

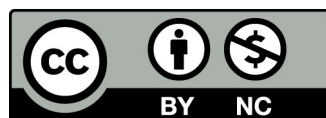
SILENT CRIES: RESEARCH REPORT ON THE NEED FOR INCREASED PROTECTION OF CHILD ASYLUM SEEKERS IN THE EUROPEAN UNION

Edited by
Caterina Luciani



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**EDITED BY
CATERINA LUCIANI**



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FOREWORD

Giovanni Carlo Bruno

Silent Cries: Research Report on the Need for Increased Protection of Child Asylum Seekers in the European Union represents an important document for reflection on children's rights.

The recognition of children as rights holders, besides their qualification of a vulnerable group in need of protection, is somehow firmly settled, in the international legal discourse at least.

The consolidation of a corpus of legal rules established and operating in universal and regional international law is a major achievement. Specific rules are found in the two 1966 International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, the 1989 United Nations Convention on the Rights of the Child (together with its 2000 Optional Protocols, on children in armed conflicts and commercialization, sexual exploitation and abuse of children, and its 2011 Optional Protocol, on the communication procedure before the Committee on the Rights of the Child), the 1990 African Charter on the Rights and Welfare of the Child, the 2006 Convention On The Rights Of Persons With Disabilities, just to mention few examples.

Meanwhile, violations of basic rights, often connected with the worsening of socio-economic conditions, or as consequences of armed conflicts, are reported by the media and by all national and international organisations dealing with children. For example, poor educational opportunities, healthcare, food, housing, and protection against violence.

Nowadays, the gap is widening between the existence of norms for the full realisation of children in society and their possible effective enjoyment.

The present research report focuses on an exceptional group of children – asylum seekers – to show the existing legal framework in the European Union (EU), together with its inconsistencies. The *Silent Cries* Report offers a comprehensive analysis of the subject, with conclusions and recommendations not only for better management of the entire process of admission of children in the EU but also for a more 'human-rights' oriented approach.

In addition, the Report contains a general 'Call for States Collective Action toward Refugee Protection in Africa,' based on responsibility-sharing and international co-operation.

The last part of the Report collects expert testimonies and personal reflections from professionals on their daily work with asylum-seeking children.

CNR-IRISS and *The Thinking Watermill Society* are working jointly, together with the Department of Law of the *University of Naples Federico II*, on projects on ‘Migration and Development.’

The *Silent Cries* Report is a valuable tool for all scholars and practitioners, since it combines the scientific approach to the subject with the contribution of professionals, to offer food-for-thought for one of the most outstanding challenges of society.

Giovanni Carlo Bruno
Scientific Responsible of the Project ‘Migration and Development’,
CNR-IRISS
October 2023,
Naples, Italy.

PREFACE

Caterina Luciani

Our previous work, *“The Right to Asylum From a Gender Perspective”* triggered an epiphany for The Thinking Watermill Society. While working on the Report, our researchers concluded that it was a great introduction to the perception of gender in asylum rights in a non-complex manner for public advocacy. On the other hand, they felt that more could be done in terms of policy change. The result is this current publication *“Silent Cries: Research Report on the Need for Increased Protection of Child Asylum Seekers in the European Union.”*

Giovanni Carlo Bruno, Senior Researcher of International Law at the National Research Council of Italy – Institute for Research on Innovation and Services for Development (CNR-IRISS), Naples, together with the President and Vice President of The Thinking Watermill Society, Caterina Luciani and Mario Di Giulio respectively, instigated this research report, owing to their great interest for asylum rights and refugee protection. In turn, this passion has been relayed to the main authors of this work, Maria Angela Wangui Maina, Davis Kosgei and Anita Wambui (Researchers at The Thinking Watermill Society) who worked endlessly to analyse policy, data, and statistics to ensure the silent cries of unprotected asylum children do not go unheard.

The *Silent Cries* Report brings out the issue that the European Union (EU) has an asylum law system that it expects its Member States to apply within their jurisdiction. However, the EU Member States have applied and even enacted divergent asylum laws, which have had an inadvertent effect on asylum-seeking children. This Report breaks down basic international refugee law, EU asylum law, the understanding of children in asylum law and the obstacles children face while seeking asylum in EU Member States due to divergent application of asylum law in reality.

A tantalising aspect of this research report is the Call for Responsibility-Sharing and International Cooperation Between States to protect refugees in Africa, as written by Professor Luis G. Franceschi (Assistant Secretary-General of the Commonwealth of Nations) together with Kimberly W. Mureithi (Researcher at The Thinking Watermill Society).

Moreover, this research study is bolstered by first-hand personal opinions and testimonies by expert professionals who encounter asylum-seeking children in their different capacities:

- a) Cesare Fermi (Director of Operations in Europe INTERSOS);
- b) Manon Khazrai and Chiara Spiezia (Dietician and Professor of Food Diet and Human Nutrition, and Nutrition Biologist at the Campus Bio-Medico University of Rome, respectively);
- c) Héctor Franceschi (Professor at the Pontificia Università della Santa Croce);

and

- d) Massimo Ciccozzi (Doctor and Professor and Head of the Medical Statistics and Epidemiology Unit at the Campus Bio-Medico University of Rome).

We greatly thank all the authors named herein and we hope this research study will trigger your mind, and, most importantly, policy review discussions.

We must protect those who cannot protect themselves and stop their silent cries.

Caterina Luciani
President, The Thinking Watermill Society
and Partner, Pavia e Ansaldo

October 2023,
Rome, Italy.

LIST OF ABBREVIATIONS

AADH	<i>Alliance des Avocats pour les Droits de l'Homme</i>
ACE2	Angiotensin Converting Enzyme 2
AIDA	Asylum Information Database
AIDS	Acquired Immunodeficiency Syndrome
BAMF	Federal Office for Migration and Refugees
BIA	Best Interest Assessment
CEAS	Common European Asylum System
CFREU	Charter of the Fundamental Rights of the European Union
CDCJ	The Committee on Legal Cooperation
CIE	Immigration Detention Facility
CJ-DAM	Committee of Experts on Administrative Detention of Migrants
CJEU	Court of Justice of the European Union
COVID-19	Coronavirus disease
CRA	<i>Centre de rétention administrative</i>
CRC	Committee on the Rights of the Child
CRC OP3	Optional Protocol to the Convention on the Rights of the Child
DHS	Department of Homeland Security
DNA	Deoxyribonucleic Acid
EASO	European Asylum Support Office
ECRE	European Council on Refugees and Exiles
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EFTA	European Free Trade Association
EMN	European Migration Network
EOIR	Executive Office for Immigration Review
EPRS	European Parliamentary Research Service
EU	European Union
EUAA	European Union Agency for Asylum
EURODAC	European Asylum Dactyloscopy Database
FGM	Female Genital Mutilation
FRA	European Union Agency for Fundamental Rights
GBV	Gender-Based Violence
GMO	Genetically Modified Organism
GUDA	<i>Guichet unique de demande d'asile</i>
HHS	United States of America Department of Health and Human Services
HIV	Human Immunodeficiency Virus
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IDPs	Internally Displaced Persons
ILO	International Labour Organisation
INA	Immigration and Nationality Act
IT	Information Technology
LGBTQ	Lesbian, Gay, Bisexual, Transgender and Questioning (Queer)

MERS-CoV	Middle East Respiratory Syndrome Coronavirus
MS	Member State
MSs	Member States
NGO	Non-Governmental Organization
OAR	Office of Asylum and Refugee, Aliens' Office
OAU	Organisation of the African Union
OFII	Office for Immigration and Integration
OFPRA	<i>Office français de protection des réfugiés et apatrides</i>
PICUM	Platform for International Cooperation on Undocumented Migrants
PTSD	Post-Traumatic Stress Disorder
RNA	Ribonucleic Acid
SARS	Severe Acute Respiratory Syndrome
SARS-CoV	Severe Acute Respiratory Syndrome Coronavirus
SARS-CoV-2	Severe Acute Respiratory Syndrome Coronavirus 2
SNVA	Special Needs and Vulnerability Assessment
SPADA	<i>Plateforme d'accueil de demandeurs d'asile</i>
TCNs	Third Country Nationals
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UAM	Unaccompanied Minor
UAMs	Unaccompanied Minors
UDHR	United Nations Declaration of Human Rights
UN	United Nations
UN CAAC	United Nations Security Council Working Group on Children and Armed Conflict
UNCRC	United Nations Convention on the Rights of the Child
UNICEF	United Nations Children's Fund
UNHCR	United Nations High Commissioner for Refugees
US	United States of America
USCIS	United States of America Citizenship and Immigration Services
WASH	Water Sanitation and Hygiene
WHO	World Health Organization

SILENT CRIES: RESEARCH REPORT ON THE NEED FOR INCREASED PROTECTION OF CHILD ASYLUM SEEKERS IN THE EUROPEAN UNION

Maria Angela Wangui Maina,¹ Davis Kosgei² & Anita Wambui³

ABSTRACT

The European Union (EU) asylum laws vary in practical application among the Member States causing divergent difficulties during the asylum-seeking procedure, especially for children and their rights. The purpose of this book is to promote the strengthening of the protection of asylum-seeking children as vulnerable persons and their rights within the EU asylum system.

KEYWORDS

asylum-seeking children, European Union, human rights, EU asylum law

SUMMARY

This research study is based on analysis conducted through desk research and examination of legislation, case law, statistical reports, published theses, and journal articles.

This study comprises the following six chapters to achieve its main purpose.

Chapter 1 Introduction

A general introduction to the background of the problem, with the presentation of the EU as the jurisdiction of focus, and the reason for emphasising on asylum-seeking children. This segment concludes with a segue into the history of international child rights and its link to the current international legislation protecting asylum-seeking children, specifically, the Universal Declaration of Human Rights (1948), the United Nations Convention on the Rights of the Child (1989), the Convention Relating to the Status of Refugees (1951) and the Protocol Relating to the Status of Refugees (1967).

1. Chief Research Coordinator-Africa at The Thinking Watermill Society.

2. Researcher at The Thinking Watermill Society.

3. Researcher at The Thinking Watermill Society.

Chapter 2

European Union Asylum Law

A breakdown of the fundamental EU primary and secondary legislation that governs asylum application processing and determination procedures among its Member States. This chapter aims to provide a comprehensive understanding of how the EU asylum law system operates, its direct or indirect effects on Member States' national legislation, and its relationship with international asylum law regarding asylum-seeking children.

In detail, the primary EU legislation examined are the Treaty of the European Union, the Treaty of the Functioning of the European Union, and the Charter on the Fundamental Rights of the European Union. While the secondary EU legislation examined are:

- a) Dublin Regulation (No 604/2013)
- b) European Dactyloscopy Database (EURODAC) Regulation (No 603/2013)
- c) The recast Qualification Directive (2011/95/EU)
- d) Asylum Procedures Directive (2013/32/EU)
- e) The recast Reception Conditions Directive (2013/33/EU)
- f) Directive (2008/115/EC) (the Return Directive)
- g) Temporary Protection Directive (2001/55/EC)
- h) Proposed New Pact on Migration and Asylum (2020)

The contributors of this report point out the triumphs and shortfalls of each of these legislative documents from the point of view of asylum-seeking children.

Chapter 3

Asylum-Seeking Children as Vulnerable Persons

An analysis of the distinct reasons why children from around the world choose to seek asylum in the EU, their recognition as vulnerable persons in the asylum process, and the legally established categories in which they are classified for the application process — as accompanied minors and unaccompanied minors.

Chapter 4

Obstacles Faced by Children Seeking Asylum in the European Union

This chapter contains a general outline of the asylum-seeking procedure in the EU followed by an in-depth analysis of the child-related weaknesses identified in each fundamental stage of the process. The manifestation of these weaknesses between EU law and its application in the Member States will be illustrated using case studies based on Germany, France, and Spain as the specific EU Member States, with a comparative study of the United States of America (US). These jurisdictions are selected based on the United Nations High Commissioner for Refugees, "Global Trends in Forced Displacement - 2020 Report" and 2021 Eurostat Annual Asylum

Statistics, which indicates the United States of America was the world's highest recipient of new asylum applications, followed by EU Member States Germany, Spain, and France.

Chapter 5

Conclusions and Recommendations

A summary of the findings within the book and the specific conclusions drawn from the same. The conclusion of this chapter is focused on giving recommendations for possible legal and practical solutions for strengthening the protection of asylum-seeking children within the EU.

Chapter 6

Chapter Contribution on Behalf of the Commonwealth of Nations: A Call for States' Collective Action Towards Refugee Protection in Africa

This chapter is written by Professor Luis G. Franceschi (Assistant Secretary-General of the Commonwealth of Nations) together with Kimberly W. Mureithi (Researcher at The Thinking Watermill Society).

This call to action seeks to analyse the meaning of responsibility-sharing and international cooperation from the perspective of individual States. Further, this research will consider whether responsibility-sharing is a legal obligation, as opposed to a voluntary undertaking by States with a primary focus on states in the African Union. This chapter ends with an additional contribution from Professor Luis G. Franceschi on the Kigali Declaration of Child Care and Protection Reform adopted by the Leaders of the Commonwealth of Nations in Kigali-Rwanda in June 2022.

Chapter 7

Expert Testimonies: The Asylum Procedure for Children and the Conditions They Face

A chapter comprising first-hand testimonies by expert professionals who encounter asylum-seeking children in their different capacities. These are their personal opinions as professionals and do not reflect the opinions of their places of work. Current testimonies in this chapter are from:

- a) Cesare Fermi (Director of Operations in Europe INTERSOS);
- b) Manon Khazrai, and Chiara Spiezia (Dietician and Professor of Food Diet and Human Nutrition, and Nutrition Biologist at the Campus Bio-Medico University of Rome, respectively);
- c) Héctor Franceschi (Professor at Pontificia Università della Santa Croce); and
- d) Massimo Ciccozzi (Doctor and Professor and Head of the Medical Statistics and Epidemiology Unit at the Campus Bio-Medico University of Rome).





CHAPTER 1

INTRODUCTION



INTRODUCTION

Children often suffer the consequences of adults' decisions in silence, hence the title of this research report. No child chooses to live in a war-torn country or to be persecuted for the only way of life they know. This is the plight of asylum-seeking children.

Children comprise 40% of all forcibly displaced people despite accounting for 30% of the world's population.⁴ The Coronavirus (COVID-19) pandemic exacerbates their circumstances by dwindling humanitarian capacity and resources.⁵ Thus, asylum-seeking children are the subject matter of this research study.

It is imperative to keep in mind that, before all else, asylum-seeking children are children in the first instance and fall under the protection of international children's rights. In the context of asylum, a minor is defined as "a third-country national or stateless person below the age of 18 years."⁶ As such, minors are protected under the United Nations Convention on the Rights of the Child (UNCRC) which recognises them as vulnerable members of society who need care, special safeguards, and need to grow up in a family environment for the full and harmonious development of their personality.⁷

This chapter presents the reader with the background of the research problem at hand, followed by the history of international child rights and its link to the current international framework protecting asylum-seeking children.

The biggest challenge faced towards the achievement of the main purpose of this study is the paradoxical characteristic of asylum which is that "asylum transcends national boundaries, but it can only be set in motion within national boundaries."⁸ In summary, bringing international protection into operation presupposes national legislation, which is politically based on the doctrine of national sovereignty. In this study, we will show that the provisions of

4. UNHCR, 'Global Trends: Forced Displacement in 2022' (UNHCR The UN Refugee Agency 2023).

5. UNICEF, 'Refugee and Migrant Crisis in Europe' (UNICEF July 2021).

6. The recast Reception Conditions Directive (2013/33/EU), Article 2 (d).

7. United Nations Convention on the Rights of the Child (1989), Preamble.

8. K. Desimpelaere, 'The Dublin Regulation: Past, Present, Future' (University of Ghent, Ghent 2015) 10.

EU asylum legislation and the national asylum legal system of EU Member States differ in crucial areas that affect the child rights of asylum-seeking minors. More so, the ongoing negotiations on the New EU Migration and Asylum Pact (2020) suggests novel changes that contain underlying hindrances to the rights of asylum-seeking children. There exists an urgent need to address the EU asylum system flaws to solve consequential issues, such as the increased risk of future child rights violations.

1.1. BACKGROUND OF THE PROBLEM

Our previous research study, *“The Right to Asylum from a Gender Perspective”*, inculcates the appreciation for the existence and evolution of human rights as the foundation for the recognition of women’s rights as human rights within the EU asylum-seeking procedure.⁹ In the same spirit, the contributors of this research study recognize that children’s rights are indeed human rights.

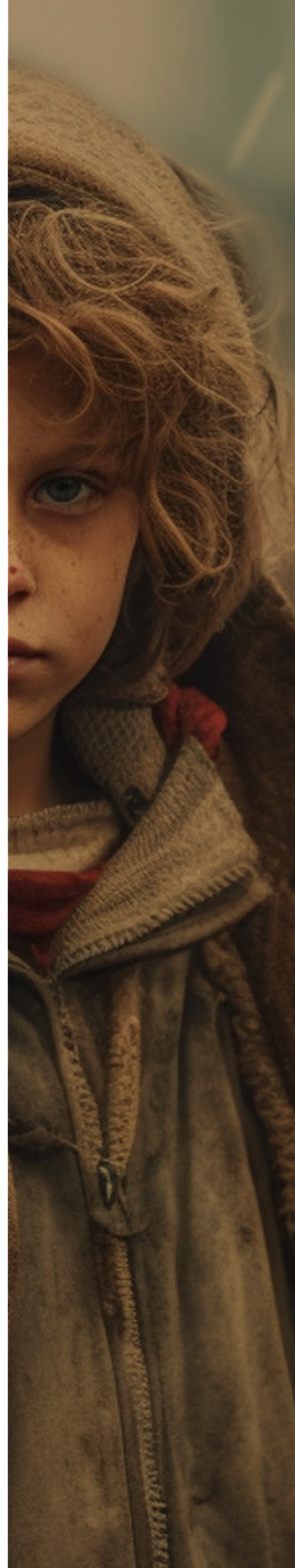
Children’s rights are made sense of and are used in political, social, and legal processes to solve specific problems.¹⁰ One of these rights includes the right to seek and enjoy asylum, which is enshrined within the Preamble of the 1948 Universal Declaration of Human Rights (UDHR) and bolstered by the 1951 Convention Relating to the Status of Refugees (the Refugee Convention) which stipulates the specific rights and freedoms of asylum-seekers and refugees. Nevertheless, there currently exists no international legislative body to ensure compliance with the rights and freedoms enshrined in the 1951 Refugee Convention, leaving the United Nations High Commissioner for Refugees (UNHCR) with the duty to supervise the application of its provisions and the International Court of Justice (ICJ) to settle disputes regarding its interpretation or application.¹¹

Children are, by some means, strangers to the legal system and often suffer in times of armed conflicts, and as such are deemed vulnerable in the eyes of society and the law, as indicated in Article 21 of the recast Reception Conditions Directive (2013/33/EU). It is important to enforce and protect the rights and best interests of asylum-seeking children to quell current violations and prevent future ones.

