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**The status of unaccompanied migrant children: the best interests
of the child in the reception of procedural safeguards under EU
law.**

Master's Thesis

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Declaration

I hereby declare that this Master's Thesis on the topic "The status of unaccompanied migrant children: the best interests of the child in the reception of procedural safeguards under EU law" is my original work and I have acknowledged all sources used.

Place: Olomouc

Date: 28 May 2020

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Abstract (EN)

This master thesis investigates how unaccompanied children in the European Union (EU) experience one part of the reception system – the social workers – in the context of their everyday life. Due to the globalisation, migration increased. Unaccompanied minors become a problem these days. The vulnerabilities and special needs of this group of children have to be assessed yet. However, unaccompanied minors constitute the most vulnerable group among all migrants and face the most serious violation of human rights when they are not treated with dignity.

Among their procedural safeguards, the rights to have legal assistances is a fundamental right that is strictly related to the realisation of other rights which are contained in the CRC. The purpose of this thesis is to assess the legal foundation for the rights of unaccompanied children, to be granted with the legal assistances under national and International law. Also, the purpose is to examine the current legal frameworks regarding their best interests and procedural safeguards. While analysing national and international systems, we can stress that EU law is relatively limited with regard to protection and realising minors' rights.

The research takes a thorough a look at the EU directives and International treaties, jurisprudence from the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). Also, there is an analysis of existing legal frameworks regarding the protection of human rights. This thesis underlines the problems of getting legal professionals with regard to getting special protection and the necessity of establishing specific regional standards.

Key words: *unaccompanied minors, human rights, asylum procedure, procedural safeguards, best interests, guardianship, procedural rights, international protection.*

Abstract (CZ)

Tato diplomová práce zkoumá jak děti bez doprovodu v Evropské Unii (EU) prožívají jednu část přijímacího systému - sociální pracovníky - v kontextu svého každodenního života. V důsledku globalizace se migrace zvýšila. Nezletilé osoby bez doprovodu se v těchto dnech stávají problémem. Zranitelnosti a zvláštní potřeby této skupiny dětí ještě musí být prozkoumány. Nezletilé osoby bez doprovodu však představují nejzranitelnější část z celé skupiny migrantů a čelí nejzávažnějšímu porušování lidských práv pokud s nimi není zacházeno důstojně.

Mezi procesní záruky nezletilých bez doprovodu patří právo na právní pomoc, základní právo, které úzce souvisí s realizací dalších práv obsažených v Úmluvě o právech dítěte. Cílem této práce je posoudit právní základ pro práva dětí bez doprovodu, která jim mají být poskytována na základě vnitrostátního a mezinárodního práva. Účelem je také prozkoumat současné právní rámce týkající se jejich nejlepších zájmů a procesních záruk. Při analýze vnitrostátních a mezinárodních systémů můžeme zdůraznit, že je právo EU relativně omezené v souvislosti s ochranou a uplatňováním práv nezletilých.

Výzkum se důkladně zabývá směrnicemi EU, mezinárodními smlouvami, judikaturou Evropského soudu pro lidská práva a Soudního dvora Evropské unie. V práci je rovněž provedena analýza stávajících právních rámců týkajících se ochrany lidských práv. V závěru práce zdůrazňuje problémy spojené se získáváním právních odborníků v rámci získání zvláštní ochrany a poukazuje na nutnost stanovení specifických regionálních standardů.

Klíčová slova: *nezletilé osoby bez doprovodu, lidská práva, azylové řízení, procesní záruky, nejlepší zájmy, opatrovnictví, procesní práva, mezinárodní ochrana.*

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List of Abbreviations and Acronyms

Acquis: The EU's *acquis* is the body of common rights and obligations that are binding on all EU countries, as EU Members.

Art: Article

CEAS: The Common European Asylum System

CFR: The Charter of Fundamental Rights

CJEU: The Court of Justice of the European Union

CRC: The United Nation Convention on the Right of the Child

ECHR: The European Convention on Human Rights

ECtHR: European Court of Human Rights

EMN: European Migration Network

EU: European Union

FCA: Federal Administrative Court

FRA: The European Union Fundamental Rights Agency

Ibid: In the same place

ICCPR: The International Covenant on Civil and Political Rights

ICESCR: International Covenant on Economic, Social and Cultural Rights

Inter Alia: Latin term that means “among other things”. It is used to indicate that something is one out of a number of possibilities.

NGO: Non-governmental organization

OPAC: The Optional Protocol on the involvement of child in armed conflict

OPIC: The Optional Protocol to the CRC on Communications Procedure

OPSC: The Optional Protocol on the sale of children, child prostitution and pornography

Para: Paragraph

Ratione Materiae: By reason of the matter in hand

SAC: Supreme Administrative Court

Sui Generis: To identify a legal classification that exists independently of other categorizations, either because of its singularity or due to the specific creation of an entitlement or obligation

UAM: Unaccompanied minor

UASC: Unaccompanied Asylum-Seeking Children

UN: The United Nation

UNGA: The United Nation Alternative Care Guidelines

UNCHR: The United Nation High Commissioner for Refugees

UNCESCR: The United Nation Committee on Economic, Social and Cultural Rights

UNICEF: The United Nation Children's Fund

Vs, v: Versus, against

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1. INTRODUCTION

According to the United Nation High Commissioner for Refugees (UNCHR), the number of migration to Europe increased in 2015 when more than one million refugees arrived and nearly 700 thousand seeking asylum refugees registered in the European Union.¹ Among these, nearly 100 thousand asylum seekers who applied for international protection were considered as unaccompanied minors. Children can migrate with their family members or on their own. According to the International Human Rights Law, the basic principle of regulating the rights of children is the best interests' principle. This principle is arising from Art. 3.1 of the United Nation Convention on the Right of the Child.² This article shall apply systematically on every stage of the migration movement. This principle must be taken into account in any development strategy by any authority which works with children, as an example the United Nation High Commissioner for Refugees. It also should include the protection and care of the child. European and also national legislation recognises the importance of the CRC and formally places the standards of this Convention at the heart of all actions concerning unaccompanied minors.³

Unaccompanied minors are particularly vulnerable to exploitation or abuse. It is important to stress that also children who migrate with family might have the same problems if they migrate without any documents. As a consequence, they have difficulty accessing education system or healthcare system. Due to the fact that their parents might be afraid of deportation and therefore they usually do not contact any competent authorities about their refugee status.

In the asylum procedures, specific substantive and procedural rights are caused for Unaccompanied Asylum-Seeking Children (UASC). It is very important to know about the unaccompanied migrant children in order to ensure that the safeguards are in place when representing UASC in their asylum application.

¹ The United Nation High Commissioner for Refugees [online]. Accessible at < <https://www.unhcr.org/>>.

² CRC 1989. Art. 3.1. "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

³ GORNIK, Barbara, SEDMAK, Mateja, SAUER, Birgit. *Unaccompanied minor migrants in Europe: between compassion and repression*. Unaccompanied Children in European Migration and Asylum Practice. 2018, pp. 1-2.

Procedural rights and safeguards needed to ensure access for migrant children to the fair and effective asylum procedure. This procedure also includes several important rights that must be respected and obligations that must be imposed on States and professionals, such as legal representatives, social workers, lawyers, guardians and people who work with children.⁴

The relevant procedural rights and safeguards usually include access to asylum procedures, access to the appointment of a guardian, access to legal assistance and representation, access to any information for migrant children in their native language, the right to be heard, etc.⁵

1.1. Aim

The research aims at reading and analysis examples about practices of EU Member States are focused on the situation of unaccompanied migrant children. When they do not reach the age of majority yet, and also among other things how European countries cope with the challenges and how the EU encountered by this category as a result of this critical change of legal regime. The present study is first and foremost focused on the difficulties encountered by the separated and unaccompanied child in the safeguards procedure and the reception system after when they lost their specific guarantees and they started to enjoy as Unaccompanied and Separated Children (UASC). The field of the current study combine some case law and testimonies about unaccompanied migrant children and also their protection until they are 18 years-old.

1.2. Research questions

This paper explores the relationship between International law and EU law regarding unaccompanied minors. The thesis deals with the principle of “best interests” of the child in the reception of procedural safeguards under EU law and also the right of the unaccompanied

⁴ Training Manual of the European Council on Refugees and Exiles. Fundamental procedural rights for unaccompanied asylum-seeking children. 2019, pp. 3-4 [online]. Accessible at <https://www.ecre.org/wp-content/uploads/2019/07/4.23.-Module-2_Fundamental-procedural-rights.pdf>.

⁵ Ibid.

minors. In conformity with the aim of this project, the research questions of the thesis have been formulated as follows:

1. What is the legal status of unaccompanied children under EU law?
2. What rights unaccompanied minors have?
3. What is the mandate of the guardianship?
4. What are procedural safeguards for unaccompanied children?

1.3. Previous research and relevance of the topic

There are plenty of scientific articles, academic books, legal materials from the Court of Justice of the European Union, there are also several resolutions concerning the problems that unaccompanied minors are having, when they cross the borders. At present, many countries are faced with the processes of migration. This phenomenon is considered as one of the consequences of globalization, which is representing a global process and requires international legal regulation. The issues of social adaptation of migrants have been especially acute. The decreasing pace of change such as political, economic, cultural, social, etc. - requires the strategy of adaptation for migrants. This, in turn, strongly underscores the development of society in that migration process is gaining significance throughout the world and especially in the EU.

1.4. Literature review

The problem of protecting the rights of migrant children is the most complex and problematic. The problem of asylum procedure for unaccompanied children was studied by many scientists.

In my work I used primary sources regarding to unaccompanied minors such as CRC⁶, European Convention on Human Rights (ECHR)⁷, Convention Relating to the Status of Refugee 1951 (Refugee Convention 1951)⁸, International Covenant on Civil and Political Rights (ICCPR)⁹, EU Treaties¹⁰, EU Directives¹¹ and Optional Protocols¹².

Secondary sources – Jason M. Pobjoy¹³; Barbara Gornik, Mateja Sedmak, Birgit Sauer¹⁴; Daniel Senovilla, Philippe Lagrange¹⁵; Ciara Smyth¹⁶ who mostly concentrate on the issue of migration of refugees to Europe; The European Union Agency for Fundamental Rights (FRA). Handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking¹⁷; and Separated asylum seeking children in European Union Member States. Comparative report.¹⁸

⁶Convention on the Rights of the Child [online]. Accessible at <<https://www.ohchr.org/documents/professionalinterest/crc.pdf>>.

⁷European Convention on Human Rights [online]. Accessible at <https://www.echr.coe.int/Documents/Convention_ENG.pdf>.

⁸Convention Relating to the Status of Refugees 1951 [online]. Accessible at <<https://cms.emergency.unhcr.org/documents/11982/55726/Convention+relating+to+the+Status+of+Refugees+%28signed+28+July+1951%2C+entered+into+force+22+April+1954%29+189+UNTS+150+and+Protocol+relating+to+the+Status+of+Refugees+%28signed+31+January+1967%2C+entered+into+force+4+October+1967%29+606+UNTS+267/0bf3248a-cfa8-4a60-864d-65cdfec1d47>>.

⁹International Covenant on Civil and Political Rights [online]. Accessible at <<https://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf>>.

¹⁰Treaty of Amsterdam 1997 [online]. Accessible at <<https://www.europarl.europa.eu/topics/treaty/pdf/amst-en.pdf>>.

¹¹The Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (the Procedures Directive) [online]. Accessible at <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:326:0013:0034:EN:PDF>>; The Directive of the European Parliament and of the Council 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals (the Return Directive) [online]. Accessible at <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0115&from=EN>>.

¹²Optional Protocol to the Convention on the Right of the Child on a Communications Procedures [online]. Accessible at <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&clang=_en>; Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict [online]. Accessible at <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&clang=_en>; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography [online]. Accessible at <<https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx>>.

