilities: Greece*, Asylum Information Database, 2024. <https://asylumineurope.org/reports/country/greece/reception-conditions/housing/conditions-reception-facilities/>

given a dignified accommodation; instead, they are often forced to share rooms with unrelated adults, in unsanitary conditions and without appropriate measures for the protection of privacy.

The remoteness of the centers adds another level of discomfort as it drastically limits the possibilities for children to access formal education. During their time at reception centers, children either have access to very basic schooling or no access to the mainstream education system at all, even when their stay is prolonged. Beyond the limited or non-existent transportation services from the centers, there is a series of practical and administrative barriers to providing access to education. These include limited capacity within schools, the reluctance of schools to enroll a large number of foreign students, language barriers, financial and economic constraints, lack of proof of previous education or challenges in recognition, and an overall complicated enrollment process from an administrative and bureaucratic perspective¹⁰⁹. As a consequence, the right to education of most unaccompanied and separated children is significantly undermined in reception centers. The infringement not only compromises academic development, but it also severely reduces social interaction with people of similar age, which can affect the social and emotional growth of the children. In the long run, children deprived of access to the education system can face higher obstacles in achieving successful integration and entering the labor market.

The insufficient provision of access to education for minor migrants in reception centers is often related to inefficient guardianship systems across the EU Member States. Unaccompanied and separated minors should be appointed a guardian or a legal representative as soon as they are identified, independently of their nationality, residence or immigration status, in order to ensure that their rights and best interests are adequately safeguarded and considered in all processes and decisions concerning them¹¹⁰. Nevertheless, challenges in guardianship systems of several EU Member States persist¹¹¹. Providing guardianship for minors involves substantial costs, as it requires a considerable availability of qualified personnel and resources to safeguard the best interests of the child and the overall well-being until the child reaches the age of majority. Generally, there is an insufficient number of guardians compared with the number of unaccompanied and separated children entitled to one. This sometimes resulted in the appointment of guardians without the required skills or training, in a large number of children appointed to a singular guardian (hence preventing individualized

¹⁰⁹ European Council on Refugees and Exiles, *The Right to Education for Asylum Seekers in the Eu*, 2023. <https://ecre.org/wp-content/uploads/2023/03/Policy-Note-Accessing-to-Education-for-Asylum-Seekers-in-the-EU-March-2023.pdf>

¹¹⁰ Council of Europe and European Union Agency for Fundamental Rights, *Children in migration: fundamental rights at European borders*, 2023. <https://rm.coe.int/prems-162623-gbr-2050-children-in-migration-16x24-web-bat/1680add8c8>

¹¹¹ B. Heiderhoff, *A European Approach to Cross-Border Guardianship*, in S. Arnold, B. Heiderhoff, *Children in Migration and International Family Law*, Springer Nature, Cham, 2025.

support), or in children reaching majority before being appointed a guardian or a legal representative¹¹².

The scarcity of well-resourced guardianship systems might contribute to children going missing and their whereabouts being unknown. In many EU MS, the disappearance of migrant minors is an alarming trend, which highlights challenges in protecting minors in vulnerable situations across the continent. Without a guardian or legal representative, children are left completely alone in precarious conditions, at times even abusive, hence they are compelled to leave prematurely. According to the investigative journalism project, “Lost in Europe”, 51,433 migrant children have disappeared after arriving in European countries between 2021 and 2023, averaging nearly 47 disappearances daily¹¹³. They are considered missing when they are registered with state authorities and go missing from the reception/accommodation centers provided for them. In reality, the true number could be even higher, since a fair share of EU countries (including seriously invested States like France, Spain, Germany and Greece) do not gather any information on minors’ disappearances. Moreover, countries do not follow a standardized procedure of data collection, leading to discrepancies in the numbers¹¹⁴.

A major issue linked to unaccompanied minors’ disappearance is the frequent occurrence of unauthorized secondary movements, as many children attempt to irregularly reach other EU States other than the one of first arrival, in order to rejoin family members or hoping to find better integration opportunities. It follows that the application of the Dublin system can be hampered by a high number of unaccompanied minors absconding and going missing from state care, both in countries of first entry and destination. For this reason, a strengthening of European information systems that enables the cross-referencing and integration of information in all MS in cases of missing children can certainly be of great benefit. Besides, if the EU were to improve legal transfers of unaccompanied minors in promotion of the child’s best interests, a better adherence to formal protection procedures can be expected by unaccompanied minors¹¹⁵.

Indeed, once outside the official protection structures, these children are likely to become homeless, facing not only immediate dangers but also long-term exclusion. Notably, beyond the serious impact on affected children, it perpetuates cycles of poverty, inequality, and social instability¹¹⁶. Without access to safe housing and essential services, they are less likely to pursue

¹¹² European Union Agency for Fundamental Rights, *Guardianship Systems for Unaccompanied Children in the European Union*, Publications Office of the European Union, Luxembourg, 2022. https://fra.europa.eu/sites/default/files/fra_uploads/fra-2022-guardianship-systems-developments_en.pdf

¹¹³ E. Van Den Hof, *Data: Explained, Lost in Europe*, 2025. <https://lostineurope.eu/investigations/data-and-statistics-investigations/more-than-50-000-unaccompanied-child-migrants-have-gone-missing-after-arriving-in-europe>

¹¹⁴ For example, Poland does not distinguish between missing accompanied and unaccompanied minors, while Moldova does not gather any information regarding minors with an assigned legal representative.

¹¹⁵ ASGI and others, *Promoting the Legal Transfers of Unaccompanied Minors or Increasing the Number of Missing Children?* 2017. https://www.asgi.it/wp-content/uploads/2017/09/Unaccompanied-minors-in-the-Dublin-Reform_1.9.17.pdf

¹¹⁶ S. Barbu, S. Perez Barranco, *Homelessness among unaccompanied minors in Europe*, FEANTSA, Brussels, 2025. https://www.feantsa.org/public/user/Resources/reports/2025/unaccompanied_minors/Unaccompanied_Minors_in_EU.pdf

education or secure employment, thereby increasing their likelihood of long-term dependency on social systems.

In such conditions, many are exposed to even graver risks, such as falling victim of criminal organizations, trafficking, and sexual or labor exploitation¹¹⁷. Their dual legal status between legality and illegality, which is a typical characteristic of the unaccompanied or separated migrant situation, plays a decisive role in their involvement with criminal networks. Indeed, their lives are likely to be managed by a long and well-coordinated chain of transnational, national, and local organized criminal groups. Through deception, coercion, and abuse of children's vulnerability, their human rights are systematically violated by reducing them into slavery or servitude, forced labor, prostitution, pornography, and begging. As for girls, sexual slavery and the risk of rape are sometimes associated with other forms of trafficking, including, especially in some regions, child marriage and sale for forced marriage¹¹⁸. In the end, many at-risk minors escape from reception centers in search of better conditions, but ultimately live in extreme poverty, frequently on the streets and in exploitative situations.

In conclusion, the protection granted to unaccompanied and separated migrant minors after their arrival in the European Union does not appear to align with the special assistance they are entitled to. As has already been mentioned, children are a highly vulnerable category of migrants who deserve particular attention throughout the migration experience. Within the States' competences in migration matters, the best interest of the child should be a primary concern in any action relating directly or indirectly to children. In view of this, in case of conflicting interests, the protection of the child should override the interests of States in migration control. Yet, practice often diverges from principles. As a consequence, minor migrants continue to be subjected to a series of hurdles that can magnify the stress and the deleterious consequences of the migration journey.

A highly controversial practice in this regard is the detention of children for immigration purposes. Given the vulnerability of migrant children, to place such individuals in detention—often regarded as one of the most severe forms of coercive measures—is an action that requires careful assessment. Despite the multiple requests by several international organizations, such as the United Nations Committee on the Rights of the Child¹¹⁹ and the Council of Europe¹²⁰, to put an end to immigration-related detention of children, it remains in use in certain EU Member States. To enhance the analysis

¹¹⁷ European Council on Refugees and Exiles, *Asylum in Europe: the situation of applicants for international protection in 2023*, Asylum Information Database, 2023. https://asylumineurope.org/wp-content/uploads/2024/11/AIDA_Briefing_Asylum-in-Europe_2023.pdf

¹¹⁸ M. Pettoello-Mantovani and others, *Lost in Transition: The Issue of Vanishing Unaccompanied Alien Children in Europe*, European Paediatric Association, 2023. <https://www.jpeds.com/action/showPdf?pii=S0022-3476%2822%2901109-X>

¹¹⁹ United Nations General Assembly, *Ending Immigration Detention of Children and Providing Adequate Care and Reception for Them*, Report of the Special Rapporteur on the Human Rights of Migrants, 2020. <https://docs.un.org/en/a/75/183>

¹²⁰ PACE, *The Parliamentary Campaign to End Immigration Detention of Children*, 2018. <https://website-pace.net/web/apce/children-in-detention>

on the vulnerability of minor migrants, the following section is going to examine the risks posed by detention on the child, examining its legality under the international and European legal framework.

2.3 Detention of Children for Immigration-Related Purposes

The use of detention for immigration-related purposes increased in the last decade, especially in the aftermath of the 2015 migration crisis, which significantly amplified the scope and scale of migration. Despite being justified by states as an efficient instrument to preserve national security in the management of massive migration flows, detention remains a major source of exclusion, racism, and human rights violations. With specific reference to children, States have been stopping migrant minors either at their border or within the country itself, upon decision by a national authority. Then, children are deprived of their liberty for the time needed by authorities and judges to decide on their status and future placement. During this time, all efforts should be made to allow the continuous enjoyment of the fundamental rights of the child, in accordance with the Convention on the Rights of the Child and other relevant legal instruments offering similar protection. As soon as the presence of a minor becomes known to the authorities, an assessment should be made of the child's particular vulnerabilities, including from the standpoint of age, health, psychosocial factors, and other protection needs (even those deriving from violence, trafficking or trauma). Overall, children should only be held in centers designed to cater to their specific needs and staffed with properly trained personnel who can communicate in a child-friendly manner. That said, the child's immediate release from the detention facility and its placement in more appropriate care should be the primary aim.

From a legal standpoint, provisions regarding the detention of migrant minors can be found both in international and in European law. At the international level, article 37 of the Convention on the Rights of the Child provides that no child shall be deprived of his or her liberty unlawfully or arbitrarily. It also sets strict conditions underlining that "the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time¹²¹". In addition, there shall be a series of guarantees for children held in detention centers, such as the right to access legal assistance and to challenge the alleged unlawfulness of their detention before a competent, independent and impartial authority. In support of this provision, several UN human rights mechanisms consider immigration detention of children to never be in the best interests of the child and to always constitute a violation of their rights. In particular, the UN Committee on the Rights of the Child and the previous Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment have called on all states to cease the detention of children on the basis of their (or their parents') irregular immigration status,

¹²¹ CRC, art. 37.

and to establish alternatives in law and in practice which do not contravene the child's fundamental rights¹²².

Within the European legal framework, the Charter of Fundamental Rights of the European Union lacks specific rules on this matter, but the general protection of the right to liberty and security is enshrined in article 6. More specific provisions are provided for by EU secondary law, where the detention of children for immigration-related purposes is subject to significant limitations, but it is not expressly prohibited. The Reception Conditions Directive 2013/33 (article 11) and the Return Directive 2008/115 (article 16-17) recognize children as vulnerable persons who warrant detailed attention should detention occur. In 2024, the Reception Conditions Directive was recast by the 2024/1346 Regulation, which in article 13(2) affirms that “minors shall, as a rule, not be detained”. However, in the same article, the 2024 Directive affirms that in exceptional circumstances detention is allowed as a measure of last resort and after it has been established that other less coercive alternative measures cannot be applied effectively, and after detention is assessed to be in the best interest of the child. In detail, minors may be detained in two cases: (a) in the case of accompanied minors, where the minor's parent or primary care-giver is detained; or (b) in the case of unaccompanied minors, where detention safeguards the minor¹²³. Such detention must be for the shortest period of time possible and must be subject to the principles of proportionality and necessity. Although this test applies to everyone regardless of age, the parameters used for children are stricter in light of their particular vulnerability. If detention is deemed necessary and proportionate, children should be placed in institutions with staff and facilities that respond to the needs of persons of their age. In fact, children must be detained separately from adults and in accommodations that guarantee the possibility to engage in leisure activities appropriate to their age.

A similar framework is provided by the ECHR. Article 5(1) of the Convention protects the right to liberty and security and lists the specific cases which allow for a deprivation of liberty, in accordance with a procedure prescribed by law. While the Convention does not contain specific provisions for the detention of children, the ECtHR applies a particularly strict test when examining cases of children detained for immigration-related reasons. Through its jurisprudence, the Court has expressed a general opposition to this practice, emphasizing that detention of such vulnerable individuals may cause them stress and anxiety and endanger their development¹²⁴. Thus, any decision

¹²² UN Committee on the Rights of the Child (CRC), *Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration*, 2012, par. 22, 79, 84.

¹²³ Dir. EU 2024/1346, art. 13(2).

¹²⁴ ECtHR, 13 December 2011, App. no. 15297/09, *Kanagaratnam and Others v. Belgium*, par. 67-69: “[...] Il faut donc partir de la présomption que les enfants étaient vulnérables tant en raison de leur qualité d'enfants que de leur histoire personnelle. Sans aucun doute, avant d'arriver en Belgique, les enfants requérants avaient déjà vécu une situation traumatique. [...]”.

regarding the detention of children for immigration purposes shall be justified by a case-by-case analysis and shall comply with the grounds included in article 5(1) of the ECHR.

Building on the case law of the ECtHR, disapproval of the detention of minor migrants has been shown by other institutions. Examples include the PACE, the Council of Europe Commissioner for Human Rights, and the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The shared opinion considers immigration detention of children as a serious violation of the right to liberty, which can be allowed only under exceptional conditions.

Notwithstanding the international effort to put an end to immigration-related child detention, recent developments at the EU level appear to diverge from this trajectory. A paramount example is the Pact on Migration and Asylum entered into force on June 11, 2024, which will be the object of Paragraph 4 of this chapter. The New Pact is a set of ten legislative instruments to promote a common migration and asylum system in view of an enhanced European security. Although the new rules will be applied in 2026 after a two-year transition period, concerns about their impact have emerged since the adoption of the Pact. One significant cause for apprehension is the risk of increased use of detention of migrants, children included, within the screening and border procedures foreseen by the Pact. Some of the new instruments, such as the Screening Regulation (SR), the Asylum Procedures Regulation (APR), and the Return Border Procedure Regulation (RBPR), may seriously violate children's rights. While the three regulations highlight the importance of "fundamental rights", including the rights and best interests of the child, it is particularly concerning that none of them excludes depriving children of their liberty solely for immigration control purposes¹²⁵. In fact, although detention remains a measure of last resort strictly limited to exceptional situations and after a thorough assessment that the measure is in the child's best interests, in the absence of a formal ban, they might be detained when there are reasonable grounds to consider children as a threat to national security or public order.

Another common argument in support of detention considers it a protective measure for the child. In some States, detention or similar restrictive measures are applied to protect children from going missing or falling prey to exploitation. On this point, the FRA underscores that any restriction on a child's freedom of movement must be proportionate, based on an individual risk assessment, and subject to judicial confirmation¹²⁶. To further ensure that the placement is necessary for the safety of the child, a frequent assessment of their condition should be performed by judicial authorities. Despite

¹²⁵ International Commission of Jurists, *Never in the Best Interests of the Child: Risks of Child Detention in the Screening and Border Procedures Under the 2024 EU Migration Pact*, Geneva, 2024. <https://www.icj.org/wp-content/uploads/2024/11/Never-in-the-best-interests-of-the-child.pdf>

¹²⁶ European Union Agency for Fundamental Rights, *Guardianship for Children Deprived of Parental Care*, Publications Office of the European Union, Luxembourg, 2014.

the applicable precautions, FRA opinion 4 strongly discourages the use of deprivation of liberty as a means to mitigate risks, which should be countered by improving reception conditions and strengthening guardianship systems to prevent children's disappearance and exploitation¹²⁷. As defined by FRA, detention shall be done when there is a «realistic prospect for removal», not for protecting minors. The mere protection of children is not a necessary and proportionate justification compared to the short-and long-term consequences of detention to children's wellbeing and development.

As a matter of fact, immigration detention is an extreme measure with long-lasting impacts on children. An accumulating body of scientific literature has consistently found immigration detention to be inherently harmful to children¹²⁸. The most significant damages concern their mental health, as well as their cognitive and physical development. Tangible manifestations of the distress range from sleeping and eating disorders to emotional and behavioral outbursts, to the infliction of self-harm and suicidal ideation. Furthermore, depression, anxiety and post-traumatic stress disorder (PTSD) are commonly observed¹²⁹. The conditions of the detention facilities are also a relevant consideration in this regard. For example, children may suffer appalling and inhuman conditions, including overcrowding, inappropriate food, insufficient access to drinking water, limited access to recreational and outside space, unsanitary conditions, and lack of other basic necessities. Even in relatively humane or child-friendly environments, detention remains deleterious for children. The harm can be caused by omission or negligent care, as detained children lack access to formal education, child-specific care and appropriate health services, which are hugely important during childhood.