9. C. Toroitich, K. Mureithi, M. Maina, ‘The Right to Asylum from a Gender Perspective’ (The Thinking Watermill Society, Italy 2021) <<https://thethinkingwatermill.com/the-right-to-asylum-from-a-gender-perspective/>>.

10. A. Holzscheiter, J. Josefsson, B. Sandin, ‘Child Rights Governance: An Introduction’ (Linköping University, Sweden 2019), p. 273.

11. Convention Relating to the Status of Refugees (1951), Article 35 (1) and 38.



Notwithstanding, the mix of international frameworks with national ones causes a muddle within the asylum-seeking process, especially for children with regard to the consideration of their best interests, family reunification, age assessment tests, treatment of unaccompanied minors (UAMs), and administrative detention — simply to name a few of the topics that will be discussed in this publication.

There were 5.4 million asylum seekers by the end of 2022, among which there were 2.6 million new individual asylum applications globally (which is the highest number ever recorded and represents an 83% increase from 2021).¹² Europe and the Americas received the largest number of individual applications in 2022.¹³ Specifically, the United States of America (US) was the world's highest recipient of new asylum applications followed by EU Member States Germany, Spain, and France.¹⁴ In addition, the EU+¹⁵ received an estimated 71,400 applications for international protection in November 2021, which is notably the second-highest level of applications received within the region since 2016, and with the highest tally of applications made by self-claimed UAMs.¹⁶ Europe also granted international protection to more than a quarter of a million people within the region in 2021.¹⁷ The 2022 invasion of Ukraine by Russia has triggered a steep increase in the number of applications for asylum and temporary protection in EU+ countries, which the European Union Agency for Asylum (EUAA) reports being one of the largest humanitarian crises Europe has seen in decades.¹⁸ The UNHCR also forecasts an increase in asylum-seekers in Europe between December 2022 and May 2023.¹⁹ It is for this reason that the EU is the jurisdiction of focus within this report.

12. UNHCR, 'Global Trends: Forced Displacement in 2022' (UNHCR The UN Refugee Agency 2023).

13. UNHCR, 'Global Trends: Forced Displacement in 2022' (UNHCR The UN Refugee Agency 2023).

14. UNHCR, 'Global Trends: Forced Displacement in 2022' (UNHCR The UN Refugee Agency 2023).

15. EU+ refers to the 27 European Union Member States, plus Norway and Switzerland. However, until the end of 2019, data for the EU+ also includes the United Kingdom.

16. European Union Agency for Asylum (EUAA), 'Latest Trends - Annual Overview 2021' (EUAA November 2021) <<https://euaa.europa.eu/latest-asylum-trends-annual-overview-2021>> 9 May 2022.

17. UNHCR, 'Refugee Statistics' (UNHCR) <<https://www.unrefugees.org/refugee-facts/statistics/>>, accessed 17 June 2022.

18. European Union Agency for Asylum (EUAA), 'Latest Trends Asylum' (EUAA February 2022) <<https://euaa.europa.eu/latest-asylum-trends-asylum>> accessed 9 May 2022.

19. The UNHCR forecasts an increase of asylum-seekers in Europe and Sub-Saharan Africa between December 2022 and May 2023.

There also exists an increasing concern for asylum-seeking children regarding the loopholes present in the 2020 EU Commission Communication on the European Pact on Migration and Asylum that contains legislative proposals with more tools and fewer safeguards that favour deportation over the protection of human rights.²⁰

Children on the move are children first.²¹ It is therefore crucial to understand the history of the rights of the child and why they came into existence before proposing the need to protect asylum-seeking minors.

1.2. HISTORY OF THE RIGHTS OF THE CHILD

World War I initiated recognition of the profound effects of conflicts on children. Children's varied experiences between 1914 and 1918 have been documented in photographs, schoolwork, drawings, and poems. For instance, the poem *"The Returning Soldier"* (*Der heimkehrende Krieger*), as written by the then 11-year-old Anny Politzer, suggests that some children even occupied an engaged position in the war.²²

Consequently, the League of Nations adopted the Declaration on the Rights of the Child in 1924, which was originally drafted and presented by Eglantyne Jebb, the founder of the Save the Children Fund. Shortly after, the International Save the Children Union in Geneva ratified it.²³ The League of Nations titled it the "Geneva Declaration of the Rights of the Child" after adoption in 1924, setting in motion the first official recognition of rights specific to children.

Humanity owes to the child the best that it must give.

-Preamble, The 1924 Geneva Declaration.²⁴

The short legislative document declared the responsibility of humankind to accept its five main duties, which are that a child must be:²⁵

20. PICUM, 'More Detention, Fewer Safeguards: How the New EU Pact on Migration and Asylum Creates New Loopholes to Ignore Human Rights Obligations' (Platform for International Cooperation on Undocumented Migrants (PICUM), Belgium October 2020) 3.

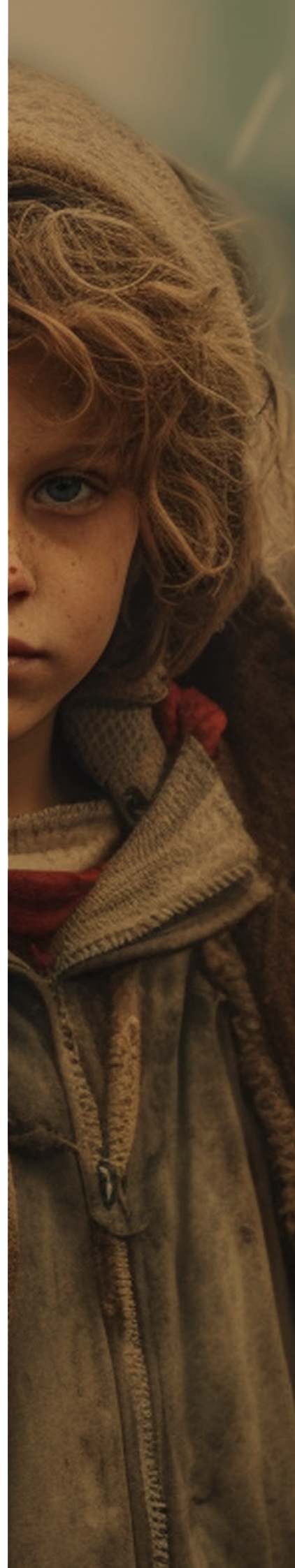
21. UNICEF, 'Migrant and displaced children' (UNICEF) <<https://www.unicef.org/migrant-refugee-internally-displaced-children>> accessed 26 April 2022.

22. S. Gillis, E. Short, 'Children's Experience of World War One' (British Library 2014).

23. UNICEF, 'History of Child Rights' (UNICEF).

24. Geneva Declaration of the Rights of the Child (1924), Preamble.

25. Geneva Declaration of the Rights of the Child (1924).



- a) Provided with the means that are necessary for material and spiritual development;
- b) Fed, nursed, helped, reclaimed, and sheltered;
- c) Assisted first in times of distress;
- d) Put in a position to earn a livelihood and be protected from exploitation; and
- e) Brought up in a consciousness that his/her talents must be devoted to the service of fellow men.

Although the Geneva Declaration offered sufficient protection of child rights during that era, it would be impossible to apply it unchanged in today's context due to the evolution in social, political, and economic complexities.

Accordingly, in 1948 the United Nations (UN) passed the 1948 UDHR which officially declared the position of child rights as human rights, with child-specific rights recognized in Article 25 (right to social protection) and Article 26 (right to education).

Thereafter, the UN adopted the Declaration of the Rights of the Child in 1959 with an extension by form to include other important rights, specifically the right to:

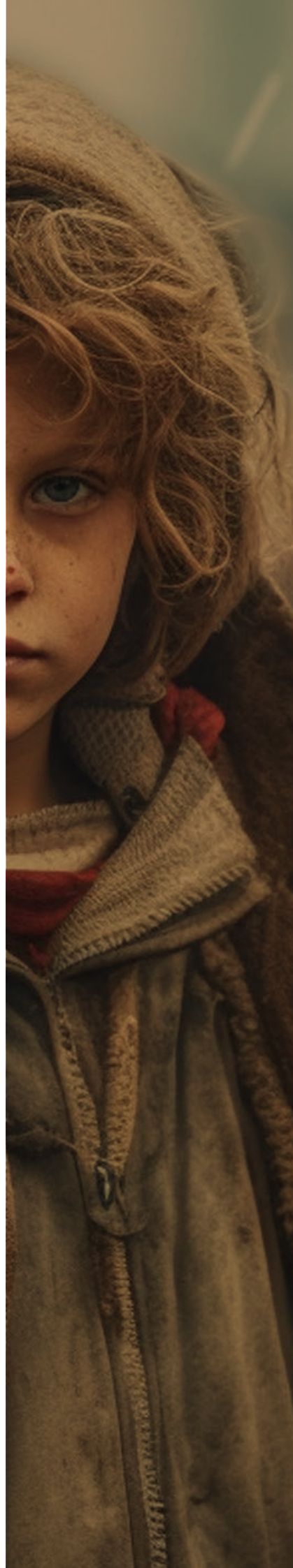
- a) Enjoy the rights set out in the Declaration without any exception;
- b) Social protection;
- c) Entitlement of a name and nationality at birth;
- d) Social security;
- e) Special treatment in the case of handicapped children;
- f) Full and harmonious personal development;
- g) Free and compulsory education;
- h) Receive relief first;
- i) Protection from all forms of neglect, cruelty, and exploitation; and
- j) Protection from practices that foster racial, religious and any other forms of discrimination.

The aforementioned principles had an impact on the future of child rights, as they stimulated the formation of further legislation, internationally and in the EU region.

The table below is a chronological history of child rights after 1959.²⁶

26. Table information sourced and compiled by UNICEF, 'History of Child Rights' (UNICEF) <<https://www.unicef.org/child-rights-convention/history-child-rights>> accessed 11 January 2022.

Year	Milestone	Importance
1966	Adoption of the International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR).	Promises made by the UN Member States to uphold equal rights for all children.
1973	Adoption of the C138 - Minimum Age Convention (No. 138) by the International Labor Organization.	Sets the minimum age for undertaking work at 18 years, especially where the work might be hazardous to a person's health, safety, or morals.
1974	Call by the UN General Assembly for the Member States to observe the Declaration on the Protection of Women and Children in Emergency and Armed Conflict.	Prohibits attacks against and imprisonment of women and children. Upholds the inviolability of women's and children's rights during armed conflict.
1985	Adoption of the UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules).	Details principles of a justice system to promote the best interests of the child, including education, treatment during detention, and social services.
1989	Adoption of the UN Convention on the Rights of the Child (UNCRC).	Recognizes the role of children as actors in civil, cultural, economic, social, and political aspects. Sets minimum standards for the protection of child rights in all capacities, including the requirement for the Member States to establish a minimum age for penal liability.
2000	UN adoption of two Optional Protocols to the 1989 UNCRC.	Obliges State Parties to take key actions to prevent hostility against children in armed conflict. Obliges State Parties to end of the commercialization, sexual exploitation, and abuse of children.
2011	The UN adopted a new Optional Protocol to the 1989 UNCRC.	Establishes a communication procedure for the fielding of complaints of child rights violations and commencing investigations by the Committee on the Rights of the Child.



1.3. CURRENT INTERNATIONAL LEGISLATION FOR THE PROTECTION OF ASYLUM-SEEKING CHILDREN'S RIGHTS

This section bears an analysis of the current EU legislation alongside the aforementioned international Conventions at length and their influence on the present asylum procedures for children.

1.3.1. United Nations Declaration of Human Rights (1948) (UDHR)

The UDHR is a fundamental human rights document, with universally recognized rights that apply to all members of humanity. It is not legally binding but is internationally recognized for detailing foundational human rights principles that inspired the adoption of more than seventy human rights treaties,²⁷ alongside numerous national constitutions and domestic legal frameworks. It is especially pivotal in designating children as beneficiaries of human rights, by being humans, despite it sparsely making express mention of children except for Articles 25 and 26. The UDHR most importantly upholds the right of a person to seek and enjoy asylum from persecution in other countries, as provided for in Article 14.

1.3.2. United Nations Convention on the Rights of the Child (1989) (UNCRC)

The UNCRC is an international treaty that was adopted in 1989 by the UN that realises the rights of children as active participants in their communities and provides a stronger foundation than that afforded in the UDHR.²⁸ It is legally binding on its signatories and has currently been ratified by all States, except the US.

It is a treaty that sets out rights applicable to all children and recognizes childhood as a vulnerable time that demands special care and attention as opposed to subjecting children to passive charity.²⁹ State Parties are further mandated to proactively make the UNCRC provisions known

27. UN, 'Universal Declaration of Human Rights' (UN) <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>> accessed 19 January 2022.

28. K. Lee-Koo, 'The Universal Declaration of Human Rights at 70: Children's Rights' (Australian Institute of International Affairs 2020) <<https://www.internationalaffairs.org.au/australianoutlook/the-universal-declaration-of-human-rights-at-70-childrens-rights/>> accessed 9 May 2022.

29. UNICEF, 'The Convention on the Rights of the Child' (UNICEF) <<https://www.unicef.org/georgia/convention-rights-child>> accessed 17 January 2022.

to adults and children alike³⁰ for the conducive realisation of the rights of the child.³¹ The UNCRC indicates society's high regard for children just as its predecessor, the Declaration on the Rights of the Child (1924).

The UN General Assembly has further adopted three Optional Protocols to the UNCRC to increase the protection of children in specific situations:

- a) Optional Protocol on the Involvement of Children in Armed Conflict (2002);
- b) Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (2002); and
- c) Optional Protocol on a Communications Procedure (2014).

The UNCRC points out two main aspects that form the foundation of the rights of asylum-seeking children. These are the definition of a child³² and the principle of the best interest of the child as a primary consideration in all matters.³³ The aforementioned foundational principles are at the genesis of the asylum determination process and are interconnected. To understand the best interest of the child, the subject must be a child. Hence, the age determination process will help ascertain if the individual is below 18 years old, as stipulated in the UNCRC,³⁴ to access education, developmental, and other support resources. These foundational principles will be analysed in-depth within the subsequent chapters to elaborate on their direct application in the asylum determination process and the crucial roles they have within the same.

Other rights within the UNCRC that are integral to the asylum determination process are the right to receive the appropriate protection and humanitarian assistance³⁵ and the right to family tracing and reunification or protection in the case that no family member is found.³⁶

The UNCRC is further credited with establishing and outlining the objectives of an independent body known as the

30. Convention of the Rights of the Child (1924), Article 42.

31. Convention of the Rights of the Child (1924), Article 41.

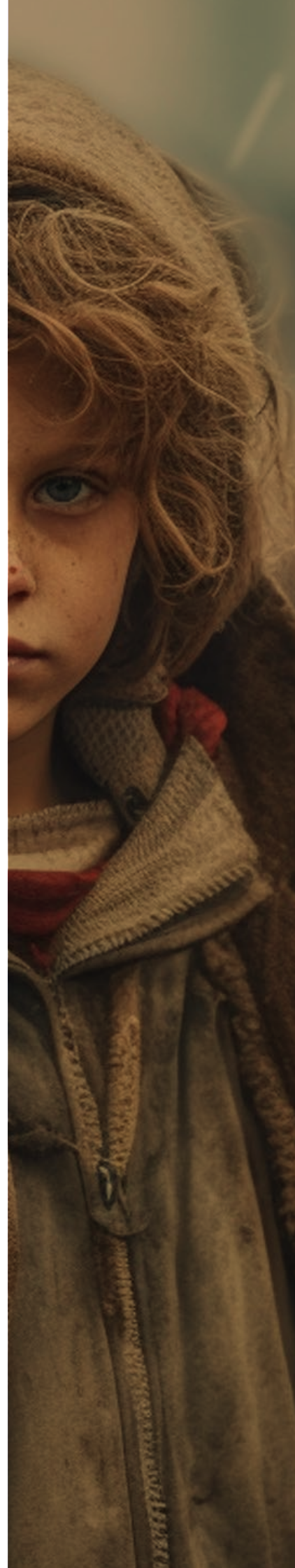
32. Convention of the Rights of the Child (1924), Article 1.

33. Convention of the Rights of the Child (1924), Article 3 (1).

34. Convention of the Rights of the Child (1924), Article 1.

35. Convention of the Rights of the Child (1924), Article 22 (1).

36. Convention of the Rights of the Child (1924), Article 22 (2).



Committee on the Rights of the Child (CRC).³⁷ The CRC comprises 18 experts within the field of international child rights governance, who collaborate with UNICEF and other UN organisations to ensure the implementation of the UN-CRC within State Parties.³⁸

The UNCRC will be a constant point of reference within this research report, as the study of children's rights must be placed in the specific historical, political, and social context that shaped the structure of the Convention, together with the current social and political landscape to understand the consequences and dynamics of child rights governance.³⁹

1.3.3. Convention Relating to the Status of the Refugees (1951) and the Protocol Relating to the Status of Refugees (1967)

The 1951 Convention Relating to the Status of the Refugees (the Refugee Convention) is founded on Article 14 of the UDHR. It is the main international instrument that contains the requirements for granting refugee status, their fundamental rights, and the foundational principles for the protection of refugees such as non-discrimination (Article 3), non-penalization (Article 31) and non-refoulement (Article 33).

The Refugee Convention originally only applied to persons fleeing events occurring before 1 January 1951 within Europe after World War II.⁴⁰ Today, it is universally applicable to asylum-seekers and refugees in all signatory party State jurisdictions due to the 1967 Protocol that played a key role in removing the geographical limitation for the application of the Refugee Convention.

There are no enforcing bodies indicated within the Refugee Convention. However, Article 38 grants the International Court of Justice (ICJ) authority to settle disputes arising from their interpretation or application at any request of any one of the parties.

The Refugee Convention grants the UNHCR (or any other

37. Convention of the Rights of the Child (1924), Article 43.

38. Convention of the Rights of the Child (1924), Article 44 and Article 45.

39. A. Holzscheiter, J. Josefsson, B. Sandin, 'Child Rights Governance: An Introduction' (Linköping University, Sweden 2019), p. 273.