¹³POBJOY, Jason M.. *The Child in International Refugee Law*. 2017, pp. 19; Allison JAMES, Alan PROUT. *Constructing and Reconstructing Childhood*. 1998, 317 p.

¹⁴GORNIK, Barbara, SEDMAK, Mateja, SAUER, Birgit. *Unaccompanied minor migrants in Europe: between compassion and repression*. Unaccompanied Children in European Migration and Asylum Practice. 2018, 189 p.

¹⁵SENOVILLA, Daniel, LAGRANGE, Philippe. The legal status of unaccompanied children within International, European and National frameworks. Protective standards vs. Restrictive implementation. 289 p.

¹⁶SMYTH, Ciara. *European Asylum Law and Rights of the Child*. 2014, 250 p.

¹⁷The European Union Fundamental Rights Agency [online]. Accessible at <<https://fra.europa.eu/en>>.

¹⁸The European Union Fundamental Rights Agency. *Separated sylum seeking children in European Union Member States. Comparative report*. 2010, 125 P.

Internet sources - Training Manual of the European Council on Refugees and Exiles. Fundamental procedural rights for unaccompanied asylum-seeking children; Access to Fair Procedures including the Right to Be Heard and to Participate in Proceedings. FAIR Project Module 1. International Commission of Jurists.

1.5. Delimitation of the topic

The legal bases of the EU in relation to children are limited¹⁹ that is why I will concentrate mostly on International law. For many years the EU has been active in the area of unaccompanied minors. This is reflected in the EU *acquis*, which provides a general framework for the protection of the rights of the unaccompanied children. The EU has incorporated aspects of the CRC and the Refugee Convention into its legislation and framework of policies. The CRC is the most important and universally accepted international instrument with regard to protect the rights of children. The CRC has been adopted as a frame of reference to guide the development of EU law and policy affecting children.²⁰

The CRC contains international legal instruments to protect children's rights. The EU Member States committed themselves to respect all rights and principles to all children under national jurisdiction. Given its limited scope of master thesis does not explored beyond procedural guarantees under EU law, because it is mostly stressed in International legal instruments.

1.6. Theoretical and Methodological framework

Children refugee studies face with problems of transit or arrival have already stressed several aspects that surface in our study, such as experience of discrimination and hostility and the role of professional support. Social science has rich knowledge as to how this impacts on unaccompanied minors to have proper care and protection in the reception of their best interests. Against this study did not want to add to these general findings, because it is mainly

¹⁹ EU Framework of Law of Children's Rights. Directorate-General For Internal Policies [online]. Accessible at <[https://www.europarl.europa.eu/RegData/etudes/note/join/2012/462445/IPOL-LIBE_NT\(2012\)462445_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/note/join/2012/462445/IPOL-LIBE_NT(2012)462445_EN.pdf)>.

²⁰ LIEFAARD, Ton, DOEK, Jaap E. *Litigating the Rights of the Child. The UN Convention on the Rights of the Child in Domestic and International Jurisprudence*. 2015, 211 p.

based on “adult” migrants. Instead, it will concentrate our study on problems, guardianship, safeguards and best interests of unaccompanied minors.

However, grouping people in this category requires caution, because unaccompanied minors are usually in public care and social services. They are seen as children since their minority which is often invoked, but debated, connects these children to particular regimes of protection. The hegemonic knowledge relate to their experience and legal status under EU law.

Regarding mythology of this research, it is important to specify the terminological origin of the existing definitions. Unaccompanied minors are “third world-country natives or stateless persons below the age of eighteen, who arrive on the territory of Member States unaccompanied by an adult responsible for them whether by law or custom, and for as long as they are not effectively taken into care by such a person, or minors who are left unaccompanied after they have entered the territory of Member States”.²¹

To sum up, there are several implicit dangers of individualising findings from studies on unaccompanied minors. Methodological contributions in the field of research on this category of migrants have outlined several issues which call for high priority. To respond adequately, our study relies on social and legal methodologies. Desk research was also undertaken for the current study. Previous researches on unaccompanied minors are relatively limited.

1.7. Outline of the chapters

The chapters of this master thesis are based on the previous researchers, articles and standpoints of the scientists. The Introduction is followed by two chapters dealing with legal regulation and analysis of the status of the unaccompanied minors, including case law.

In chapter 2, “Legal regulation” presents a summary of the legal framework at the International and European levels provided by CRC or national laws of each Member States.

²¹ Art. 2 of Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [online]. Accessible at < <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001L0055&from=EN>>.

The role of the UN Committee on the Rights of the Child and its work concerning the best interests of the unaccompanied children who have special rights and needs under CRC. Also, this chapter presents a methodology for assessing the best interests of the child and the path of unaccompanied children in search of international protection in the EU. At the national level, unaccompanied minor might be treated not primarily as a child. The chapter introduces a method how to help to build trust and a positive attitude and provides agency to the unaccompanied minors. Finally, unaccompanied minors live in a state of chronic uncertainty without any durable solution.

In Chapter 3, “Analysis of human rights principles regarding the protection of unaccompanied minors” deal with the right to be heard, right of the child to seek and to qualify for international protection and the right to an effective remedy (right to appeal). It begins with clarifying that every child has all these rights. This means that all children must be allowed to lodge an asylum application. Also, they have the right to be granted international protection. The right to be heard is a general principle of the CRC that has significant implications for the asylum procedure. This right is equivalent to the right to a fair hearing. It means that unaccompanied minors have the right to be heard and to have their own views according to age and maturity. The right to be heard is implicated by many provisions. These are analysed for compliance with the various aspects of this right. The final section of Chapter 3 discusses the right to an effective remedy. The remedy must be accessible and effective in practice as well as in law. It also has to be independent and impartial and provided by a judicial body. In this chapter, the thesis will concentrate on specific procedural safeguards and rights with regard to unaccompanied minors. The chapter is based on analysis of wording and case law of the ECtHR. It will discuss role of legal professionals regarding unaccompanied minors with examples in case law.

2. Legal regulation

The legal regulation concerning unaccompanied children consists both laws. Despite that my diploma thesis is about EU law but also I will use International law as well. The EU legal regulation on unaccompanied minors is undevelopped and the EU legislation for action in relation to unaccompanied minors is relatively limited.

2.1. Child migration with the International and European laws

International law recognized that child in migration is entitled to special care and protection. The international community adopted two treaties, namely the Refugee Convention and the CRC which are concerned involuntary alienage and special care and assistance required by children.²² Following the said documents “migrants” are people who moved away from own place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons.²³ The Refugee Convention applies to all persons irrespective of age, but it is not providing separate provisions regarding the refugee status for children. In case of separated and unaccompanied children with the individual application for refugee status, the child has to prove that he has a well-founded fear of being persecuted based on race, religion, citizenship, political opinion, etc. The age and gender of the child are important for determining refugee status, to give most attention to such child-specific forms and manifestations of prosecution as well as gender-based violence in national refugee status-determination procedure, for example, early military service, child trafficking, sexual exploitation, etc. The well-founded fear of persecution of a child must be associated with one or more characteristics listed in Art. 1. A. (2) of the Refugee Convention, so that the child can apply for refugee status.²⁴

In 1959 the UN adopted the Declaration of the Rights of the Child. This Declaration included 10 principles, 5 of them were taken from the 1924 Declaration. For the first time,

²² BELLAMY, Carol, ZERMATTEN, Jean. *Realizing the Rights of the Child*. 2007, pp. 209.

²³ International Organization for Migration, Glossary on migration, IML Series No. 34, 2019 [online]. Accessible at <https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf>.

²⁴ Art. 1. A. (2) of the Refugee Convention 1951: “...owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

the Declaration mentioned the best interests principle of the child. For protecting children, the Declaration is remarkable because it contains the principle of non-discrimination, which provides an extensive list of ground for discrimination, which repeats the provision of the International Covenant on Civil and Political Rights.²⁵ The rights to special treatment, education and caring for socially disabled children can be attributed to refugee children whose social vulnerability is obvious. It is important to notice the principle of preventing all forms of neglect, cruelty and exploitation when children are forced to be slave labour, etc.

The 1959 Declaration was fundamental for the 1989 CRC – adopted by UN General Assembly. It was the first international document to recognise children as individual rights-bearers active in the construction and determination of their own social lives.²⁶ The first thing that what was mentioned in CRC is the best interests principle which should be guided in all action regarding children.²⁷ States Parties shall ensure the necessary actions regarding the individuality of the child. The Convention provides assistance and protection for the child if their rights were violated.

To sum up, another provision of the Convention is related to right of unaccompanied and separated children not to be separated from their parents. The legal status of unaccompanied children is internationally guaranteed in CRC Art. 22²⁸ which imposes obligations on States parties to ensure that refugee child or child seeking refugee status receive the appropriate level of protection and humanitarian assistance. This framework requires special protection into a treaty-based mechanism to guarantee that protection.²⁹

²⁵ Art. 24.1 of the ICCPR: “Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State”.

²⁶ POBJOY, Jason M.. *The Child in International Refugee Law*. 2017, pp. 19; Allison JAMES, Alan PROUT. *Constructing and Reconstructing Childhood*. 1998, pp. 8.

²⁷ Art. 3.1 of the CRC: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”.

²⁸ Art. 22 of the CRC; POBJOY, Jason M.. *The Child in International Refugee Law*. 2017, pp. 19; JAMES, Allison, PROUT, Alan. *Constructing and Reconstructing Childhood*. 1998, pp. 21.

²⁹ Ibid.

2.2. Legal framework of the European Union in the context of child migration

The EU primary law does not directly regulate rights of unaccompanied minors. However, some actions of the EU have been taken in specific areas, such as sexual exploitation.³⁰ The legislation of the EU in relation to children is limited. A specific reference which covered only offences against children is provided by the Amsterdam Treaty (1997).³¹ The main approach of the EU is based on the EU Charter of Fundamental Rights (2000)³² and the Council Resolution on Unaccompanied Minors (1997).³³ More recently, however, there has been a growing interest in the development of a clear legal basis for children's rights within the EU treaties.³⁴

The Council Resolution on Unaccompanied Minors is however not legally binding. It also shows preoccupations of control of migratory flow. Although at the same time it recognizes vulnerability of children who should be protected and have basic care. The Resolution is establishing that in accordance with their national practice and legislation Member States can refuse admission at their frontier to unaccompanied children if they are without special documents.³⁵ Each Member State has to take measures, according to their national legislation to prevent illegal entry on their territory.³⁶ Member States have a right to determine who they allow to stay on their territory. However, the CRC requires unaccompanied children to stay on the territory of Member State and Convention granted temporary protection until the solution can be found. The Resolution defines that children are

³⁰ SENOVILLA HERNANDEZ, D., KANICS, J., TOUZENIS, K. *Migrating Alone: Unaccompanied and Separated Children's Migration to Europe*. Paris, UNESCO Publishing. 2010, pp. 43.

³¹ Treaty of Amsterdam 1997 [online]. Accessible at <<https://www.europarl.europa.eu/topics/treaty/pdf/amst-en.pdf>>.

³² Charter of Fundamental Rights of the European Union 2000 [online]. Accessible at <https://www.europarl.europa.eu/charter/pdf/text_en.pdf>. Article 242 of the EU Charter of Fundamental Rights represents a considerable step forward it is weaker in several respects than the text of the United Nations Convention on the Rights of the Child.

³³ Council Resolution of 26 June 1997 on unaccompanied minors who are nationals of third countries [online]. Accessible at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997Y0719\(02\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997Y0719(02)&from=EN).

³⁴ SENOVILLA, Daniel, LAGRANGE, Philippe. *The legal status of unaccompanied children within International, European and National frameworks*. Protective standards vs. Restrictive implementation. pp. 21.

³⁵ Ibid; Art. 2.1 of the Council Resolution on unaccompanied minors: "Member States may, in accordance with their national legislation and practice, refuse admission at the frontier to unaccompanied minors in particular if they are without the required documentation and authorizations. However, in case of unaccompanied minors who apply for asylum, the Resolution on Minimum Guarantees for Asylum Procedures is applicable, in particular the principles set out in paragraphs 23 to 25 thereof".