Against this background, immigration detention of children remains possible under the European legal framework. According to the 2022 IOM, UNHCR and UNICEF Recommendation¹³⁰, 27 countries in Europe still resort to child detention in the immigration context. The extensive case law of the ECtHR has established that child detention is not prohibited, but states must prove that their detention is necessary and proportionate. In practice, the Court usually finds a violation of the right to liberty (article 5) and of the prohibition of torture and ill-treatment (article 3) in cases concerning children.

¹²⁷ European Union Agency for Fundamental Rights, *European Legal and Policy Framework on Immigration Detention of Children*, Publications Office of the European Union, Luxembourg, 2017.

¹²⁸ A. Kuowei Tay, S. Mares, D. Nathanson, D. Silove, K. Zwi, *The Impact of Detention on the Social-Emotional Well-Being of Children Seeking Asylum: A Comparison with Community-Based Children*, *Eur Child Adolesc Psychiatry*, 2017, p. 411.

¹²⁹ A. Karatzas, *Bringing Child Immigration Detention to An End: The Case of EU Return Procedures*, European Policy Center, Brussels, 2022.

¹³⁰ IOM, UNICEF, UNHCR, *Safety and dignity for refugee and migrant children: Recommendations for alternatives to detention and appropriate care arrangements in Europe*, 2022.

Under article 2 of the TEU, the EU is founded on the values of respect for several fundamental rights, including human dignity, freedom, and the rule of law¹³¹. Indeed, the Union is strongly committed to promoting and protecting a plethora of rights both within the EU and worldwide, in compliance with the founding Treaties and the EU Charter of Fundamental Rights. Therefore, the absence of an explicit ban on immigration detention of children appears to be incoherent with the EU framework. However, the EU's recent policy has shown a shift of focus from the protection of the child's vulnerability and best interests to the national exigency to control or stop irregular migration.

It is therefore crucial that EU Member States resorting to child detention for immigration purposes must, at least, ensure compliance with all safeguards guaranteeing the protection of human rights. Such safeguards should be implemented in domestic law and practice, carefully and in good faith, and the best interests of the child should be given primary importance in all decisions affecting children. As highlighted by several international actors, immigration detention is never in the best interests of the child, States should thus refrain from using it even in the exceptional circumstances allowing such restriction of liberty.

3. Legal Framework and General Principles on the Protection of Minor Migrants

The protection of unaccompanied and separated children in migration is covered by a range of rights at the international, regional, and national level. The foundation of the international framework for children's rights is the Convention on the Rights of the Child (1990), which prescribes the minimum standards of protection that all State Parties must adhere to. Relevant General Comments of the Committee on the Rights of the Child in relation to unaccompanied and separated children are, *inter alia* and beyond, the General Comment No. 6 (2005) on the Treatment of Unaccompanied and Separated Children outside their Country of Origin and the General Comment No. 13 (2011) on the right of the child to freedom from all forms of violence. Additional and complementary protection is provided by the Convention relating to the Status of Refugees (1951) and its Protocol, especially for children fleeing armed conflicts, mass killings, persecution and/or pervasive sexual and gender-based violence (SGBV). Over and above this, the Universal Declaration of Human Rights (UDHR) upholds the fundamental principle that everyone (including children), everywhere, at all times, is entitled to the full range of human rights, which are universal and indivisible.

At the regional level, specifically within the European Union, children are generally protected by the Treaty on European Union in article 3(5)¹³² and the EU Charter in article 24 on the rights of

¹³¹ TEU, art. 2.

¹³² Treaty on the European Union, 2012, art. 3(5): "In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human

the child. Although the EU is not a party to the CRC, the Convention plays a crucial role in guiding EU actions on children's rights. In addition, EU policies and legal instruments under the CEAS provide the main framework for the protection of children involved in migration, which includes aspects such as the conditions for their reception, the treatment of their applications, and their integration¹³³. This system has been subject to a comprehensive reform since 2016, eventually actualized in the EU Pact on Asylum and Migration that entered into force on 11 June 2024, and will enter into application in 2026.

Regarding the national level, EU Member States have the primary responsibility for child protection systems, although the EU supports national efforts. All EU Member States are Parties to the CRC and thus must ensure that the provisions and principles of the Convention are fully incorporated and enforced in relevant domestic legislation. Moreover, EU MS are bound by EU legislation to respect common European standards of protection. In this regard, the level of protection granted to unaccompanied and separated minors varies greatly depending on the policy approach of the country to which they arrive. Some countries consider child migrants from a child protection rather than a migration policy perspective. Consequently, their well-being and access to safe and effective care are always the primary focus of practice. By contrast, in countries where the unaccompanied minors' condition as irregular migrants prevails over their being children, access to and enjoyment of special assistance may be subject to the granting of international protection or asylum status. In the latter case, therefore, some social policies are solely aimed at children seeking or granted international protection or asylum.

This section is going to analyze each of the three levels of protection, which must be intended as complementary parts of a universal, comprehensive, and integrated protective regime that should be guaranteed at all times. It is against this legal background that restrictive implementations and security-driven migration policies emerge, leaving many children without the special assistance and care they are entitled to. The purpose of this analysis is therefore to highlight the main challenges and protection gaps that are currently present in the legal framework on migrant children.

3.1 The International Level

The treatment of children, and migrant children in particular, as subjects of international law began with the adoption of the United Nations Convention on the Rights of the Child (CRC) on 20 November 1989 by the General Assembly Resolution 44/25. The Convention came into force on 2

rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter”

¹³³ A. Radjenovic, *Vulnerability of unaccompanied and separated child migrants*, Members' Research Service, 2024, pp. 8-10.

September 1990 after being ratified by 196 countries. It became the most widely subscribed of all UN Treaties (apart from the United Nations Charter itself), with the United States of America being the only state to have signed the Convention but not ratified it.

The adoption of the CRC has certainly been influenced by previous instruments concerning children. In fact, the need to give particular care to children has been stated in the Geneva Convention Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted in 1959. Children were recognized as vulnerable individuals in other instruments such as the Universal Declaration of Human Rights (in particular in articles 25 and 26), the International Covenant on Civil and Political Rights, (in particular in articles 23 and 24) in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children. While a growing awareness of the special status of children emerged, these earlier instruments did not include any traditional civil or political rights for children beyond protection against non-discrimination. As such, children remained objects of protection rather than rights bearers until the adoption of the Convention on the Rights of the Child¹³⁴.

On this ground, the Convention on the Rights of the Child was the first international instrument to explicitly recognize children as human beings with innate and inherent rights. The rights are set out in 54 articles and in three Optional Protocols, namely the Optional Protocol on the sale of children, child prostitution and child pornography¹³⁵, the Optional Protocol on the Involvement of Children in Armed Conflict (OPAC)¹³⁶, and the Optional Protocol on a Communications Procedure (OPCP)¹³⁷. Like many of the UN human rights Conventions, the CRC established the UN Committee on the Rights of the Child (UNCRC) to review State Parties' compliance with the Convention¹³⁸.

To fully grasp the relevance of the CRC, it is foremost necessary to clarify its scope. The Convention has a strong child-centric approach, whereby the primary criterion for protection is indeed being a child. Article 2 of the Convention further specified that the rights set forth therein are valid for each child within the States Parties' jurisdiction, without discrimination of any kind. With respect to migration, the protection should include undocumented migrant minors, accompanied children, unaccompanied and separated children, refugees, and asylum seekers. On this point, the CRC is closely related to a key instrument on the international protection of refugees, namely the 1951 Convention Relating to the Status of Refugees.

¹³⁴ J. Tobin, *The UN Convention on the Rights of the Child: A Commentary*, Oxford Commentaries on International Law, 2019.

¹³⁵ A/RES/54/263, 2002.

¹³⁶ *Ibid.*

¹³⁷ A/RES/66/138, 2011.

¹³⁸ CRC, art. 42-44-45.

The connection is particularly evident in article 22 of the CRC, which provides for the obligation of states to take all appropriate measures for a child “who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures.”¹³⁹ According to the 1951 Refugee Convention, a refugee is a person who is outside the country of his nationality, due to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.¹⁴⁰ Such a restrictive enumeration of the grounds of persecution and the subjective criterion of “fear” does not secure a universal approach, leaving the group of migrant minors outside the scope of Article 22 of the CRC.

In practice, the protection gap within the CRC is bridged by balancing the international obligations with the national ones. Essentially, States primarily examine the status of unaccompanied and separated children at their borders implementing national policies in order to ensure whether these children satisfy the definition of “refugee” as set above. However, children are often part of mixed migration movements that may include migrants, refugees and asylum seekers. As migration is cyclical and diverse, a child’s migration or refugee status can change several times throughout the journey. The nature of migration might therefore exceed the restrictiveness of the definition provided by the 1951 Refugee Convention, hindering effective protection. For this reason, children in migration contexts should be considered as children first and foremost, with the same human rights as all children, and this should be the foundation of any migration-related decision and procedure¹⁴¹.

Within this interplay, the CRC constitutes a complementary source of protection in relation to the 1951 Refugee Convention. As scholar Pobjoy explains in his work “*The Child in International Refugee Law*”, this parallel protection derives from three main sources: the first is that participation in the CRC is greater than participation in the Refugee Convention. Therefore, the CRC draws in States that have not ratified the 1951 Refugee Convention, expanding the protection of children. Secondly, the CRC covers children at risk of some form of harm but who do not satisfy the Convention refugee protection. Thirdly, the CRC has a greater level of international oversight of state compliance, mainly through the UNCRC. Contrarily, the 1951 Refugee Convention does not have an interstate supervisory body to hold states accountable for non-compliance with the treaty obligations.

Furthermore, the CRC enlarges the explicit and implicit duties of *non-refoulement*. Although the CRC does not make an explicit reference to the notion of *non-refoulement*, the UNCRC in its General Comment No. 6 stipulates that States parties must fully respect the *non-refoulement* obligations deriving from international human rights, humanitarian and refugee law, and, in particular, must respect obligations codified in article 33 of the 1951 Refugee Convention. In fulfilling

¹³⁹ CRC, art. 22.

¹⁴⁰ Convention relating to the Status of Refugees, 1951, art. 1(2).

¹⁴¹ A/79/213, *Human Rights of Migrants*, 2024, par. 1.

obligations under the Convention, the Committee has underlined that a state must not return a child to her country of origin where there are substantial grounds for believing that there is a real risk of irreparable harm to the child¹⁴². While an exhaustive definition of irreparable harm is not provided, the Committee stated that the concept includes (although is not limited to) those harms contemplated under articles 6 (right to life, survival and development) and 37 (right to liberty and freedom from torture and cruel, inhuman or degrading treatment) of the CRC.

By means of a systematic interpretation, the CRC expands the relatively restrictive definition provided by the Refugee Convention in cases concerning children. To some extent, it can be said that the duty of non-return in the CRC considers both the specific grounds provided by the 1951 Refugee Convention and the principle of the best interests of the child. In this sense, if a return is incompatible with the child's best interests, then such a return would violate the CRC. This is crucial for two reasons: the first is that the CRC has a wider reach than the 1951 Refugee Convention, hence it expands the protection of children. Secondly, the considerations relevant to a child's best interests go well beyond assessments of whether a child's life or freedom is threatened. Consequently, compliance with the prohibition of *non-refoulement* under the CRC ensures a broader protection for all children, irrespective of their status, and encompasses a wider range of risks that should be assessed to grant such protection.

On the whole, the Convention on the Rights of the Child stands as the centerpiece element of an integrated legal regime for recognizing the rights of all children, stemming from human rights law, international humanitarian law, and refugee law. Since its adoption, other relevant instruments have emerged with particular attention to children in vulnerable circumstances, including migration. Examples include the Migrant Worker's Convention; the Trafficking and Smuggling Protocols; the Optional Protocols to the CRC itself, and the Convention on the Rights of Persons with Disabilities. Moreover, various supra-national human rights instruments have been adopted across different parts of the world to ensure protection at the regional level.

Throughout the evolution of international law relative to the protection of child migrants, the CRC clearly marked a significant qualitative transformation in recognizing children as holders of rights, dignity, and worth. As such, it became the landmark treaty in this field, outlining universal standards for the care, treatment, survival, development, protection, and participation of all children at the national, regional and international levels.

¹⁴² CRC/GC/2005/6, par. 27.

3.1.1 Main Children's Rights and Principles in the Context of Migration

The Convention on the Rights of the Child incorporates a variety of human rights addressed to children, including civil, political, economic, social and cultural rights. According to the scope of this thesis, the Convention will be analyzed with particular attention to its four core principles, which are mostly affected by migration processes. These are the principle of the best interests of the child, the right to life, survival and development, the right to non-discrimination, and the right to participation and being heard.

In the specific context of migration, unaccompanied and separated children are recognized by the Convention, especially by the UNCRC General Comment No. 6, but a binding and comprehensive legal regime tailored to them is still lacking. For this reason, their protection derives from the broader principles of the Convention, complemented by the interpretative guidance provided by the Committee. It remains the case that unaccompanied and separated children are entitled to the same rights as other migrant children (and children in general), but their particular vulnerability requires heightened protection measures.

Lastly, it is important to mention that the implementation of the CRC in migration is supported by an underlying principle: the standards set out in the Convention should have supremacy over any other interest or policy involved. Therefore, the rights of children should never be subjected to migration goals defined by a state. In other words, all migrant children, asylum-seekers and refugees, whether accompanied or not, should be entitled to a series of rights that must be primarily considered in any migration policy, piece of legislation, and decision that might impact them.

3.1.2 The Principle of the Best Interests of the Child

The principle of the best interests of the child stands at the very heart of the Convention. As established by the Committee on the Rights of the Child in its General Comment No.14, the child's best interests is a threefold concept: a substantive right, a principle of interpretation and a rule of procedure. As a right, it is conferred upon children as individual rights holders and can be invoked before the authorities in case the best interests are not properly assessed and determined. As an interpretative legal principle, when a legal norm has multiple interpretations, the one that best serves the child's best interests should be prioritized. As a rule of procedure, it requires that all decisions affecting children should include an evaluation of the possible impacts (positive or negative) of the decision on the child or children concerned¹⁴³. This procedural guarantee requires States parties to provide a detailed justification demonstrating how the best interests of the child have been taken into account in any decision affecting minors.

¹⁴³ CRC/C/GC/14, par 1-7.

The principle is stipulated in article 3(1) of the CRC, which affirms that the best interests of the child should be assessed and weighted as a primary consideration in all actions concerning children. It refers to all judicial and administrative decisions as well as policies and legislation concerning children. In the context of migration, such decision might involve detention of children for immigration-related purposes, return to the country of origin, care arrangements, family reunification or any necessary protection service.

Notwithstanding its relevance, the principle of the best interests of the child is a complex concept that lacks a clear definition in the Convention. The Committee indicates that this principle should operate as a unifying concept, transforming the rights enshrined in the Convention into outcomes. While there is no hierarchy of rights in the CRC, all rights are deemed to embody the notion of best interests. The concept of the child's best interests is therefore aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child¹⁴⁴. Such overarching principle should lead the implementation of all rights enshrined in the CRC and should be considered at every stage of protection. By consequence, whenever domestic or supranational law falls short in safeguarding children, this principle serves to bridge the gap between rights on paper, governmental actions and concrete protection of children in practice.

In practice, in its General Comment No.14, the UNCRC recognizes the need for a degree of flexibility in the application of this fundamental principle¹⁴⁵. The best interests of the child is a dynamic and evolving concept that can change from child to child. In fact, the assessment of the child's best interests is a unique activity, which should entail a case-by-case analysis, in view of the specific characteristics of the child as well as his/her social and cultural context. Thus, decision-makers should not only assess the physical, emotional, educational and other needs, but also the future prospects of the child's development both in the short and long term¹⁴⁶. In this context, decisions concerning children should reflect the continuity and stability of the child's present and future situation.

Once a case is assessed, the best interests of the child may contradict other legitimate public interests, including those of other parties, the controlling of borders, or the maintenance of an organized system of regular and legal immigration. In these cases, State Parties must examine each

¹⁴⁴ The Committee expect States to interpret the development of the child as a holistic concept embracing the physical, mental, spiritual, moral, psychological and social growth.