40. Convention Relating to the Status of Refugees (1951), Introductory Note by the Office of the UNHCR.

UN agency that succeeds it) supervisory powers to ensure the application of the Refugee Convention provisions in the Contracting States.⁴¹ The Contracting States are obligated to cooperate with the UNHCR through the provision of information and statistical data concerning the condition of refugees, the implementation of the Refugee Convention, and the national laws, regulations, and decrees in force relating to refugees.⁴²

The UNHCR's role concerning asylum-seekers has significantly expanded since the 1990s due to the increased migration of people from developing countries to industrialised States.⁴³ Today, the international agency confronts a vast interconnected framework of refugee-related matters such as advocacy, tackling sexual exploitation, climate change, public health, and economic inclusion, simply to state a few.

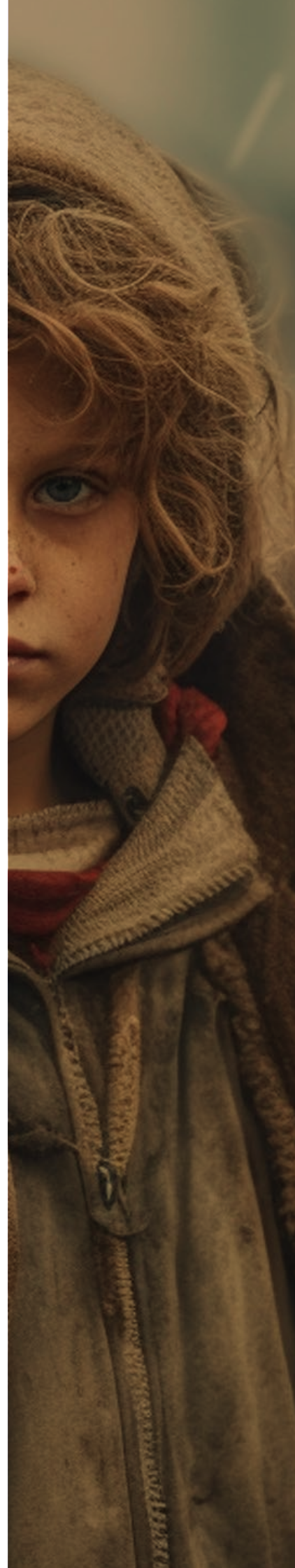
While the UNHCR has an optimistic vision for accelerating the global response to refugee flows, researchers note the highly problematic nature of the EU's increasingly restrictive refugee and migration policies that obstruct the movement of asylum seekers to Europe.⁴⁴ Hence, this study seeks to point out the areas in need of redress for asylum seekers considering instances of modern conflict, the effects of climate change, the COVID-19 pandemic and other major global events with far-reaching effects.

41. Convention Relating to the Status of Refugees (1951), Article 35 (1).

42. Convention Relating to the Status of Refugees (1951), Article 35 (2).

43. J. Crisp, 'UNHCR at 70: An Uncertain Future for the International Refugee Regime' [June 2020] GG, Volume 26 Issue 2 236, 249.

44. J. Crisp, 'UNHCR at 70: An Uncertain Future for the International Refugee Regime' [June 2020] GG, Volume 26 Issue 2 236, 249.







CHAPTER 2

EUROPEAN UNION ASYLUM LAW



EUROPEAN UNION ASYLUM LAW

The EU is the jurisdiction of focus within this study. The EU has a legal personality under international law and legal powers that can be exercised on an international level, particularly in all policy areas falling within its competence.⁴⁵

This chapter examines fundamental EU primary and secondary legislation that governs asylum application processing and determination procedures among its Member States. This chapter provides a comprehensive understanding of how the EU asylum law system operates, its direct or indirect effects on Member States' national legislation, and its relationship with international asylum law regarding asylum-seeking children.

2.1. PRIMARY EU LEGISLATION GOVERNING ASYLUM

Treaties are the foundation of EU law and are the primary binding agreements made between the EU Member States setting out their objectives, institutional rules, and decision-making procedures.

2.1.1. Treaty on the European Union (TEU)

The TEU established the regional integration of European countries into one union to institute the common citizenship of their nationals and to enable the achievement of their common and mutual goals. Among these interests, the ones worth mentioning are the creation of a common foreign and security policy, the facilitation of the free movement of peoples of Europe, and enabling decision-making that is as close as possible to the European citizens per the principle of subsidiarity.⁴⁶ Under the TEU, EU Member States confer competencies to the Union to attain the objectives they have in common.⁴⁷

The TEU contains only one mention of asylum, providing that the Union shall establish appropriate measures for external border control, asylum, and immigration, along with offering its citizens free movement within Europe.⁴⁸

45. *Commission of the European Communities v Council of the European Communities* (1971), para. 14.

46. Treaty of the European Union (1993), Preamble.

47. Treaty of the European Union (1993), Article 1.

48. Treaty of the European Union (1993), Article 3.

2.1.2. Treaty on the Functioning of the European Union (TFEU)

The TFEU was enacted to ensure the economic and social progress of European States by eliminating barriers and strengthening the unity of the economies by reducing differences existing between the various regions.⁴⁹ The TFEU contains more specific functions of the Union and the European Parliament and Council, general EU policies, and measures geared towards the main aims of the treaty.

Under Article 78, the Union has the mandate to frame a common policy on asylum, subsidiary protection, and temporary protection for third-country nationals requiring international protection under the principle of non-refoulement.⁵⁰ Such policy is to be fair towards third-country nationals.⁵¹

The mandate placed on the European Parliament and Council to adopt measures for a Common European Asylum System (CEAS) includes measures on a uniform system status of asylum for third-country nationals, common procedures for granting and withdrawing asylum protection, criteria for determining the country responsible for considering asylum applications and standards concerning the conditions for reception of asylum applicants. These mandates have been performed by the passing of the Asylum Procedures Directive (2013/32/EU), the Dublin Regulation (No 604/2013), and the recast Reception Conditions Directive (2013/33/EU), which shall be delved into later in this report.

Of current interest, the TFEU allows the European Council to adopt provisional measures in the event of an emergency where there is a sudden inflow of third-country nationals.⁵² The European Commission fulfilled this mandate by enacting the Temporary Protection Directive (2001/55/EC).⁵³ However, the impetus to activate and utilise this Directive, as shall be discussed later, has been unfair and biased at best, and discriminatory at worst.

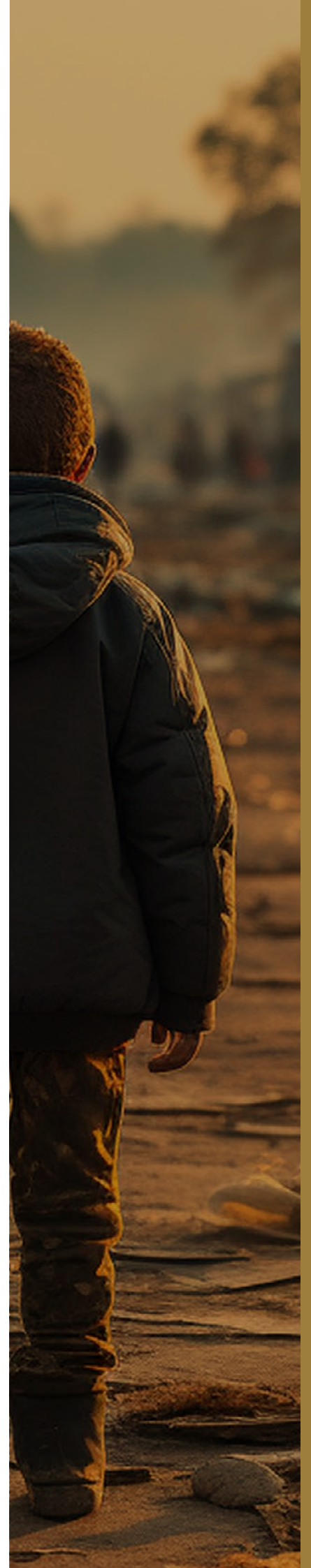
49. Treaty on the Functioning of the European Union (1958), Preamble.

50. Treaty on the Functioning of the European Union (1958), Article 78.

51. Treaty on the Functioning of the European Union (1958), Article 67.

52. Treaty on the Functioning of the European Union (1958), Article 78 (3).

53. Temporary Protection Directive (EC) 200/55/EC (2001).



The TFEU also permits the Union to conclude agreements with third countries for readmission of third-country nationals who do not or who no longer fulfil the conditions for entry, presence, or residence in EU territory.⁵⁴

2.1.2.1 Triumphs of the TEU and TFEU Regarding Asylum

a) *Passing of Legislation on Asylum.*

The 1999 Treaty of Amsterdam amended the TEU granting EU institutions the power to draw up legislation around asylum. The treaty envisaged the enactment of legislation delineating the mechanisms for determining which Member State (MS) is responsible for considering asylum applications, and minimum standards on the reception of asylum seekers, among others.⁵⁵ These have been passed and include the Dublin Regulation, the European Asylum Dactyloscopy Database (EURODAC) for storing and comparing fingerprint data, the Reception Conditions Directive, the Asylum Procedures Directive, and others.

b) *Creation of a Common System Comprising a Uniform Status and Procedure.*

The 2009 Treaty of Lisbon amending the TEU and TFEU required the European Union to frame a common policy on asylum based on solidarity between Member States which is fair towards third-country nationals.⁵⁶

It further required the European Parliament and Council to adopt measures for a Common European Asylum System (CEAS) comprising uniform status of asylum for Third Country Nationals (TCNs) throughout the EU, the uniform status of subsidiary protection for TCNs seeking international protection, a common system of temporary protection in the event of mass inflow and common procedures for granting and withdrawing asylum, among others. These have been enabled through the various directives on asylum in the CEAS.

This is not to say that all asylum seekers in EU Member States are treated similarly and subjected to the same procedures, but rather that the EU asylum acquis has provided a base common system allow-

54. Treaty on the Functioning of the European Union (1958), Article 79 (3).

55. Treaty of Amsterdam (1999), Article 73k (1).

56. Treaty of Lisbon (2009), Article 63 (1).

ing for small variations towards efficient handling of asylum applications according to each State.

2.1.2.2. Shortfalls of the TEU and TFEU Regarding Asylum

a) *Enabling Migration Policies That Are Unassertive of Human Rights.*

Over the years, especially since 2011, the focus of EU policy has been preventing migrant arrivals, outsourcing responsibility to countries outside the EU, and downgrading refugee protection inside the EU.⁵⁷ These have raised serious human rights concerns. For example, the externalising or outsourcing of asylum procedures in practice has often led to the violation of migrant peoples' rights. It has frustrated the right of people to escape abusive or violent situations whether it is in their own country or another.⁵⁸

Consider the EU-Turkey agreement⁵⁹ where Turkey agreed to receive back irregular EU immigrants, intercept migrants before reaching the EU, and prevent irregular migration openings from Turkey into the EU. A myriad of human rights violations occurred, including violent pushbacks, live-fire shootings by Turkish authorities, and summary deportations.⁶⁰ Further, many migrants continue to live in poverty, and many of their children lack access to education.⁶¹

Following the Turkey deal, Greece introduced policies that restricted migrants to refugee camps while waiting for the determination of their asylum appli-

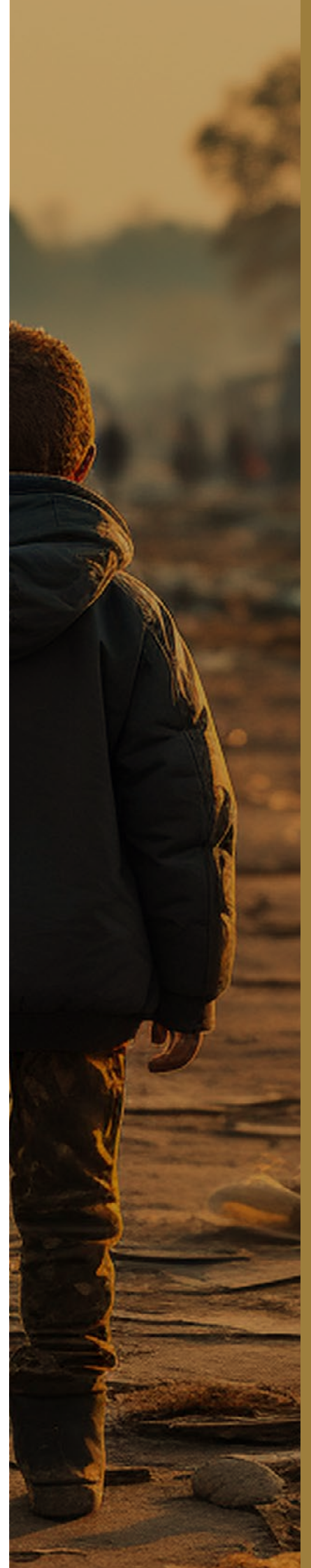
57. Human Rights Watch, 'Towards an Effective and Principled EU Migration Policy: Recommendations for Reform' (Human Rights Watch 2018), 1 <https://www.hrw.org/sites/default/files/supporting_resources/hrw_eu_migration_policy_memo_0.pdf> accessed 21 April 2022.

58. Human Rights Watch, 'Towards an Effective and Principled EU Migration Policy: Recommendations for Reform' (Human Rights Watch 2018), 2 <https://www.hrw.org/sites/default/files/supporting_resources/hrw_eu_migration_policy_memo_0.pdf> accessed 21 April 2022.

59. European Commission, 'EU-Turkey joint action plan' 2015 <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_15_5860> accessed 21 April 2022.

60. Human Rights Watch, 'Towards an Effective and Principled EU Migration Policy: Recommendations for Reform' (Human Rights Watch 2018), 2 <https://www.hrw.org/sites/default/files/supporting_resources/hrw_eu_migration_policy_memo_0.pdf> accessed 21 April 2022.

61. DW, 'Turkey migration deal a 'stain on EU rights record', 2021 <<https://www.dw.com/en/turkey-migration-deal-a-stain-on-eu-rights-record/a-56903392>> accessed 21 April 2022.



cations.⁶² Many migrants from Afghanistan, Syria, Somalia, and Palestine, a large chunk of whom were children, remained stranded in those overcrowded refugee camps.⁶³ To make matters worse, these migrants and their children faced a serious hunger crisis following a conscious policy by the Greek government to halt the provision of food to migrants who were no longer in the asylum procedure, leaving thousands unable to access food.⁶⁴

b) *Failure to Enhance Cooperation Among Member States.*

The EU asylum acquis is full of reference to the terms of solidarity, fair sharing of responsibility, and burden-sharing, *inter alia*. Under the TEU, for example, one of the aims of the EU is to promote solidarity among the Member States.⁶⁵ These kinds of words point to the element of cooperation between the Member States including assisting the other Member States when they need assistance, such as during an influx of refugees.⁶⁶

Indeed, Article 80 of the TFEU indicates that the principle of solidarity and fair sharing of responsibility are what govern the policies on border checks, asylum, and immigration. Therefore, in applying the laws under the EU asylum acquis, it was expected that Member States would work together to support states at the border entries of the EU territory like Italy, Malta, and Greece (hotspot countries). This has not been the case.

While some Member States volunteered to accept relocations of asylum seekers into their countries

62. Amnesty International, 'EU: Anniversary of Turkey deal offers warning against further dangerous migration deals' 2021 <<https://www.amnesty.org/en/latest/news/2021/03/eu-anniversary-of-turkey-deal-of-fers-warning-against-further-dangerous-migration-deals/>> accessed 21 April 2022.

63. Amnesty International, 'EU: Anniversary of Turkey deal offers warning against further dangerous migration deals' 2021 <<https://www.amnesty.org/en/latest/news/2021/03/eu-anniversary-of-turkey-deal-of-fers-warning-against-further-dangerous-migration-deals/>> accessed 21 April 2022.

64. Relief web, 'People in Greece are going hungry as over one-third of those living in refugee camps are denied food' 2022 <<https://reliefweb.int/report/greece/people-greece-are-going-hungry-over-one-third-those-living-refugee-camps-are-denied>> accessed 21 April 2022.

65. Treaty of the European Union (1993), Article 2.

66. Boldizsár Nagy, 'Sharing the responsibility or shifting the focus? The responses of the EU and the Visegrád countries to the post-2015 arrival of migrants and refugees', (2017) Central European University, Working paper 17 <https://www.iai.it/sites/default/files/gte_wp_17.pdf> accessed 22 April 2022.

from the hotspot countries, others have been reluctant to do so. Hungary, Austria, Poland, the Czech Republic, and Slovakia, for instance, either refused to participate in burden-sharing or were reluctant to pledge places for asylum seekers.⁶⁷ Some of these countries like Hungary and Slovakia have been vocal against burden-sharing and have sought legal action against the mandatory relocation of asylum seekers into their territories.⁶⁸

Hungary, for instance, issued a decree in 2016 that authorised the police to automatically and summarily remove anyone intercepted for irregular entry and stay.⁶⁹ It also constructed a 175 km four-metre-high barbed wire fence to prevent migrants from crossing.⁷⁰ In May 2020, the Hungarian government introduced further extraordinary measures to curtail asylum rights. One of these measures required people seeking international protection to first express their intent in non-EU Hungarian embassies before being able to access its territory, which is impossible for people trying to flee their countries.⁷¹ In March 2021, Hungary extended the 2016 decree.⁷² This set of actions by the Hungarian government speaks of the failure of the TEU and TFEU to mandate or enhance member cooperation on asylum issues.

2.1.3. Charter on the Fundamental Rights of the European Union (EU Charter)

The EU Charter aims to create an area of freedom, security, and justice. According to its preamble, it is founded on certain universal values including freedom, equality, and

67. Boldizsár Nagy, 'Sharing the responsibility or shifting the focus? The responses of the EU and the Visegrad countries to the post-2015 arrival of migrants and refugees', 8.

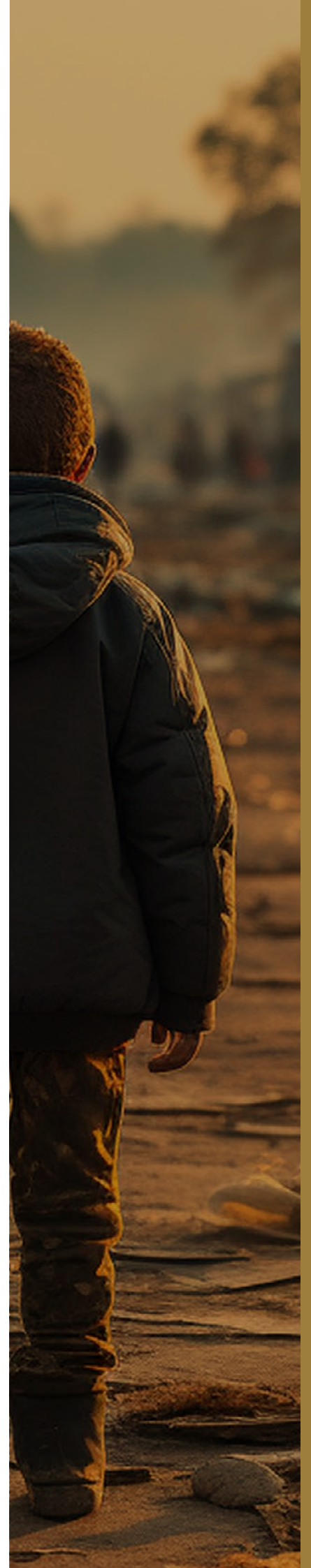
68. Boldizsár Nagy, 'Sharing the responsibility or shifting the focus? The responses of the EU and the Visegrad countries to the post-2015 arrival of migrants and refugees', 10.