³⁶ Art. 2.2 of the Council Resolution on unaccompanied minors: "In this connection, Member States should take appropriate measures, in accordance with their national legislation, to prevent the unauthorized entry of unaccompanied minors and should cooperate to prevent illegal entry and illegal residence of unaccompanied minors on their territory".

entitled to have basic care and minimum guarantees that each Member State has to provide as soon as possible by legal guardianship or representation by national or any other organizations which are responsible for care of the minors.³⁷ The standards set out in the Council Resolution on Unaccompanied Minors are relatively weak overall. According to article 37 of CRC children seeking asylum are not kept in detention. But the Resolution makes no commitment and it identifies the need for unaccompanied minors to be represented after arrival, it is under responsibility of each Member State.

In 2003, the European Commission introduced the Council Directive laying down the minimum standards for reception of asylum seekers (the Reception Directive).³⁸ The Directive provided that Member States can place unaccompanied children aged 16 or over in accommodation centres for asylum seekers.

The Qualification Directive was introduced in 2004.³⁹ This Directive imposes a duty to ensure the representation of unaccompanied children by legal guardianship only after the minors has been granted refugee status or subsidiary protection.⁴⁰

The Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive) was established in 2008.⁴¹ The Directive has been criticised Member States that minors are not subjects to coercive measures and can be held in custody as last resort.

³⁷ Art. 3.2 of the Council Resolution on unaccompanied minors: “Irrespective of their legal status, unaccompanied minors should be entitled to the necessary protection and basic care in accordance with the provisions of national law”; Art. 3.4 of the Council Resolution on unaccompanied minors: “For the purposes of applying this Resolution, Member States should provide as soon as possible for the necessary representation of the minor by: (a) legal guardianship, or (b) representation by a (national) organization which is responsible for the care and well-being of the minor, or (c) other appropriate representation”.

³⁸ Art. 2 (h) of the Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers: “Unaccompanied minors - persons below the age of eighteen who arrive in the territory of the Member States unaccompanied by an adult responsible for them whether by law or by custom, and for as long as they are not effectively taken into the care of such a person; it shall include minors who are left unaccompanied after they have entered the territory of Member States” [online]. Accessible at <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003L0009&from=EN>>..

³⁹ The Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (the Procedures Directive) [online]. Accessible at <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:326:0013:0034:EN:PDF>>.

⁴⁰ Committee on the Rights of the Child (2005): General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin, paragraph 33 [online]. Accessible at <<https://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf>>; SENOVILLA, Daniel, LAGRANGE, Philippe. *The legal status of unaccompanied children within International, European and National frameworks. Protective standards vs. Restrictive implementation.* pp 24.

⁴¹ The Directive of the European Parliament and of the Council 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals (the Return Directive) [online]. Accessible at <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0115&from=EN>>.

According to this Directive, each Member State has to take into account basic principles, such as the best interests, family life and etc.⁴² This Directive prohibits removing unaccompanied children as long as there is no guarantee that they can be handed over at the point of departure or upon arrival to family, legal representative or guardian of the return's country.⁴³

Thus, all these legal bases instruments stand in general frame of the EU competences based on immigration and asylum. The current legislation is focused more on security and prevention of irregular migration and less on exploitation and prevention. It does not give enough guarantees to unaccompanied minors, who are treated like foreigners while they should be treated primarily as children. Developing EU legislation does not sufficiently incorporate the principle of the best interests.⁴⁴ References to articles 2 and 12 of the ECHR are likewise missing. Whenever there is a reference to the principle of the best interests, it often stands alone with no guidelines on how to implement it. It is too vague and left to the EU countries' discretion as to how to apply it. Also it is difficult to reconcile the principle with general rules.⁴⁵

2.3. Unaccompanied minors and the process of determination of refugee status in the EU

The current state of affairs and the rights of unaccompanied children who arrived on the territory of the EU defined by international law. The EU migration legislation is designed in line with the general provision of international human rights law. Many aspects of European policies set out in CRC and child protection policies.⁴⁶

Most of the unaccompanied minors who arrived on the territory of the EU are granted refugee status or subsidiary protection. Each Member State provides temporary residence permits only when a positive decision on the application has been taken. Many EU countries

⁴² Art. 5 of the Directive of the European Parliament and of the Council 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals (the Return Directive) [online]. Accessible at <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0115&from=EN>>.

⁴³ Ibid, Art.10.

⁴⁴ SENOVILLA, Daniel, LAGRANGE, Philippe. *The legal status of unaccompanied children within International, European and National frameworks*. Protective standards vs. Restrictive implementation. pp. 21.

⁴⁵ SENOVILLA HERNANDEZ, D., KANICS, J., TOUZENIS, K.. *Migrating Alone: Unaccompanied and Separated Children's Migration to Europe*. Paris, UNESCO Publishing. 2010, pp. 39-40.

⁴⁶ GORNIK, Barbara, SEDMAK, Mateja, SAUER, Birgit. *Unaccompanied minor migrants in Europe: between compassion and repression*. Unaccompanied Children in European Migration and Asylum Practice. 2018, pp. 8.

grant national alternative or temporary statuses to unaccompanied and separated minors, which are specifically for each country.⁴⁷

The Refugee Convention is completely silent on the procedural aspects of the international refugee protection regime, allowing states a high degree of discretion in the design and implementation of their domestic refugee status determination procedures.⁴⁸ The arrival of unaccompanied and separated minors has given rise to the development of contemporary jurisprudence addressing the child in international refugee law.⁴⁹ For States, it is difficult to overlook the claim from the child who arrived alone. In general, the jurisdictions allow to unaccompanied and separated children to have a right to apply for refugee status. One of the most public examples is the case of *Aarabi v. Greece*.⁵⁰ A Palestinian child has grown up in the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) camp in Lebanon⁵¹. He fled to Greece by boat and was detained and arrested with a view of expulsion for his irregular entry into Greece. He had been transferred to the north of Greece. Legal representation emphasizing that detention conditions violated Art. 3 of the ECHR⁵². He claimed refugee status as well. The Court noted that he was detained for several days in different places, but he did not put forward any arguments concerning his situation.⁵³

The decision of the Court was grounded on three core policy decisions: first, that there was no violation of Art. 3 regarding detention; second, that he did not exhaust domestic remedies and the Court dismissed his claim as manifestly unfounded according to Art. 35 para 3 (a)⁵⁴ and 4⁵⁵ of the Convention; third, that the Court rejected his claim concerning

⁴⁷ Approaches to unaccompanied minors following status determination in the EU plus Norway [online]. Accessible at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_emn_inform_uam_update_final_en.pdf.

⁴⁸ POBJOY, Jason M. *The Child in International Refugee Law*. 2017, pp. 19; JAMES, Allison, PROUT, Alan. *Constructing and Reconstructing Childhood*. 1998, pp. 44.

⁴⁹ *Ibid* pp. 48.

⁵⁰ *Aarabi v. Greece*.

⁵¹ The United Nations Relief and Works Agency for Palestine Refugees in the Near East [online]. Accessible at <https://www.unrwa.org/>.

⁵² Art. 3 of the ECHR: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”.

⁵³ *Ibid*.

⁵⁴ Art. 35. 3 (a) of the ECHR: “The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: (a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application”.

⁵⁵ Art. 35. 4 of the ECHR: “The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings”.

refugee status under Art. 3 and Art. 13⁵⁶ as manifestly ill-founded pursuant to Art. 35 para 3 (a) and 4 of the Convention.

The CRC highlighted that irrespective of the age asylum-seeking minors have a right to access to asylum procedure or any other international protection procedures. The UNHCR underlined the importance of providing for each family member the possibility of submitting claims for refugee status.⁵⁷ However, the removal of a child without any individual assessment of refugee status could amount to the breach of non-refoulement set by Art. 33 of the UNHCR.⁵⁸ Importantly, the duty of non-refoulement prohibits the return of a refugee on the territory where he or she was threatened. The obligation of non-refoulement is not classified by age of the refugee. Asylum-seeking child, as well as unaccompanied minors, shall enjoy access to asylum procedures and other mechanisms providing international irrespective of their age.⁵⁹ According to Art. 22 (1) of the CRC unaccompanied or accompanied child who is seeking refugee status have to receive appropriate protection.⁶⁰

To draw the conclusion, one can say that children have a right to apply for refugee status whereby each Member State shall examine the application of any third national country. The application should meet all criteria which are set out in Charter III. However, the situation with unaccompanied children is different. They have a right to apply with the help of their representative. Representatives help to examine the application and prepare the unaccompanied minors for the interview.

⁵⁶ Art. 13 of the ECHR: “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”.

⁵⁷ UNCHR, Conclusion on the protection of the Refugee’s Family, No 88 (L) (1999); Jason M. POBJOY. *The Child in International Refugee Law*. 2017, pp. 19; JAMES, Allison, PROUT, Alan. *Constructing and Reconstructing Childhood*. 1998, pp. 52.

⁵⁸ Art. 33 of the UNHCR.

⁵⁹ Committee on the Rights of the Child (2005): General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin, paragraph 33 [online]. Accessible at <<https://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf>>.

⁶⁰ Art. 22 (1) of the CRC.

2.4. The Convention of the Rights of the Child – the principle of non-discrimination and the best interests of unaccompanied and separated children

Unaccompanied and separated minors have special needs and rights under national and regional legislation and also under the CRC. The child has the right to apply for international protection and also get a negative decision or their residence permit can be rejected. On this stage, the Return Directive is playing an important role in the decision-making process whether a child can stay in the EU or not. However, in practice, Member States have to in practice to apply or implement it's by international human rights standards, including CRC, refugee protection obligations and Charter.⁶¹

When assessing the best interests of the child for purposes of finding a durable solution, the return is one of the solution that can be considered. There are three outcomes: the right to stay in the Member States; resettlement or family reunification in a third country; return to the country of origin.⁶² This guarantee given by CRC must apply to all children under the jurisdiction of the EU countries, irrespective of their status and without discrimination, access to healthcare, education and psychosocial support. It should be ensured while children as well as unaccompanied and separated are waiting for the identification of a durable solution.⁶³ The practice of the EU with the assessment of the best interests of unaccompanied children are diverse. It depends on the specific procedures and policy of each Member States. Most of the best assessments are informal, undertaken on an ad hoc basis, without any systematic methods and any records assessments. Some EU countries established legal provisions that mandate the assessment of the best interests of unaccompanied children during the return procedure.⁶⁴

There are two procedures: assessment and determination of the best interests of the child. It is relating to the optimal implementation of the principle of the best interests of the child in actions affecting children. According to the Return Directive Art. 10 (1), the central

⁶¹ The Directive of the European Parliament and of the Council 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals (the Return Directive), recitals (22) and (24) and Art. 1 [online]. Accessible at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0115&from=EN>; Returning unaccompanied children: fundamental rights considerations. FRA Focus, pp. 8.

⁶² Ibid, pp. 9.

⁶³ Ibid.

⁶⁴ Ibid; European Migration Network (2018), Section 4.1.1.

requirement is the assistance by appropriate bodies. It should start before the launch of the return procedure. The mentioned article does not specify which kind of assistance should be granted. The term “assistance” has to be interpreted in the way that the best interests of the child will have a meaningful context. Indeed, the fundamental aspect of the assistance is the assessment of the best interests of the child. Different aspects of assistance mentioned in the Return Directive.⁶⁵

Concerning unaccompanied children, assistance has to include timely and multidisciplinary assessment of the age of the child. The Commission recommends referring to the relevant provisions of the Asylum Procedures Directive.⁶⁶

There are several general provisions of the CRC concerning the best interests of the child. The non-discrimination principle prohibits all forms of discrimination. It requires all children rights guaranteed by CRC have to be recognised. Also, it is required for proactive measures to ensure equal opportunities and treatment.⁶⁷

Right to be heard is stated in the CRC and directly connected with the complementary principle of the best interests of the child. Children have a right to freely express their views. Member States have to put in place child-friendly procedures to solicit the views of the children. Countries have to take into account the age, maturity and leaving capacities of the child.⁶⁸ The Committee underlines the importance of respect right to life, survival and development in any assessment or formal determination of the best interests of the child.⁶⁹

However, several additional provisions in the CRC relate to special protection for unaccompanied and separated children. According to Art. 20 unaccompanied children entitled to special protection and assistance.⁷⁰ They must be provided with alternative care by national law of Member State.