¹⁴⁵ CRC/C/GC/14, par. 32-35

¹⁴⁶ *Ibid.* par. 84: "Decision-makers should therefore consider measures that can be revised or adjusted accordingly, instead of making definitive and irreversible decisions. To do this, they should not only assess the physical, emotional, educational and other needs at the specific moment of the decision but should also consider the possible scenarios of the child's development, and analyse them in the short and long term."

case carefully, giving ‘high priority’ and ‘larger weight’ to what serves the child best¹⁴⁷. This means that depending on the child’s age, dependency, legal condition, and maturity, the interests of the child should have priority, but it is not the only circumstance to be considered¹⁴⁸. In only two occasions the CRC demands that the best interests of the child are the determining factor, namely adoption (article 21) and separation of a child from their parents (article 9). In any other situation, States must always consider that the purpose of assessing and determining the best interests of the child goes beyond the mere procedural evaluation and aims to ensure the full and effective enjoyment of all the rights recognized in the CRC¹⁴⁹.

3.1.3 Other Relevant Rights

The fulfillment and respect of the principle of the best interests of the child encompass a plethora of other rights that should be safeguarded at all times. One of them is the right to life, protected by article 6 of the CRC, which requires States to ensure children’s life, survival and development to the maximum extent possible¹⁵⁰. The Committee on the Rights of the Child has highlighted that a child’s life, survival and development are particularly at risk in migratory processes. The migration journey exposes migrant children to a series of dangers ranging from extreme travel conditions, violent pushback or interception operations, excessive use of force by border authorities, limited access to basic services, and detention practices. In addition, children risk being recruited for trafficking, involvement in criminal activities or any abusive environment which could result in harm to the child, or in extreme cases, in death.

An equally serious threat arises from the recruitment and participation in hostilities, which can inflict irreparable harm and violate fundamental human rights, including the right to life. In this regard, article 38 of the Convention, read in conjunction with articles 3 and 4 of the OPAC¹⁵¹, requires States Parties to take all feasible measures to prevent under-age recruitment or participation in hostilities, in compliance with international humanitarian law and the Convention. For the same reason, States should also refrain from returning a child in any manner to the borders of a State where there is a real risk of under-age recruitment or participation, directly or indirectly, in hostilities.

¹⁴⁷ *Ibid*, par. 37-38.

¹⁴⁸ S. Sanz Caballero, Migration of Unaccompanied Children: Is the EU Up to the Challenge? A Legal Perspective of the Southern Mediterranean in S. Panebianco, Border Crises and Human Mobility in the Mediterranean Global South, Palgrave Macmillan, 2022, pp. 208-213.

¹⁴⁹ M. Kalverboer, D. Beltman, C. Van Os, C., E. Zijlstra, *The Best Interests of the Child in Cases of Migration: Assessing and Determining the Best Interests of the Child in Migration Procedures* in L. Lundy, H. Stalford, *The International Journey of Children’s Rights*, BRILL, 2017, pp. 119-120.

¹⁵⁰ CRC, art. 6.

¹⁵¹ Article 38(2) of the CRC states that “States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.”. The concept is reinforced when read in conjunction with articles 3(1) and 4(1) of OPAC, respectively affirming that: “States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities” and “armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.”

Given the precarious status of migrant children, the Committee has strongly encouraged States to take practical measures at every level to shield them from risks that may jeopardize their right to life, survival and development. These measures should apply regardless of their or their parent's status and must ensure an adequate standard of living for their physical, mental, spiritual and moral development¹⁵². Possible actions include the prompt appointment of guardians, prioritization of at-risk child procedures, and provision of child-friendly information about the potential dangers they may encounter.

Another relevant provision in the context of migration is the right to non-discrimination which is enshrined in article 2 of the Convention. As aforementioned, the article establishes a universal protection for every child within the State Parties' jurisdiction. Accordingly, migrant children, regardless of their migration status, should have access to education, health care, child protection services, social protection and child-friendly justice mechanisms. However, children in migration contexts remain particularly vulnerable to de facto discrimination, given that many migration measures can assume a discriminatory nature in their implementation. This risk entails positive obligations for States to counter conditions that could result or reinforce discrimination¹⁵³. Discrimination explains, for example, why so many unaccompanied and separated children are kept in residential care¹⁵⁴, even in countries that have well-established family-based alternative care systems. It is also the reason why child immigration detention is often justified as a protective measure for asylum-seeking and refugee children—a reasoning that would be unacceptable for national children in similar circumstances—and why States rarely grant undocumented migrant children the level of healthcare that they afford to their own citizens¹⁵⁵.

Lastly, every decision or procedure affecting migrant children should respect their right to participation and being heard. This right is expressed in article 12 of the CRC and implies that children who are capable of forming their own views have the right to express them freely in all matters affecting them. The views and opinion of the child should be considered giving due weight to the age and maturity of the child. The CRC further specifies that children should be provided with the opportunity to be heard in any judicial and administrative proceedings affecting them.

The UNCRC has clarified that child participation should take place in an environment that contributes to the free expression of the child's opinion. This means that the environment should not be intimidating, hostile or otherwise inappropriate to the age of the child¹⁵⁶. In addition, to allow for

¹⁵² CRC/GC/2005/6, par. 22-23.

¹⁵³ A/79/213, *Human Rights of Migrants*, 2024, par. 11.

¹⁵⁴ Residential care is care provided in any non-family-based group setting, such as places of safety for emergency care or transit centers, that usually fail to meet children's need and to uphold their rights effectively.

¹⁵⁵ Global Compact for Migration, *Implementing the Global Compact for Safe, Orderly and Regular Migration. Guidance for governments and all relevant stakeholder*; The United Nations Network on Migration, Geneva, 2023.

¹⁵⁶ CRC/C/GC/12, par. 23, 34, 60.

a well-informed expression, it is imperative that children are provided with all relevant information concerning them. Examples include their entitlements, the available means of communication, the asylum process and information about their family (if available). Such information must be provided in a language the child understands, and a manner adapted to their maturity.

An important implication of the right to being heard is that the child's opinion should be taken seriously and the child should be aware of how his opinion influenced the decision-making process¹⁵⁷. This means that children should not be heard by way of formality, but their opinion should be closely assessed in compliance with their status of holders of rights and participants in decision-making affecting their lives¹⁵⁸.

In essence, the CRC gave children several fundamental rights and significantly shaped the understanding of children as members of a separate social category and as active agents in society. This innovative concept has challenged traditional views and has questioned hierarchical relations between adults and children. Therefore, the effectiveness of the implementation of children's rights partly depends on the willingness of adults to share their power with children. In practice, the vulnerability of children, especially in migration contexts, leads to their objectification and silencing¹⁵⁹. As a result, children's opinions are easily overlooked by adults who may misinterpret their needs and fail to provide the specific assistance they deserve. In view of this, States need to thoroughly evaluate the impact of migration policies, practices and decisions on the rights, well-being and development of children to ensure that the fundamental principles of the CRC are effectively prioritized and meaningfully implemented.

3.2 The European Level

The European Union has gradually developed a substantial body of legal guarantees in the migration and asylum field. In particular, the protective framework concerning unaccompanied and separated minors is mainstreamed across the regulations and directives constituting the CEAS, but also among soft-law instruments. All these should be viewed alongside relevant provisions in international and regional law instruments such as the Convention on the Rights of the Child, the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights. Moreover, the corpus of norms includes agreements, cooperation with non-EU States and the functioning of relevant EU agencies such as the FRA, EASO or FRONTEX.

¹⁵⁷ *Ibid*, par. 28: "Article 12 stipulates that simply listening to the child is insufficient; the views of the child have to be seriously considered when the child is capable of forming her or his own views."

¹⁵⁸ S. Rap, *Vulnerability and Child Participation: A Reflection on the Involvement of Refugee Children in Asylum Procedure* in T. Haugli, M. Martnes, *Perspectives on Children, Rights and Vulnerability*, Scandinavian University Press, 2025, pp. 273-275.

¹⁵⁹ L. Lundy, *In defense of tokenism? Children's right to participate in collective decision-making*, *Childhood*, Vol. 25, Issue 3, 2018, pp. 340-354.

3.2.1 EU Primary Law

A noteworthy primary consideration is that the protection of migrant children stems from two systems operating complementarily: the Council of Europe and the EU.

The Council of Europe's most notable achievements in the matter are the establishment of the European Convention on Human Rights (ECHR), and the relative court, the ECtHR, solving the role of an enforcement mechanism. Although the ECHR does not expressly address migrant children, the Court's case-law has underlined a number of provisions of significance. First, article 3 of the ECHR protects individuals against torture and/or cruel and degrading treatment, and the risk of *refoulement*. To fall within article 3, a minimum level of severity must be attained and assessed considering a variety of factors (such as the duration and effects of the harmful actions, age, sex and state of health of the alleged victim). In cases involving children, the Court has highlighted that the particular vulnerability of the child must be a decisive factor¹⁶⁰ to be prioritized over any other considerations relating to their immigration status¹⁶¹. Furthermore, a lower level of severity is required to qualify a treatment against children as falling within the scope of article 3.

The second provision of significance for migrant children is article 5 on the right to liberty and security, with a particular focus on arbitrary detention. The Convention allows State Parties to detain irregular migrants for the purpose of their expulsion in article 5(1)(f). However, the Court has adopted a more restrictive interpretation of this article for migrant children. In fact, in respect of the best interests of the child principle, the automatic application of a national law allowing for deprivation of liberty of migrant children cannot comply with articles 3 and 37 of the CRC¹⁶². In this sense, States are encouraged to end immigration detention of children or to resort to this measure only after having demonstrated that alternative measures are not available.

It is true that this interpretation of the ECHR does not constitute an absolute ban on the detention of migrant children, but the protection against arbitrary detention is also guaranteed through the prohibition of torture¹⁶³. In particular, three factors are deemed critical to determine whether the detention of children amounts to torture or inhuman or degrading treatment contrary to article 3 of the ECHR. These are: the age of the child; the duration of the detention; and the conditions in the

¹⁶⁰ ECtHR, 4 November 2014, App. no. 29217/12, *Tarakhel v. Switzerland*, par. 99: "With more specific reference to minors, the Court has established that it is important to bear in mind that the child's extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant [...]"

¹⁶¹ ECtHR, *Immigration: Detention of Migrant Children*, Key Theme: Immigration Detention of Migrant Children, 2025. <https://ks.echr.coe.int/documents/d/echr-ks/detention-of-migrant-children>

¹⁶² The former article refers to the best interests of the child as a primary consideration in all decisions concerning children, while the latter establishes the prohibition of torture or other cruel, inhuman and degrading treatment as well as unlawful or arbitrary deprivation of liberty of children.

¹⁶³ C. Danisi, *Immigration control and the best interests of the child in Europe*, in L.B. Benson, M. Crock, *Protecting Migrant Children*, Edward Elgar Publishing, 2018, ch.7, pp.149-150

holding center. Taking into consideration these elements might lead to an enhanced protection of migrant children in line with their extreme vulnerability.

At last, in relation to article 8 of the ECHR (right to respect for private and family life), the Court has reaffirmed that in light of the broad consensus in international law, the principle of the best interests of the child is of overriding importance in all decisions involving children. Thus, States must take appropriate measures to ensure the unity or reunification of families, except if it is contrary to the child's best interests.

In addition to the ECHR, the Council of Europe promoted the conclusion of a European Social Charter (ESC), sided by a committee tasked with the adjudication of violations of the protected rights. With regards to children, article 17 of the Charter entitles them the exact same level of fundamental rights granted to adults, instating them as individuals rights' holders due to the inherent possession of human dignity. Thus, the comprehensive rights protection provided to children by the Council of Europe is to be found in both the ECHR and the ESC framework. Notwithstanding its plurality of legal sources, the Council of Europe does not have any express authority to regulate matters relative to immigration and refugees, aside from non-binding recommendations aimed at improving individual States' performances concerning human rights and migratory flows. Nevertheless, the Parliamentary Assembly of the Council of Europe (PACE) has been showcasing a peculiar interest in the issue of unaccompanied and separated children in Europe, trying to elaborate standards to protect their rights in the context of migration. With this goal, the PACE has produced several recommendations on a plethora of matters, ranging between migrant children's living conditions, access to legal assistance and guardians, the arrival, stay and return of unaccompanied minors, and their treatment during their transition to adulthood.

From the European Union standpoint, binding human rights instruments have been present since 2009, when the Charter of Fundamental Rights of the European Union (CFR) was officially regarded as part of the EU's constitutional documents, given the entry into force of the Lisbon Treaty. Even though the Charter does not extend the powers of the Union nor establish any new power, it binds both EU institutions and Member States in the implementation of EU law. In fact, every piece of EU legislation must align with the content of the Charter. Regarding children, the CFR has introduced at the regional level the rights of the child as "autonomous rights", filling an apparent void in the ECHR structure. Notably, the decision to insert article 24 (on the rights of the child) in the 'Equality' Chapter highlights the equal worth of children as independent human rights bearers. Under this article, all actions related to children, thus including migration, must regard the best interests of the child as a primary consideration. The CFR further expanded the guarantees provided by the ECHR

through the inclusion of a right to asylum *per se*, with no limitation of age whatsoever¹⁶⁴, whilst the ECHR lacks such explicit provision.

Although the Council of Europe and the EU fulfil different roles within Europe, their regimes on human rights for migrant children are based on similar and complementary values. Since all EU Member States have ratified the ECHR, both EU law (including the Charter) and the ECHR apply and must be respected in their jurisdiction. In case of overlapping, CFR provisions must maintain the same meaning and scope of the ECHR¹⁶⁵. Finally, this complex framework is further intricated by the role of the UN Convention on the Rights of the Child, which all EU and Council of Europe Member States have ratified. In this sense, all guarantees at the European level must be aligned to the CRC's core values¹⁶⁶.

3.2.2 EU Secondary Law

The EU legal framework on children in migration is reinforced by sources of secondary law of the European Union, mostly Directives and Regulations, which have been jointly adopted by the Council and the European Parliament, upon proposals by the European Commission. The strongest effort by the EU in this field is represented by the Common European Asylum System (CEAS), a legal and policy framework to guarantee harmonized and uniform standards for people seeking international protection in the EU. This system provides a series of measures to protect unaccompanied and separated minors, including the conditions for their receptions, the treatment of their application and their integration.

Despite the growing awareness of the specific needs of children in migration and the importance of targeted actions within the EU asylum and migration acquis, the system is not always cohesive and consistent across the Union. Moreover, recent policy developments reveal an increasingly restrictive orientation that might undermine the fundamental rights of migrant children. In this context, the political rivalries and a lack of solidarity among Member States further impede any concrete steps to establish a sounder and protective framework. Instead, the system is driven by a strong focus on national security which obstructs a due consideration to human rights, particularly those of the most vulnerable. A concrete example of the current approach is represented by the 2024 Pact on Migration and Asylum, which encompasses an innovative legislative framework aimed at strengthening and integrating key EU policies on migration, asylum, border management and

¹⁶⁴ Charter of Fundamental Rights of the European Union, art. 18: "The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community."

¹⁶⁵ C. Danisi, *Immigration control and the best interests of the child in Europe*, in L.B. Benson, M. Crock, *Protecting Migrant Children*, Edward Elgar Publishing, 2018, ch. 7, pp.140-141.

¹⁶⁶ See Chapter II, par. 3.1

integration. This reform might increase the risks of human rights violations and suffering at the EU's borders and beyond, compromising the fundamental values of the EU migration and asylum mechanism¹⁶⁷.

Until 2026, the CEAS is composed by the following instruments (that will be recast after the entry into force of the New Pact on Migration and Asylum): the Return Directive (2008/115/EC), the Qualification Directive (2011/95/EU), the Asylum Procedures Directive (2013/32/EU), the Reception Conditions Directive (2013/33/EU), and the Dublin III Regulation (604/2013).

All five pieces of legislation include references to the CRC's core values, considering unaccompanied and separated minors as a category of vulnerable persons. For this reason, Member States must take into account the particular situations of such individuals within a reasonable period of time after an application for international protection is made. At the same time, children should not be subject to accelerated asylum procedures such as those applied to applicants from "safe countries of origin" or in cases deemed manifestly unfounded, and special procedures in transit zones, airports, or at borders should also be avoided. By combining these requirements, it is clear that Member States must apply higher procedural standards when dealing with unaccompanied minors in view of their special status and peculiar vulnerability¹⁶⁸.

The first element of attention is the incorporation of the best interests of the child in the CEAS. The principle is mentioned in all the instruments as a primary driver for decisions concerning minors, both as a very general provision and sometimes specifically in relation to a peculiar aspect of the children's rights. A concrete implication of this principle is provided by the Dublin III Regulation which plays a significant role in the treatment of minors when they apply for asylum in the EU. Under article 6, the Regulation provides that "the principle of the best interests of the child should be a primary consideration with respect to all procedures provided for in this Regulation". In view of this, it should be incorporated in the criteria determining the Member State responsible for a minor's asylum application. The specific circumstances to be considered are listed in article 8. First, responsibility lies on the Member State where a family member or a sibling is legally present, provided that it is in the child's best interests. Likewise, the best interests should be primarily considered when the child has a relative in more than one Member State. Lastly, if no family member, sibling or relative can be traced, the Member State where the unaccompanied minor has lodged his/her application for protection shall be responsible for the child, as long as the best interests are preserved.