69. Amnesty International, 'Hungary: Change to asylum law puts tens of thousands at risk' (2015) <<https://www.amnesty.org/en/latest/news/2015/07/hungary-change-to-asylum-law-puts-tens-of-thousands-at-risk/>> accessed on 20 April 2022; Krisztina Juhasz, 'Assessing Hungary's stance on Migration and Asylum in light of the European and Hungarian migration strategies' (2016) 13 *Politics in Central Europe* 1, 42.

70. Krisztina Juhasz, 'Assessing Hungary's stance on Migration and Asylum in light of the European and Hungarian migration strategies' (2016) 13 *Politics in Central Europe* 1, 41.

71. UNHCR, 'UNHCR concerned by Hungary's latest measures affecting access to asylum' (2021) <<https://www.unhcr.org/news/press/2021/3/6048976e4/unhcr-concerned-hungarys-latest-measures-affecting-access-asylum.html>> accessed 20 April 2022.

72. UNHCR, 'UNHCR concerned by Hungary's latest measures affecting access to asylum' (2021) <<https://www.unhcr.org/news/press/2021/3/6048976e4/unhcr-concerned-hungarys-latest-measures-affecting-access-asylum.html>> accessed 20 April 2022.



human dignity, which form the basis of the recognition of the right to asylum in Article 18, which is guaranteed with due respect for the rules of the Refugee Convention and its 1967 Protocol concerning the TEU and the TFEU.

The EU Charter does not, however, offer an express definition of the right to asylum and neither does it provide the scope nor context of this specific right. Indeed, the *travaux préparatoires* to the EU Charter indicate the tension the drafters had regarding the scope of protection to be granted to asylum seekers, hence the decision to apply minimalistic wording to Article 18. It must therefore be recalled that within the EU legal framework, to interpret Article 18, recourse must be made to secondary sources of law (EU Regulations, Directives, and Decisions).

In any case, the Articles of the EU Charter provide basic interpretative approaches to its provisions including Article 18. The preamble, for instance, provides that the rights in the Charter are a reaffirmation of those resulting from “the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case law of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR).”⁷³ Further, in interpreting its provisions, due regard should be given to the explanations prepared under the authority of the Presidium of the Convention which drafted the Charter and updated it under the responsibility of the Presidium of the European Convention.⁷⁴ That being so, the explanations on the right of asylum provided for and by these sources of law give interpretative guidelines under the Charter itself.

In addition, Article 52 of the EU Charter provides a set of interpretative guidelines indicating that the meaning and scope of guaranteed rights shall be the same as those laid down by the said Convention where the rights in the EU Charter correspond with those in the European Convention for the Protection of Human Rights and

73. Charter of the Fundamental Rights of the European Union (2000), Preamble.

74. Charter of the Fundamental Rights of the European Union (2000), Preamble.

Fundamental Freedoms.⁷⁵ Moreover, these rights shall be interpreted in harmony with the constitutional traditions of Member States when these rights result from them.⁷⁶ This is one of the instances that feeds into the earlier mentioned paradox characteristic of asylum, which is that of bringing international protection into operation through national legislation, which is politically based on the doctrine of national sovereignty since “asylum transcends national boundaries but it can only be set in motion within national boundaries.”⁷⁷

On that account, it is fair to ask what value the EU Charter provides in safeguarding asylum-seekers’ rights considering Article 18’s minimalistic wording.

To begin with, the incorporation of Article 18 in the EU Charter provides a legally binding right for individuals to seek asylum in the territory of its State Parties, therefore, offering a guarantee of the right to asylum to every person who meets the relevant requirements. The right to asylum was initially only recognized in the UDHR until the adoption of the EU Charter. At the time of the EU Charter’s adoption, the right to be granted asylum was not recognized by any other human rights instrument including the Refugee Convention.⁷⁸ This meant that, before the EU Charter, no legally binding instrument provided for or guaranteed that right.

Secondly and perhaps most importantly, the right to asylum under Article 18 is wider in scope than the one foreseen in the 1951 Geneva Convention since it includes additional safety standards developed by the European Court of Human Rights (ECtHR)⁷⁹ and the Court of Justice of the European Union (CJEU) case law.⁸⁰

75. Charter of the Fundamental Rights of the European Union (2000), Article 52 (3).

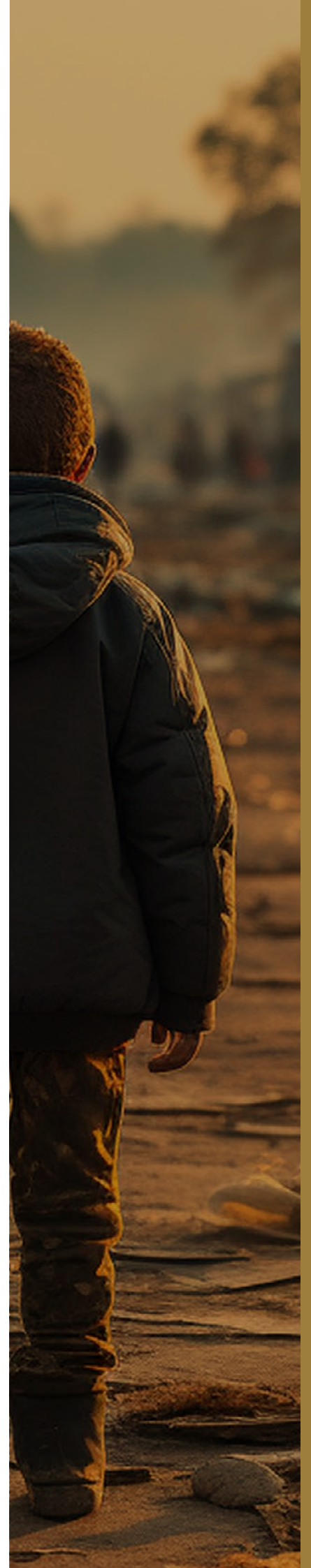
76. Charter of the Fundamental Rights of the European Union (2000), Article 52 (4).

77. K. Desimpelaere, ‘The Dublin Regulation: Past, Present, Future’ (University of Ghent, Ghent 2015) 10.

78. Judging the Charter, ‘The Charter and the Right Asylum – Introduction’ accessed from <https://charter.humanrights.at/manual/asylumintroduction> accessed on 10 March 2022.

79. See ECtHR, ‘Guide on the case-law of the European Convention on Human Rights: Immigration’ (2021) <https://www.echr.coe.int/Documents/Guide_Immigration_ENG.pdf> accessed on 07 June 2022.

80. See European Union Agency for Asylum (EUAA), ‘Jurisprudence of the Court of Justice of the EU (CJEU)’ in Asylum Report 2020 (eds) (2020) <<https://euaa.europa.eu/asylum-report-2020/27-jurisprudence-court-justice-eu-cjeu>> accessed on 07 June 2022.



The EU Charter also safeguards the right to an effective remedy and to a fair trial within a reasonable time by an independent and impartial tribunal, with the right to legal aid/representation where they lack sufficient resources.⁸¹

Lastly, the EU Charter provides for special rights of the child, which are of extreme importance in asylum law and speak to the special considerations owed to minors in the entirety of the asylum process. It reiterates the principle of the best interest of the child as a primary consideration in any action that concerns children.⁸² It also safeguards children's right to protection and care that is necessary for their well-being alongside their right to maintain direct contact and a personal relationship with their parents regularly, unless it is contrary to the child's interests.⁸³

2.2. SECONDARY EU LEGISLATION GOVERNING ASYLUM

The legislative body that is referred to as secondary legislation in the EU derives from principles and objectives of treaties, together with regulations, directives, decisions, and recommendations as expressly indicated in Article 288 of the TFEU.

Regulations are binding in their entirety and directly applicable to the Member States without transposition to national law. The intention is to ensure the uniform application of EU law. Regulations supersede any national laws that are incompatible with their substantive provisions.

Directives are also binding, but to the Member States they directly address, a particular result to be achieved with the burden of enforcement falling on national authorities. Unlike Regulations, the Directives must be transposed into national law either by a transposing act or by national implementation measures. Consequently, Directives are not directly applicable without this transposition except where the provisions of the Directive are clear and sufficient.

Similarly, Decisions are binding in their entirety and if they specify the Member States to whom it is addressed, then they shall only be binding to them.

81. Charter of the Fundamental Rights of the European Union (2000), Article 47.

82. Charter of the Fundamental Rights of the European Union (2000), Article 24 (2).

83. Charter of the Fundamental Rights of the European Union (2000), Article 24 (1) and (3).

Lastly, Recommendations and Opinions have no binding force and do not confer any rights or obligations. Instead, they merely guide as to the interpretation and content of EU law.

This section examines the secondary legislation governing asylum-seeking processes and procedures within the EU alongside each of their achievements, failures, and criticisms that contribute to the irregular treatment of asylum-seeking children.

2.2.1. Dublin Regulation (EU No 604/2013)

The Dublin Regulation by the European Parliament and the Council came into force in 2014 and established the criteria for determining the EU Member State responsible for dealing with applications for international protection (asylum) by third-country nationals or stateless persons.

Today, the Dublin Regulation is a binding legislative act that applies in its entirety across the EU,⁸⁴ specifically to all EU Member States, Iceland, Liechtenstein, Norway, and Switzerland. Its main purpose is to fine-tune the previous Dublin I and Dublin II enactments by increasing the harmonisation of EU asylum law and practice within the EU, providing uniform statutes and common procedures.⁸⁵ Within this context, a third-country national is any person who is not a citizen of the EU within the TFEU definition, and who is not a State national of any of the States to which the Dublin Regulation applies.⁸⁶

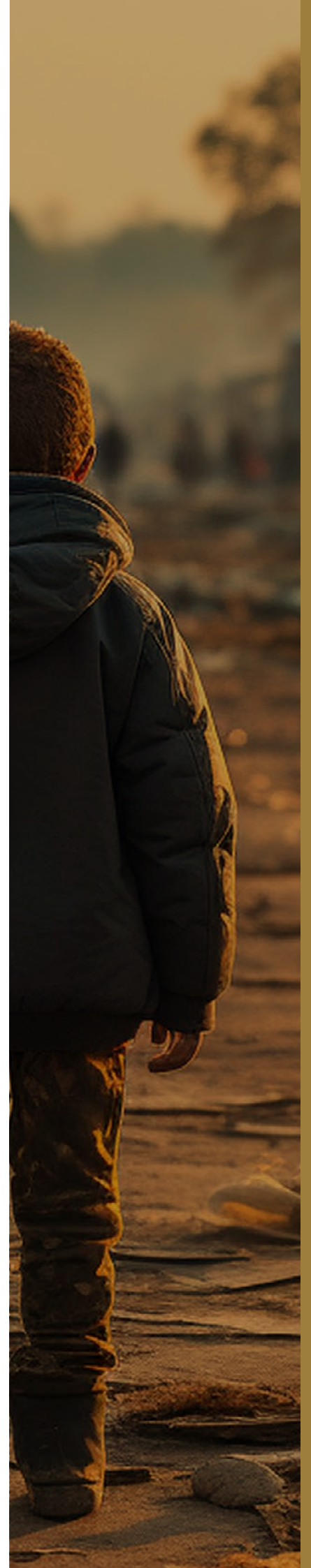
Its designation as the Dublin III Regulation comes from its origin as a successor of the Dublin Convention (Dublin I Regulation) signed in Dublin 1990 and the Dublin II Regulation that initiated the creation of the EU as an area of free movement underlying the principle of mutual trust among the Member States. The Dublin I Regulation was adopted as an effort of EU Member States to combat the phenomenon of “asylum shopping” (multiple asylum applications in different States), to avoid secondary migration of asylum seekers⁸⁷ and to guarantee that asylum applications

84. European Commission, ‘Types of Legislation’ (European Union) accessed from <<https://european-union.europa.eu/institutions-law-budget/law/types-legislation>> accessed 25 February 2022.

85. P. Boeles, M. den Heijer, G. Lodder and K. Wouters, ‘European Migration Law’ (Second Edition, Intersentia 2014), 250.

86. Dublin Regulation (EU) No 604/2013, Article 2 (a).

87. K. Desimpelaere, ‘The Dublin Regulation: Past, Present, Future’ (University of Ghent, Ghent 2015) 10.



reach the authority of the country responsible for examining it.⁸⁸ Furthermore, Dublin II was enacted to initiate the creation of the envisioned Common European Asylum System (CEAS), which was later amended to create the current Dublin III Regulation (hereinafter referred to as “the Dublin Regulation”) in a bid to mend the discrepancies in the application of the Refugee Convention principles, national asylum systems and reception conditions among the EU Member States.⁸⁹

The Dublin Regulation forms a part of the “Dublin System” together with the recast Qualification Directive (2011/95/EU), the Asylum Procedures Directive (2013/32/EU), the recast Reception Conditions Directive (2013/33/EU) and the EURODAC Regulation in conjunction with national asylum authorities who help to enforce decisions made within the asylum determination process.

The “Dublin Procedure” within the Dublin Regulation is as follows.

- a) Arrival in a Member State (Member State) territory. The process begins when an asylum seeker applies for international protection with a Member State.⁹⁰ Upon arrival, the applicants provide their basic information and present their fingerprints in EURODAC to establish a “hit” indicating the previous Member States (MS) where the applicants have passed through or made an application (if any).
- b) Determination of the responsible Member State. One single Member State is required to have the responsibility to examine the asylum application according to the Refugee Convention criteria together with national laws.⁹¹ Such responsibility is determined using the criteria below:
 - i) *Where it is the applicant’s first State of entry:* the Member State of first entry is the one responsible for accessing the asylum procedure.

ii) *Where it is not the applicant’s first State of*

88. European Union and Migrationsverket, ‘I’m in the Dublin procedure - What does this mean?’ (European Union 2014) 4.

89. K. Desimpelaere, ‘The Dublin Regulation: Past, Present, Future’ (University of Ghent, Ghent 2015) 10.

90. Dublin Regulation (EU) No 604/2013, Article 7 (1).

91. Dublin Regulation (EU) No 604/2013, Article 3 (1).

entry based on a EURODAC hit that shows the applicant applied to another Member State: either a “take back” or “take charge” request is made to the Member State found responsible.

A take-back request is made to the Member State where an asylum application was first lodged to take back that person.⁹² Inversely, a take-charge request is when no new application has been made in a Member State and this mostly concerns persons who are illegally staying in the territory of the requesting Member State.⁹³ Both take charge and take back requests must be made within three months of the asylum seeker lodging their application or within two months of receiving a EURODAC hit.⁹⁴ The result of a take charge request may be either to send the applicant back to the responsible Member State or return to a third country if the application in the other Member State was rejected by a final decision.⁹⁵

The determining Member State is required to examine the asylum application and its compliance with the EU Charter, before designating a Member State as responsible for preventing the breach of human rights violations that may result in inhuman or degrading treatment.

As a last resort, the determining Member State becomes the Member State responsible where there are systemic flaws in the asylum procedure and reception conditions of the Member State in consideration and when none of the above criteria is met.⁹⁶

- c) Aspects taken into consideration by the Member States. The requesting state is required to furnish another Member State with evidence of the below criteria before they accept the request to take back or take charge of an applicant.⁹⁷ These considerations are as follows:

92. Dublin Regulation (EU) No 604/2013, Article 23 (1).

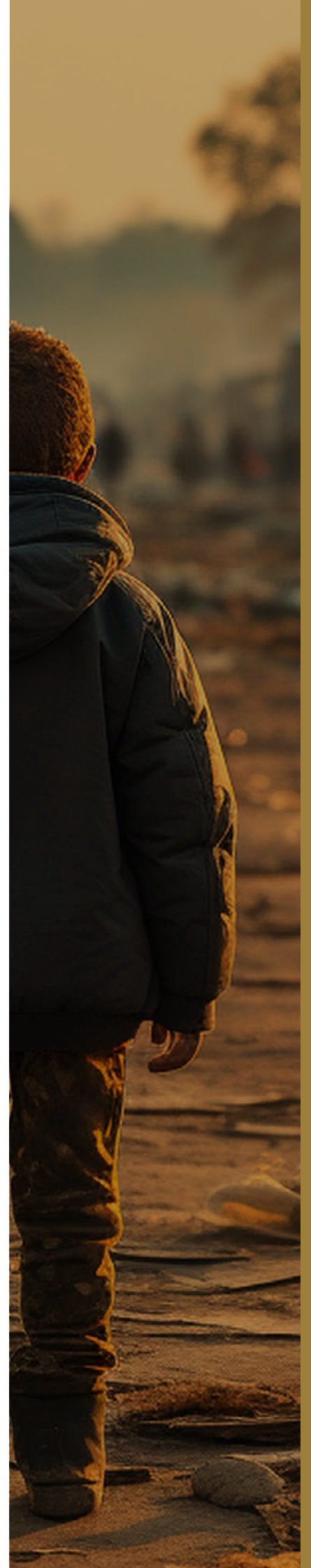
93. Dublin Regulation (EU) No 604/2013, Article 24 (1).