⁶⁵ Legal assistance, provision of necessary medical assistance and health care, contact with family, access to basic education.

⁶⁶ ECRE, Information Note on Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), pp. 25-28 [online]. Accessible at <<https://easo.europa.eu/sites/default/files/public/Dve-2013-32-Asylum-Procedures.pdf>>.

⁶⁷ GORNIK, Barbara, SEDMAK, Mateja, SAUER, Birgit. *Unaccompanied minor migrants in Europe: between compassion and repression*. Unaccompanied Children in European Migration and Asylum Practice. 2018, pp. 39.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Art. 20 of the CRC.

According to Art. 37 of the CRC, children have to be protected from torture or other cruel inhuman punishment. Also, it includes a provision of safeguards, legal aid, etc.⁷¹ There are three Optional Protocols to the CRC which contain provisions for the protection of unaccompanied and separated children. The Optional Protocol on the sale of children, child prostitution and child pornography (OPSC)⁷² includes measures to protect the child from any kind of offences. The best interests of the victim's child must be a primary consideration.⁷³ The Optional Protocol to the CRC on a Communications Procedures (OPIC)⁷⁴ includes rights to bring complains about violations to the Committee on the Right of the Child.⁷⁵ The Optional Protocol on the involvement of children in armed conflict (OPAC) stated that children who were affected by armed conflict should be provided with assistance for their mental and physical recovery.⁷⁶

Concerning the principle of non-discrimination which marked in Article 2 of the CRC. This Article sets up a non-discrimination obligation concerning the application and recognition of the rights of the CRC to all children within the jurisdiction of every signature State. It means that every child is entitled to all rights which are specified at the CRC.⁷⁷

To confirm this interpretation, the Committee on the Right of the child states that “the enjoyment of rights stipulated in the Convention is not limited to children who are citizens of a State party and must, therefore, if not explicitly stated otherwise in the Convention, also be available to all children, including asylum-seeking, refugee and migrant children - irrespective of their nationality, immigration status or statelessness”.⁷⁸ This obligation can be positive or negative. It means that “State parties should avoid any action susceptible to hinder

⁷¹ Art. 37 of the CRC.

⁷² Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography [online]. Accessible at <<https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx>>.

⁷³ Art. 8 (3) of the Optional Protocol on the sale of children, child prostitution and child pornography.

⁷⁴ Optional Protocol to the Convention on the Right of the Child on a Communications Procedures [online]. Accessible at <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&clang=_en>.

⁷⁵ Art. 7 (e) of the Optional Protocol to the CRC on a Communications Procedure.

⁷⁶ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict [online]. Accessible at <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&clang=_en>.

⁷⁷ Art. 2.1 of the CRC: “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status”.

⁷⁸ Committee on the Rights of the Child (2005): General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin, paragraph 12 [online]. Accessible at <<https://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf>>.

unaccompanied children's entitlement to the rights of the Convention and promote measures to facilitate their enjoyment of these rights".⁷⁹

Still, according to this interpretation, the implementation of the Convention should support every child that is entering the territory of the State. It applies to all unaccompanied children who are deprived of liberty at points of entry before authorising or refusing access to the territory of the concerned State party.⁸⁰

2.5. EU Council Resolution 97/C of 26 June 1997 on unaccompanied children who are nationals of third countries

EU Council Resolution 97/C has been the only EU document that wholly concentrated on the issue concerning unaccompanied children.⁸¹ It does not have legally binding force. This Resolution is an influential point for the development of EU legislation as part of the Common European Asylum System. EU Council Resolutions 97/C shows preoccupations of control of migratory flux. It concentrates on measures to prevent irregular entry of unaccompanied minors or to return them to country of origin. Nevertheless, it recognized the vulnerability of these children who have to have access to basic care and protection. Appointment of a guardian as well as legal representation is recommended. In asylum proceedings it is necessary to set up minimum guarantees and access to scholarship. States are ensured to take all measures to prevent any inhuman treatment of unaccompanied minors.

The Resolution establishes that all Member States, according to their national law, have a right to refuse admission at their frontier to unaccompanied minors, especially if they are without any documentation.⁸²

⁷⁹ Committee on the Rights of the Child (2005): General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin, paragraph 13 [online]. Accessible at <<https://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf>>.

⁸⁰ SENOVILLA, Daniel, LAGRANGE, Philippe. *The legal status of unaccompanied children within International, European and National frameworks*. Protective standards vs. Restrictive implementation. pp. 21.

⁸⁰ GORNIK, Barbara, SEDMAK, Mateja, SAUER, Birgit. *Unaccompanied minor migrants in Europe: between compassion and repression*. Unaccompanied Children in European Migration and Asylum Practice. 2018, pp. 9.

⁸¹ Council Resolution 97/C 221/03 of 26 June 1997 on unaccompanied minors who are nationals of third countries [online]. Accessible at <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:l33041&from=EN>>.

⁸² Art. 2.1 of the European Union Resolution of 26 June 1997 on unaccompanied minors who are nationals of third countries.

Also, EU Council Resolution establishes that State parties have to take appropriate measures, according to their national law, to prevent the unauthorized entry of unaccompanied minors and should cooperate with prevention illegal entry to their territory.⁸³ This demonstrates the focus of European migration legislation on the illegal entrance. It is conformity with the principle that the Member States have a right to determine who they want on their territory. However, it goes in contrary to the protection that all children are granted by CRC. It is required that unaccompanied minors can entry the territory and are granted temporary protection until a permanent solution can be found, even if they have to be returned.

The Resolution establishes that unaccompanied children are entitled to the basic care and necessary protection, irrespective of their irregular status.⁸⁴ Minimum guarantees are established for all unaccompanied children and States parties have to provide with the legal professionals of the minor which are responsible for all care and well-being of children.⁸⁵

Minor's rights have to be effectively protected in the period pending a decision and that their best interests are taken into consideration. However, not only legal guardian can properly represent minors.⁸⁶ Where a guardian is appointed for unaccompanied minors, the guardian ensures that all needs of minors are met.⁸⁷ Also, unaccompanied minors have to receive appropriate medical treatment.

All standards which set up in the Resolution are relatively weak overall. The Resolution represents an important commitment by all Member States to recognizing unaccompanied minor's rights. It has some practical implementation of high-quality standards. It means that Member States can refuse permission to enter EU without documentation, whereas the CRC ensures that official documents might be lost, destroyed or never existed.⁸⁸ The UNHCR states that children who are seeking asylum do not have to be in detention.⁸⁹

⁸³ Art. 2.2 of the European Union Resolution of 26 June 1997 on unaccompanied minors who are nationals of third countries.

⁸⁴ Ibid, Art. 3.2.

⁸⁵ Ibid, Art. 3.4.

⁸⁶ Ibid, Art. 3.4.c.

⁸⁷ Art. 3.5 of the Council of the European Union Resolution of 26 June 1997 on unaccompanied minors who are nationals of third countries.

⁸⁸ UN High Commissioner for Refugees, Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, February 1997, para 4.1.

⁸⁹Ibid, para 7.6.

However, the Resolution makes no such commitment and whereas it is correct to identify special needs for unaccompanied children. They have to be represented as soon as they arrived on the territory of the Member State. The method and specific responsibilities left to each EU country.

In conclusion of this chapter, we can say that the legal status of the unaccompanied minors are influenced by the trajectory of integration of the Member States with granted international protection. Some of the EU countries provided different measures for integration, depending on the legal status of unaccompanied minors, the other Member States support regardless of the legal status.

3. Analysis of human rights principles regarding the protection of unaccompanied children

Migration practice and policies can be effective if they are based on a firm foundation of legal norms and operate under the rule of law. To obtain authority migration governance has to be based on a public legal framework established by a formal legislative process in parliament. The executive branch has to be administrated under law.⁹⁰

Effective application and recognition of certain rights of unaccompanied minors require special attention. These rights are fundamental human rights in international law. The law limits their incorporation in national policy and law.⁹¹

The recasts of the legal acts and EU legal acts have strengthened the protection of unaccompanied minors by law. The protection of children was improved in terms of legal regulations, potential gaps nevertheless remain in EU legislation concerning the conditions of entry of unaccompanied minors, where only a few specific provisions are in place. The EU borders refer to special rules, but the same standards of control as for adults and does not provide for special guarantees for unaccompanied minors. There are only few specific guarantees for unaccompanied minors who arrive in the EU without applying for international protection.⁹²

The role of the institutions of the Council of Europe has assumed an increasing role regarding unaccompanied children. ECtHR adopted protective position when assessing brought its rulings if the detention of unaccompanied minors is considered as violation of their fundamental rights.⁹³ Also, the Parliamentary Assembly and Committee of Ministers stressed that unaccompanied children have special needs and protection.⁹⁴

Unaccompanied children need special protection and help in some areas of their life to make sure that their well-being cared for their best interests are safeguarded and would result in a decision to allow access to the territory.⁹⁵ Regarding unaccompanied children, they have distinct and complementary roles. Member States have obligations under CRC to apply

⁹⁰ Migration, human rights and governance. Handbook for Parliamentarians N 24. 2015, pp. 40.

⁹¹ Ibid, pp. 93.

⁹² BELLAMY, Carol, ZERMATTEN, Jean. *Realizing the Rights of the Child*. 2007, pp. 209.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Art. 24 of the Charter of Fundamental Right of the EU; Art. 18.2, and 20.1 of the CRC.

within the countries' borders concerning the right of these children. When unaccompanied children cross the border of the EU, it is important to register all child migrants. With registration, a guardian should be appointed for each unaccompanied minor. Furthermore, the guardian serves as a key procedural safeguard to ensure respect for the best interests of unaccompanied minors.⁹⁶

There is no specific legal regime or safeguard for unaccompanied children and also international protection for children who just reached majority. In some EU countries, when the child reaches the age of majority during his or her asylum procedure, they lose guardian and their cases are transferred to the Migration Board.⁹⁷ After 21, migrants have more chances to lose their specific safeguards.⁹⁸

3.1. Right to be heard

The children gets access to the procedure and that the eligibility concepts are child-right sensitive, there is still problem in the asylum procedure, because it is not designed for children.⁹⁹ The asylum process is mostly focused on adults. Determination of individual status is based on an interview. Asylum officers have to ask information from applicant. It is clear that children may not be able to communicate their story. The key right of the child in this regard is the right to be heard.¹⁰⁰

All children have the right to be heard in all decisions that might affect them. The right to be heard help children access fair procedures and decisions can be made in their best interests.¹⁰¹ The right to be heard should be considered among four principles: the principle of non-discrimination; the best interests of the child; the right to life, survival and development; the right to participate and to be heard. The principles took central place to respect the rights of the child under CRC. They have to be applied to migrant children.¹⁰²

⁹⁶ UNHCR / Council of Europe field research on European State practice regarding the transition to adulthood of unaccompanied children and separated asylum-seeking and refugee children. Unaccompanied and separated asylum-seeking and refugee children turning eighteen: what to celebrate? March 2014. Strasbourg, France. pp. 25.

⁹⁷ Ibid, pp. 25-26.

⁹⁸ Ibid.

⁹⁹ SMYTH, Ciara. *European Asylum Law and Rights of the Child*. 2014, pp. 96.

¹⁰⁰ Ibid.

¹⁰¹ BHABHA, Jacquelin. *Children Without a State: A Global Human Rights Challenge*. 2011, pp. 1-42.

¹⁰² Ibid.