In the same way as the international framework, the EU's discipline on the best interests of the child has received critics referring to its lack of clarity. In fact, no EU rule regarding the

¹⁶⁷ See Paragraph 4.

¹⁶⁸ B. Parusel, *Unaccompanied minors in the European Union – definitions, trends and policy overview in Unaccompanied Minors in Europe*, Vol. 15, No. 1, 2017, pp-7-8.

assessment of the best interests of the child has been developed, thus leaving this principle relatively abstract and dependent upon the value system of each decision maker. Accordingly, most EU states do not have an established process for implementing this legal obligation within asylum systems. In order to address this shortcoming, the EU Commission called upon EU agencies to further develop guidance and tools on the best interests of the child. As a result, in 2019 the EASO has issued a practical guide to help EU Member States in applying this principle and enhance the guarantees for children.

To further ensure that the best interests are properly considered, the case-law of the ECtHR has shown that specific factors (or checklists) are expected to be visible in the assessment and examined with sufficient quality. These elements vary from each case, such as the link between the best interests and other relevant rights of the child, as well as the last resort argumentation¹⁶⁹ and the content and weight of the child's views. Nevertheless, the correctness of such procedural approach is still biased by the closer assessment of the best interest performed at the domestic level which is better placed to make fact-based evaluations regarding the necessity and proportionality of each decision involving children. Therefore, it has been argued that a procedural interpretation of this right might lead to a shallow assessment by national authorities of the child's best interests¹⁷⁰, resulting in a diluted and insufficient protection.

The second element of interest is the issue of discrimination addressed in all the legal instruments, aside from the Dublin III. In practice, non-discrimination does not automatically translate into equal treatment for all children due to intrinsic differences in the implementation of certain rights which vary from child to child because of the difference of age, maturity and evolving capacities. For example, the Asylum Procedures Directive, provides the obligation for MS to appoint a specially designated person to represent and assist unaccompanied children in asylum proceedings, in order to exercise a legal capacity for the child and ensure protection of his/her best interests. Interestingly, in article 25(2), the provision prescribes the possibility for MS to "refrain from appointing a representative where the unaccompanied minor will in all likelihood reach the age of maturity before a decision at first instance is taken¹⁷¹". A similar framework is set out in article 24 of the Reception Conditions Directive which allows Member States to make a distinction between unaccompanied minors aged 16 or 17 and younger minors regarding the accommodation during asylum procedures. Those that are 16 or older may be placed in accommodation centers for adult

¹⁶⁹ M. Sormunen, *Understanding the Best Interests of the Child as a Procedural Obligation: The Example of the European Court of Human Rights*, University of Helsinki, 2020, pp. 761-765.

¹⁷⁰ P. Cumper, T. Lewis, *Blanket Bans, Subsidiarity, and the Procedural Turn of the European Court of Human Rights*, *International Comparative Law Quarterly*, Vol. 68, Issue 3, 2019, pp. 611-638.

¹⁷¹ Dir. EU 2013/32, art. 25(2).

asylum applicants, provided that it is in their best interests¹⁷². Therefore, the possible difference of treatment on grounds of age among the same category of children appears to be not in line with the standards of the CRC¹⁷³.

Another relevant consideration concerns the respect for the views of the child, which is one of the four general principles of the CRC. Within the EU, article 31(3) of the Qualification Directive¹⁷⁴ mentions the fact that “the views of the child shall be taken into account in accordance with his or her age and degree of maturity”. However, this provision is limited to the context of unaccompanied minors placed with adults relatives, foster family or accommodations specialized or suitable for minors. Such a narrow application fails to reflect the broader nature of the principle established by the international framework which recognizes this right as a core value guiding the interpretation and implementation of all other rights. A child’s views should be respected and considered in all matters affecting them, in respect of their status as individuals with fundamental human rights, views and feelings of their own. Yet, the EU protection appears minimal and confined to specific circumstances. Additionally, no mention of the child’s participation is made in the Reception, Asylum Procedures or Return Directives, or in the Dublin III Regulation.

The treatment of the child with respect to the aforementioned principles is further affected by the presence of a representative and a legal guardian. All CEAS acts address the appointment of legal guardians and representatives, which are intended to have the same role and responsibilities toward unaccompanied and separated minors. Generally, a representative should be appointed ‘as soon as possible’ after the granting of international protection and be adequately qualified to perform his or her tasks in accordance with the child’s best interests¹⁷⁵. The unaccompanied or separated minor should also be informed immediately of the appointment. A regular assessment of the representative regarding the availability of the necessary means for representing the minor is only mentioned in the Qualifications and the Reception Conditions Directive, respectively in articles 31(2) and 24(1). The Procedures Directive specifies in article 25(1) that a representative should inform the minor of the meaning and consequences of a personal interview and where appropriate, assist them in preparing for it. Furthermore, under article 6(2) of the Dublin III Regulation, a representative shall have access to the content of the relevant documents in the minor’s file.

An effective guardianship system can significantly shape the treatment and respect for the rights unaccompanied and separated minors. Despite the various provisions on the matter across the CEAS, the timing of the appointment remains vague, no specific quality standards are included, and

¹⁷² Dir. EU 2013/33, art. 24.

¹⁷³ M. Diop, *Unaccompanied Minors’ Rights Within the European Union: Is the Eu Asylum and Immigration Legislation in line With the Convention on the Rights of the Child?* Odysseus Network, 2009, pp. 56-59.

¹⁷⁴ Dir. EU 2011/95.

¹⁷⁵ Dir. EU 2013/33, art. 24(1), Dir. 2011/95, art. 31, Dir. EU 2013/32, art. 25(1), Reg. EU 2013/604, art. 6(2).

the system lacks accordance regarding monitoring mechanisms and limits on the number of children that a representative should be responsible for. Consequently, the current guardianship system offered by Member States is highly diversified, with some affording a greater level of protection than others. According to the 2022 FRA report on “Guardianship Systems for Unaccompanied Children in The European Union”, most EU States still rely on local authorities to assign guardianship responsibilities, creating disparities in the implementation of guardianship services¹⁷⁶. Although there have been improvements on monitoring systems and the professionalism of guardians, such as the enhanced role of the Ombudsperson for Children in Italy, the system is still far from being clear and harmonized across the Union.

Attention should also be drawn to a paramount element of child’s protection which refers to the provisions concerning detention for immigration-related purposes. Under the Reception Condition Directive and the Return Directive, detention shall be used as a measure of last resort when other less coercive measures cannot be applied effectively. Similarly, although the Dublin Regulation lacks a specific disposition for the detention of unaccompanied minors, the general framework applicable to them conditions detention to the fact that ‘other less coercive alternative measures cannot be applied effectively¹⁷⁷’. In the exceptional circumstances where detention is allowed, unaccompanied and separated minors should be held for the shortest period of time and all efforts should be made to release the detained minors and place them in suitable accommodation. It follows that they should be held in facilities designed for children that can guarantee adequate living conditions, separation from adults and access to leisure activities appropriate for their age. In addition, in case children have been victims of abuse, neglect, violence or other traumas, they should benefit from rehabilitation services.

It is important to highlight that the Dublin Regulation does not include the child-specific concept of last resort, thus a proper protection against detention of unaccompanied minors might be prevented since the requirement of the absence of less coercive measures reflects a standard designed for adults. Moreover, even when the ‘last resort’ criterion is included, it lacks a clear definition in EU law. Therefore, authorities are left with a considerable margin of discretion in assessing what this concept actually encompasses. As a consequence, children’s treatment risks being equated with the one applicable to adults, potentially overlooking their specific vulnerability. In other words, both the Reception Condition Directive and the Return Directive align with the international norms from a

¹⁷⁶ European Union Agency for Fundamental Rights, *Guardianship Systems for Unaccompanied Children in The European Union*, Publications Office of the European Union, Luxembourg, 2022.

¹⁷⁷ Reg. EU 2013/33, art. 28(2).

textual perspective. However, the CEAS's detention regime is limited to a mere formal compliance that should entail better substantial safeguards to avert significant violations of fundamental rights¹⁷⁸.

Despite the legislative provisions, there is an increasing reliance on immigration detention even in absence of the exceptional circumstances that allow this extreme measure¹⁷⁹. Furthermore, recent developments have not improved in terms of transparency, fairness and supervision of children's detention. Considering that the EU upholds the protection of human rights as a cardinal principle, the fact that children detention is yet to be completely outlawed raises significant concerns on the actual safeguards offered by the Union¹⁸⁰.

Lastly, a mention should be addressed to the requirement of guaranteeing a dignified standard of living consistent with the physical, mental, spiritual, moral and social development of minors, provided by the Reception Conditions Directive¹⁸¹. Together with the Qualifications Directive, the act specifies that to achieve such standard, children should be placed with adults relatives, a foster family or in other special or suitable facilities¹⁸². Furthermore, children should have access to basic healthcare, education and housing in order to ensure dignified living conditions but also foster a correct and fulfilling integration of the child into the host country.

4. The New Pact on Migration and Asylum

After a series of lengthy and extenuating negotiations and despite the diffused concern about the final outcome, the European Parliament and the European Council adopted the EU Pact on Migration and Asylum on April 10th, 2024. Commonly referred to as the "New Pact", the document comprises ten legislative files, aimed at reforming the EU's migration and asylum system by adopting a shared, common European solution to migratory challenges. Specifically, the system's reform offers a comprehensive approach that aims at strengthening and harmonizing key EU policies on migration, asylum, border management and integration. The newly established rules are designed to manage migration in a long-term view, providing EU countries with the flexibility to address the peculiar challenges they face, and necessary safeguards to protect people in need. The effects of the New Pact, which entered into force on June 11th, 2024, will enter into application after two years, ideally ensuring the safety and strength of EU borders, the respect for individual rights in the context of

¹⁷⁸ A. Plan, *The Detention of Unaccompanied Minors in EU Asylum Law*, in M. Klassen, S.Rap, P. Rodrigues, T. Liefwaard, *Safeguarding Children's Rights in Immigration Law*, International Journal of Law, Policy and the Family, Vol. 35, Issue 1, Cambridge, 2020, pp.165-166.

¹⁷⁹ International Detention Coalition, *A Fundamentally Different Approach is Needed, Joint Statement to the European Committee on Legal Cooperation on the Council of Europe on the Codification of European Rules for the Conditions of Administrative Detention of Migrants*, 2017.

¹⁸⁰ K. Gromek-Broc, *Vicissitudes of Unaccompanied Minors in the EU. In the best interests of a child: one step forward two steps back*, Ordines, 2018, pp. 18-27.

¹⁸¹ Dir. EU 2013/33, art. 23(1): "Member States shall ensure a standard of living adequate for the minor's physical, mental, spiritual, moral and social development."

¹⁸² Dir. EU 2013/33, art. 24(2) and Dir. EU 2011/95, art. 31.

migration and asylum, and a fairer distribution of the pressing burden relative to migration fluxes between Member States.

The structure of the new migration and asylum policy is articulated around four pillars, laid out with renovated specific measures: secure external borders, fast and efficient procedures, an effective system of solidarity and responsibility, and the embedment of migration within international partnerships.

The first pillar revolves around the necessity to enhance the security of the EU's external borders, an issue often claimed by national governments and revitalized by the outbreak of the Russo-Ukrainian conflict. In particular, this objective shall be guaranteed through the adoption of five new policy instruments, all in the form of Regulations, aimed at tackling a specific element of the more general topic. The newly established Screening Regulation¹⁸³ introduces stricter and more robust procedures for the screening of third-country nationals upon their arrival at the EU's external borders. All individuals undergoing the screening process should be guaranteed a minimum living standard that complies with the CFR, and they should also have access to emergency medical care and necessary treatment for diseases. The second issue on the external borders security agenda refers to the amelioration of the pre-existing Eurodac system, in order to ensure a clear identification of everyone entering as an asylum seeker or an irregular migrant. In this sense, the Eurodac Regulation¹⁸⁴ provides the creation of a new asylum and migration database, useful to avoid errors or difficulties in migrants' identification. The third instrument for the enhancement of external borders security is represented by the revised the Return Border Procedure Regulation¹⁸⁵, which establishes a virtuous mechanism alongside the Asylum Procedures Regulation (APR), further explained in the following paragraph. Finally, the Crisis and Force Majeure Regulation¹⁸⁶ provides quick response protocols in case of a crisis at the EU borders, alongside operational support and funding, with the aim to sharpen the authorities' preparedness and contingency planning.

The second pillar of the New Pact on Migration and Asylum concerns the introduction of revised, fast, and efficient migration and asylum procedures. Specifically, the Asylum Migration Management Regulation (AMMR)¹⁸⁷ introduces an effective and univocal system to determine which EU country shall be responsible for handling a specific application for asylum, alongside several solidarity measures between Member States. Secondly, the Reception Conditions Directive¹⁸⁸ establishes harmonized standards across the EU, ensuring a minimum level of living conditions for

¹⁸³ Reg. EU 2024/1356.

¹⁸⁴ Reg. EU 2024/1358.

¹⁸⁵ Reg. EU 2024/1349.

¹⁸⁶ Reg. EU 2024/1359.

¹⁸⁷ Reg. EU 2024/1351.

¹⁸⁸ Dir. EU 2024/1346.

asylum seekers, strengthening safeguards and guarantees while improving integration processes. Furthermore, the Qualification Regulation¹⁸⁹ harmonizes criteria for defining when an individual can be a beneficiary of international protection, and his related rights and obligations. Specifically, the Qualification Regulation provides standards for the qualification of third country nationals or stateless persons as beneficiaries of international protection, reinforcing the provisions of the Qualification Directive¹⁹⁰. The last tool providing measures for the second pillar is the Asylum Procedure Regulation (APR)¹⁹¹, which sets out clear obligations of cooperation for asylum seekers, even providing consequences in cases of non-compliance. This instrument, in concert with the aforementioned Return Border Procedure Regulation, establishes a common procedure for international protection, introducing even more extensive safeguards.

The third pillar of the New Pact aims at the creation of an effective system of solidarity and responsibility between Member States in the management of migration, with the aid of EU agencies and dedicated funds. EU countries will be able to choose the manners of their supportive participation, between relocations, financial contributions, and operational support. In order to guarantee a smooth and functioning mechanism, asylum seekers must apply for international protection in the EU country of first entry, where they will reside until the Member State responsible for their application is determined.

Finally, the fourth pillar of the Pact on Migration and Asylum aims at embedding migration in international partnerships, mainly through the strengthening of border management authorities in partner countries of origin and a reinforced cooperation with Frontex. In addition, with the support of partner countries and UN agencies, the EU promotes specific anti-smuggling operational partnerships toward the most affected countries of origin, hoping to enhance cooperation on migrants' management, return, and readmission.

4.1 Provisions Related to Unaccompanied and Separated Minors

Within the complex and intricate general framework of the New Pact on Migration and Asylum, there are several provisions precisely directed to the condition of unaccompanied and separated minors. In fact, the vast majority of the newly established Regulations and Directives provide different and specific measures only applicable to unaccompanied children, in order to ensure a more comprehensive and thorough level of guarantee for this fragile category.

Relatively to the pillar of enhanced external borders security, the Screening Regulation affirms that, aside from the minimum living standard required by the provision during the screening

¹⁸⁹ Reg. EU 2024/1347.

¹⁹⁰ Dir. EU 2011/95.

¹⁹¹ Reg. EU 2024/1348.

processes, special consideration is required in cases involving unaccompanied minors. In fact, according to article 13, the best interests of the child shall always be a primary consideration during the screening procedure, and Member States must appoint a representative to assist unaccompanied minor during the entirety of the screening process. The representative shall possess the necessary skills and expertise, including regarding the treatment and specific needs of minors, and shall act in order to safeguard the best interests and general well-being of the minor and so that the unaccompanied minor can benefit from the rights provided by this Regulation. Naturally, the person in charge of accompanying and assisting an unaccompanied minor shall not be a person responsible for any elements of the screening, shall act independently, and shall not receive orders from the screening authorities or any person responsible for the procedure. According to article 13(5), Member States shall place a representative in charge of a proportionate and limited number of unaccompanied minors. Under normal circumstances, a representative can assist no more than 30 unaccompanied minors at one time, to ensure that their tasks are performed effectively. As an additional guarantee, the fact that a representative has not been appointed shall not prevent an unaccompanied minor from exercising the right to apply for international protection. Furthermore, even the Eurodac Regulation provides specific measures for unaccompanied minors, affirming that for the entirety of the recognition procedures, a representative or a person trained to safeguard the best interests of the child should accompany an unaccompanied minor during the collection of his biometric data, starting from the age of six. Officials are specially trained to collect a minor's biometric data in a child-friendly and sensitive manner, while fully respecting the child's best interests and the overall protection outlined in the CRC. The provision further affirms that minors cannot be coerced into providing biometric data. However, if permitted by relevant EU or domestic law, and only as a last resort, a proportionate degree of coercion may be used against minors to ensure their compliance with this obligation.