94. Dublin Regulation (EU) No 604/2013, Article 21 (1) and 23 (2).

95. Dublin Regulation (EU) No 604/2013, Article 24 (4).

96. Dublin Regulation (EU) No 604/2013, Article 3 (1) and (2).

97. Dublin Regulation (EU) No 604/2013, Article 7.



i) Minors: The Dublin Regulation defines a minor as a third-country national or stateless person below the age of 18 years.⁹⁸ This includes UAMs who are minors arriving in a Member State territory without an accompanying adult who is responsible for them by law or by practice,⁹⁹ and married minors without the legal presence of their spouse.¹⁰⁰

ii) Family considerations: The Member State needs to determine if the applicant has either singular or multiple family members already enjoying the benefit of international protection within a Member State. In this instance, the responsibility falls to the Member State with the single family member who is legally present therein.¹⁰¹ Where there is more than one relative of the minor legally residing in different Member States, then the best interest of the child¹⁰² is taken into consideration as to which Member State will be responsible.¹⁰³

iii) Recent possession of a visa or residence permit in a Member State: The Member State that issued these documents is responsible for examining the asylum seeker's application.¹⁰⁴

iv) Need for a visa is waived: Where the need for an applicant to have a visa is waived by a Member State, then that State is responsible for the asylum application.¹⁰⁵

v) Irregular entry by an applicant: Where an applicant irregularly enters a Member State territory from a third country, the Member State thus entered is responsible for examining the asylum application, only within 12 months after the irregular crossing took place.¹⁰⁶

d) Acceptance by the State with responsibility for the

98. Dublin Regulation (EU) No 604/2013, Article 2 (i).

99. Dublin Regulation (EU) No 604/2013, Article 2 (j).

100. Dublin Regulation (EU) No 604/2013, Article 8 (1).

101. Dublin Regulation (EU) No 604/2013, Article 8 (2).

102. Dublin Regulation (EU) No 604/2013, Article 6 (3).

103. Dublin Regulation (EU) No 604/2013, Article 8 (5).

104. Dublin Regulation (EU) No 604/2013, Article 12.

105. Dublin Regulation (EU) No 604/2013, Article 14.

106. Dublin Regulation (EU) No 604/2013, Article 13 (1).

asylum application and delivery of the Dublin asylum application. A Member State must make a decision for a take-back request within one month from the receipt of the request or within 2 weeks if the data was obtained from a EURODAC hit.¹⁰⁷ An acceptance by the Member State is implied where there is a failure to meet the stipulated timeline, leading to the obligation to take the person back and provide proper arrival arrangements.¹⁰⁸

- e) Notice of Transferal to the Responsible State. The applicants must be notified of the acceptance to take charge or take back personally or through their legal advisors¹⁰⁹ either in writing (through common standard leaflets and an additional leaflet for UAMs) or orally before the transfer decision, in line with their right to information as stipulated within Article 4 of the Dublin Regulations.¹¹⁰ Furthermore, detention is not mandatory for all applicants within the Dublin Procedure and is only necessary where there is a “significant risk of absconding”¹¹¹ and for the shortest period possible pending the transfer of the applicant.
- f) Transfer to the responsible Member State. Member States exchange relevant information such as health data, age assessment of applicants, information on education (for minors), and family contacts.¹¹² The transfer of the applicant is conducted as soon as practically possible or within six months of the acceptance at the costs of the transferring Member State¹¹³ which ensures the transfer is conducted humanely, respecting fundamental rights and human dignity.¹¹⁴ The obligation of the requesting Member State ceases when the applicant has left its territory for at least three months or has obtained a residence document from another Member State.¹¹⁵

107. Dublin Regulation (EU) No 604/2013, Article 25 (1).

108. Dublin Regulation (EU) No 604/2013, Article 25 (1).

109. Dublin Regulation (EU) No 604/2013, Article 26 (1).

110. K. Desimpelaere, ‘The Dublin Regulation: Past, Present, Future’ (University of Ghent, Ghent 2015) 78.

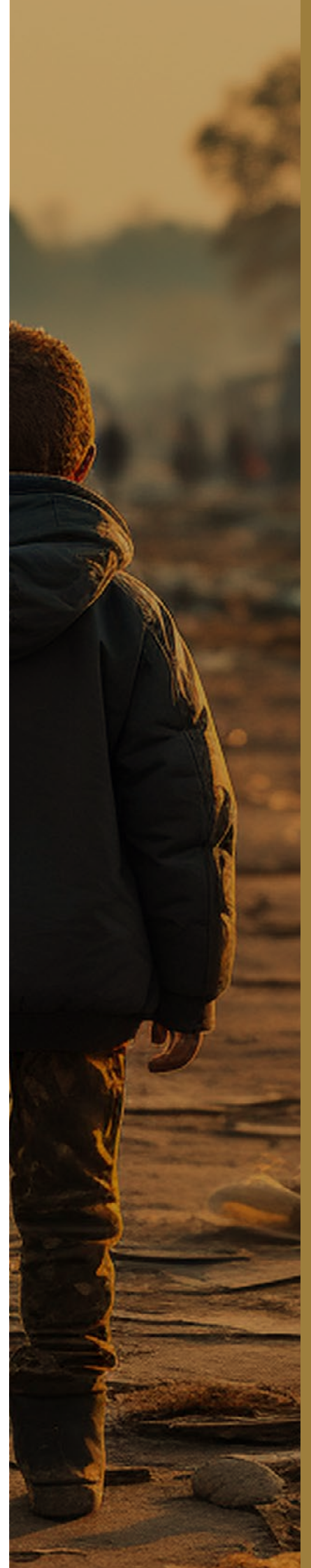
111. Dublin Regulation (EU) No 604/2013, Article 28 (2).

112. Dublin Regulation (EU) No 604/2013, Article 31.

113. Dublin Regulation (EU) No 604/2013, Article 30 (1).

114. Dublin Regulation (EU) No 604/2013, Article 29.

115. Dublin Regulation (EU) No 604/2013, Article 20 (5).



In totality, the Dublin Procedure is expected to be completed within a minimum timeframe of eleven months or a maximum period of two years and one month in exceptional cases.¹¹⁶ Asylum seekers are allowed to appeal against negative application outcomes through the national authorities in the Member State concerned. A decision from this authority may be appealed through the national appellate body of the Member State concerned and if the appeal is unsuccessful, then the applicant is returned by virtue of the Return Directive.¹¹⁷ On the other hand, where the appeal is successful then asylum is granted as per the recast Qualification Directive 2011/95.¹¹⁸

2.2.1.1. Triumphs of the Dublin System Regarding Asylum-Seeking Children

The Dublin Regulation cements the second stage of the CEAS creation and is viewed as a triumphant achievement in the EU's journey towards a common asylum system.

The important aspects introduced in this Regulation include the:

- a) Consideration of the “best interest of the child” principle throughout the Dublin procedure.¹¹⁹
- b) Introduction of the respect for family reunification by relocating responsibility to the Member State hosting the minor's relative(s).¹²⁰
- c) Safeguard for asylum seekers by stipulating the right to information,¹²¹ the requirement for a personal interview¹²² to assess the applicant's comprehension of their rights and the procedure, and the special assistance guarantees for vulnerable people such as UAMs and newborn children.

116. K. Desimpelaere, ‘The Dublin Regulation: Past, Present, Future’ (University of Ghent, Ghent 2015) 79.

117. Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals.

118. Directive 2011/95 of the European Parliament and of the Council on Standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

119. Dublin Regulation (EU) No 604/2013, Article 6.

120. Dublin Regulation (EU) No 604/2013, Article 8.

121. Dublin Regulation (EU) No 604/2013, Article 4.

122. Dublin Regulation (EU) No 604/2013, Article 4 (c).

- d) Setting time limits for take-back and take-charge requests and their acceptances¹²³ for the assessment of asylum claims in suitable time.

2.2.1.2. Pitfalls of the Dublin System Regarding Asylum Seeking Children

The Dublin System has equally received criticism and has been vilified as the failure of solidarity and burden-sharing among the EU Member States since it has not appeared to achieve any of its two major primary goals, which are to prevent asylum shopping or refugees in orbit, multiple asylum applications and provide quick access to protection for those in need.¹²⁴

The necessity of separate national asylum systems within a European area that lacks internal border controls makes the Dublin mechanism all the more important and must be reviewed to address the pitfalls evident in low effective transfer rates and persistently high instances of secondary movement among asylum seekers.¹²⁵ The Dublin Regulation is also criticised for containing aspects that directly and indirectly affect asylum-seeking children as analysed below.

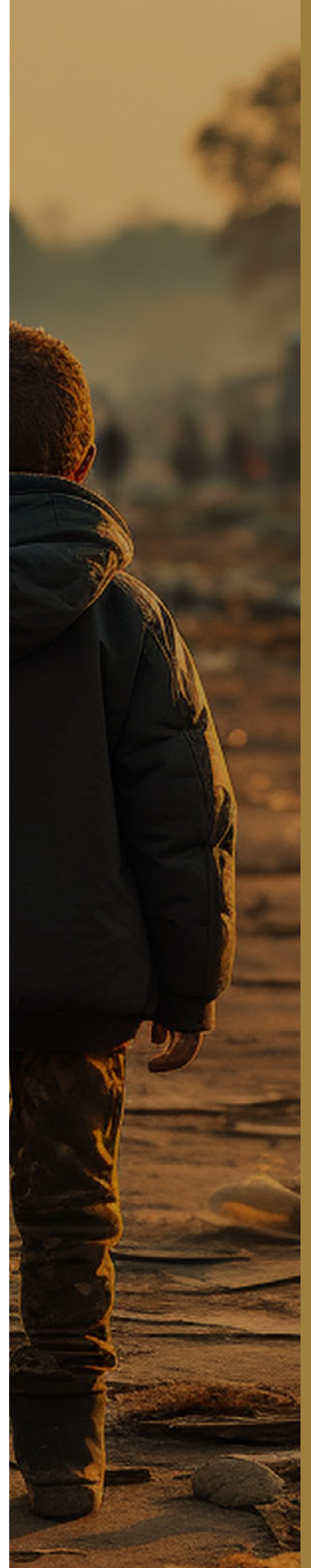
- a) *Diverging Interpretations of the 1951 Refugee Convention.*

After a Member State is deemed responsible for asylum applications, the applicants are transferred to the said Member State for their application processing in line with the requirements stipulated in the Refugee Convention. As such, the Dublin Regulations are silent on the interpretation of the Refugee Convention among the Member States that have different interpretations of the requirements for granting asylum, especially on the grounds of persecution. The Refugee Convention does not make it a legal obligation to grant asylum to persons facing or under the threat of persecution, but it imposes a narrow duty of non-refoulement which is also subject to State sovereignty that directly hampers the interpretation of the principles it contains.

123. Dublin Regulation (EU) No 604/2013, Article 21 (1), 23 (2) and 24 (2).

124. S. Fratzke, Not Adding Up: The Fading Promise of Europe's Dublin System (Migration Policy Institute Europe, Brussels 2015) 1.

125. S. Fratzke, Not Adding Up: The Fading Promise of Europe's Dublin System (Migration Policy Institute Europe, Brussels 2015) 1.



In *T.I v The United Kingdom*, the UNHCR submitted that diverging interpretations of the Refugee Convention by the Member States hampered the effective application of the Dublin System, especially regarding “agents of persecution.”¹²⁶ The UNHCR pointed out that this would lead to instances of indirect refoulement where the persons are sent back to the first Member State where they lodged an application and, thus, suffer a higher chance of facing rejection as it would be difficult to consider their present application without examining past applications.

b) *Consideration of the Best Interests of the Child.*

In 2017, the UNHCR found that there exists a disparity between the best interests of the child principle and family unity, especially with the procedural safeguards guaranteed in the Dublin Regulation and respected in international law practice.¹²⁷ Their findings show that the Best Interests Assessment (BIA) is not comprehensive, it does not take into account the guarantees for minors included within Article 6 of the Dublin Regulation.

In addition, family tracing is not often carried out proactively by relevant authorities and lastly, the varying method and recognition of age assessment outcomes greatly hinders the asylum process for children and their chances of family reunification.¹²⁸ Determining the best interests of minors within the asylum-seeking process is a crucial step, especially when they are unaccompanied.

There are specific aspects within the Dublin Regulation that notably hinder the consideration of the best interests of the child, which are:

i) *Presumption of Mutual Trust and Safety among EU Member States.*

The pivotal element of the CEAS is developing mutual trust among the EU Member States;¹²⁹ is a notion that is vague and subject to misinterpretation

126. Submission by the United Nations High Commissioner for Refugees *T.I v The United Kingdom* (2000) Application No. 43844/98. 1 (ECtHR) 6, para 24 and 26.

127. UNHCR, *Left in Limbo: UNHCR Study on the Implementation of the Dublin Procedure* (UNHCR, 2017) 6.

128. UNHCR, *Left in Limbo: UNHCR Study on the Implementation of the Dublin Procedure* (UNHCR, 2017) 6.

129. Dublin Regulation (EU) No 604/2013, Recital (22).

when dealing with cases of uniting asylum-seeking children and their relatives who legally reside in the other EU Member States. In one instance, the Dutch Council of State rightfully pointed out that the Dublin III Regulation does not impose an obligation on the country that takes charge of the applicant to investigate the applicant's considerations when accepting a take-charge request.¹³⁰

The Dublin Regulation also involves the allocation of responsibility to one single Member State to determine an individual's asylum application. There is a rebuttable presumption that all States that apply the Dublin Regulation are safe and comply with the EU Charter and ECHR,¹³¹ when, in fact, this is not always the case. For instance, the Denmark Refugee Appeals Board reversed a Danish Immigration Service Decision to Dublin regarding the transfer of a single mother seeking asylum and her two minor children to Italy after acceptance of a take-charge request because the reception conditions in Italy were subject to certain shortcomings and the applicants were extremely vulnerable.¹³² The Board found evidence of the applicants not receiving any help, being forced to live in the street where the mother was exposed to rape leading to a diagnosis of PTSD that made her unable to take care of her children alone.¹³³

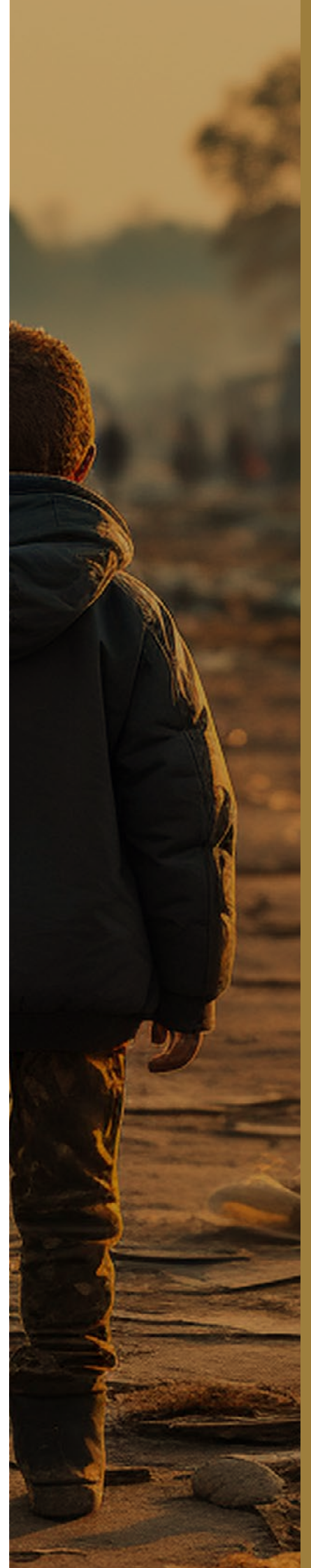
The presumption of safety is linked with the presumption of mutual trust among the Member States without further examinations being conducted after responsibility has been determined. Consequently, this contributes to the secondary movement of asylum seekers and even indirect rejection (refoulement) that leads to the violation of their international human rights.

130. *Council of State Netherlands (Raad van State), Decision (2020) No. 201906353/1/V3.*

131. European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Law Relating to Asylum, Borders, and Immigration* (Publications Office of the European Union, Luxembourg 2020) 125.

132. *The Refugee Appeals Board, Denmark (30 November 2017)* accessed from <<https://www.asylumlawdatabase.eu/en/case-law/denmark-refugee-appeals-board%E2%80%99s-decision-30-november-2017#content>> accessed on 25 February 2022.

133. *The Refugee Appeals Board, Denmark (30 November 2017)* accessed from <<https://www.asylumlawdatabase.eu/en/case-law/denmark-refugee-appeals-board%E2%80%99s-decision-30-november-2017#content>> accessed on 25 February 2022.



Children are additionally the unfortunate victims of such decisions where they are accompanied by adults, as seen in the aforementioned case where the initial decision by the Danish Immigration Service to return the mother and her two minor children to Italy did not involve the consideration of their best interests. In such a situation, the children have no control or say in the matter and are also subjected to a violation of their child rights given the State Parties' obligation in Article 7 of the UNCRC, which ensures the implementation of child rights in their national law and their obligations under relevant international instruments in this field, in particular where the child would otherwise be stateless.¹³⁴

Moreover, this illustrates the manifestation of the two major criticisms of the Dublin Regulation and System, which are that it pushes responsibility for examining claims to Europe's external borders¹³⁵ and States that may be ill-equipped to handle this additional burden and that it causes inordinate delays that places asylum seekers at risk of hardship and possible human rights violations.¹³⁶

Unfortunately, Article 3 (2) of the Dublin Regulation only takes into consideration case law from the Court of Justice of the European Union (CJEU)¹³⁷ and requires the implied consideration of case law from the European Court of Human Rights (ECtHR) that requires the Member States to not transfer an applicant where there are substantial grounds for believing systematic flaws that may result in violation of Article 4 of the ECHR.¹³⁸ As stipulated in *Tarakhel v Switzerland*, when there is doubt regarding a responsible Member State's compliance with the ECHR, then the determining State needs to obtain individual guarantees from that State.¹³⁹

ii) Differing Interpretation of Dublin Detention Requirements.

134. United Nations Convention on the Rights of the Child, Article 7 (2). See *Tarakhel v Switzerland* (2014), Judgement of 4 November 2014 (ECtHR).

135. These are the European States at the border of Europe that receive the most asylum applications since they are the first points of access for most asylum seekers, and as such receive a disproportionate share of responsibility compared to other States. These countries include Germany, Italy, and Greece.

136. S Fratzke, *Not Adding Up: The Fading Promise of Europe's Dublin System* (Migration Policy Institute Europe, Brussels 2015) 7.

137. *M.S.S v Belgium and Greece* (2011) and joined cases *N.S v Secretary of State for the Home Department* and *M.E v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* (2011).

138. Dublin Regulation (EU) No 604/2013, Article 3 (2).

139. *Tarakhel v Switzerland* (2014) Application No. 29217/12 (ECtHR).

The Dublin procedure is noted to pose serious risks of violations and hardships in unifying families, especially in the case of minor children and their parents.¹⁴⁰ Moreover, UAMs have gained recognition as one of the most vulnerable groups during the migration process.¹⁴¹ Yet, there appears to be irregular treatment where detention is concerned despite the test for detention under the Dublin Regulation being when “one is at a significant risk of absconding.”