The right to be heard provided in Article 12 of the CRC¹⁰³ and interpreted by the Committee on the Right of the child and other bodies. It is the general principle of relevance to the interpretation and implementation of all rights CRC.¹⁰⁴

Article 12 of the CRC establishes the right to be heard. In the scope of *ratione materiae* it established a general right to be heard in the asylum context. Unaccompanied minors have to be provided with the opportunity to be heard in any administrative and judicial proceedings affecting them.¹⁰⁵

This right was *sui generis* in international human rights law at the time of the drafting CRC, and it was restated in Article 24 of the EU Charter of Fundamental Rights.¹⁰⁶ This provision is applicable and it is not restricted to some proceedings. The CJEU interpreted the meaning of the Article 24.1 in relation to the obligation of States under Brussels II bis Regulation.¹⁰⁷ The Court found the physical presence of the child before the court's hearing is required. In case *Aguirre Zarraga v. Simone Pelz*¹⁰⁸ the court made a connection between Article 24. 1 – the right to be heard, and Article 24. 2 – the best interests of a child.¹⁰⁹

The right to be heard is a general principle of the EU law.¹¹⁰ The right to be heard is a part of the right to effective judicial protection which includes principles of effectiveness and equivalence. The status of the principle of effectiveness is a general principle of the Law.¹¹¹ The principle of effectiveness means that domestic procedural law has to make possible to enforce rights derived from EU law and from the point of national law this principle should

¹⁰³ Art. 12 of the CRC: "... right to express those views freely in all matters affecting the child ... due weight in accordance with the age and maturity of the child"; "... to be heard in any judicial and administrative proceedings ... directly, or through a representative or an appropriate body..."; Committee on the Right of the Child N 5, "General measures of implementation of the Convention on the Right of the Child (art. 4, 42, 44, para 6); UN Doc. CRC/GC/2003/5 (2003); Ciara SMYTH. *European Asylum Law and Rights of the Child*. 2014, pp. 97.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Art. 24.1 of the EU Charter of Fundamental Rights provides inter alia: "... children may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity".

¹⁰⁷ Brussels II bis Regulation [online]. Accessible at <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:l33194&from=EN>>.

¹⁰⁸ *Aguirre Zarraga v. Simone Pelz*.

¹⁰⁹ Ibid.

¹¹⁰ BEQIRAJ, Pranvera (Mihani). *The Right to Be Heard in the European Union – Case Law of the Court of Justice of the European Union*. European Journal of Multidisciplinary Studies. 2016 [online]. Accessible at <http://journals.euser.org/files/articles/ejms_jan_apr_16_nr1/Pranvera.pdf>.

¹¹¹ *Kadi v Commission*. The Court held that the manner of regulation to respect the right to be heard led to an infringement of the principle of effective judicial protection, because it prevented the Court from reviewing the substantive lawfulness of the regulation.

easily ensure the full effectiveness of EU law. Under EU law domestic law must give full effect to EU directives. Also the minimum standards of rights should be protected by the EU law.¹¹²

The second principle of equivalence means that domestic procedural law must operate in the same way as domestic law and EU law.¹¹³ Under EU law, Member States have to take into consideration the views of unaccompanied children. The right to be heard gives guarantees to every person to know their views during proceedings before decisions.¹¹⁴

For the right, the Asylum Procedures Directive provides a personal interview. It applies to the decision-making process. It is crucial for a fair asylum procedure. This right is guaranteed by Article 18 of the EU Charter of Fundamental Rights.¹¹⁵ The right to be heard appears also in some international reports and guidelines. The Committee identifies five steps to implement the right to be heard. It helps legal professionals to respectfully right of the child to be heard in any context. According to unaccompanied and separated children, General Comment No. 12 calls for urgent implementation of the right to be heard.¹¹⁶

Thus, in case *Sahin v. Germany*¹¹⁷, the ECtHR emphasized that the child was under 4 when the appeal started. The Court observes that the national court should assess the evidence before them. Domestic Court always requires hearing children while parents do not have custody. It depends on some circumstances of every case. The Court heard the expert's evidence. The expert had meetings with the child. The decision was made on the basis of the analysis of the opinion of a child.¹¹⁸

¹¹² BEQIRAJ, Pranvera (Mihani). *The Right to Be Heard in the European Union – Case Law of the Court of Justice of the European Union*. European Journal of Multidisciplinary Studies. 2016 [online]. Accessible at <http://journals.euser.org/files/articles/ejms_jan_apr_16_nr1/Pranvera.pdf>; Training Manual of the European Council on Refugees and Exiles. Fundamental procedural rights for unaccompanied asylum-seeking children. 2019, pp. 11-20, [online]. Accessible at <https://www.ecre.org/wp-content/uploads/2019/07/4.23.-Module-2_Fundamental-procedural-rights.pdf>.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Art. 18 of the EU Charter of Fundamental Rights: “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”.

¹¹⁶ General Comment No. 12. The right of the child to be heard (2019) [online]. Accessible at <<https://www.refworld.org/docid/4ae562c52.html>>.

¹¹⁷ *Sahin v. Germany*.

¹¹⁸ Ibid.

3.2. Right to seek international protection

A general source of the right to seek protection is the “best interest” principle, which includes the obligation under Article 22 of the CRC.¹¹⁹ Many rights in the CRC relate to protection and care, which are applicable to all children by virtue of the general principle of non-discrimination.¹²⁰

According to Article 22 of the CRC which includes special measures of protection for refugee and asylum-seeking children which provides guarantees for children who already seek asylum. In Article 22.1 of the CRC stressed the link between protection of human rights and children who are seeking asylum or the child has the right to seek asylum, which means that they have right to seek protection. USAC shall enjoy access to asylum procedures providing international protection irrespective of their age. All children who are seeking asylum have to be provided with appropriate protection.¹²¹

The right of the child is potentially relevant to establishing an international protection need. It came from the principle of the best interests of a child.¹²² The basic of International protection is the Refugee Convention which does not include provision specific to children and there is no definition of a refugee might be relevant to the child. The only indication that the refugee might be a child was stressed in Article 22 on public education.

Article 6 of the Qualification Directive specifies the identity of a potential victim of serious harm or persecution whereas Article 7 specifies people who are entitled of protection. According to Article 1.a.2 of the Refugee Convention applicant is unwilling to avail them of the State’s protection. States must be shown to be unwilling to provide effective protection.¹²³

Article 8 of the Qualification Directive founds the concept of internal protection. It means that internal protection is the notion that if part of the country of origin is safe for children, and then they do not need to search for international protection.¹²⁴ In cases *Sufi and*

¹¹⁹ Art. 22 of the CRC.

¹²⁰ SMYTH, Ciara. *European Asylum Law and Rights of the Child*. 2014, pp. 138-139.

¹²¹ Art. 22.1 of the CRC: “...unaccompanied or accompanied by his or her parents must receive appropriate protection”.

¹²² McADAM, Jane. *Seeking asylum under the Convention on the Right of the Child: A case for complementary protection*. *International Journal of Children’s Rights* 14, 2006, pp. 251-274; Ciara SMYTH. *European Asylum Law and Rights of the Child*. 2014, pp. 63-64.

¹²³ UNHCR Guidelines on Child Asylum Claims, op cit., paras 97-100; Ciara SMYTH. *European Asylum Law and Rights of the Child*. 2014, pp. 84-85.

¹²⁴ Ibid.

Elmi v. the UK and *Salah Sheek v. the Netherlands* internal protection was rejected as being contrary to Article 3 of the ECHR.¹²⁵ Nevertheless, in case *A.a.o. v. Sweden* the internal protection was found not to violate Article 3 of the ECHR.¹²⁶

There are three steps to in order to review the applicant's entitlement to internal protection. The first step is about to assess whether the applicant would be free of the serious harm in the proposed relocation area.¹²⁷ The second is about to assess whether the relocation will put them at risk of any other persecution or serious harm.¹²⁸ The third step is whether relocation can be accessible and sustainable. If it is not then the applicant will be sent back.¹²⁹ Concerning children only step two and three have to be taken into account the violation of the rights of a child. According to Article 8 of the Qualification Directive¹³⁰, para 3 unaccompanied minors had a risk that all care might be disregarded in applying the concept. From now Article 8.1.b provides the applicant has access to protection. Recital 24 provides, *inter alia*, when unaccompanied minors are applicant, the availability of appropriate care become a part of the assessment as to whether that protection is effectively available.¹³¹ The concept of internal protection has to be applied with care in order to conform to the requirements of refugee and international human rights laws. From the child point of view, analysis of the accessibility and sustainability of the proposed relocation area is the basic.¹³²

Refugee's Cessation appears when there are no needs for providing international protection. It raises the same issue with the cessation of refugee and cessation of subsidiary protection status. According to Article 11.1 of the Qualification Directive, refugee status can be ceased in some specific circumstances.¹³³

In conclusion, it can be that if a risk of violation of children's rights was an aspect of the claim that international protection occurs, then the changing circumstances must to eradicate this risk.¹³⁴ In the case *Abdulla and others v. Bundesrepublik Deutschland*¹³⁵, CJEU

¹²⁵ *Sufi and Elmi v. the UK; Salah Sheek v. the Netherlands*.

¹²⁶ *A.a.o. v. Sweden*.

¹²⁷ SMYTH, Ciara. *European Asylum Law and Rights of the Child*. 2014, pp. 84-85.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ Qualification Directive [online]. Accessible at <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:en:HTML>>.

¹³¹ *Ibid.*, pp. 93.

¹³² *Ibid.*, pp. 87.

¹³³ SMYTH, Ciara. *European Asylum Law and Rights of the Child*. 2014, pp. 87.

¹³⁴ *Ibid.*

¹³⁵ *Abdulla and others v. Bundesrepublik Deutschland*.

held that cessation thus implies that the change of circumstances has remedied the reasons which led to the recognition of refugee status.¹³⁶ Then the CJEU stressed that not only circumstances should be considered to grant of refugee status have ceased, but it should also be verified that the person does not have another reason to fear of being persecuted.¹³⁷

3.3. Right to appeal (right to have an effective remedy)

International human rights treaties require States to ensure effective remedies against rights' violations. The remedy has to be effective in practice and in law, enforceable, accessible and lead to reparation for the rights violation concerned.

Investigation and adjudicating on the remedy have to be impartial and independent. In some cases, the remedy has to be provided by a judicial body. Effective remedy has to be available to all without discrimination. Mostly migrant children unable to access remedy when their rights are violated. States, under International and EU law are obliged to ensure access to an effective remedy.¹³⁸

The CFR guarantees that everyone has the right to an effective remedy before a court. That general principle applies to the Member States when they are implementing EU law. According to Article 47 of the CFR, all States have to ensure right to an effective remedy¹³⁹ It is also important to stress the access to effective remedy in expulsion proceedings and the right to appeal with suspensive effect.¹⁴⁰

Direct and indirect effects on the individual's rights to an effective remedy have expulsion of migrant or the threat.¹⁴¹ Direct effect appeared when expulsion takes place and

¹³⁶ Abdulla and others v. Bundesrepublik Deutschland, para 65.

¹³⁷ Ibid, para 76.

¹³⁸ Art. 2 of the ICCPR: "... to ensure that any person shall have an effective remedy..."; Art. 13 of the ECHR "... shall have an effective remedy before national authority"; Access to Fair Procedures including the Right to Be Heard and to Participate in Proceedings. FAIR Project Module 1. International Commission of Jurists. [online]. Accessible at <<https://www.icj.org/wp-content/uploads/2018/06/Europe-FAIR-module-1-Training-modules-2018-ENG.pdf>>.

¹³⁹ Art. 47 of the CFR: "... the right to an effective remedy before tribunal".

¹⁴⁰ BIOCCHI, Luca. *Undocumented children in Europe. Ignored victims of immigration restriction*. In BHABHA, Jacqueline. *Children Without a State: A Global Human Rights Challenge*. 2011, pp. 109-129.