Differences in the treatment of unaccompanied minors even persist in the documents regarding the second pillar of the New Pact on Migration and Asylum. On this regard, the AMMR is directly built upon the Dublin Regulation and reflects the same criteria to determine the Member State responsible for an unaccompanied minor's application for international protection. Additionally, the AMMR expands provisions related to representing and assisting an unaccompanied minor in all relevant procedures. A mention to unaccompanied minors is also present in the Reception Conditions Directive which rules on the specific situation of minors, and their peculiar reception needs. Following the date on which an unaccompanied minor applies for international protection, Member States must designate a representative as soon as feasible, and no later than within 15 working days. Moreover, the Directive remarks the exceptional circumstances allowing for detention of unaccompanied minors, as well its residual nature. It reinforces that unaccompanied and separated

minors must be kept apart from adults and housed in facilities designed specifically for their needs. Member States must also make sure judicial, administrative, or other authorities are tasked with overseeing the representatives' correct execution of their duties throughout the detention process.

The Qualification Regulation provides specifics regarding the right of unaccompanied minors to have a guardian and his relative responsibilities. In considering the internal protection alternative, the determining authority must always consider the best interests of the minor, specifically focusing on the availability of sustainable and adequate care and custody arrangements in a country where the minor would be granted internal protection.

Additionally, the APR and the Return Border Procedure Regulation ensure that unaccompanied minors are not subjected to incorrect or unreasonable age-assessment procedures. In reality, unaccompanied minors should generally not be subjected to border procedures unless there are good reasons to believe that the minor poses a threat to the national security or public order of the Member State. Under certain circumstances, such as when the applicant is from a safe country of origin, when the applicant poses a threat to national security or public order of the Member State, or when the applicant is thought to have intentionally misled the authorities by presenting false information or documents or by withholding relevant information or documents, Member States should be able to apply an accelerated examination procedure even to unaccompanied minors. Other circumstances that may make this procedure necessary include when the applicant is of a nationality or (in the case of stateless persons) a former habitual resident of a third country, for which the determining authority has granted international protection in 20 % or less of cases. When determining whether a third country can be considered a first country of asylum or a safe third country, each unaccompanied minor's peculiar circumstances should be assessed individually, with special attention paid to the availability of suitable long-term care and custody arrangements in those countries. For cases involving unaccompanied minors, a third country can only be deemed a first country of asylum or safe if it is not against the unaccompanied minor's best interests, and the Member State's authorities have obtained assurance from authorities of the third country in question that the unaccompanied minor will be taken in charge by those authorities and will immediately benefit from effective protection.

Finally, concerning the third pillar of the New Pact and the system of solidarity and responsibility between Member States, the framework is reinforced by the establishment of the Union Resettlement Framework¹⁹², which qualifies unaccompanied minors, along with other vulnerable individuals, as eligible for admission under a resettlement program or for humanitarian admission. In

¹⁹² Reg. EU 2024/1350, art. 5(3).

order to promote this virtuous mechanism, Member States will receive a compensation of €8000 for each admitted unaccompanied minor.

4.2 Risks and Threats for the Protection of Unaccompanied and Separated Minors

Notwithstanding the ambitious and positive turn that the New Pact intends to achieve, the final agreement leaves profound criticalities in the foundations of the EU migration and asylum system. As a matter of fact, the vast majority of the Directives and Regulations composing the EU Pact on Migration and Asylum present serious and tangible flaws, especially in relation to the situation of unaccompanied minors entering the EU borders.

Starting from the Screening Regulation, which introduces a mandatory screening procedure applicable to all third country nationals, including children, there are some critical profiles to raise, mostly due to the complete equalization of children and adults in the entirety of the document. First, the practice of detention of children is allowed, both when they (or their parents) have applied for asylum and when they have not, given that they must remain available to the screening authorities¹⁹³. The conditions that must be met depend on whether they have applied for asylum or not: if they have, the Reception Conditions Directive (RCD) applies¹⁹⁴; if they have not, the Return Directive (RD) applies¹⁹⁵. In this sense, it is necessary to recall that the UN Committee on the Rights of the Child and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families deem child immigration detention to be in violation of the UN Convention on the Rights of the Child. Nevertheless, the EU allows for immigration detention of children, falling in violation of these international standards. Notwithstanding the fact that the RCD states that children and families should not as a rule be detained, the same document allows the derogation from these requirements in duly justified cases and for a reasonable period of time, that shall be as short as possible¹⁹⁶. Under the RD, detention can only be applied if no other less coercive measures are possible¹⁹⁷. This means that children with families who do not apply for asylum can only be placed in detention if it is necessary to achieve the specific goal of return. If return is not possible, they cannot be placed in detention. Despite the fact that both the RCD and RD include clear criteria to be met before detaining someone, especially children, the fact that Member States must ensure that people in screening remain available raises serious concerns that they will resort to a widespread use of *de facto* detention, meaning a measure which in practice amounts to deprivation of liberty but which states do not formally qualify as such.

¹⁹³ Reg. EU 2024/1356, art. 6-7-9.

¹⁹⁴ Dir. EU 2024/1346, art. 4 (1)(b).

¹⁹⁵ Dir. EC 2008/115, art. 8(7).

¹⁹⁶ Dir. EU 2024/1346, art. 13(6).

¹⁹⁷ Dir. EC 2008/115, art. 15.

From the standpoint of representation, the Screening Directive contemplates that unaccompanied children may not be appointed their representative during the screening procedure, even though they are in a critical phase in their migration process. Furthermore, the Regulation does not cover what must be done in the interim, leaving a legislative vacuum in the discipline. Moreover, the Screening Regulation does not differentiate between unaccompanied and separated children, thus separated children should be treated as unaccompanied children as they are without a person holding parental authority. The right to representation encounters another barrier relatively to the number of unaccompanied children that a guardian can support, set at 30. While it is good that a cap is included in the Regulation, it is much higher than the current maxima in certain Member States. Thirty children might represent an excessive number, since it is doubtful that *ad interim* representatives can assist so many children well or do their job in line with the requirements set out in the Regulation. Finally, given the purpose of the Screening Regulation, it is to be expected that unaccompanied children will be interviewed for screening purposes, but the Regulation does not include minimum standards, safeguards or references regarding child-friendly interviewing or collection or interpretation of information.

Many critical profiles arise even from the Asylum Procedures Regulation (APR) and the Return Border Procedure Regulation (RBPR). Neither the APR nor the RBPR mention the presence of child protection actors during border procedures, including the spaces where children will be held. During the asylum claim, applicants can request free legal counselling, while they can ask for free legal assistance and representation only in appeal procedures. This implies that asylum claims will be registered without people truly knowing what it means and what the consequences are. In other words, the APR does not ensure free legal assistance and representation during the asylum procedure, nor does the RBPR during the return border process. Ensuring proper assistance and representation would contribute to quality decisions, improving the fairness and efficiency of the system. Moreover, it is crucial that information and counselling provided to applicants does not cover only international protection but also provides information on residence permits available on other grounds under national law.

A further element refers to the accelerated procedures, given that the APR allows accelerated asylum procedures for certain groups of people, meaning that an asylum application should be examined on the merits and decided upon within three months of lodging it. Nevertheless, unaccompanied children are not automatically subjected to an accelerated examination on the merits unless they are provided with the necessary support that create the conditions necessary for the

genuine and effective access to procedures¹⁹⁸. However, this is a much weaker safeguard than a blanket exclusion of children and people with vulnerabilities.

A subsequent issue emerges by the fact that the asylum border procedure cannot be applied to unaccompanied children, unless they can be considered a danger to national security or public order¹⁹⁹. While excluding the vast majority of unaccompanied children is a positive element, this potential inclusion of ‘dangerous’ unaccompanied children is, in reality, highly problematic. First of all, they remain children with specific protection needs and a right to support. Secondly, “being violent” can cause an unaccompanied child to be flagged as a security threat²⁰⁰. And while Member States should only flag someone if they cause physical harm to someone that would amount to a criminal offence under national law, that definition is not included in the articles, leaving Member States the ability to understand it more broadly. Moreover, unaccompanied children, especially those who are homeless or undocumented, are highly vulnerable to exploitation and becoming the victims of trafficking by organized crime groups. Thus, they should be treated as victims of trafficking first, not perpetrators of crime. The risk is that children are misclassified as a security risk and placed in accelerated or border procedures with limited safeguards.

In relation to representation, the whole body of EU legislation uses different terminology and minimum standards for representatives and guardians, which can actively create confusion with policy makers and administrators. Once again, even the APR and the RBPR provide an excessive number of unaccompanied children per guardian, jeopardizing the children’s safeguarding level. One of the most important profiles of these Regulations refers to the fact that the ages of children could be assessed. The children and their representative must consent to any medical examination to assess the children’s age²⁰¹ but not to the age assessment in itself. Interestingly, the refusal to consent to a child’s medical examination can be used as a presumption of false minority of the child. Moreover, the APR does not include any reference to appealing the results of the age assessment. Indeed, the proposal by the European Parliament to add a right to appeal against an age assessment decision was not included in the final text. For this reason, the APR puts enormous pressure on every involved actor to agree with the medical examination, since the child may otherwise be excluded from the child-specific support they need. Furthermore, the APR shall be implemented in line with the best interests of the child, the Charter and the Convention on the Rights of the Child, which include a child’s right to effective remedy or judicial protection.

¹⁹⁸ Reg. EU 2024/1348, art. 21(1).

¹⁹⁹ *Ibid.* art. 53(1).

²⁰⁰ Reg. EU 2024/1358, art. 17-22-23.

²⁰¹ Reg. EU 2024/1348, art. 25(5).

Another criticality of the APR concerns the difficult access to residence permits on other grounds than international protection. In fact, a return decision must be issued at the same time as the decision to reject the asylum claim or find it inadmissible, unfounded or explicitly or implicitly withdrawn²⁰². This requirement is problematic because the determination of the refugee status is usually limited to the conditions for refugee and subsidiary protection status, and it does not consider other grounds for stay, including *non-refoulement*, being stateless, victim of trafficking, crime or exploitation, humanitarian grounds, respect for family unity, social ties or the best interests of the child. Thus, it increases the likelihood that return orders/decisions are issued without the necessary checks are made.

Finally, the RBPR does not include an automatic voluntary departure period, which could increase the risk of entry bans. People must request the 15-day voluntary departure period provided in the Regulation, during which they must surrender any valid travel document they may have for as long as necessary to prevent absconding²⁰³. The persons remain fictionally ‘at the border’ during the voluntary departure period. The fact that a period for voluntary departure is not automatic may be problematic, since it may mean that entry bans are issued more systematically than before, including to children. On this point, article 11 of the Return Directive requires Member States to add entry bans to return decisions if no period of voluntary departure has been granted. With relation to unaccompanied and separated minors, especially in lack of an effective guardianship system, it is more likely that children are not made aware of the necessity to request a voluntary departure period.

On a more positive note, it is important to observe that the last document in analysis, the Eurodac Regulation, includes more references to child protection actors than the Screening Directive, APR and RBPR combined. Specifically, the Eurodac Regulation requires that the biometric data of children older than 6 must be taken and stored²⁰⁴. This lowers the age by eight years, as it was previously only required for those 14 and up. Given that Eurodac will apply to children whose age may be unclear, it is very positive that article 14(1) includes the benefit of the doubt. The article states that in the event that there is uncertainty as to whether or not a child is under the age of six and there is no supporting proof of that child’s age, the competent authorities of the Member States shall consider that child to be under the age of six for the purposes of this Regulation.

With regard to the system of cooperation and solidarity between Member States, the intention to ease the pressure to which border States of entry are subjected to remains a utopistic goal, which could well result in a greater perpetration of human right violations at the borders. In fact, the entire system of responsibility-sharing between Member States does not consider the potential difficulties

²⁰² Reg. EU 2024/1348, art. 37.

²⁰³ Reg. EU 2024/1349, art. 4(5).

²⁰⁴ Reg. EU 2024/1358, art. 14.

in the hosting of additional refugees for stressed countries, which could in turn compromise the mechanism's functioning and result in the detention at borders of families and children, alongside fewer opportunities for people to undergo a fair asylum application processing.

From a Member States perspective, the New Pact received a high volume of criticism from any political source, due to various reasons. In fact, right-wing politicians²⁰⁵ claim that the newly established legislation appears insufficient to prevent illegal immigration, especially due to the alleged lack of provisions relating to migrant returns. Moreover, the entire system is perceived as undermining national sovereignty, mostly due to the provided obligation to host migrants. On the other hand, left-wing critics of the New Pact affirmed that the new legislation puts the human rights of asylum seekers at risk, obtaining support from human rights organizations such as Oxfam, Caritas, Amnesty International, and Save the Children²⁰⁶. From a general standpoint, researchers and scholars have expressed serious doubts toward the effectiveness of the reform²⁰⁷, defined as unlikely to lead to a reduction in illegal immigration to the EU and founded on excessively optimistic estimates about Member States' infrastructure, capability, and willpower to implement the reformed legislation. As a result of the diffused discontent, the Netherlands, Hungary, and Poland asked to opt out of the New Pact, while France has agreed to rediscuss its terms. Finally, notwithstanding the initial deadline of December 2024 for Member States to present their national implementation plans, several countries are yet to provide, exacerbating the level of tension and distrust between government leaders and EU institutions.

5. Criticalities of the European Legal Framework on Migrant Minors

The EU is a well-equipped region at the legislation level in terms of protection of migrant minors and has made significant efforts to strengthen their safeguards. Notwithstanding its noble purposes, the system presents profound shortcomings and practical flaws with regard to meeting the specific needs of unaccompanied and separated children. The combination of international treaties, EU primary and secondary legislation, as well as recent policy innovations especially the 2024 Pact on Migration and Asylum has produced a normative apparatus that in principle should ensure an effective and thorough protection. However, there exists a substantial discrepancy between textual provisions and concrete application, undermining the efficacy of the rules in place and obstructing the full enjoyment of the rights and guarantees children are entitled to.

²⁰⁵ C. Chiappa, *Unlikely allies Viktor Orbán and Donald Tusk rail against EU migration deal*, Politico, 2024.
<https://www.politico.eu/article/viktor-orban-donald-tusk-eu-migration-deal/>

²⁰⁶ The Guardian, *EU reaches asylum deal that rights groups say will create 'cruel system'*, 2024.
<https://www.theguardian.com/world/2023/dec/20/eu-reaches-asylum-deal-human-rights-groups-cruel-system>

²⁰⁷ G. Knaus, *Statement on Migration agreements with safe third countries*, European Stability Initiative, Berlin, 2024.
<https://www.esiweb.org/rumeliobserver/wp-content/uploads/2024/07/Knaus-BMI-Statement-on-migration-agreements-with-safe-third-countries-June-2024.pdf>

In this framework, the most important criticism concerns the lack of clarity of certain provisions that can result in an arbitrary and uneven application of the main principles protecting migrant children and in poor evaluation of each specific case. As a result, children become invisible to authorities and public services and live in a state of legal limbo²⁰⁸. In this context, the protection might change depending on the Member State where the child is located. While some States have integrated advanced guarantees into their domestic systems, others have adopted minimalist approaches, often prioritizing border control over the protection of children. Such differentiated application of the legislative tools is further exacerbated by the lack of economic funds, the multiplicity of uncoordinated organizations involved, the deplorable state of the reception infrastructure, and the scarcity of qualified personnel. Because of this incongruity in policy implementation, the extreme vulnerability of unaccompanied and separated minors risks being incorrectly assessed and insufficiently protected across the European territory.

The outspread inconsistency is further aggravated by the interplay between EU and domestic law. EU countries have been applying collective and general solutions instead of individualized treatments, focusing more on border controls than on the humanitarian reception of people in need of assistance, especially children travelling alone. In this sense, the mechanism seems more devoted to accommodating national prerogatives, rather than fulfilling minors' best interests and fundamental rights. In addition, Member States are reluctant to share the burden and to acknowledge responsibility deriving from mass migration flows, compromising both the principle of solidarity enshrined in article 2 of the TEU and that of the best interests of the child included in article 3 of the CRC and reflected in the EU framework. These issues have also been addressed by the European Commission in its Communication "Toward a reform of the Common European Asylum System and enhancing legal avenues to Europe", where the Commission has expressed the need to rethink the EU legal framework on asylum and migration in pursuance of an improved solidarity and collaboration among Member States. The current interaction between national and supranational priorities fuels political tensions within the Union and between Member States. As a result, reception systems are excessively pressured by poorly managed migration flows, thus unable to provide adequate protection to minors requiring extensive care and assistance.