The Federal Supreme Court in 2016 set down the need for examination of specific indications for a substantial risk of absconding to determine if detention is necessary. The conflict in Switzerland comes with the different aspects of national law that have different definitions of the risk of absconding and the maximum duration of detention which are not in line with Article 28 of the Dublin Regulation.¹⁴² The problem appears worse since Switzerland is not an EU Member State, has no access to the CJEU to clarify issues on interpretation, and does not provide an effective remedy for an asylum seeker to contest the violation of EU law by Swiss law.¹⁴³ Swiss law also prohibits the detention of children under 15 years, creating a possibility of administrative detention of minors between ages 15 and 18 with further differing applications in Swiss cantons. For instance, Geneva and Neuchâtel formally prohibit the detention of all minors in their law while ten cantons have communicated placing minors in administrative detention for particularly lengthy periods as is the case in Bern, Valais, Zug, and Zurich.¹⁴⁴

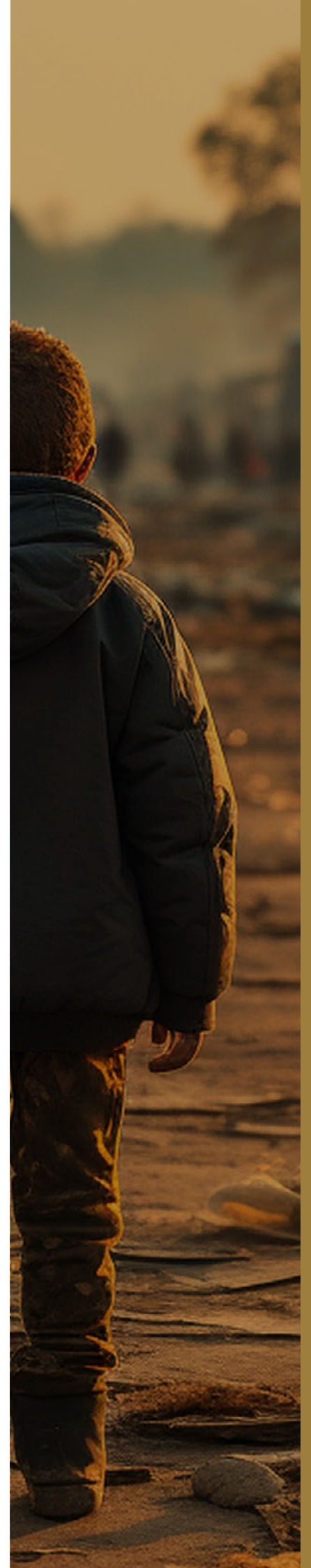
140. S. Fratzke, ‘Not Adding Up: The Fading Promise of Europe’s Dublin System’ (Migration Policy Institute Europe, Brussels 2015) 17.

141. European Parliamentary Research Service, ‘Migration and Asylum’ (European Parliamentary Research Service 2019)
<<https://www.europarl.europa.eu/thinktank/infographics/migration/public/index.html?page=intro>> accessed 24 February 2022.

142. AIDA, ECRE ‘Country Report: Switzerland: Grounds for Detention’ (Asylum in Europe 2021)
<<https://asylumineurope.org/reports/country/switzerland/>> accessed 17 March 2022.

143. AIDA, ECRE, ‘Country Report: Switzerland: Grounds for Detention’ (Asylum in Europe 2021)
<<https://asylumineurope.org/reports/country/switzerland/>> accessed 17 March 2022.

144. AIDA, ECRE ‘Country Report: Switzerland: Grounds for Detention’ (Asylum in Europe 2021)
<<https://asylumineurope.org/reports/country/switzerland/>> accessed 17 March 2022.



On the other hand, from March 2017 to May 2020 all unaccompanied children above the age of 14 were *de facto* detained in Hungarian transit zones for the whole of the asylum procedure, despite the law requiring fulfilment of the risk of absconding as a condition for detention. This changed on 14 May 2020 when the CJEU delivered a judgement in the joint cases *C-924/19 PPU* and *C-925/19 FMS* ruling, among others, that the automatic and indefinite placement of asylum-seekers in the transit zones at the Hungarian-Serbian border qualifies as unlawful detention.¹⁴⁵

The limitations present in the Dublin Regulation have been subject to debate within the European Commission and offered proposals between 2016 and 2018 to help establish a solid EU CEAS. The 2020 Communication by the EU Commission on a New Pact on Migration and Asylum notes that the “rules for determining the Member State responsible for an asylum claim should be part of a common framework and offer smarter and more flexible tools to help the Member States facing greater challenges.”¹⁴⁶ The Commission indicates that it will “withdraw its 2016 proposal amending the Dublin Regulation to be replaced by a new, broader instrument for a common framework for asylum and migration management - the Asylum and Migration Management Regulation.”¹⁴⁷ Especially since there was less progress achieved on the proposals for the Dublin Regulation and the Asylum Procedure Regulation due to diverging views in the Council.¹⁴⁸ The proposal for the Asylum and Migration Management Regulation is currently undergoing the ordinary legislative procedure and has reached the First Reading Stage within the Council of the European Union.¹⁴⁹

145. Asylum Information Database (AIDA), European Council of Refugees in Exile (ECRE), ‘Country Report: Hungary: Grounds for Detention’ (Asylum in Europe 2021) <<https://asylumineurope.org/reports/country/hungary/>> accessed 17 March 2022.

146. European Commission (EC), ‘Communication from the Commission on New Pact on Migration and Asylum’ (2020) (COM 609).

147. European Commission (EC), ‘Communication from the Commission on New Pact on Migration and Asylum’ (2020) (COM 609).

148. European Commission (EC), ‘Communication from the Commission on New Pact on Migration and Asylum’ (2020) (COM 609).

149. Proposal (EC) COM/2020/610 for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] (2020) (EC) 2003/109.

2.2.2. European Dactyloscopy Database (EURODAC) Regulation (No 603/2013)

The EURODAC Regulation was established mainly for the comparison of fingerprints for the effective application of the Dublin regulation.¹⁵⁰ As a precursor for establishing the Member State responsible for examining an application for international protection, it is meant to establish the identity of applicants and of persons apprehended, who have illegally crossed the borders of the EU.¹⁵¹ In this manner, it allows Member States to check whether TCNs or stateless persons found illegally staying in their territories have applied for international protection in another Member State.¹⁵² All this is done by the use and comparison of fingerprints.¹⁵³

The Regulation sets up a system known as EURODAC which consists of a central system operationalizing a computerised central database of fingerprint data and an electronic means of transmission of this data between Member States.¹⁵⁴ It also lays down the conditions under which Member States and the European Office Police (Europol) may request the comparison of fingerprint data stored in the central system.¹⁵⁵

2.2.2.1. Salient Features of the EURODAC Regulation Regarding Asylum Applicants

Under the Regulation, only Member States with **Designated Authorities** can request comparisons with EURODAC data.¹⁵⁶ Further, these authorities can only be those responsible for the prevention, detection, or investigation of terrorist offences or other serious criminal offences, but they cannot be agencies exclusively responsible for intelligence relating to national security.¹⁵⁷

150. EURODAC Regulation (EU) No. 603/2013, Preamble (1).

151. EURODAC Regulation (EU) No. 603/2013, Preamble (4).

152. EURODAC Regulation (EU) No. 603/2013, Preamble (4).

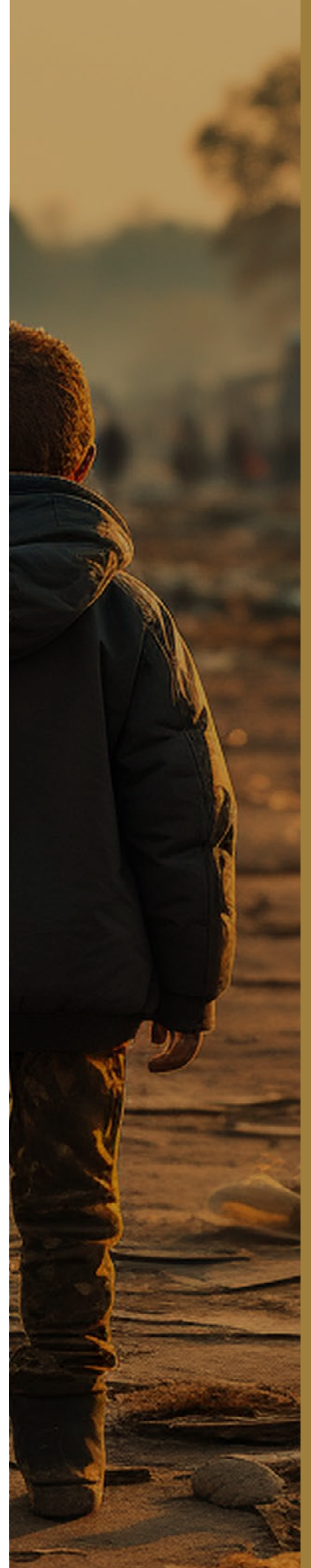
153. EURODAC Regulation (EU) No. 603/2013, Preamble (5).

154. EURODAC Regulation (EU) No. 603/2013, Preamble (6).

155. EURODAC Regulation (EU) No. 603/2013, Article 1 (3).

156. EURODAC Regulation (EU) No. 603/2013, Article 5 (1).

157. EURODAC Regulation (EU) No. 603/2013, Article 5 (1).



Member States must also have one **Verifying Authority** that ensures that the Designated Authorities have fulfilled the conditions for requesting comparisons with EURODAC data.¹⁵⁸ Only empowered staff of this authority are authorised to receive and transmit a request to EURODAC.¹⁵⁹

In taking fingerprints from TCNs, Member States are required to adhere to safeguards laid down in the Charter of Fundamental Rights of the European Union, the Convention for the Protection of Human Rights and Fundamental Freedoms, and the UN Convention on the Rights of the Child.¹⁶⁰ In this regard, Member States are bound to promptly take the fingerprints of all fingers of every applicant for international protection who is at least 14 years old and, as soon as possible but not later than 72 hours after applying, to transmit the application itself and the data to the Central System.¹⁶¹ The European Agency for the Operational Management of large-scale IT systems in the area of freedom, security, and justice (EU-LISA) is in charge of the management and operations of the Central System of EURODAC. The central system is then mandated to transmit the hit or negative result of the comparison to the requesting Member State.¹⁶²

Where the status of the applicant changes, Member States are required to update this information in their records. This includes circumstances where: they arrive in the Member State responsible for their application following a transfer; they leave the territory of a Member State, or they leave the territory of a Member State in compliance with a return decision or a removal order among others.¹⁶³ Apart from this information, the Central System may only record the applicants' fingerprint data, the date on which the fingerprints were taken, the Member State of origin, the place and date of the applicants' applications, their sex, the reference number used by the Member State of origin, the date on which the data were transmitted to the Central System and the operator user ID.¹⁶⁴

158. EURODAC Regulation (EU) No. 603/2013, Article 6 (1-2).

159. EURODAC Regulation (EU) No. 603/2013, Article 6 (3).

160. EURODAC Regulation (EU) No. 603/2013, Article 3 (4).

161. EURODAC Regulation (EU) No. 603/2013, Article 9 (1).

162. EURODAC Regulation (EU) No. 603/2013, Article 9 (5).

163. EURODAC Regulation (EU) No. 603/2013, Article 10.

164. EURODAC Regulation (EU) No. 603/2013, Article 11.

As to the conditions for access to EURODAC, the Designated Authorities of Member States may only make such requests if comparisons with other databases do not lead to the establishment of the identity of the data subject. These other databases include the national fingerprint databases, the automated fingerprinting identification systems of all other Member States, and the visa information system.¹⁶⁵ The designated authorities of Europol may only submit access requests where the comparison with fingerprint data stored in information systems technically and legally accessible by Europol did not lead to the establishment of the identity of the data subject.¹⁶⁶ Three other cumulative conditions are imposed on both designated authorities and these are: the comparison is necessary for the prevention, detection, or investigation of terrorist offences; the comparison is necessary for a specific case and is not part of a systematic comparison; and that there is a substantiated suspicion that the data subject could be a suspect, perpetrator or victim of a terrorist offence or other serious criminal offence.¹⁶⁷

The regulation also outlines the rights of data subjects, which include the rights to be informed in a language they can understand: the purpose for which their data will be processed in EURODAC,¹⁶⁸ the recipients of the data¹⁶⁹ and the obligation to have their fingerprints taken.¹⁷⁰ They also have the right to access data that relates to them and the right to request that inaccurate data relating to them be corrected or that unlawfully processed data be erased.¹⁷¹ For adherence and implementation of these rights, the data subjects also have the right to receive information on procedures for exercising them.¹⁷²

Member States are also obligated under the Regulation to ensure the security of the data during transmission to the Central System.¹⁷³ In this regard, they are also in charge of ensuring that there are measures to physically protect the

165. EURODAC Regulation (EU) No. 603/2013, Article 20.

166. EURODAC Regulation (EU) No. 603/2013, Article 21.

167. EURODAC Regulation (EU) No. 603/2013, Article 20 & 21.

168. EURODAC Regulation (EU) No. 603/2013, Article 29 (1) (b).

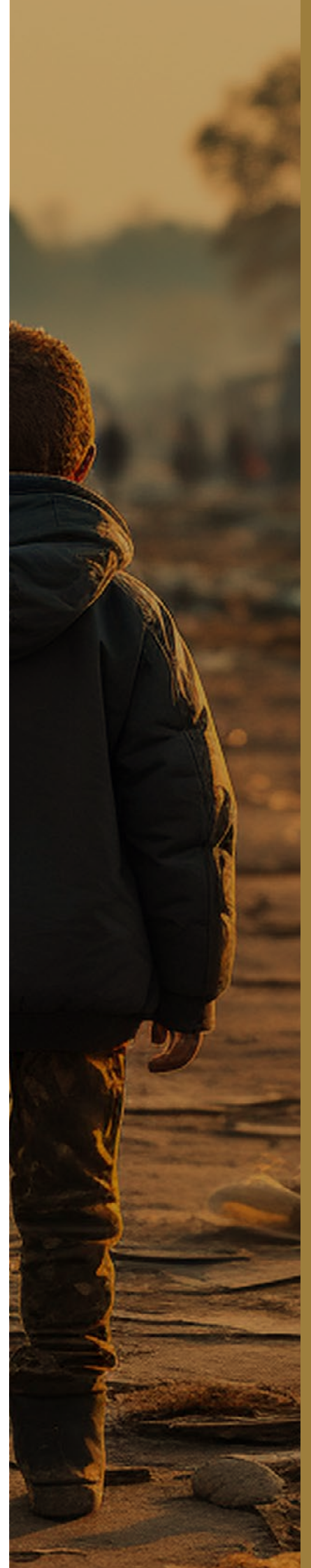
169. EURODAC Regulation (EU) No. 603/2013, Article 29 (1) (c).

170. EURODAC Regulation (EU) No. 603/2013, Article 29 (1) (d).

171. EURODAC Regulation (EU) No. 603/2013, Article 29 (1) (e).

172. EURODAC Regulation (EU) No. 603/2013, Article 29 (1) (e).

173. EURODAC Regulation (EU) No. 603/2013, Article 34 (1).



data, to deny any unauthorised person access to national installations that are used for operations for purposes of EURODAC, to prevent unauthorised input, reading, copying, modification, removal, and erasure of stored personal data among other measures.¹⁷⁴

The Regulation also prohibits Member States from transferring data to third countries, international organisations, or private entities.¹⁷⁵ This is more so where there is a risk that the data subject may, because of such transfer, be subjected to torture, inhuman and degrading treatment or punishment, or any other violation of their fundamental rights.¹⁷⁶

2.2.2.2. Failures and Concerns of EURODAC Concerning Child Asylum Seekers

a) *Concerns Posed by the Proposed Recast EURODAC Regulation.*

Following the 2014-2016 influx of refugees and asylum seekers in the EU that stretched and exhausted the national reception capacities of EU Member States, several gaps in the EU CEAS were unearthed. Among these gaps were those that related to the implementation of the EURODAC Regulation. Registration of immigrants had become extremely difficult. For one, the large numbers of immigrants exceeded the administrative capacity of EURODAC registration in the form of systematic fingerprinting.¹⁷⁷ Secondly, a huge number of asylum applicants had either refused to have their fingerprints taken or intentionally damaged their fingerprints to avoid identification.¹⁷⁸ This stemmed from fears and mistrust of authorities or the desire to be registered in a specific country.¹⁷⁹

The interim response to these identified challenges

174. EURODAC Regulation (EU) No. 603/2013, Article 34 (2).

175. EURODAC Regulation (EU) No. 603/2013, Article 35 (1).

176. EURODAC Regulation (EU) No. 603/2013, Article 35 (2).

177. European Parliamentary Research Service, 'EU Parliament briefing EU legislation in progress - Recast EURODAC Regulation' (2021), 3.

178. ECRE, 'ECRE comments on the European Commission Staff Working Document 'on implementation of the EURODAC Regulation as regards the obligation to take fingerprints' (2015), 2; Statewatch, 'Analysis: 11 years of EURODAC' (2014), 5; European Parliamentary Research Service, 'EU Parliament briefing EU legislation in progress - Recast Eurodac Regulation' (2021), 4.

179. European Parliamentary Research Service, 'EU Parliament briefing EU legislation in progress - Recast EURODAC Regulation' (2021), 4.

was to introduce the hotspot approach through an informal meeting between the Heads of State as a short-term relief. The aim of this was to allow agencies, such as Frontex, European Asylum Support Office (EASO), and Europol, to temporarily provide operational support for identification, fingerprinting, and registration of immigrants at sections of the EU border that had “specific and disproportionate migratory pressure.”¹⁸⁰ There was also a 20 July 2015 EU Council endorsed staff working document that provided a common approach to fingerprinting and it encompassed the use of specific and limited detention of applicants who do not cooperate and coercion as a means of last resort.¹⁸¹

The 2016 recast proposal of the recast EURODAC came in offering recommendations on possible permanent solutions. However, it also sought to expand the purpose of the Regulation from a mere Dublin Regulation facilitator to an instrument meant to serve the general EU policies on asylum, resettlement, and irregular migration.¹⁸² Some of the proposals in it have presented major concerns. Some of these that relate to and affect minors are as follows.

i) Lowering the age for fingerprinting to six.