¹⁴¹ Access to Fair Procedures including the Right to Be Heard and to Participate in Proceedings. FAIR Project Module 1. International Commission of Jurists. [online]. Accessible at <<https://www.icj.org/wp-content/uploads/2018/06/Europe-FAIR-module-1-Training-modules-2018-ENG.pdf>>.

can provide remedy against rights' violation that occurred in host country.¹⁴² The duty of the State is to ensure access to an effective remedy. People outside of their countries can also effectively access the remedy. Regarding to indirect effect the fear or the threat of expulsion constitutes some obstacle for migrants to exercise their right to access a remedy against violations of their rights. States have to create conditions which will allow migrants to avail remedy without fear of expulsion.¹⁴³

Children's right to be heard and the principle of the best interests of a child should be insured during expulsion procedure. A child who has been under the risk of expulsion have a right to be heard. This right have not be restricted to those who are considered to be lawfully in the territory of the host State, but have to apply to all migrant children.¹⁴⁴

In the case *Rahimi v. Greece*, 15 years-old unaccompanied boy from Afghanistan arrived in Greece where he was arrested and sent to a detention camp for refugee pending deportation.¹⁴⁵ The authorities did not offer him any legal assistance nor legal guardian. He was homeless for some time until he received help from local NGOs. The applicant should have had special supervision considering his age. He complained that he did not get basic care when he was detained and also when he was released. He also claimed about the conditions of the place where he stayed with an adult when he was arrested. He contested that he was not informed about the reason for his detention and about the possibility to appeal.¹⁴⁶

There were several reports from international and national institutions, NGOs and other organization about the general condition of Pagani detention centre. The Court quotes a report from the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment "abominable conditions of detention". There was a second report from the same institution and there was stressed "unhealthy beyond all description" and illegal immigrants were detained in conditions "that could be qualified as inhuman and degrading treatment". Considering these reports, the Court concluded the conclusion that this place was dangerous for detained people and staff.¹⁴⁷

¹⁴² Access to Fair Procedures including the Right to Be Heard and to Participate in Proceedings. FAIR Project Module 1. International Commission of Jurists. [online]. Accessible at <<https://www.icj.org/wp-content/uploads/2018/06/Europe-FAIR-module-1-Training-modules-2018-ENG.pdf>>.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ *Rahimi v. Greece*.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid, para 30, 31, 37, 41 and 47.

The ECtHR found that the right to be free from torture or inhuman treatment was violated. The Court held that the authority failed to ensure his right to an effective remedy.¹⁴⁸ The ECtHR founded these judgement on the CRC. The Court found the violation of Article 3 and the principle of the best interests of the child.¹⁴⁹ Also, there was a violation of Article 37.b with the same text where detention of the child can take place when there is no any available possibility.¹⁵⁰ However, if the national authority does not carry interantional obligations, it is considered as a violation of Article 3 of the ECHR.¹⁵¹ In case *Rahimi v. Greece*, the Cour held that it is the firs judgement where the child released from deprivation of liberty without protection.

The right to appeal is given to applicants in court or before tribunal a negative decision of the first instance.¹⁵²

In another case *Mohamad v. Greece*, an unaccompanied minor was arrested and sent to a detention pending his removal.¹⁵³ He complained that authority did not take into account his status as minor. The Court found violation of Article 3 regarding prohibition of inhuman or degrading treatment. The ECtHR also held violation of Article 13 regarding right to an effective remedy of the CRC taken in conjunction with Article 3, finding that he did not have effective remedy by which to complain of the conditions of his detention.¹⁵⁴

To sum up, in case *H.A. and Others v. Greece*, unaccompanied minors were detained in different police stations for 21 or 33 days.¹⁵⁵ They were transferred to the Diavata reception centre and then to special facilities for children. They complained about conditions of detention and lack of an effective remedy. Also they alleged that they had been placed in police cells and they were not able to lodge an appeal challenging the lawfulness of detention. The Court found violation of Article 3. Conditions of detention represented degrading

¹⁴⁸ *Rahimi v. Greece*.

¹⁴⁹ Art. 3.1 of the CRC: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”.

¹⁵⁰ Art. 37.b of the CRC: “No child shall be deprived of his or her liberty unlawfully or arbitrarily. 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 time”.

¹⁵¹ *M. Mayeka and K. Mitunga v Belgium*.

¹⁵² ECRE, Information Note on Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), pp. 25-28 [online]. Accessible at <<https://easo.europa.eu/sites/default/files/public/Dve-2013-32-Asylum-Procedures.pdf>>.

¹⁵³ *Mohamad v. Greece*.

¹⁵⁴ *Ibid*.

¹⁵⁵ *H.A. and Others v. Greece*.

treatment. That detention could have caused them to feel isolated with some negative consequences for their physical and moral well-being. The ECtHR held also violation Article 13 of the CRC. They had not had an effective remedy. It was noticed by Court that unaccompanied minors spent several weeks in police stations before the National Service of Social Solidarity recommended them placement in reception centre. Also public prosecutor at the Criminal Court had not put them in contact with lawyers and did not appeal on their behalf to stop their detention in the police stations.¹⁵⁶

3.3.1. The rights of child victims of crime

In the EU the number of child victims of violence is high. The causes of this violence are numerous. Culturally or Socially accepted forms of violence against children constitute deeply entrenched barriers in the EU. In addition, only 23 EU countries prohibited corporal punishment.¹⁵⁷

According to article 1 of the ECHR, Member States have to secure the human rights within their jurisdiction.¹⁵⁸ This obligation requires EU countries to take measures to ensure that individuals rights are not violated, which include entities or private individuals.¹⁵⁹

The Member States are obliged to take measures to provide effective protection for children, whether accompanied or unaccompanied from ill-treatment by actors and must take reasonable steps to prevent it. These steps include non-discrimination enforcement of the criminal law or criminalization of harmful conduct.¹⁶⁰

¹⁵⁶ H.A. and Others v. Greece.

¹⁵⁷European Commission. Violence against children [online]. Accessible at <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/rights-child/violence-against-children_en>.

¹⁵⁸ Art. 1 of the ECHR: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”.

¹⁵⁹ Art. 2 of the ECHR: “1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection”; Art. 3 of the ECHR: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”.

¹⁶⁰ Access to Fair Procedures including the Right to Be Heard and to Participate in Proceedings. FAIR Project Module 1. International Commission of Jurists. [online]. Accessible at <<https://www.icj.org/wp-content/uploads/2018/06/Europe-FAIR-module-1-Training-modules-2018-ENG.pdf>>.

Member States have positive obligations to exercise due diligence to investigate and prevent acts of persons which impair the enjoyment of rights. EU countries have to take measures when they know about the threat or harm to a victim.¹⁶¹ Also, they have to ensure protection for those, who became victim to a crime and their rights including investigations and prosecutions.¹⁶²

Children victims of crimes have a right to respect for their rights which include action against perpetrators and to compensation.¹⁶³ They have to have support to enable them to access justice. It includes providing support, raising awareness of their rights and training of law enforcement personnel.¹⁶⁴

In the case of the CJEU, criminal proceedings against *Maria Pupino*¹⁶⁵, a school teacher, who was charged with serious injuries on her pupils. The court held that children allegedly mistreated by a teacher. Within the meaning of the Framework Decision, they were considered as “vulnerable”. They were provided with specific protection. The national court had to interpret national law “so far as possible, in the light of the wording and purpose of the Framework Decision”.¹⁶⁶

In another case, *P. and S. v. Poland*¹⁶⁷, the ECtHR was struck by the fact that the authorities decided to institute a criminal investigation on charges of unlawful intercourse against the first applicant who has to be considered to be a victim of sexual abuse. The Court considers that this kind of approach fell short of the requirements inherent in the positive obligations of the States to establish and apply effectively a system of punishments of all forms of sexual abuse.¹⁶⁸

The investigation was discounted, but the fact that they were conducted shows that the profound lack of understanding of her predicament.¹⁶⁹ The ECtHR considers that no proper regard was had to the first vulnerability of applicant, young age and her feelings and own

¹⁶¹ Access to Fair Procedures including the Right to Be Heard and to Participate in Proceedings. FAIR Project Module 1. International Commission of Jurists. [online]. Accessible at <<https://www.icj.org/wp-content/uploads/2018/06/Europe-FAIR-module-1-Training-modules-2018-ENG.pdf>>.

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ Case C-105/03, *Maria Pupino*.

¹⁶⁶ Ibid.

¹⁶⁷ *P. and S. v. Poland*.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

views.¹⁷⁰ In fact, the first applicant was separated from mother and deprived of liberty in breach of requirements of Article 5 (1).

The ECtHR concluded that the first applicant was treated in a deplorable manner and it meets under Article 3. There was also a breach of this provision.¹⁷¹

Thus, in case *Z and Others v. the United Kingdom*¹⁷², the ECtHR reiterates that Article 3 prohibits torture or inhuman or degrading treatment or punishment. The obligations under Article 1 taken in conjunction with Article 3, requires State to take measures in ensuring that individuals are not subjects of torture, inhuman or degrading treatment.¹⁷³ States have to take measures to provide effective protection of children and to prevent ill-treatment.

3.4. Detention of unaccompanied minors and their right to liberty

Most of the children who cross the border of the EU countries – both accompanied and unaccompanied – are detained.¹⁷⁴ The detention can be justified on the ground that it is protective detention. However, the child’s detention is inimical to the protection and care of children. Therefore, the CRC has developed specific standards for the detention of children to ensure that they are protected not to be detained or they are protected in detention.¹⁷⁵

In the area of migration, the *acquis* of the EU is based on the presumption of non-recourse to detention.¹⁷⁶ The principle of “the best interest” of the child must be a primary consideration. Anyway, it allows the child’s detention in the context of migration. This kind of detention should be for the shortest period of time. When the detention of a child happened all efforts have to be made to release the minors and place in accommodation which suitable for children. Regarding unaccompanied minors, the detention can only take place in exceptional circumstances, and every effort has to be made to release unaccompanied minor

¹⁷⁰ P. and S. v. Poland.

¹⁷¹ Ibid.

¹⁷² Z and Others v. the United Kingdom.

¹⁷³ Ibid.

¹⁷⁴ Report from the Commission to the Council and to the European Parliament on the application of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers; SMYTH, Ciara. *European Asylum Law and Rights of the Child*. 2014, pp. 209.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

as soon as possible.¹⁷⁷ Unaccompanied minors have to be accommodated separately from adults.¹⁷⁸ EU countries have to ensure the rules regarding alternatives to detention, such as the obligation to stay at an assigned place, regular reporting to the authorities or the deposit of financial guarantee.¹⁷⁹

Detention is justified only to prepare the removal or return processes when there is a concrete risk of absconding. In general, detention can be used only as a means of last resort and if there is a reasonable prospect of removal. Regarding the children, given the exceptionality of detention measures, which are the last resort and can be applied for a short period of time. There are several additional safeguards for children in detention with the aim of ensuring their best interests pending the removal procedure.¹⁸⁰

The Reception Condition Directive and the Dublin Regulation¹⁸¹ contain provisions regarding the detention of children. The EU asylum *acquis* is based on the principle that person does not have to be held in detention for the sole reason that child is seeking international protection or that the person is subject to transfer procedure to another Member State responsible for examining the application. They can be detained only under very clearly exceptional circumstances that must be laid down in the law.

Refugee law established a presumption against the detention, while human rights law is not prohibiting detention outright, subjects it to a series of criteria and safeguards in view of the importance of liberty.¹⁸² At the international level, Articles 9 and 10 of the ICCPR relate to safeguards against arbitrary or unlawful detention and minimum standards regarding conditions of detention.¹⁸³ Regarding the regional level, Article 5 of the ECHR says that administrative detention to prevent unauthorised entry and to effect deportation requires that

¹⁷⁷ CRAWLEY, Heaven. *Child First, Migrant Second: Ensuring that Every child Matters*. 2006, pp. 73.

¹⁷⁸ Ibid.