Furthermore, the absence of effective enforcement and control mechanisms represents a critical issue. Notwithstanding the creation of EU agencies like the European Union Agency for Asylum and the Union's reliance on the Fundamental Rights Agency for compliance verification, such institutions frequently fall short of binding authority to oblige Member States to comply with

²⁰⁸ S. Sanz Caballero, *Migration of Unaccompanied Children: Is the EU Up to the Challenge? A Legal Perspective of the Southern Mediterranean* in S. Panebianco, *Border Crises and Human Mobility in the Mediterranean Global South*, Palgrave Macmillan, 2022, pp. 223-225.

child protection standards. That being so, systematic violations, insufficient guardianship, arbitrary detention and faulty age-assessment methods persist despite being constantly reprehended by international organizations and civil society actors. The result is a *de facto* acceptance of practices that contravene both EU law and the Convention on the Rights of the Child.

Another criticality concerns the diffused climate of hostility and suspicion toward unaccompanied and separated minors due to prejudices relative to their honest and virtuous intentions within their migration experience. Member States often envision migration through an emergency and security-focused approach rather than a migrant-centered and human-rights based one, in contrast with the European Union values. Regardless of the guarantees granted to them by law, migrant minors suffer the consequences of a framework gradually oriented toward control, externalization and containment, rather than protection. Within such a securitarian approach, migrant children are frequently perceived as irregular migrants whose presence must be regulated and curtailed. The scarcity of child-friendly measures and specialized personnel reflects not only procedural shortcomings, but also the general predominance of migration control logics over the specific needs of children. The outcome is a systematic neglect of the best interests of the child and the related rights, which, although extensively proclaimed in both EU and international law, are rarely prioritized in operational migration contexts.

Notwithstanding the leading narrative of deterrence, the persistence of conflicts in Africa and the Middle East, alongside the economic disparities between these regions and Europe, will likely continue to increase the number of migrant minors arriving in the EU in the near future. Therefore, the EU should act to ameliorate its approach concerning the respect of these individuals' rights, considering them first and foremost as children with specific needs rather than framing them as mere components of the migratory issue.

The recent renovation of the EU legal and policy framework reproduces the general vagueness and inadequacy of the measures addressing children in migration. The 2024 Pact on Migration and Asylum continues to intend unaccompanied and separated minors as fragile individuals, in need of a special and extensive level of protection, but this safeguard remains limited to an abstract and normative standpoint. In fact, the document presents various contradictory profiles which could jeopardize the best interests and well-being of this particularly vulnerable category of migrants. Moreover, some provisions are even in contrast with international law, showcasing more profound weaknesses in the revised EU framework.

In such a complex and flawed system, the most adequate response is to improve harmonization and collaboration in the legal, social, economic and policy framework for children in migration. To achieve this goal, EU Member States should surrender further competences to the EU in this field to

develop a comprehensive integrated European approach whose primary objective is child protection reached through the best interests of the child principle. The recommendation is therefore to adopt a consistent and binding European framework on unaccompanied and separated children, aimed at concretely meeting the specific needs of children, which would likely be followed by the harmonization of national practices. In view of a more coherent legislative and policy apparatus, an enhanced respect of international standards of protection should also be pursued. In particular, the respect of the rights set forth in the Convention on the Rights of the Child and in other relevant international instruments should be deemed as minimum standards of protection upon which higher and more thorough safeguards can be established.

Despite the EU's history as a model for the protection of human rights, its stance on migration policy, in particular regarding migrant and asylum-seeking children may compromise its guidance. It appears in fact, that the protection of unaccompanied and separated minors cannot exclusively rely on legislative provisions, notwithstanding their advancement. The recent proneness toward a conservative approach, discouraging migration, closing national borders and combating terrorism might result in an excessive negative influence on the effective protection of minors involved in migratory dynamics. The EU should not allow this overspill effect, which endangers its peculiar and core values. In response to this critical orientation, the New Pact was intended as a resolute measure, which would ensure a more child-oriented approach. In reality, the focus still seems to be in line with the recent past developments, leaning more specifically on border control, deterrence and national security, threatening children's protection and assistance throughout their migration experience. Therefore, what is compelling is the institution of binding monitoring systems, functional burden-sharing among Member States, and a renovated commitment to the prioritization of the best interests of the child above logics of practicality and security. Aiming to an enhanced protection of unaccompanied and separated minors, these reforms are essential for the EU to conciliate its migration management goals with its constitutional values and international imperatives.

CHAPTER III

The ECtHR Jurisprudence on Unaccompanied and Separated Minors: Case-law Analysis

The effectiveness of the protection of unaccompanied and separated minors provided by the European legislative framework is completed by the jurisprudence and supervision of domestic, supranational and international courts. A great share of landmark cases on the matter has been managed by the European Court of Human Rights, the organ tasked with overseeing the compliance of States Parties with the respect of the rights and guarantees set out in the Convention. The Court examines complaints lodged by individuals or States, in order to identify potential violations. Whenever it finds a Member State to be breaching the covered rights and guarantees, the Court delivers a binding judgement, with which States are obliged to comply.

The intervention of the Court in immigration-related cases has been of great interest given the contrast between national security and the respect of human rights. In cases involving migrant children, the conflictual interplay is even more enhanced by the general fragility of the normative apparatus. In this sense, children's interests and vulnerability risk not being covered and protected in a proper and extensive manner.

The final chapter of this work will analyze two landmark cases on the issue of migrant minors. The first case is *Mubilanzila Mayeka and Kaniki Mitunga V. Belgium* of 2006, still to this day considered as one of the turning points of the ECtHR jurisprudence on unaccompanied migrant minors, notwithstanding its chronological distance. Secondly, the *A.T. and Others v. Italy* case of 2023 will be observed, in order to delineate the recent conditions of migrant minors in a border country's hotspots. The study of these cases aims to emphasize the behavioral evolution of the Court in its role as a developer of legal doctrines on human rights. In particular, the focus is placed on the impact that the Court's interpretation of the ECHR and of its alleged violations has on the protection of unaccompanied and separated minors.

1. The Role of the ECtHR in the Protection of Migrant Children

The European Court on Human Rights is an international court established in 1959 by the European Convention on Human Rights. The Court acts as an independent judicial body to guarantee the collective enforcement mechanism of the rights and freedoms expressed in the Convention. This supervisory function works through inter-state or individuals complaint, with the latter being in considerable majority ever since the institution of the Court. The introduction of the right to file an individual petition was an innovative feature that marked a clear distinction between the Convention and other human rights instruments. While today the possibility for individuals to challenge state

practice is firmly established in numerous regional and international human rights instruments, it has been pivotal to Convention's success and to the broader development of human rights law.

The importance of the right to individual appeal lies primarily in the additional safeguard offered to individuals against human rights breaches by States Parties. In doing so, it established human rights not solely as obligations between states (as in traditional international treaties), but as obligations toward individuals, recognizing their status as holders of legal rights before an independent and competent body. This mechanism acts as a safety net, ensuring accountability for states, promoting the consistent interpretation of human rights across Europe and ultimately strengthening the rule of law by providing a tool for fair redress and preventing future abuses.

To understand the ECtHR's role in the protection of children, it is necessary to examine the scope of the ECHR and the concrete application in cases involving minors. In theory, under article 1, the ECHR recognizes to everyone the rights and freedoms defined in its Section I. Moreover, the possibility to file individual applications (article 34) establishes that all human beings under the jurisdiction of any of the State Parties to this Convention have legitimate right to access the European Court of Human Rights if a violation of any of the rights and freedoms recognized in the Convention takes place, provided that all domestic remedies have been exhausted. Therefore, under the Council of Europe's scope, everybody, children included, can appeal under the same conditions to the European Court. In practice, children face numerous legal, economic, social and cultural obstacles within domestic judicial system which obstruct the exhaustion of domestic remedies, hence hindering their access to the ECtHR especially in certain countries where they are not able to assert their rights on their own.

From a normative standpoint, without the supplementing protocols, the reference to children in the Convention is confined to two articles²⁰⁹: article 6(1) on the right to a fair trial, and article 5(1)(d) on the right to liberty and security. However, the restrictive terms of these provisions have limited the scope of the ECtHR's jurisprudence. By contrast, other norms that make no reference to children have proven to be more flexible in their implementation, thus offering a greater potential to ensure children's protection. Focusing specifically on migrant children, the provisions most frequently invoked are article 3 (prohibition of torture and inhuman and degrading treatment or punishment), article 8 (respect for private and family life) and the aforementioned article 5.

The scarcity of provisions on children is consistent with the early stage of development of children's rights at the time of drafting of the Convention. Children were predominantly deemed as

²⁰⁹ In addition, article 2 of Protocol 1 guarantees the right to education and article 5 of Protocol 5 recognizes parental equality and the role of the best interests of the child in the exercise of parental responsibility.

objects of benevolence and recipient of special protection, rather than subjects holding individual legal rights. Subsequently, in the second half of the 20th century, the idea of the child has an autonomous and independent human being gained momentum in the international community. As a result, children were accorded fundamental rights and started to be seen as active bearers of rights in the normative framework. Accordingly, the ECtHR has developed a substantial body of case law concerning children, covering issues ranging from education, religion, private and family life, health, juvenile justice and immigration.

In order to apply the ECHR effectively, the Court has pointed out in several rulings that the Convention is a living instrument, meaning that it should be interpreted in light of the present conditions.²¹⁰ This dynamic approach is supported by the Court's consideration of the increasingly high standards required in the area of the protection of human rights and fundamental liberties, which correspondingly demand a greater firmness in the assessment of breaches of the fundamental values of democratic societies²¹¹. Therefore, in the Court's view, the ECHR should not be deemed as a rigid theoretical apparatus, but as a concrete and effective protection to be applied with regard to current developments. This perspective, aided by universal or regional human rights instruments, has allowed to apply the ECHR to children's rights, leading to the development of positive obligations for States that define the specific measures necessary to ensure effective protection of children. In other words, the Court has endorsed the view that the existence of these instruments reflects the development of human rights protection and common values²¹². In this sense, a particular mention should be addressed to the UN Convention on the Rights of the Child, which has been used as the main tool of reference to check coherence between the Court's judgements and the recognized standards in children's rights. By this means, the Court has not only reinforced pre-existing children's rights standards, but it has also forged an entirely unique set of legal requirements in areas not originally designed for children protection.

Considering immigration cases, the ECtHR has to find a balance between the two pivotal issues of national security and the respect of human rights. With respect to the vulnerable category of migrant children this contrast is further exacerbated, eventually leading to controversies and debatable stances from the Court²¹³. In particular, the Court has showed a distinct approach to two categories within children immigration matters. The first concerns deportation, expulsion, and family

²¹⁰ E.g. ECtHR, 7 July 1989, App. no. 14038/88, *Soering v. the United Kingdom*, par. 102; ECtHR, 28 July 1999, App. no. 25803/94, *Selmouni v. France*, par. 101.

²¹¹ ECtHR, 12 October 2006, App. no. 13178/03, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, par. 48: "This absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe."

²¹² N. Takacs, *The Threefold concept of the best interest of the child in the immigration case law of the ECtHR*, Hungarian Journal of Legal Studies, Vol. 62, Issue 1, 2021, pp. 96-114.

²¹³ C. Fenton-Glynn, *Children and the European Court of Human Rights*, Oxford Academic, 2021, chapter 5.

reunification where the State's interests have a general prevalence and children's rights, while considered, are demoted to a secondary position²¹⁴. In these cases, the rights of children remain essential to evaluate violations, but they seem to be instrumentalized by the Court. As suggested by Beduschi, this means that the Court prioritizes children's rights to the extent that they are convenient for finding a violation of the Convention, rather than using them as a systematic tool for evaluation of state action²¹⁵. On the other hand, the focus on children's rights is more dominant in cases on immigration detention, which showcase a significant protection carved out for children within article 3. Indeed, the Court has recognized that the child's extreme vulnerability must be a decisive factor that takes precedence over considerations relating to the legality of the migration.

This difference may be partly a consequence of the articles of the Convention involved: the first category refers predominantly to article 8, which allows balancing between state interests and individual rights, while the second largely focuses on articles 3 and 5, which have more restrictive terms. In particular, article 3 is absolute and no justification on the basis of legitimate aims or pressing interests is possible. This being said, the Court maintains a case-by-case evaluation, but in cases of immigration detention of children the obligations of effective protection ought to be stronger, especially if unaccompanied minors are involved. In this sense, the Court aligns with the evolving tendency of international instruments to eradicate this practice, although several domestic behaviors are still falling behind on this point.

1.1 The notion of vulnerability within the ECtHR

The extreme vulnerability of migrant children serves as a magnifier for States' obligations, exposing a greater duty of protection and care. The ECtHR's notion of vulnerability encompasses a plethora of aspects linked to the fragile nature of all human beings and it is equally related to the children's belonging to one or more social groups. In cases involving migrant children, their condition is aggravated by simultaneously being minors and irregular aliens in a foreign country who are not always accompanied by an adult. Furthermore, the ECtHR has been considering additional elements of precarity such as gender, disability and mental health issues, which could contribute to a situation of extreme vulnerability. Accordingly, it is possible to conceive vulnerability as a composite concept whenever two or more of these elements are present at the same time. However, the Court does not intend composite vulnerability as cumulative in nature, but rather it stresses the need for a particularized view of migrant children's concrete situations.

²¹⁴ *Ibid*, p. 145.

²¹⁵ A. Beduschi, *Vulnerability on Trial: Protection of Migrant Children's Rights in the Jurisprudence of the International Human Rights Courts*, Boston University International Law Journal, 2018, pp. 55-85.

In the Court's jurisprudence, migrant children's vulnerability has been interpreted as a threefold concept, as theorized by Peroni and Timmer²¹⁶. First, vulnerability can be seen through its relational aspect, as it is shaped by social, historical and institutional forces. In this sense, the Court considers the treatment of the vulnerability of the migrant child as an axiom, since children are automatically vulnerable to the abuse of their rights in their relationship with adults. Secondly, vulnerability is intended as shaped by specific group-based experiences, meaning that the ECtHR considers the particular experiences encountered by migrant children within their vulnerable group. In other words, migrant children are *per se* more vulnerable than adults, and the risks related to the migratory context further exacerbate their condition. Lastly, the concept situates harm, including physical, mental and sexual abuse, social disadvantage and material deprivation, at the center of the Court's understanding of vulnerability. Indeed, the risks of harm to which migrant children are exposed while migrating is linked to threats to their life, freedom, security, and personal integrity.

In the specific context of migrant children's rights, a correct assessment of vulnerability is crucial to offer an adequate protection and care. In fact, judicial recognition of their vulnerability can lead to improved considerations of their specific needs. By identifying the particularities of these children's situations, courts can avoid the stigmatization of already vulnerable individuals. Moreover, when vulnerabilities stem from a particular situation rather than being intended as inherent to childhood, the risk of harm can be better prevented. In this sense, the ECtHR takes into account the different elements relating to the migrant child's personal history and state of physical and mental health, the environment in which they develop, and the risk of abuses they face while on the move and once in the country of destination. Through this approach, it imposes a multi-layered analysis of their vulnerability based on these different elements.

Together with vulnerability, the ECtHR tends to include the principle of the best interests of the child in the evaluation of issues relating to the protection of migrant children's rights. This principle complements the concept of vulnerability, creating an additional layer of protection. In practice, the Court's reliance on these intertwined concepts has not been without several limitations. The main critics refer to the Court's vague and imprecise inclusion of this principle. In fact, the best interests of the child have been imported from the realm of the CRC without a comprehensive definition of its scope or the specific obligations required from States. In addition, the Court failed to refer to the UN guidance expressed in the Committee on the Rights of the Child's General Comment No. 6. In fact, the ECtHR omitted the definition of the determination of best interests

²¹⁶ L. Peroni, A. Timmer, *Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law*, *International Journal of Constitutional Law*, Vol. 11, Issue 4, 2013, pp. 1056–1085.

adopted by the Committee²¹⁷, presumably in an attempt to avoid being bound by the Committee's stronger child-centered approach. Ultimately, the ECtHR has never imposed a ban on detention of migrant children, albeit it is widely recognized as an extreme measure never in favor of the best interest of the child.

Despite these shortcomings, the ECtHR continues to rely upon the concept of vulnerability in conjunction with the principle of best interests of the child, in order to emphasize the need for special protection for migrant children. This approach can pave the way toward a more robust and effective implementation of adequate measures as these fundamental concepts can guide States in the treatment of migrant minors.

In summation, a correct acknowledgement of the composite vulnerability of migrant children, alongside due consideration of the child's best interests, can significantly enhance their protection. It is in pursuit of a more substantial child-oriented approach that the ECtHR has progressively directed its jurisprudence as a way to increase awareness on the condition of migrant children. While further refinements are required, the Court has contributed to amplify the obligations upon States, strengthening the protection of migrant children's rights. In view of a more comprehensive protection, the ECtHR's role is pivotal, considering its impact on domestic decision-making through emulation and judicial dialogue with domestic courts.