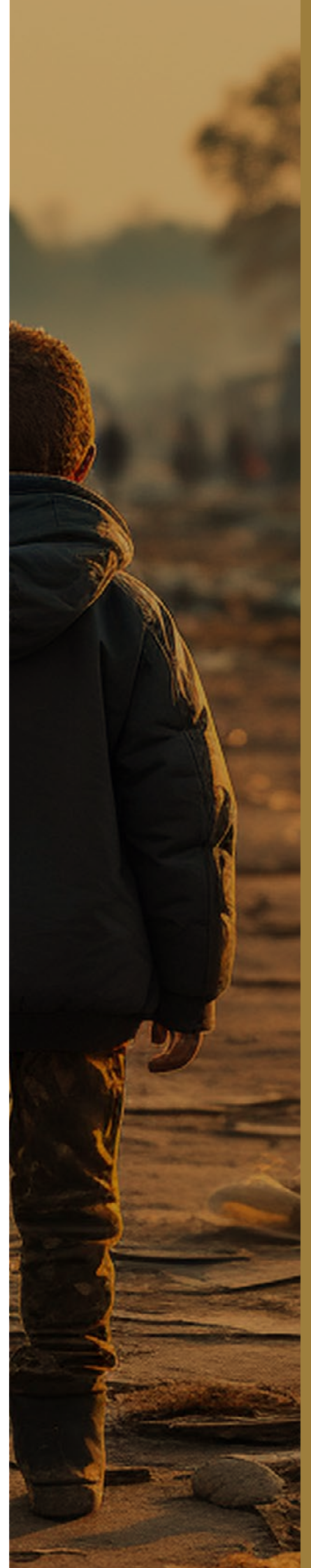
In the new proposal, the minimum age for the taking of fingerprints would be lowered from 14 to 6 years. The provided reason for this modification is that many families become separated as they travel to and through Europe and young children may be separated from their parents in this way. Collecting and retaining children’s fingerprints and facial images would allow authorities to track them and determine whether they ended up in other countries.¹⁸³ Another justification provided is that it would also be beneficial to unaccompanied minors who may abscond from child protective services and who cannot be

180. European Parliamentary Research Service, ‘EU Parliament briefing EU legislation in progress - Recast EURODAC Regulation’ (2021), 3,5.

181. European Digital Rights (EDRI), ‘EURODAC database repurposed to surveil migrants’ (2021) <<https://edri.org/our-work/eurodac-database-repurposed-to-surveil-migrants/>> accessed on 7 June 2022.

182. European Digital Rights (EDRI), ‘EURODAC database repurposed to surveil migrants’ (2021) <<https://edri.org/our-work/eurodac-database-repurposed-to-surveil-migrants/>> accessed on 7 June 2022.

183. European Parliamentary Research Service, ‘EU Parliament briefing EU legislation in progress - Recast EURODAC Regulation’ (2021), 6; Niovi Vavoula, ‘Transforming EURODAC from 2016 to the New Pact: From the Dublin System’s sidekick to a database in support of EU Policies on Asylum, Resettlement and Irregular Migration’ (2020) Working Paper



identified under the current framework.¹⁸⁴

This proposal however presents potentially significant violations of children's rights. As stated under the GDPR and reiterated by human rights defenders, children - especially those under 16 years - cannot give consent and, in this case, consent to have their data processed.¹⁸⁵ This has significant implications for their data protection rights and their right to private life.¹⁸⁶ Indeed, the ECtHR - concerning the right to private life - has held that fingerprints objectively contain unique information about an individual that allows his or her identification with precision in a wide range of circumstances. It held that, as a result, fingerprints are capable of affecting one's private life and retaining this information "without the consent of the individual concerned cannot be regarded as neutral or insignificant".¹⁸⁷ ECRE has therefore stressed that fingerprinting and taking images of children must be done purposely for the benefit of an individual child and not merely systemically. Further, for the taking of fingerprints, it must be demonstrated by the authorities that the data taken would facilitate efforts to locate the family members and relatives of the individual child.¹⁸⁸

The proposal also fails to provide specific safeguards that would adhere to and promote the best interests of the child principle. The European Council on Refugees and Exiles (ECRE) has in this regard recommended that the taking of fingerprint images of minors should be done in a "child-friendly and child-sensitive manner" by "officials specifically trained to enrol minors' fingerprints and facial images."¹⁸⁹

184. EURODAC Regulation' (2021), 6.

185. Access Now Int. Amnesty Int. et al, 'Joint Open Letter on fundamental rights concerns about the Eurodac reforms' (2021), 1. ; General Data Protection Regulations (GDPR) (2018), Article 8.

186. European Convention on Human Rights (1950), Article 8.

187. *S. and Marper v The United Kingdom* (2009) ECtHR.

188. ECRE, 'ECRE Comments on the Commission Proposal to recast the Eurodac regulation' (2016), 9.

189. ECRE, 'ECRE Comments on the Commission Proposal to recast the Eurodac regulation' (2016), 12.

ii) Extension of access to third-country authorities.

Contrary to the current position that prohibits access to EURODAC data by third-country authorities, the new proposal suggests extending access to them on certain conditions. They would not be able to get direct access, but data could be transferred to them to establish the identity of third-country nationals for return purposes.¹⁹⁰ The challenge with this extension is that it violates the purpose-limitation principle of data protection. The principle prohibits the collection of data for unknown or unspecified reasons and further prohibits the use of data for purposes other than the specific ones for which they were collected.¹⁹¹

2.2.3. The Recast Qualification Directive (2011/95/EU)

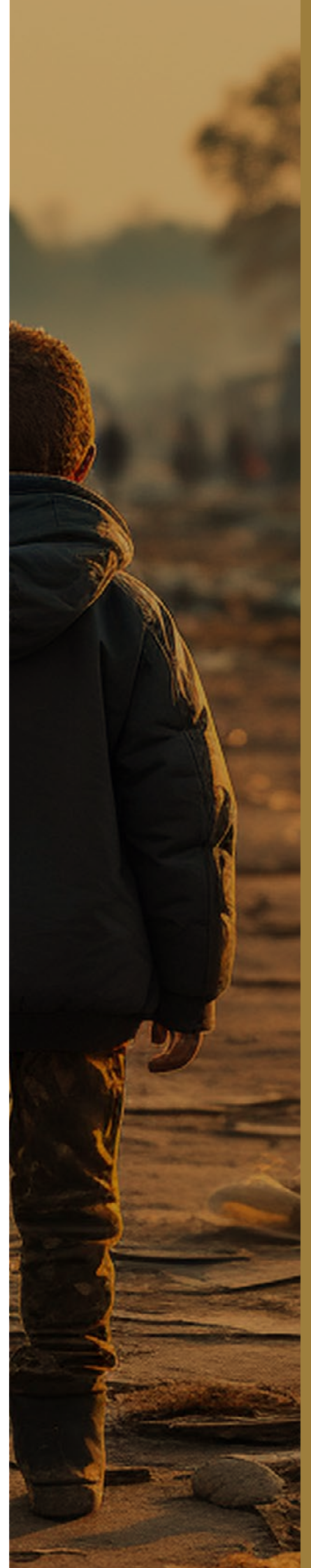
The recast Qualification Directive (2011/95/EU) of the European Parliament and of the Council of 13 December 2011 was created under Article 78 of the TFEU and requires the EU to adopt a uniform status of asylum for third-country nationals, which would be valid throughout the Union. The Recast Qualification Directive establishes standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or persons eligible for subsidiary protection, and the content of the protection granted. This was proposed during the creation of the first phase of the CEAS when the European Council's Hague Program invited the Commission to conclude the evaluation of the first-phase legal instruments and to submit the second-phase instruments to the Council and the European Parliament.¹⁹²

The Recast Qualification Directive was therefore published to ensure higher protection standards based on a full and inclusive application of the 1951 Refugee Convention, the ECHR, and the EU Charter. It constitutes a major development in harmonising eligibility criteria and the content of protection at the EU level aimed toward reducing sec-

190. European Parliamentary Research Service, 'EU Parliament briefing EU legislation in progress - Recast EURODAC Regulation' (2021), 7.

191. General Data Protection Regulations (GDPR) (2018), Article 5 (1)(b).

192. European Council, 'The Hague Programme: Strengthening Freedom, Security and Justice in the European Union' (2005/C 53/01).



ondary movements within the European Union.¹⁹³ The Recast Qualification Directive mandates the Member States to enact domestic legislation necessary to comply with the Directive by 21 December 2013.¹⁹⁴ It applies to all EU Member States except Ireland and Denmark, with the former being bound by Directive 2004/83/EC, whilst neither of these Directives does not bind the latter.¹⁹⁵ The main purpose of the Directive is to ensure full respect for human dignity and the right to asylum of applicants and their accompanying family members and to promote the application of the EU Charter and should therefore be implemented accordingly.¹⁹⁶

2.2.3.1. General Amendments to the Council Directive 2004/83/EC

The current recast Qualification Directive is based on the Council Directive 2004/83/EC that contained minimum standards for the qualification and status of third-country nationals or stateless persons as refugees. The Directive was recast in the interests of clarity with the present directive making the amendments presented below.

a) *Clarification on the Definition of Actors of Protection.*

The recast Qualitative Directive has also clarified the definition of actors of protection, which could be either the State or parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State.¹⁹⁷ It has further clarified that there is a requirement for such protection to be effective and of a non-temporary nature that the State parties or organisations in question should be able and willing to offer protection and that the applicant has access to such protection.¹⁹⁸

b) *Alignment of the Internal Protection Concept with*

193. Directive (EC) 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2009] OJ L 337.

194. The recast Qualification Directive (2011/95 EU), Article 39.

195. Council Directive (2004/83/EC) of 29 April 2004.

196. Joined cases C- 411/10 N.S. & C-493/10 M.E. & Others (21 December 2011), (CJEU), para. 77.

197. The recast Qualification Directive (2011/95 EU), Article 7 (1).

198. The recast Qualification Directive (2011/95 EU), Article 7 (2).

ECtHR Case Law.

Article 8 of the recast Qualification Directive aligns the internal protection concept with jurisprudence from the ECtHR. It provides that the Member States may determine that an applicant does not need international protection if, in a part of the country of origin, he or she has no well-founded fear of being persecuted or is not at real risk of suffering serious harm; or if he or she has access to protection against persecution or serious harm, and he or she can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there.¹⁹⁹

This provision largely reflects the view of the ECtHR in the case of *Salah Sheekh v the Netherlands*, where the requirement in that judgement is that the person is “able to settle there” as opposed to the diminished standard of “reasonably being expected to settle there.”²⁰⁰ The use of the word “settle” implies that an assessment of different factors, such as economic survival in the area, taking into consideration the personal circumstances of the applicant, has been carried out. The ECtHR in *Sufi and Elmi v United Kingdom* mandated such an individualised assessment²⁰¹ and *M.S.S. v Belgium and Greece*²⁰² when considering internal relocation and IDP camps. In invoking the internal protection mechanism, the burden of proof is on the Member State to establish whether there is an internal protection alternative in a part of the country of origin.²⁰³ When the State or agents of the State are the actors of persecution or serious harm, there is a presumption against the availability of effective protection.²⁰⁴

Article 8 further removes the possibility of applying this internal protection concept notwithstanding technical obstacles to return. Therefore, Member States may not apply the concept of internal protection as an alternative when there are obstacles to returning

199. The recast Qualification Directive (2011/95 EU), Article 8.

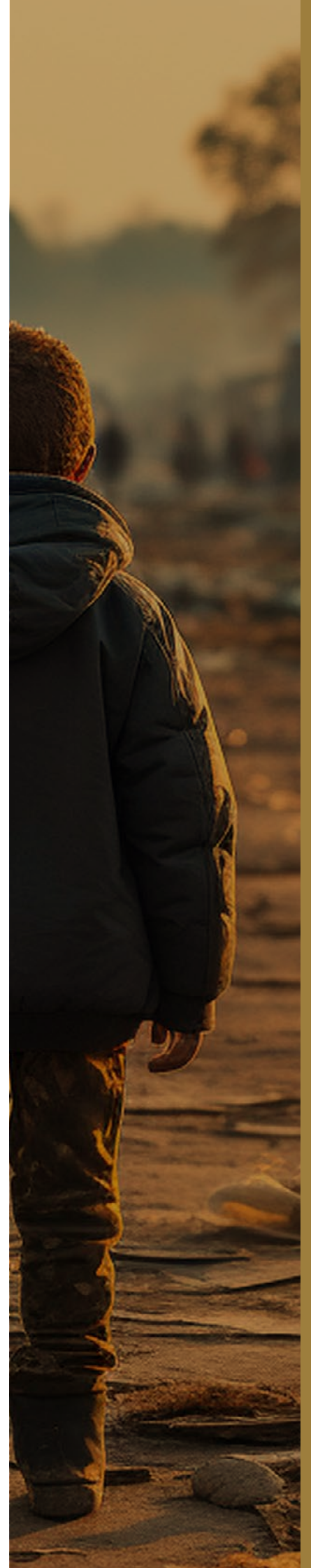
200. *Salah Sheekh v Netherlands* (11 January 2007), (ECtHR), para. 141.

201. *Sufi and Elmi v the United Kingdom* (28 June 2011), (ECtHR).

202. *M.S.S. v Belgium and Greece* (21 January 2011), (ECtHR), para. 254.

203. UNHCR, ‘Guidelines on International Protection No. 4: “Internal Flight or Relocation Alternative” within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 23 July 2003, para. 34.

204. The recast Qualification Directive (2011/95 EU), Recital 16.



the applicant to the country of origin designated.
Clarification of the “Causal Link” Requirement Between Acts of Persecution and the 1951 Refugee Convention.

Article 9 (3) of the recast Qualitative Directive has been amended to clarify that the causal link requirement between acts of persecution and the 1951 Refugee Convention grounds (race, religion, nationality, membership of a particular social group, or political opinion) is fulfilled also where there is the absence of protection against such acts.²⁰⁵ The significance of this amendment lies in the fact that it extends protection to situations where the risk of persecution emanates from non-state actors which may often be the case in situations of gender-based persecution, for instance.²⁰⁶

c) *Incorporation of an Exception to Cessation Due to Compelling Reasons Arising Out of Previous Persecution.*

If the circumstances in connection with which they have been recognized as refugees have ceased to exist, persons cease to be refugees if they, *inter alia*, continue to refuse to avail themselves of the protection of the country of nationality;²⁰⁷ or, being stateless persons, they can return to the country of their former habitual residence.²⁰⁸ Article 16 further provides that a third-country national or a stateless person ceases to be eligible for subsidiary protection when the circumstances that led to the granting of the subsidiary protection status cease to exist or have changed to such a degree that protection is no longer required.²⁰⁹ However, both Articles 11 and 16 incorporate a humanitarian exception to cessation when there are compelling reasons arising out of previous persecution.²¹⁰

In the joined cases of *Aydin Salahadin Abdulla and*

205. The recast Qualification Directive (2011/95 EU), Article 9.

206. ECRE, ‘ECRE Information Note on the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)’ (ECRE 2016) accessed from <https://ecre.org/wp-content/uploads/2016/07/ECRE-Information-Note-on-the-Qualification-Directive-recast_October-2013.pdf> accessed 20 March 2022.

207. The recast Qualification Directive (2011/95 EU), Article 11 (1) (e).

208. The recast Qualification Directive (2011/95 EU), Article 11 (1) (f).

209. The recast Qualification Directive (2011/95 EU), Article 16 (1).

210. The recast Qualification Directive (2011/95 EU), Articles 11 (3) and 16 (3).

others v Bundesrepublik Deutschland, the CJEU also held that the refugee status ceases to exist when having regard to a change in circumstances of a significant and non-temporary nature in the third country concerned, (i.e. the circumstances which justified the person's fear of persecution, based on which refugee status was granted), no longer exist and that that person has no other reason to fear being persecuted. The burden of proof that the refugee status should cease is on the State.²¹¹

d) *The Approximation of the Rights for Beneficiaries of Refugee Status and Subsidiary Protection.*

Recital 41 recognizes that, to enhance the effective exercise of the rights and benefits laid down in this Directive for beneficiaries of international protection, it is necessary to take into account their specific needs and the particular integration challenges with which they are confronted.²¹² Chapter VII of the recast Qualification Directive approximates the content of rights for both refugees and subsidiary protection beneficiaries except for distinctions made concerning the duration of residence permits and social welfare. The alignment of the rights of the beneficiaries of subsidiary protection with the rights granted to refugees shows that both parties often have similar protection and social needs and ensure compliance with the principle of non-discrimination as interpreted by the ECtHR.²¹³

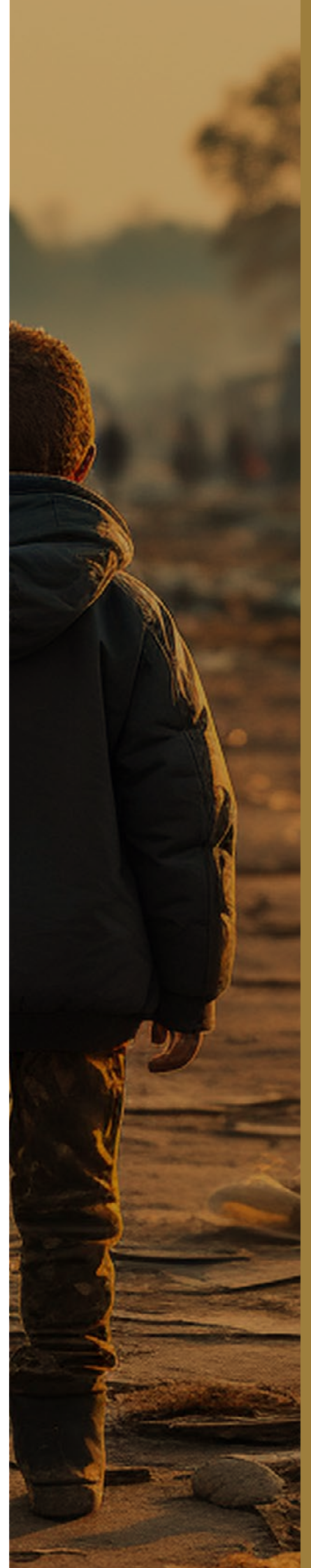
e) *Deletion of Articles 20 (6) and 20 (7) in Directive 2004/83/EC.*

Member States are no longer permitted to reduce the content of rights granted to beneficiaries of refugee status and people eligible for subsidiary protection because such status was obtained due to activities engaged in for the sole or main purpose of creating the necessary conditions for being recognized as a person eligible for refugee status or subsidiary pro-

211. *Aydin Salahadin Abdulla, Kamil Hasan, Ahmed Adem, Hamrin Mosa Rashi & Dier Jamal v Bundesrepublik Deutschland* (2 March 2010), (CJEU). See, UNHCR, 'Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention Relating to the Status of Refugees (the "Ceased Circumstances" Clauses)' (UNHCR, 2003).