¹⁷⁹ Report from the Commission to the Council and to the European Parliament on the application of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers; SMYTH, Ciara. *European Asylum Law and Rights of the Child*. 2014, pp. 209.

¹⁸⁰ SMYTH, Ciara. *European Asylum Law and Rights of the Child*. 2014, pp. 209.

¹⁸¹ Dublin III Regulation [online]. Accessible at <<http://www.orac.ie/website/orac/oracwebsite.nsf/page/AJNR-AA9BHP955224-en.pdf>>

¹⁸² SMYTH, Ciara. *European Asylum Law and Rights of the Child*. 2014, pp. 210.

¹⁸³ Art. 9 of the ICCPR provides, *inter alia*: “1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful”; Art. 10 (1) of the ICCPR: “1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”.

such detention must be lawful and amenable to judicial review.¹⁸⁴ Also, Article 6 of the EU CFR establishes a right to liberty and security.¹⁸⁵

In conclusion, the case *Abdullahi Elmi and Aweys Abubakar v. Malta*¹⁸⁶ both applicants alleged that their detention in the Safi Barracks Centre was arbitrary and unlawful and they did not have a remedy to challenge the lawfulness of their detention. The ECtHR held that there was a violation of Article 5 (1) of the Convention, nothing in particular that the applicants were minors and their detention had inappropriate conditions. Also, there was a violation of Article 5 (4) refers to the right to have the lawfulness of detention speedily by a court. Both applicants did not have an effective remedy to challenge the lawfulness of their detention.¹⁸⁷

3.5. Role of guardians and representatives

To begin with there is no definition of a “guardian” under EU law. Also, there is no general obligation to appoint a guardian for unaccompanied minors. Only two directives provide for the appointment of a guardian regarding unaccompanied minors.¹⁸⁸ The Qualification Directive stressed the mandate of a guardian to ensure the needs of unaccompanied minors.¹⁸⁹

Representatives mentioned in recasts of Asylum Directive and Reception Condition Directive. According to Article 25 of the recast Asylum Procedure, Directive allows

¹⁸⁴ Art. 5 of the ECHR: “1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition. 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him. 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful”.

¹⁸⁵ Art. 6 of the CFR: “Everyone has the right to liberty and security of person”.

¹⁸⁶ *Abdullahi Elmi and Aweys Abubakar v. Malta*.

¹⁸⁷ *Ibid*.

¹⁸⁸ ECRE, Information Note on Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), pp. 30-31 [online]. Accessible at <<https://easo.europa.eu/sites/default/files/public/Dve-2013-32-Asylum-Procedures.pdf>>; Training Manual of the European Council on Refugees and Exiles. Fundamental procedural rights for unaccompanied asylum-seeking children. 2019, pp. 24, [online]. Accessible at <https://www.ecre.org/wp-content/uploads/2019/07/4.23.-Module-2_Fundamental-procedural-rights.pdf>.

¹⁸⁹ *Ibid*.

representatives to be the same representatives from the recast Reception Condition Directive Article 24.

The limitation of EU law on the role and definition of guardians is justified by legal documents and International policy and approved at the highest level. All aspects of the life of a child and development cover by guardian mandate. The appointment of a guardian should take place whenever a child is deprived of the parental environment.¹⁹⁰ The definition of the guardian is similar in the European Union Fundamental Rights Agency (FRA) Handbook with the definition of representatives in recast Asylum Procedure Directive and recast Reception Condition Directive.¹⁹¹

The UNHCR Procedural Standards for Refugee Status Determination under UNHCR's Mandate¹⁹² insists on the importance of the appointment a guardian for all unaccompanied and separated children to help with assistance at all stages of the asylum procedures. According to these standards, UNHCR uses guardian for addressing legal representation and ensuring the well-being of a child and safeguarding their best interests.

International instruments, EU law and Soft Law agree on a number of premises to ensure that guardians act according to the best interests of unaccompanied and separated children. According to UN Children's Fund (UNICEF) guardians should be appointed as soon as unaccompanied children are identified in all contexts.¹⁹³

EU law has different timing for guardian appointment and it depends on contexts. For example, in context of child-trafficking, Member States have to make guardian appointment

¹⁹⁰ UN Guidelines for the Alternative Care of Children “19. No Child should be without the support and protection of a legal guardian or other recognized responsible adult or competent public body of any time...”; General Comment No. 6 “33 ... consulted and informed regarding all actions taken in relation to the child ... authority to be present in all planning and decision-making processes ...”.

¹⁹¹ The European Union Fundamental Rights Agency. Handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking, 2014, pp. 15-18 “... an independent person who safeguards the child's best interests and general well-being ... complements the limited legal capacity of the child ...”, “... most comprehensive view of the child's situation and individual needs ... ensure continuity ... to enable the child to participate effectively ...”; Handbook on European law relating to the rights of the child, pp. 96 “The child's right to a guardian or representative is key to securing his or her broader rights ... the mandate of a legal guardian is to safeguard the child's best interests, ensure his or her overall well-being and complement his/her limited legal capacity”.

¹⁹² UNHCR Procedural Standards for Refugee Status Determination under UNHCR's Mandate, 3.25 “... to assist the child in all stages of the process and to ensure that the child is properly represented, that his/her views are expressed, and that any decisions taken are in his/her best interests...”

¹⁹³ UNICEF. A call for effective guardianship: “Once an unaccompanied and separated child is identified, a guardian should be immediately appointed...”.

or representative for a child victim from the moment when the child is identified as unaccompanied.¹⁹⁴

In context of international protection, EU law distinguishes whether legal representative or legal guardian have to be appointed as soon as a child is granted refugee status.¹⁹⁵

Representatives can do the legal representation of unaccompanied minors. Also, they are a part of the mandate of a guardian. Representatives are appointed to the guardian as an addition. A representative is entitled to limit legal capacity. The role of the legal representative highlighted by the Committee in General Comment No. 6.¹⁹⁶ According to the Asylum Procedure Directive, the legal representative should be provided as soon as possible to enable a child to make an application for international protection and during the asylum protection.¹⁹⁷

The difficulties generated by failing to provide the child with a legal representative for unaccompanied minors can be illustrated by revisiting the case of *Austria – Supreme Administrative Court*¹⁹⁸ where two brothers of Iraqi nationality applied for international protection. One of the brothers is a minor. The older brother was conferred with custody for his elder brother. A legal representative was not appointed to the minor. The older brother was considered as a legal representative. The Constitutional Court annulled the decision of the Federal Administrative Court (FAC) regarding custody. The appeal regarding minor was dismissed by the Supreme Administrative Court (SAC). However, the appeal of the minor was successful. The younger brother had to be considered as underage. Austrian law stipulates that representation by parents or other persons entitled with custody, unaccompanied minors have to be provided with legal representatives and older brother does not have a right to represent his brother.¹⁹⁹

To sum up, the Austrian Civil Code set up the best interests of the child as a guardian principle, which should be ensured in guardianship, with regard to minors.²⁰⁰ Guardianship

¹⁹⁴ Art. 14 of the Anti-Trafficking Directive.

¹⁹⁵ Art. 25 of the Asylum Procedure Directive; Art. 31 of the Qualification Directive.

¹⁹⁶ “In case where children are involved in asylum procedures or administrative or judicial proceedings, they should in addition to the appointment of a guardian, be provided with legal representation”.

¹⁹⁷ Training Manual of the European Council on Refugees and Exiles. Fundamental procedural rights for unaccompanied asylum-seeking children. 2019, pp. 24, [online]. Accessible at <https://www.ecre.org/wp-content/uploads/2019/07/4.23.-Module-2_Fundamental-procedural-rights.pdf>.

¹⁹⁸ Austria – Supreme Administration Court, 30 August 2017, Ra 2016/18/0324.

¹⁹⁹ Ibid.

²⁰⁰ Art. 138 of Austrian Civil Code, JGS N. 946/1811.

for unaccompanied minors needs all the time. Austrian Supreme Court noted that no distinction between Austrian citizens and non-citizens when it goes to the basic rights which can be ensured only through guardianship.²⁰¹

3.6. Role of lawyers and access to child-friendly legal aid or legal assistance

Lawyers play a very important role in ensuring protection, respect, access to rights of all persons. Both representatives and legal assistances through the asylum procedure is a crucial safeguard to ensure efficiency and fairness. Legal assistance during the asylum procedure has become necessary for asylum seekers to assert their rights under EU asylum acquis.²⁰² A Lawyer represent a child at a personal interview. Also lawyers ensures that all rights of the children are heard and taken into account in the proceedings.²⁰³ The right to free legal assistance in the asylum procedures derives from the right to an effective remedy, the right to non-refoulement and access to asylum.²⁰⁴ Regarding to criminal charges, the right to have free legal assistance takes from the right to a fair trial.²⁰⁵

According to Article 3 of the ECHR unaccompanied minors can be granted for a guardian and it may be classified as part of the State's positive obligation. In case *M. Mayeka and K. Mitunga v Belgium*.²⁰⁶, where 5 year-old boy, who was unaccompanied minor, was detained in an adult detention centre. The fact that the second applicant received legal assistance, had daily telephone contact with her mother or uncle and that staff and residents at the centre did their best for her cannot be regarded as sufficient to meet all her needs as a 5

²⁰¹ GORNIK, Barbara, SEDMAK, Mateja, SAUER, Birgit. *Unaccompanied minor migrants in Europe: between compassion and repression*. Unaccompanied Children in European Migration and Asylum Practice. 2018, pp. 90.

²⁰² ECRE, Information Note on Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), pp. 25-28 [online]. Accessible at <<https://easo.europa.eu/sites/default/files/public/Dve-2013-32-Asylum-Procedures.pdf>>.

²⁰³ Access to Fair Procedures including the Right to Be Heard and to Participate in Proceedings. FAIR Project Module 1. International Commission of Jurists. [online]. Accessible at <<https://www.icj.org/wp-content/uploads/2018/06/Europe-FAIR-module-1-Training-modules-2018-ENG.pdf>>.

²⁰⁴ Training Manual of the European Council on Refugees and Exiles. Fundamental procedural rights for unaccompanied asylum-seeking children. 2019, pp. 31, [online]. Accessible at <https://www.ecre.org/wp-content/uploads/2019/07/4.23.-Module-2_Fundamental-procedural-rights.pdf>

²⁰⁵ Art. 47 of the Charter is essential element of the "rule of law"; Art. 6 and 13 of the European Convention on Human Rights.

²⁰⁶ *M. Mayeka and K. Mitunga v Belgium*.

year-old child. The Court further considers that the uncoordinated attention she received was far from adequate.²⁰⁷ Also guardian was not appointed.²⁰⁸

The Court underlined that States must take measures with providing protection and care as part of positive obligation under Article 3 of the ECHR. Even though not only children but also adults cannot be treated like that. All appropriate measures have to be taken by State authorities to ensure that unaccompanied minors got legal assistance from a qualified person.²⁰⁹ The Court concluded that measures that were taken by Belgian authorities were not sufficient to fulfil its obligation concerning basic care to 5 years-old girl.²¹⁰ Child detention “demonstrated a lack of humanity to such a degree that it amounted to inhuman treatment”, this girl suffered because of the detention conditions and the Court considered that there had been a violation of Article 3 of the ECHR.²¹¹

The ECtHR considered that Article 3 of the ECHR was violated also with regard to her mother. It means that not only parent, but relatives could be a victim due to the ill-treatment of their child. The Court stressed on several factors such as “the proximity of the family tie – in that context, a certain weight will attach to the parent-child bond – the particular circumstances of the relationship and the way in which the authorities responded to the parent’s enquiries”. In such case “the essence of such a violation lies in the authorities’ reactions and attitudes to the situation when it is brought to their attention”.

The Jurisprudence of the ECtHR concerning unaccompanied minors or asylum seeking children has been sporadic. The Court condemned Belgian authorities for the detention and posterior return of 5 year-old girl who tried to reunite her mother.