2. Landmark Judgements on Unaccompanied and Separated Minor Migrants

Over the decades, the jurisprudence of the ECtHR has decisively shaped the European discipline on unaccompanied and separated minors in migration. In fact, the evolution of migrant minors' protection is profoundly reflected in the behavioral development of the Court's reasonings, which helped in creating a solid network of guarantees toward such a delicate and fragile category. In order to correctly grasp the role of the ECtHR's jurisprudence for minors in migration, this paragraph will briefly but thoroughly analyze the most relevant cases on the matter in chronological order, highlighting the landmark judgements that composed the Court's guarantee framework.

The first important judgement is *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* of 2006, one of the case laws analyzed in this work. This case concerned the detention and deportation by Belgian authorities of a 5-year-old Congolese girl, named Tabitha, during her attempt to reunite with her mother who was granted a refugee status in Canada. In this decision, the Court found a violation of article 3, article 5(1), article 5(4), article 8 of the ECHR. To be precise, the Court affirmed that States have the duty to take adequate measures to provide care and protection as part of their positive

²¹⁷ CRC/GC/2005/6, par. 20: "A determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child's identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs [...]".

obligations under article 3 of the ECHR. Furthermore, the same ruling states that a minor should not be detained unless there is no alternative and in the exceptional case where detention has to take place it should be implemented in appropriate centers and not in the same conditions as adults. Moreover, appropriate measures should be taken by authorities to ensure that unaccompanied immigrant children receive proper counselling and educational assistance from qualified personnel, especially mandated for that purpose. It should be noted that in this case, the violation of article 3 of the ECHR was detected not only with regard to the minor, but also to her mother, extending the protection of migrant minors to invested close relatives under certain circumstances.²¹⁸

In 2011, the ECtHR delivered another paramount decision regarding the immigration detention of a minor in *Rahimi v. Greece*. The applicant, Eivas Rahimi, was a 15-year-old Afghan national who arrived in Lesbos after the death of his parents. Upon his arrival, he was arrested in the Pagani adult detention center, infamous for numerous reports regarding the abominable conditions of detention²¹⁹. After being released, a deportation order was issued giving Rahimi 30 days to leave the country. Without any kind of livelihood, the minor remained unprotected and homeless until a support association in Athens intervened. He had also applied for asylum, but at the time of judgement the application was still pending. The violations found in this case concern article 3, article 5(1) and article 13 of the ECHR. Precisely, the Court considered that there had been an inhuman or degrading treatment since the child was not assisted throughout his arrest and release. Moreover, the situation of extreme vulnerability given by the applicant's status of unaccompanied migrant minor, exacerbated the gravity of the aforementioned violations. A noteworthy aspect of this case is that, for the first time, the Court recognized the neglect of an unaccompanied minor by national authorities following release from a detention center without any kind of protection, as a violation within the meaning of article 3 of the ECHR.

Moving forward to more recent years, an important judgement was issued in *Moustahi v. France* in 2020, concerning the detention and collective expulsion of two unaccompanied children. The applicants are Mr. Moustahi and his two children, all Comorian nationals. The father entered the French overseas territory Mayotte in 1993 with a temporary residence permit, whereas his wife and children were issued a removal order to the Comoros in 2011, due to their irregular status. In 2013, the children attempted to reunite with their father by travelling to Mayotte by boat, but they were intercepted and subsequently detained by French authorities. Upon arrival, the children were registered as travelling with a certain adult (a 'M A') and were consequently detained and linked to

²¹⁸ See Chapter III, par. 3.

²¹⁹ CPT/Inf, 2010 Section 26/51.

<https://hudoc.cpt.coe.int/eng#%7B%22fulltext%22:%5B%22Pagani%22%5D%22sort%22:%5B%22cptdocumentdate%20descending.cptdocumentid%20ascending.cptsectionnumber%20ascending%22%5D%22cptsectionid%22:%5B%22p-grc-20090917-en-26%22%5D%7D>

the removal order of the unrelated adult. The ECtHR found detected several critical profiles in France's behavior, resulting in a violation of article 3, article 5(1), article 5(4), article 8 of the ECHR and article 4 of Protocol No. 4. As a matter of fact, the children's detention in adult-like conditions, alongside their connection with an unrelated adult to speed their removal did not respect the principle of the best interests of the child. The authorities should have delved into the bonds between the children and M A in order to ascertain if there truly existed a family tie. Due to these reasons, plus the lack of precautions and individual assessment for the children's expulsion, the ECtHR observed that the children were treated in a manner incompatible with the ECHR and Protocol No. 4. Moreover, the denial of contact between Mr. Moustahi and his children constituted a violation of article 8 ECHR in respect of all three applicants.

The last case in analysis is *Darboe and Camara v. Italy* of 2022, where the ECtHR has ruled on age assessment for alleged unaccompanied minors for the first time. The facts of the case involve two applicants, Mr. Camara, whose complaint was declared inadmissible, and Mr. Darboe, a Guinean national who reached Italy claiming to be 17 years old. The Italian authorities transferred the applicant to a reception facility for adults, without opening an asylum procedure. After a month of dire living conditions, he was subjected to a medical age assessment procedure using the Greulich and Pyle method²²⁰, without the applicant's explicit consent and failing to inform him on the details. The Court ruled that an age assessment procedure is essential to guarantee the rights of children, but the presumption of minor age implies procedural guarantees which were not respected by the Italian authorities. Under EU and domestic law standards, the ECtHR highlighted the lack of appointment of a legal guardian and a violation of the applicant's right to information. These procedural flaws, alongside the reception conditions and the failure to provide effective remedies, constituted a violation of article 3, 8, 13 of the ECHR.

This overview showcases that the case law of the European Court of Human Rights concerning unaccompanied migrant or asylum-seeking children has been sporadic. This failing is likely to have been motivated by the precarious situation of this particular category of migrants as well as the existing procedural obstacles within domestic judicial systems. Nonetheless, the Court has intervened on several occasions to ensure the correct enforcement of the fundamental principles of the European Convention of Human Rights with respect to minor migrants. In this sense, the Court recognized the extreme complexity of the tasks faced by national authorities, particularly in view of the high number of unaccompanied minors constantly entering the EU. However, given the utmost

²²⁰ The Greulich and Pyle method is one of the two main ways to assess the bone age of children through a left hand and wrist radiograph making use a standard bone age atlas that the reporter can compare their image to and make an estimation of bone age.

importance attributed to the guarantees provided by the ECHR, in concert with the promotion of the respect of human rights in the European legislative framework, no derogations of States from their obligations can be justified. This requirement is further enhanced by the extreme vulnerability of the category of unaccompanied and separated minors, toward which the Court adopts a more protective approach when balancing their rights with States' interests and national security.

3. The case of Mubilanzila Mayeka and Kaniki Mitunga V. Belgium (2006)

Notwithstanding its chronological distance, one of the most relevant cases on unaccompanied minors to this day is represented by the case *Mubilanzila Mayeka and Kaniki Mitunga V. Belgium* of 2006, commonly referred to as the *Tabitha Case*. The case's applicants, Ms. Pulchérie Mubilanzila Mayeka and her daughter, Tabitha Kaniki Mitunga, resorted to the ECtHR in 2006 to report multiple violations of the ECHR, perpetrated by the Belgian Government toward an unaccompanied minor at a transit center for adult foreigners. In particular, the applicants alleged that the child's detention and deportation had violated Articles 3, 8, 5, and 13 of the ECHR.

The facts began on 17 August 2002, when the Belgian authorities apprehended Tabitha, a five-year-old Congolese girl at the Brussels airport, who was travelling with her uncle without the necessary documentation. The child was then detained in Transit Center n°127, as requested by the Aliens (Entry, Residence, Settlement and Expulsion) Act of 1980²²¹. The purpose of the journey was for the child to rejoin her mother, Ms. Mubilanzila Mayeka, a Congolese national who had rightfully obtained refugee status in Canada in 2001. In fact, the mother had asked her brother, a Dutch citizen living in the Netherlands (hereinafter referred to as K.) to collect her daughter Tabitha from the Democratic Republic of Congo and to look after her until she was deemed legally able to join her mother in Canada. The child was detained for two months in precarious conditions without sufficient care to meet her needs. Furthermore, the Belgians Aliens Office declared her application for asylum inadmissible, thus refusing the child's entry into Belgium and ordering her removal to the country of origin. In October 2002, the Chambre de Conseil of the Brussels Court of First Instance held that Tabitha's detention was to be incompatible with articles 3(1)(2) of the UN Convention on the Rights of the Child, thus ordering the child's immediate release. The following day, the child was deported to the Democratic Republic of Congo. She was accompanied to the airport by a social worker and looked after in the plane by an in-flight attendant. Tabitha travelled with three unrelated adults who were also being deported and when she arrived, no members of her family were waiting for her. On the same day, Ms. Mubilanzila Mayeka contacted the Transit Centre n°127, asking to speak to her daughter, but was rapidly informed that she had been deported earlier on. At the end of October 2002,

²²¹ Aliens (Entry, Residence, Settlement and Expulsion) Act of 1980, art. 74/5.

the child ultimately joined her mother in Canada, following the intervention of the Belgian and Canadian Prime Ministers. In 2006, the case reached the ECtHR that issued a judgement addressing each of the alleged violations and founding profound criticalities in the treatment granted by Belgian authorities to an unaccompanied minor as well as to her mother.

Regarding article 3 ECHR, the Belgian authorities have been found in violation of its safeguards from a variety of profiles. First, the Court noted that the unaccompanied child had been detained for two months in a transit center intended for adults, since no facilities for children existed at the time, with no counselling or educational assistance from a qualified person specially assigned to her. Given her very young age, the fact that she was an illegal alien in a foreign land and her status of unaccompanied minor put her in an extremely vulnerable situation. Despite the absence of specific legal framework governing the situation of unaccompanied alien minors, the authorities failed to take adequate measures to fulfil their duty to take care of the child and to prevent or remedy the situation. Her detention demonstrated a lack of humanity and amounted to inhuman treatment. In fact, at a crucial stage in her development, Tabitha had been denied freedom of movement, had been unable to play or express her feelings, and had been held in generally substandard conditions.

Secondly, the child's deportation was performed without due consideration of her care during the travel or to the real situation she was likely to encounter on her return. In view of the conditions of its implementation, her removal caused her extreme anxiety and reconfirmed the lack of humanity toward a very young unaccompanied minor. The Court further found that by deporting the child, Belgium has violated its positive obligations to take requisite measures and precautions. On both profiles (detention and deportation) the threshold of severity to establish a violation within the meaning of article 3 ECHR had been attained.

A particular aspect of the Court's reasoning concerns the violation under article 3 found regarding the mother's rights. The evidence before the Court indicated that the only action which the Belgian authorities had taken with respect to MS. Mubilanzila Mayeka was to inform her that her daughter had been detained and to provide her with a telephone number where she could be reached. The authorities' limited action in respect of the mother caused her deep distress and anxiety. Likewise, the Belgian authorities advised the mother of her daughter's deportation only after the event, aggravating her concern. In depth, the Court explained that a relative, especially a parent, could qualify as a victim of the ill-treatment of their child or another person of their family. Naturally, this condition depends on a plethora of factors, such as the proximity of the family tie, the particular circumstances of the relationship, and the way in which the authorities responded to the parent's

enquiries. In situations similar to the *Tabitha Case*, “the essence of such a violation lies in the authorities’ reactions and attitudes to the situation when it is brought to their attention²²²”.

With regards to article 8 ECHR, the Court held that far from assisting the reunion with the family, the authorities’ actions had hindered it. Besides its obligations under the ECHR, as a state party to the CRC, Belgium should have followed the guidance provided in articles 3 and 10 in assessing the necessity of the interference with family life. The Court reiterated that the mutual enjoyment by parent and child of each other’s company constituted a fundamental element of family life, and that Tabitha’s detention amounted to an interference of both applicants’ right to family life, which would constitute a violation of article 8 ECHR unless it was “in accordance with the law” and “necessary in a democratic society”, meaning proportionate to pursued objectives. The first requirement was satisfied as the detention was based on section 74/5 of the Aliens (Entry, Residence, Settlement and Expulsion) Act of 1980. Furthermore, the decision pursued a legitimate aim for the purpose of article 8(2) ECHR since it could have been in the interests of national security, the economic well-being of the country or for the prevention of disorder or crime. Nevertheless, the Court asserted that detention was not necessary in a democratic society under the circumstances of the case. On this point, the Court observed that no risk of evasion was detected (nor other pressing need proportionate to the legitimate aim pursued). Therefore, the child’s detention served no purpose, and other less restrictive measures could have been taken to better respect the best interests of the child. For these reasons, the Court held that both applicants’ rights under article 8 had been violated.

The next alleged violation regards article 5 ECHR, both in paragraph 5(1) and 5(4). The former in explaining the cases in which an individual can be deprived of his liberty, in accordance with a procedure prescribed by law, contemplates “the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority”²²³. On this matter, the Court stated that although Contracting States are entitled to control the entry and residence of non-nationals on their territory at their discretion, this right must be exercised in conformity with the provisions of the ECHR. In this case, the conditions of detention were not adapted to the position of extreme vulnerability of the unaccompanied minor. In those circumstances, the Court considered that the legal void in the Belgian domestic law regarding the protection of minors did not sufficiently protect her right to liberty, thus configuring a violation of article 5(1) ECHR.

Finally, relatively to Article 5(4) and 13 ECHR, the Court noted that the Belgian authorities decided for the child’s deportation on the day after she lodged an application to the *Chambre du*

²²² ECtHR, 12 October 2006, App. no. 13178/03, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, par. 61.

²²³ ECHR, art. 5(1)(d).

Conseil for release, that is to say even before it had delivered its decision. Moreover, the deportation had proceeded despite the fact that the 24-hour period for an appeal by the public prosecutor had not expired. The child's successful appeal against detention was thus rendered futile. Even assuming that Tabitha's deportation could be assimilated to a release for the purposes of article 5(4) ECHR, there was no link between her deportation and the granting of an effective remedy, constituting a violation of article 5(4) ECHR²²⁴.

In short, the Court concluded that the child's detention and deportation amounted to a violation of articles 3 and 8 ECHR in relation to both the child and her mother. The Court also held that there had been a violation of articles 5(1) and 4 in relation to the child. Furthermore, under article 41 (just satisfaction), the Court awarded the applicants EUR 35,000 for non-pecuniary damages and EUR 14,036 for costs and expenses.

4. The case of A.T. and Others v. Italy: Unaccompanied Minors in Italian Hotspots (2023)

The second case of interest concerns the shortcomings in migrant reception and retention conditions in Italian hotspots, an issue that has been thoroughly investigated by the European Court of Human Rights over the last decade. In fact, the judgment of *A.T. and Others v. Italy* of 2023 holds a relevant significance given the precedent series of sentences by the ECtHR against Italy's reiterated violations of migrants' human rights²²⁵. Due to Italy's status as a bordering country extremely invested by migration flows, it is pivotal to observe the Court's approach toward a pressured system which nevertheless is expected to function in compliance with recognized human rights standards.

The case addresses facts that trace back to 2017, when the four applicants reached Italy on May 22 as minors and claimed refugee status in the Taranto Early Reception and Aid Centre. Three of the applicants, I.C., M.J. and K.I.S., were relocated to appropriate centers for the reception of unaccompanied minors in the same region upon decision of the Taranto Juvenile Court, and they were assigned to a legal guardian under the care of social services. On the contrary, no decision was communicated regarding applicant A.T. who was transferred to another reception facility outside the region on July 15, 2017.

The ECtHR excluded the part of the application pertaining to the first three applicants due to the loss of contact with their legal representative. As for A.T., the applicant claimed a violation of his rights under articles 3, 5 and 13 of the ECHR with regard to the period spent in the Taranto hotspot (which amounted to approximately one month and twenty days) due to the inadequate material

²²⁴ The Court held that a complaint under article 13 ECHR would be absorbed by a complaint under article 5(4) ECHR, since the requirements of the former are less strict than those of the latter.

²²⁵ ECtHR, 21 July 2022, App. no. 5797/17, *Darboe and Camara v. Italy* and ECtHR, 30 March 2023, App. no. 21329/18, *J.A. and Others v. Italy*.

condition and an ill-founded deprivation of liberty. To corroborate his claims, the applicants submitted evidence from the 2017 report of the Italian Senate's Extraordinary Commission for Human Rights²²⁶ highlighting the defectiveness of the center, especially in accommodating minors. In 2023, the ECtHR evaluated the case and found Italy accountable for subjecting the applicants to inhuman and degrading treatment, as well as for his arbitrary detention in the Taranto hotspot.