The Court also found violation the right to have legal assistance in case *Güveç v. Turkey*.²¹² The lawyer or other representative had not been appointed under legal aid.²¹³

According to case law of the ECtHR, provisions have to be made for legal aid where its absence will make impossible to ensure an effective remedy.²¹⁴ There is a system of legal assistance for cases before CJEU.

²⁰⁷ M. Mayeka and K. Mitunga v Belgium, para. 52.

²⁰⁸ Ibid.

²⁰⁹ Ibid, para 50.

²¹⁰ Ibid., para 55.

²¹¹ Ibid, para 58.

²¹² *Güveç v. Turkey*.

²¹³ Ibid.

In *Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland (DEB)*²¹⁵, the CJEU stressed that the principle of effective judicial protection, as enshrined in Article 47 of the Charter, must be interpreted as meaning that it is not impossible for legal persons to rely on that principle and that aid granted pursuant to that principle may cover, inter alia, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer.²¹⁶ In this regard, national court can establish whether the conditions for granting legal aid constitute the limitation of the right to access to the courts. Then CJEU held that national court have to take into account subject-matter of the litigation in making assessment and the amount of the costs of the proceedings to assess the proportionality of the national rule.

The ECtHR found in case *Panovits v. Cyprus*²¹⁷ that 17 years-old boy was questioned without lawyer or any legal representatives. Cyprus failure to give the lawyer access to proceedings and violated his right to be heard and rights of defence at the pre-trial stage of the proceedings.²¹⁸ In another case *Salduz v. Turkey*²¹⁹ ECtHR 17 years-old applicant was taken into custody. He was interrogated by the police in the absence of a lawyer. The Court held that there has been violation of Article 6. 3 (c) and Article 6. 1 with providing access to a lawyer where the person in custody is a minor.²²⁰

Thus, to access legal assistance at no cost, children should have access to legal aid. In order to provide legal aid to unaccompanied and separated children it requires knowing their specific situation and maturity. Legal professionals have to adopt their own way to interact with unaccompanied minors and they have to make sure that context and proceedings are child-friendly. Child-friendly aid has to be delivered by lawyers or trained people who are specialist in children's law. In line with the right to be heard, legal representatives have to inform children with proceedings.

In conclusion of this chapter, we can say that guardians have different mandates and functions. The guardian's mandate can cover all aspects concerning to guardianship or be delimited upon appointment by the authority. The duties assigned and the duration of the

²¹⁴ Airey v. Ireland.

²¹⁵ DEB Case C – 279/09.

²¹⁶ Ibid.

²¹⁷ Panovits v. Cyprus.

²¹⁸ Ibid.

²¹⁹ Salduz v. Turkey.

²²⁰ Ibid.

appointment depends on the specific situation of the minor, on migration and residence status or particular legal procedure that minor was involved. The task of guardians, as we already stressed before, is not defined by the law. Guardians have to represent the child in legal transaction or other proceedings. Provisions laying down parental rights can be used for determination the content of mandate of guardians including specific rights and duties of the unaccompanied minors. The general mandate of the minors is define through the asylum and migration provision.

Regarding the rights that unaccompanied children have, we can say that children are genuine rights-holders. They have a range of different rights.²²¹ All EU Member States and State Parties of the CRC obliged to ensure that their rights. EU law are directly bound by the CRC.²²²

Further, there are provisions which concern unaccompanied children and many of them are set out general terms with no implementation processes such as ensuring the principle of the best interests of the child.²²³ They can also establish important safeguards but rarely establish procedural safeguards such as guardianship, legal representation, assistance and etc. However, the children might have an access to asylum procedures, but not to the process to identify durable solution.²²⁴

Mostly, as we already stressed before, procedural safeguards depends on multidisciplinary and inter-agency approaches. The CRC Clusters focused in relation to procedural safeguards, such as general principles, violation their rights, freedoms, protections.²²⁵

²²¹ SMYTH, Ciara. *European Asylum Law and Rights of the Child*. 2014, pp. 54.

²²² Ibid.

²²³ Initiative for children in migration. Spotlight on the EU: procedural safeguards [online]. Accessible at <<http://childreninmigration.eu/Procedural-safeguards>>.

²²⁴ Ibid.

²²⁵ Ibid.

4. CONCLUSION

In public international law, there is no definition of the notion of unaccompanied minors.²²⁶ The most important and universal instrument regarding the protection of the rights of children is the CRC which contains obligations for states to respect the rights. The Refugee Convention refers to the need to ensure the protection of all children, including unaccompanied minors. All EU Member States ratified this both Conventions and some of the countries are bound by the other treaties which guarantee rights. EU Member States have to respect obligations in the national law, when they legislate autonomously and when they implement EU legal acts.²²⁷

The CFR does not refer to the rights of unaccompanied minors, but according to Article 24 (2) the best interests of the child have to be a primary consideration in all actions regarding children.²²⁸ According to Article 51 of the CFR applies to the institutions and bodies of the EU and the Member States when they are implementing EU law.²²⁹

There are no exceptions in International and EU law concerning unaccompanied minors. All legal instruments in the relation of child protection, migration and asylum apply to the situation of unaccompanied minors.²³⁰

The priority of the Member States should be connected to the care of unaccompanied minors, especially before when their status was determined. Irrespective of immigration status, similar guardianship and accommodation apply to all unaccompanied minors.²³¹

²²⁶ Approaches to Unaccompanied Minors Following Status Determination in the EU plus Norway. Synthesis Report for the EMN Study [online]. Accessible at <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_eu_synthesis_report_unaccompanied_minors_2017_en.pdf> July 2018, pp. 55.

²²⁷ Ibid.

²²⁸ Art. 24 (2) of the CFR: “In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration”.

²²⁹ Art. 51 of the CFR: “1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties. 2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties”.

²³⁰ Approaches to Unaccompanied Minors Following Status Determination in the EU plus Norway. Synthesis Report for the EMN Study [online]. Accessible at <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_eu_synthesis_report_unaccompanied_minors_2017_en.pdf> July 2018, pp. 55.

²³¹ Ibid.

Several conclusions emerge from this thesis regarding the care for unaccompanied minors, which depends on their status, whether they seek asylum or not, granted international protection and etc.

4.1. Findings of the thesis

During recent years, migration became a more complex phenomenon. Starting from the terminology it has become more nuanced. Thousand of unaccompanied minors have migrated from their original countries to EU. The EU is affected in a relatively unprecedented way. The policy response to the migration flow is impeded by the difficulty in identifying what type of migrant enter the EU Member State. At times, the identification of migration status of each individual is not sufficiently clear.

Within the EU's migration policy, there is the situation of a group of people who require special protection and it was outlined that the existing legal regulations have certain gaps.²³² For instance, they are considering as an underage migrants who arrive to the territory of the EU illegally and unaccompanied by an adult.²³³ It is a fact that minors can be also repatriated if their guardian or reception centre in the Member State of return receives them on arrival.

The principle of the best interests of the child is the cornerstone of a number of policy and legal instruments adopted by EU Member States at the EU and national levels. When it comes to unaccompanied minors who seek asylum and protection in Europe, EU countries shirk from their obligations that they signed up to in the CRC. The result is that unaccompanied minors find themselves unprotected.

The legal bases of the EU concerning the children are limited.²³⁴ The EU legal regulation on unaccompanied minors is undeveloped and the EU legislation for action concerning unaccompanied minors is relatively limited.²³⁵ Therefore, International law plays

²³² Refugee and Migrant Children- Including Unaccompanied and Separated Children – in Europe [online]. Accessible at <<https://www.unicef.org/eca/>>.

²³³ Ibid.

²³⁴ EU Framework of Law of Children's Rights. Directorate-General For Internal Policies [online]. Accessible at <[https://www.europarl.europa.eu/RegData/etudes/note/join/2012/462445/IPOL-LIBE_NT\(2012\)462445_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/note/join/2012/462445/IPOL-LIBE_NT(2012)462445_EN.pdf)>.

²³⁵ Ibid.

a very important role in securing special protection for refugee children. Within the international human rights legal framework, the CRC, as we already mentioned, provides the most comprehensive and exacting set of standards on the children's treatment including refugee children.²³⁶

The rights of unaccompanied minors are not defined by the rules of international law but shaped by asylum and migration policies.²³⁷ However, the EU asylum and migration legislation are designed in line with the general provisions of international human rights law, in fact, a lot of aspects of EU policy regarding child protection demonstrate the obligations under CRC.²³⁸

The EU countries according to CRC introduced special provisions regarding unaccompanied minors. In the EU legislation, there is no exception regarding the treatment of unaccompanied minors. Children, who arrive in Europe in the form of uncontrolled migration, need to have humanitarian assistance.²³⁹

Unaccompanied minors might be subject to procedures which highlighted in the Return Directive, when they do not meet the conditions for stay, entry and residence in the EU. These procedures implicate several fundamental rights concerns, particularly from the perspective of the rights of the children.²⁴⁰

The CRC became an independent source of status. Human rights guarantees are complementary and should be considered after a refugee status determination. The CRC provides a critical additional layer of protection, which can provide a more child-friendly gateway for assessing the protection needs of a child seeking international protection.²⁴¹

²³⁶ POBJOY, Jason M.. *The Child in International Refugee Law*. 2017, pp. 19; Allison JAMES, Alan PROUT. *Constructing and Reconstructing Childhood*. 1998, pp. 43.

²³⁷ Ibid.

²³⁸ GORNIK, Barbara, SEDMAK, Mateja, SAUER, Birgit. *Unaccompanied minor migrants in Europe: between compassion and repression*. *Unaccompanied Children in European Migration and Asylum Practice*. 2018, pp. 32-33.

²³⁹ Ibid. pp. 54-55.

²⁴⁰ Returning unaccompanied children: fundamental rights considerations. *FRA Focus*, pp. 30.

²⁴¹ POBJOY, Jason M.. *The Child in International Refugee Law*. 2017, pp. 19; JAMES, Allison, PROUT, Alan. *Constructing and Reconstructing Childhood*. 1998, pp. 238.

As I have shown in this research, the rights of the child appear to be very ambitious, especially when these rights go with the interests of a certain state to control migration flux and reduce the number of illegal migrants in their territory.²⁴²

The EU Member States have identified the special needs for improving guardianship and protection for unaccompanied minors. There are several provisions regarding guardians, its role, guardianship system and etc.²⁴³ Children, who obtained international protection and who are covered by the EU law, will get benefits from the same care and integration support during the asylum procedure. Some Member States unaccompanied minors getting benefits from the protection.

However, the protection of unaccompanied minors with refugee or subsidiary protection status is more extensive than others with temporary or alternative statuses.²⁴⁴ Only in the certain Member States, unaccompanied minors may be granted these with this status. It does not regulate under EU law. EU countries became separated when it comes to providing integration support to unaccompanied minors, even though if some of the children apply different integration measures, which depends on the status of a child.²⁴⁵

Some of the EU Member States have a specific procedure to assess the principle of the best interest of the child for supporting the decision-making process on the most appropriate individual care for minors. The lack of guidance on assessing the best interests of the child in general and unaccompanied minors, in particular, the same as specific requirements for social workers, legal assistance and other professionals who have a particular knowledge of immigration and unaccompanied minors.²⁴⁶

There are no specific measures suggesting that the Member States encourage the voluntary departure of unaccompanied minors. The national legislation is not detailed, except only a few Member States where it is understood as a place where minors can be treated regarding their needs.²⁴⁷

²⁴² Approaches to Unaccompanied Minors Following Status Determination in the EU plus Norway. Synthesis Report for the EMN Study [online]. Accessible at <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_eu_synthesis_report_unaccompanied_minors_2017_en.pdf> July 2018, pp. 55.

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ Ibid.

²⁴⁶ Ibid.

²⁴⁷ Ibid.

Unaccompanied minors with rejection application usually have to fulfil their return obligations. In practice, EU Member States continue to care for unaccompanied minors until they return to their country of origin. The role of guardians is safeguarding the rights of the unaccompanied minors underlined by some Member States.

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