In the first place, the applicants complained about the conditions of the facility, which provided poor living conditions, was overcrowded and designed solely for adults. In detail, the submitted report highlighted that the heating was poor, clothing and hygiene items were inadequate for an extended stay, and minors were not allowed to leave the facility, contrarily to adults. The applicants further added that the conditions had been even harsher than those described in the report, as the hotspot exceeded its hosting capacity throughout their stay, with more than 1,400 people compared to a capacity of 400. In light of these considerations, the Court concluded that the applicants' rights under article 3 ECHR had been violated as they endured an inhuman and degrading treatment.

With reference to the issue of deprivation of liberty, the ECtHR affirmed the applicants' retention lacked a clear and accessible legal basis and information relative to the reasons for the measure. Additionally, the Court condemned the absence of an appropriate means to enable the applicants to challenge the lawfulness of their *de facto* detention before a judicial authority. Therefore, the Court asserted that article 5 ECHR had been violated under paragraphs 1, 2 and 4.

Lastly, the ECtHR evaluated and confirmed a violation of article 13 ECHR in conjunction with article 3 ECHR. In this regard, the Italian Government failed to provide the applicants with any specific remedy to lodge a complaint relating to the dire reception conditions of the Taranto hotspot. This shortcoming should be considered even more aggravated by the applicants' status as unaccompanied minors. In its judgement, the ECtHR unanimously ruled that Italy pay each applicant EUR 6,500 for non-pecuniary damages, and EUR 4,000 to the applicants collectively for expenses incurred before the Court.

5. The Evolution of the ECtHR's Judicial Standards and the Outcome on Member States

The analysis of a selection of ECtHR's case law on the issue of unaccompanied and separated minors demonstrates a solid and specific approach that the Court held to discipline the matter. Since the early 2000s, the ECtHR has maintained a thorough and meticulous case-by-case approach, useful to fill the normative void in the ECHR relatively to the category of migrant minors by enacting the most

²²⁶ Commissione Straordinaria per la Tutela e la Promozione dei Diritti Umani presso il Senato della Repubblica, *Rapporto sui Centri di Identificazione ed Espulsione in Italia*, 2017, pp. 24-29.

protective solution to each single situation. With this aim, the jurisprudential evolution of the Court has gradually provided a comprehensive level of protection and guarantees toward this fragile category of migrants. Notably, the ECtHR's jurisprudence has recognized the extreme vulnerability of unaccompanied and separated minors as a decisive factor that takes precedence over their immigration status. Such child-oriented approach is further enhanced by the consideration of the best interests of the child as a driver in decision-making. Accordingly, the Court's judicial standards evolved with the aim to reduce Member States' margin of appreciation in the treatment, detention and deportation of minors in migration. In this sense, the judicial progress of the ECtHR has been remarkable, covering a variety of cases and situations that have established a robust network of guarantees toward children with which States are required to comply. Starting with the extension of the rights contained in the ECHR to unaccompanied minors' close family, the Court proceeded to recognize the neglect of an unaccompanied minor by national authorities following release from a detention center without any kind of protection, arriving to regulate on age assessment procedures. Nevertheless, the ECtHR's efforts toward a functioning and effective mechanism of reception and treatment of unaccompanied and separated minors remain too fragmented, especially due to the normative vacuums contained in the ECHR and the reluctance of States to relinquish their decisional power over a matter that interferes with their domestic security.

Notwithstanding the enormous difficulties in the implementation of the ECtHR's jurisprudence in domestic legislation and statal approaches toward migration, the Court's sentences have produced some concrete effects on national bodies of law. In particular, a different outcome can be observed in Belgium and Italy, after the two aforementioned cases.

In Belgium, the aftermath of the *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* case prompted a series of legal reforms of the domestic framework. First and foremost, the detention of unaccompanied minors whose minor status is determined, has been prohibited by law²²⁷. Instead, when they arrive at the border, they are assigned to a so-called Observation and Orientation Centre for unaccompanied children which is required to provide them with appropriate care²²⁸. An exception to the legal prohibition to detain unaccompanied children applies when there are well-founded doubts on the minority of an unaccompanied child. In such a case, the alleged minor can be detained exclusively for the duration of the age assessment procedure. Furthermore, the deportation of an unaccompanied minor is allowed only insofar as it aligns with their higher interest and aims at family reunification. Additional guarantees include a verification by the Aliens Office that the minor will be cared for in the country of return²²⁹, as well as the involvement of the minor's guardian in the process

²²⁷ Aliens (Entry, Residence, Settlement and Expulsion) Act of 15 December 1980, art.74/19.

²²⁸ Loi du 2007 sur l'accueil des demandeurs d'asile et de certaines autres catégories d'étrangers.

²²⁹ Loi modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers.

of finding a lasting solution. With respect to the guardian, unaccompanied minors should be granted a legal representative from the time of interception. This figure has to provide them with care (under the supervision and coordination of the Guardianship Department) and has the capacity to challenge a deportation order.

Despite the innovations in the normative framework, several human rights concerns persist in the protection of unaccompanied minors provided by Belgium. In fact, reception centers face limited availability compared to the unexpected high number of unaccompanied minors reaching the country in the last few years. Moreover, there is a general insufficiency of qualified legal guardians, thus leading to an average waiting time of four months to be assigned one²³⁰. Lastly, the age assessment procedures have been found to fall short in meeting European and international guidance on the age determination of unaccompanied minors.

In Italy, the judgment on *A.T. and Others v. Italy* of 2023 is notably significant because it adds to a series of other convictions by the ECtHR against Italy specifically in relation to the detention of migrants during the initial reception phase. In particular, following the judgment on *Khlaifia and Others v. Italy* of 2016, the Committee of Ministers of the Council of Europe established a supervision procedure to annually check the normative progresses to achieve a protection of human rights of migrants consistent with conventional principles. Notwithstanding the reiterated inadequacy of the Italian reception system, exacerbated by Italy's high exposure to migration flows, this procedure ceased in 2021 since the prospected instruments proposed by the Italian Government were deemed adequate.

In reality, the insufficiency of the Italian reception system and the absence of specific jurisdictional remedies has persisted in the following years. The systematic and diffused lack of idoneous infrastructure for migrants in Italy still represents a very serious issue, especially in relation to the reception of minors. With reference to *A.T. v. Italy* and other recent decisions by the ECtHR²³¹, the basic life conditions in reception centers and hotspots are not satisfied, due to overcrowding, appalling hygienic conditions and lack of sanitary and psychological assistance. Furthermore, the presence of unaccompanied minors in centers specifically designed for adults makes the shortcomings of the system even more evident. In this sense, the treatments reserved to the extreme vulnerable category of children, such as age assessment procedures, the impossibility to leave open centers and the absence of a legal representative, risk constituting serious breaches of recognized human rights.

²³⁰ Euro-Med Rights Monitor, *Happiness, Love and Understanding: The Protection of Unaccompanied Minors in the 27 EU Member States*, 2023.

²³¹ ECtHR, 21 July 2022, App. no. 5797/17, *Darboe and Camara v. Italy* and ECtHR, 31 August 2023, App. no. 70583/17, *M.A. v. Italy*.

In light of this complicated background, it is important to showcase the most relevant normative evolutions on the matter of unaccompanied and separated minors. The first evolution traces back to 2017, with the adoption of the *Legge Zampa*²³² on the protection of unaccompanied minors. In pursuit of the best interests of the child, the law excludes any possibility of preventing or blocking unaccompanied minors' entrance in Italy. In this law, unaccompanied minors are recognized as legal persons with their own rights and a great vulnerability. Precisely, article 1(1) affirms that “unaccompanied foreign minors are entitled to the same rights in terms of child protection as minors who are Italian or European Union citizens”, thus recognizing children as such, irrespective of their migrant status. Moreover, the provision established the prohibition of rejection of unaccompanied minors, and an expulsion order can be issued within 30 days from reception, unless it involves a risk of serious harm to the child²³³. Furthermore, the law institutes screening and identification safeguards for minors crossing the Italian border, including the presence of a supervisor throughout the entire procedure²³⁴. As for detention, the maximum period is set at 30 days, necessary for identification of the minor, for finding any family members, and to decide whether the minor shall be transferred to specific centers or returned through the procedure of the assisted repatriation.

A more recent step has been concluded with the amended conversion of law decree n. 133/2023 that includes some provisions on minors. This law does not appear to be in compliance with the sentences of the ECtHR, due to various profiles of criticality. In fact, it allows temporary detention of unaccompanied minors aged at least 16 in facilities for adults, for a maximum of 150 days. Despite the extraordinary nature of the measure, its implementation risks to reiterate scenarios similar to the ones already condemned by the ECtHR as breaches of fundamental human rights. On this point, the Court has always remarked that each violation of the ECHR has to be considered in light of the age and the specific vulnerability of the victim which is always present in cases involving minors.

From a general standpoint, in the near future the entry into force of the 2024 Pact on Migration and Asylum will provide standardized measures for each adhering State, which seem to reflect a more general trend toward the issue of migration in Europe. In fact, there is a growing utilization of instruments of long-term detention and return with regards to migrants, especially in bordering countries, which appears to be in line with the safety-oriented approach of the New Pact. In this context, the vulnerable situation in which unaccompanied and separated children can find themselves due to the serious challenges faced during their journey and due to immigration-related practices, calls for greater awareness from authorities and for specialized care in the centers where children are placed. It is pivotal to underline the remarked stance of the ECtHR, which does not interpret the

²³² L. n. 47/2017.

²³³ *Ibid.*, art. 3.

²³⁴ *Ibid.*, art. 5.

difficulties related to the diffused inflows of migrants as a justification for States to contravene to their obligations provided by the ECHR. Thus, the current management of the migration phenomenon requires significant improvements both at the supranational and domestic level. In fact, a universally recognized democratic system like the European one cannot accept to be insufficient toward the necessities of migrants, and minors in particular. For this reason, the shared constitutional and international norms on the respect of human rights shall always be promoted and considered as the minimum level of protection.

CONCLUSIONS

This thesis has sought to examine the complex phenomenon of the protection of unaccompanied and separated minors involved in migration toward the European Union, investigating its interplay with the legislative and policy framework on the matter. The research question guiding this work asked whether the European Union has succeeded in reconciling its commitment to human rights protection, particularly in the safeguard of the fragile category of migrant minors, with the pressing demands of migration management. The answer that emerges is nuanced. On the one side, the European Union has been a safe haven for innumerable migrants, providing a dense legislative framework aimed at safeguarding their fundamental rights and ensuring access to legal guarantees and assistance. In this context, the protection of migrant children has been progressively strengthened both by upholding general principles of human rights law and by incorporating specific provisions on the matter in EU law. From the respect of international human rights instruments such as the Convention on the Rights of the Child, to the ratification of the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union, and ultimately with the evolution of the Common European Asylum System recently recast by the New Pact on Migration and Asylum, the Union has demonstrated a constant effort to improve and adjourn its normative apparatus on migrant minors.

It can be argued that the current CEAS package, interpreted in compliance with the international legal architecture, contains important measures to protect the fundamental rights of unaccompanied minors. Reforms launched in 2016 and concretized in the 2024 New Pact strengthened some of these safeguards, while at the same time they introduced a more punitive approach towards migrants and asylum-seekers, sanctioning and preventing secondary movements and possible abuse of the asylum system. These changes must be interpreted within the broader narrative of control and deterrence which is currently driving EU asylum and migration policies. The increased use of pushbacks or collective expulsions, informal migration management agreements with third countries and measures to detain or contain people reflect security-based logics prioritizing domestic interests over human rights protection. Migration is therefore often envisioned as an emergency threatening national security rather than an opportunity of growth and enrichment. Likewise, Member States are increasingly leaning toward the enactment of restrictive norms, increasing the likelihood of disregard of the human-rights based approach promoted by the European Union.

Furthermore, given the interference of migration with national security, Member States are reluctant from conferring a greater power to the Union in this field. Consequently, the EU has been lacking a common and shared policy in migration management, *de facto* undermining its authority over Member States, which tend to prioritize their national goals. As a result, the implementation of

the legal apparatus has been obstructed by policy fragmentation and insufficient solidarity between Member States that prefer to manage migratory pressures through individualized solutions rather than with the collective response the migration phenomenon needs. The attempt to fill this legal vacuum through the adoption of the New Pact does represent a step toward a functional harmonization, but the instrument presents several flaws and criticalities. On the one side, the New Pact is meant to cover all of different elements needed for a comprehensive European approach to migration and to establish a fairer sharing of responsibility and solidarity. On the other, this normative evolution appears vague, hard to align with international standards, and difficult to interpret and apply univocally. Additionally, the increasing orientation toward measures aimed at discouraging migration, closing national borders, and fighting terrorism has been reaffirmed by this recent EU policy evolution.

Such shortcomings generate repercussions on migrant minors, resulting in differentiated levels of protection and leaving many children in a situation of legal uncertainty, in which their special needs remain inadequately addressed. In other words, clear gaps remain between the letter of the law and the lived reality of migrant minors that in absence of necessary representation and assistance remain unaware and deprived of a full enjoyment of the rights and guarantees they are entitled to. Given their precarious condition, children should be treated first and foremost as children, irrespective of their immigration status. The challenge to ensure effective safeguards is further exacerbated when minors are unaccompanied or separated. In fact, these children are particularly exposed to risks for their minority, for their involvement in migration and their lack of familial or adult protection.

Over the last decades, the EU has encountered numerous breaches of migrant minors' rights throughout their migration journey, arrival and stay in the Union. The internationally recognized principle of the best interests of the child is often curbed in favor of restrictive domestic policies. In addition, unaccompanied and separated minors suffer from inadequate reception conditions, lack of legal representation and frequent detention and return practices for immigration-related reasons. In these circumstances, children are highly exposed to different forms of exploitation, including recruitment by criminal networks or human trafficking.

For these reasons, Member States have been repeatedly addressed by European and international institutions, in the attempt to align them with the respect of human rights standards on which the European Union is founded. In this regard, an important role is played by the European Court of Human Rights, whose jurisprudence has broadened the scope of the European Convention on Human Rights through a dynamic interpretation, allowing its application to children's rights. Through the application of the ECHR in light of international instruments, especially the UN Convention on the Rights of the Child, the Court has strengthened the protection of migrant minors, while creating a unique array of legal requirements in fields previously unrelated to children. As a demonstration of

this approach, the ECtHR has consolidated its role as guarantor of human rights in several judgements. This work, focusing on unaccompanied and separated minors, examined in detail the cases of *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (2006) and *A.T. and Others v. Italy* (2023). These judgements showcased a progressively more extensive safeguard of this vulnerable category of migrants, in compliance with the evolution of the relative normative framework. Notwithstanding the concrete impact generated upon domestic legislations, Member States generally continue to fall short in the provision of an effective protection in accordance with international standards. Therefore, the case law reviewed serves as a caution that even well-meaning governments can falter, and that constant vigilance and legal accountability are required to protect such vulnerable individuals. Accordingly, the ECtHR has often been instrumental in protecting the rights of unaccompanied minors, for instance when it comes to immigration detention, family reunification and interpreting the best interests of the child. For this reason, as the EU and its Member States move towards a restrictive interpretation of the CEAS, the Court will bear even a greater responsibility in ensuring that unaccompanied children continue to access the rights granted to them by law.

In summation, the protection of unaccompanied and separated minors provided by the European Union appears sufficient from a normative standpoint, notwithstanding recent security-oriented trends risk to jeopardize their extremely vulnerable condition. Over time, the EU has adopted a plethora of instruments enshrined in its legal apparatus to ensure effective guarantees for migrant minors and has committed to the respect of international law on the matter. Nevertheless, this framework does not encounter thorough validation in its implementation. Furthermore, States remain reluctant to relinquish a greater control on migration to the European Union which could lead to a harmonization and amelioration of the discipline. Given this discrepancy, the protection of children travelling to the EU alone is inconsistent, eventually leading to obstructions in the access to the dedicated legislative apparatus. As a result, the treatment of unaccompanied and separated minors remains exposed to the discretion of national authorities, which often results in neglect of the child's best interests and human rights violations.

The outcome of this uncertainty confirms the perception of the European Union as a controversial migration hub. The expectations of migrant minors looking for safety, protection and better living conditions are reflected in the legislative framework, but the concrete experience endured by children unravels an opposite image. While the EU and its Member States face ongoing challenges in protecting migrant children, especially those who are unaccompanied and separated, there exists a widespread desistance in the concrete application of the tools and principles to effectively and adequately meet their special needs.

Therefore, the European Union can be described a beacon for the respect of fundamental and human rights, but in relation to unaccompanied and separated minors significant and unacceptable vacuums persist. In order to reaffirm its renowned role, the EU cannot persevere in the lack of assessment of such a crucial issue, especially in light of a global context where the protection of rights is of essential and utmost importance.

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