212. The recast Qualification Directive (2011/95 EU), Recital 41.

213. *Niedźwiecki v Germany* (15 February 2006), (ECtHR) and *Okpiz v Germany* (25 October 2005) (ECtHR).



tection.²¹⁴

f) *Strengthened Provision on Access to Procedures for Recognition of Qualifications.*

Due to the forced and hasty nature of flight from their countries of origin or habitual residence, beneficiaries of international protection may have left behind their diplomas and certificates and be unable to provide documentary evidence of their qualifications. Article 28 of the recast Qualification Directive, therefore, mandates the Member States to ensure equal treatment between beneficiaries of international protection and nationals in the context of the existing recognition procedures for foreign diplomas, certificates, and other evidence of formal qualifications.²¹⁵

2.2.3.2. Amendments Related to Children Seeking Asylum

a) *Extended Definition of Family.*

The recast Qualification Directive acknowledges that it is necessary to broaden the notion of family members, considering the different particular circumstances of dependency and the special attention to be paid to the best interests of the child. It defines family members of the beneficiaries of international protection to include: their spouses or their unmarried partners in a stable relationship provided that the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals; the minor children of such spouses or unmarried partners, provided that the children are unmarried, and the parents or guardians are responsible for the beneficiary of international protection whether by law or by the practice of the Member State concerned when that beneficiary is minor and unmarried.²¹⁶ It has deleted the requirement of its predecessor that minor children of the beneficiary of international protection are dependent.²¹⁷

b) *New Explicit Obligation for States to Take into Con-*

214. European Commission, 'Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third-country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (Recast)', COM (2009), 9.

215. The recast Qualification Directive (2011/95 EU), Article 28 (1).

216. The recast Qualification Directive (2011/95 EU), Article 2 (j).

217. The recast Qualification Directive (2011/95 EU), Article 2 (j).

sideration Gender-Related Aspects.

Article 10 (1) (d) constitutes a new explicit obligation for States to take into consideration gender-related aspects, including gender identity to define membership in a particular social group.²¹⁸ Legal traditions and customs which result in FGM, forced sterilization, or forced abortion are legitimate causes for the applicant's well-founded fear and should therefore be given the necessary consideration.²¹⁹ Similarly, when interpreting other grounds under Article 10, Member States should take a gender-sensitive approach since a claim may be based on one or more grounds.²²⁰

c) *Family Members of Subsidiary Protection Beneficiaries Are Entitled to the Same Content of Rights Granted Under Chapter VII.*

Article 23 (2) of the recast Qualification Directive mandates Member States ensure that family members of the beneficiary of international protection who do not individually qualify for such protection are entitled to claim the benefits referred to in Chapter VII per national procedures and as far as is compatible with the personal legal status of the family member.²²¹ This is in line with Article 8 of the European Convention on Human Rights, which states that everyone has the right to have his private and family life, his home, and his correspondence respected.²²² The extended definition of the family with the deletion of the requirement that minor children of the beneficiary of international protection are dependent.

d) *Obligations Related to UAMs.*

While this is not an amendment, one of the most significant provisions regarding children seeking asylum is the obligation to trace the family members of unaccompanied children as soon as possible whilst protecting the best interests of the child.²²³ This is in line with the obligations under Article 9, Article 10, and Article 22(2) of the UNCRC concerning family

218. The recast Qualification Directive (2011/95 EU), Article 10 (1) (d).

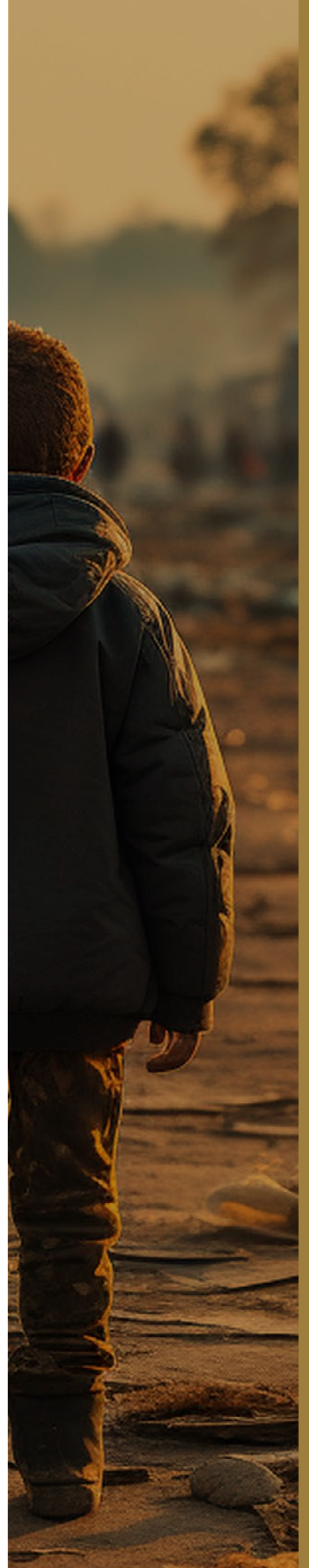
219. The recast Qualification Directive (2011/95 EU), Recital 30.

220. Council of Europe, 'Convention on preventing and combating violence against women and domestic violence' (2011) CETS 210, 1.

221. The recast Qualification Directive (2011/95 EU), Article 23 (2).

222. European Convention on Human Rights (1953), Article 8.

223. The recast Qualification Directive (2011/95 EU), Article 31.



unity and the best interests of the child. Article 31 (6) further requires those working with UAMs to have had and continue to receive appropriate training concerning their needs. They should also be bound by confidentiality rules concerning any information they obtain in the course of their work as is required under the recast Reception Conditions Directive.²²⁴

2.2.3.3. Weaknesses of the recast Qualification Directive

a) *Non-Removal of Non-State Actors from the Definition of Actors of Protection.*

Non-state actors cannot and should not be considered actors of protection, according to ECRE, as they cannot be held accountable under international law and are often only able to provide protection that is limited in duration and scope. Further, with the clarification that protection must be effective and non-temporary, non-state actors may not be able to fulfil this requirement in practice.²²⁵

b) *The Approach to the Definition of “Membership of a Particular Social Group” in the Recast Directive Still Does Not Accurately Reflect International Refugee Law.*

It recommends that to meet the objective of this provision, the concept of a “particular social group” should be interpreted inclusively by determining that it exists based on either an innate or common characteristic of fundamental importance, that is, the protected characteristics approach (*ejusdem generis*) or social perception, rather than requiring both.²²⁶

c) *The recast Qualitative Directive Fails to Amend Article 15 (c) On Serious Harm Due to Indiscriminate Vi-*

224. The recast Reception Conditions Directive, Article 24 (4).

225. ECRE, ‘ECRE Information Note on the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)’ (ECRE 2016) accessed from <https://ecre.org/wp-content/uploads/2016/07/ECRE-Information-Note-on-the-Qualification-Directive-recast_October-2013.pdf> accessed 20 March 2022.

226. ECRE, ‘ECRE Information Note on the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)’ (ECRE 2016) accessed from <https://ecre.org/wp-content/uploads/2016/07/ECRE-Information-Note-on-the-Qualification-Directive-recast_October-2013.pdf> accessed 20 March 2022.

olence in an International or Internal Armed Conflict. Courts and national authorities have very divergent interpretations as to key concepts in this provision, such as “civilian” and “armed conflict,” and as to when a person fleeing generalised violence qualifies for subsidiary protection under the recast Qualification Directive (2011/95 EU).²²⁷

- d) *Lack of Convergence of Recognition Rates and Differing Status of Protection Granted to Asylum Seekers with Similar Claims Within the EU, the Duration of the Residence Permits, and the Level of Rights Ensured to Those Granted International Protection.* This can incentivize asylum shopping and secondary movements within the EU. With the replacement of the current Directive with a Regulation, there would be greater convergence in the way similar asylum claims are decided, as well as the content of international protection granted. This would discourage moving within the EU and ensure that beneficiaries of international protection are treated equally across the EU.²²⁸

2.2.4. Asylum Procedures Directive (2013/32/EU)

The Asylum Procedures Directive sets up common procedures to be applied by a Member State for granting and withdrawing applications for international protection seeking refugee status or subsidiary protection within a Member State by a third-country national or a stateless person²²⁹ or for an application of any kind falling outside the scope of the Qualification Directive 2011/95/EU.²³⁰ Its operation is triggered when an application or withdrawal of application for international protection (asylum) is made in the territory of the Member States (including at the border, in territorial waters, or the transit zones).²³¹

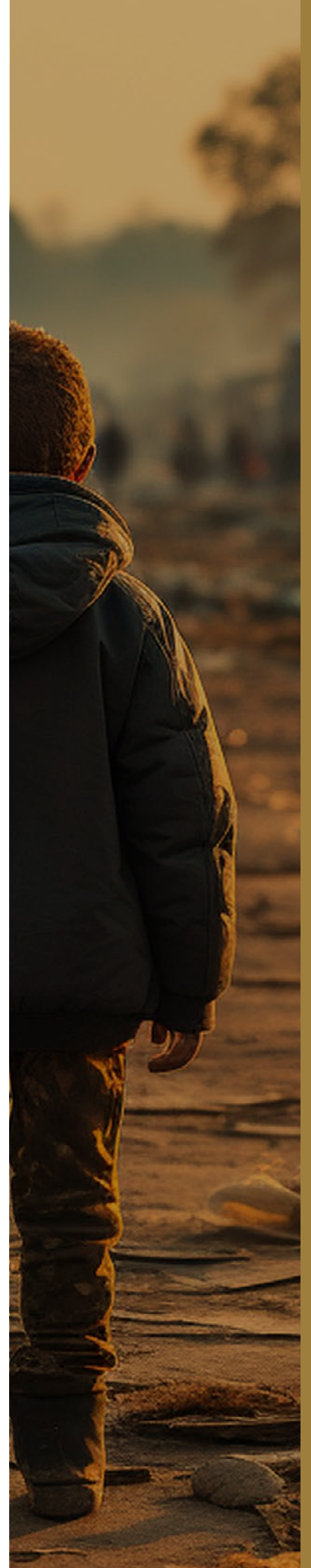
227. Hungarian Helsinki Committee, ‘The Luxembourg Court: Conductor for a Disharmonious Orchestra? Mapping the national impact of the four initial asylum-related judgments of the EU Court of Justice,’ 2012.

228. Proposal (EC) for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (2016) COM (2016).

229. Asylum Procedures Directive (EC) 2013/32/EU (2013), Article 2 (b).

230. Asylum Procedures Directive (EC) 2013/32/EU (2013), Article 3 (3).

231. Asylum Procedures Directive (EC) 2013/32/EU (2013), Article 3 (1).



An asylum application is first lodged to an authority competent under a Member State's national law for registration within three working days after it is made,²³² and the Member State must ensure all applications are registered no later than six working days²³³ with a possible extension of ten working days.²³⁴ The Asylum Procedures Directive allows for the following categories of applicants for international protection, which entail different procedures and timeframes:²³⁵

- a) Regular asylum procedure:²³⁶ An application for asylum protection with the examination of protection needs to be concluded within six months of being lodged or from the moment the responsible Member State is determined;
- b) Prioritised procedure:²³⁷ examination of protection needs of vulnerable applicants (particularly unaccompanied minors) or manifestly well-founded cases;
- c) Accelerated procedure:²³⁸ examination of protection needs of unfounded or security-related cases which are conducted at the border or in the transit zones;
- d) Admissibility procedure:²³⁹ examination of admissibility (but not protection needs) of asylum-seekers who may be the responsibility of another country or have lodged repetitive claims;
- e) Dublin procedure (Dublin Regulation (EU) No 604/2013): the examination of claims (but not protection needs nor admissibility) of asylum-seekers who may fall under the responsibility of another EU Member State; and
- f) Border procedure:²⁴⁰ accelerated examination of admissibility or merits at borders or in transit zones.

232. Asylum Procedures Directive (EC) 2013/32/EU (2013), Article 6 (1).

233. Asylum Procedures Directive (EC) 2013/32/EU (2013), Article 6 (1).

234. Asylum Procedures Directive (EC) 2013/32/EU (2013), Article 6 (5).

235. European Parliament, 'Common Procedure for Asylum' (European Parliament 2021) accessed from <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/595920/EPRS_BRI\(2017\)595920_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/595920/EPRS_BRI(2017)595920_EN.pdf)> accessed 25 February 2022.

236. Asylum Procedures Directive (EC) 2013/32/EU (2013), Article 31 (1).

237. Asylum Procedures Directive (EC) 2013/32/EU (2013), Article 31 (7).

238. Asylum Procedures Directive (EC) 2013/32/EU (2013), Article 31 (8).

239. Asylum Procedures Directive (EC) 2013/32/EU (2013), Articles 33 - 34.

240. Asylum Procedures Directive (EC) 2013/32/EU (2013), Article 43.

After asylum seekers apply, they are granted the right to remain within the Member State where the procedure is taking place.²⁴¹ All their rights are communicated to them by the competent authorities in a language they understand, and they often have the opportunity to contact UNHCR.²⁴²

During the application examination time frame, the asylum seekers are required to cooperate with the competent authorities to provide them with the necessary information and documents needed to determine the responsible Member State or, after such determination has already been made, to provide evidence in support of their asylum application. Additionally, asylum seekers are granted the right to a personal interview and the right to a legal counsellor or advisor provided by the receiving Member State, as bolstered by the Dublin Regulation. Member States can also detain applicants who are subject to a return decision under the Return Directive or before a responsible Member State is determined under the Dublin Regulation. Grounds for detention are left to be set in national law.

Article 26 of the Asylum Procedures Directive stipulates that a person should not be held in detention for the sole reason that he or she is an applicant for international protection, and if detained, this person should have access to a speedy judicial review. Thus, in the event of a non-satisfactory outcome of an application assessment, the asylum seeker has the right to appeal such a decision within the national authority of the Member State that determined their application.

All the Member States must examine all asylum applications within a brief period and inform the applicants of the decision taken.

As for the withdrawal of the refugee status, it may also be applied when there has been a change of situation, and the refugee status is no longer necessary.

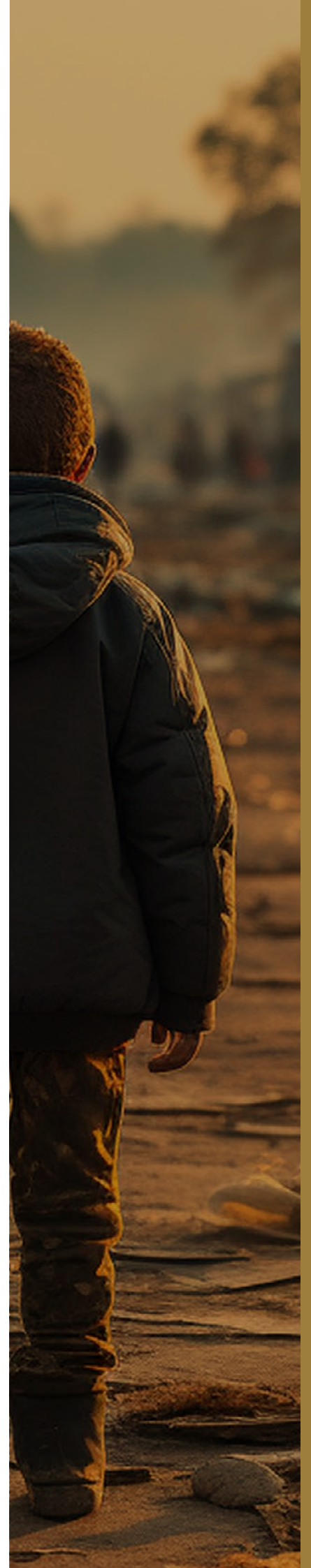
2.2.4.1. Criticisms of the Asylum Procedures Directive

- a) *Discrepancies on the Transposition of the First Country of Asylum Concept and the Safe Third Country Concept.*

Article 35 of the Asylum Procedures Directive intro-

241. Asylum Procedures Directive (EC) 2013/32/EU (2013), Article 9 (1).

242. L.E. Bacaian, 'The Protection of Refugees and Their Right to Seek Asylum in the European Union' (Genève 2011) 29.



duces the concept of the first country of asylum, which is the country where an applicant has been recognized as a refugee and enjoys sufficient protection, as well as the right to non-refoulement. Member States are responsible for making decisions concerning the first country of asylum. Article 38 also introduces the safe country concept, which is defined as a place where life and liberty are not threatened, the principle of non-refoulement is respected, there is no risk of torture, cruel or degrading treatment, and where the Geneva Refugee Convention is respected and the possibility of requesting refugee status exists), as well as the concept of safe country of origin (a country that is presumed to be safe and that does not produce refugees so that all applications that come from that country are considered unfounded).²⁴³

In real-time, different Member States have applied these two concepts differently which has led to discrepancies in practical application. For example, In Spain, the transposition in the new Asylum Law does not limit the threat to life and liberty to grounds of race, religion, nationality, membership of a particular social group, or political opinion, as provided by Article 27 (1) (a) of the Asylum Procedures Directive. Instead, the principle of non-refoulement is linked to the persecuting country and not to the third country; while the possibility of receiving protection in the third country becomes a mere possibility to ask for protection but does not necessarily require that the applicant receives it.²⁴⁴ In Germany, there is no explicit provision incorporating Article 27 (1) of the Asylum Procedures Directive criteria, however, the criteria are applied in practice and they must be fulfilled (*“offensichtlich”*).²⁴⁵ Moreover, in Bulgaria, Article 13 (2) of the Law on Asylum and Refugees refers directly to the legal definition of a safe third country which generally reflects the requirements under Article 27 (1) of the Asylum Procedures Directive, which must

243. M. Mouzourakis, ‘We Need to Talk About Dublin: Responsibility under the Dublin System as a blockage to asylum burden-sharing in the European Union’ (2014) RSC Working Paper Series 4, 21.

244. Refworld, ‘The Concept of First Country of Asylum’ (Refworld) accessed from <<https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=4bab55da2>> accessed 25 February 2022.

245. Refworld, ‘The Concept of First Country of Asylum’ (Refworld) accessed from <<https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=4bab55da2>> accessed 25 February 2022.

be established by the decision-maker on a case-by-case basis.²⁴⁶

b) *High Reliance on the Controversial Dublin Regulation.*

The Dublin Regulation has been the victim of heavy criticism on aspects illustrated in the previous section. The Asylum Procedures Directive receives part of these criticisms due to its reliance on the Dublin Regulation in terms of dictating the establishment of provisions on determining which Member State is responsible for examining an asylum application.

Additionally, the rapid processing of asylum applications within no more than 6 months²⁴⁷ (except for applications by UAMs and victims of torture) is in line with the Dublin Regulations requirements. Nevertheless, scholars have indicated that Governments cannot hold any comprehensive internal or EU-wide debate on individual or collective approaches to asylum responsibility without addressing Dublin's "value for money."²⁴⁸

c) *Too Broad and Complex in Light of Asylum-Seeking Influx.*

The Asylum Procedures Directive has received criticism for leaving the Member States with too broad discretion, leading to differences in treatment and outcomes, a point that was noted in light of the 2014 influx of asylum seekers to European States.²⁴⁹

d) *Non-Harmonization with Other EU Asylum Acquis.*

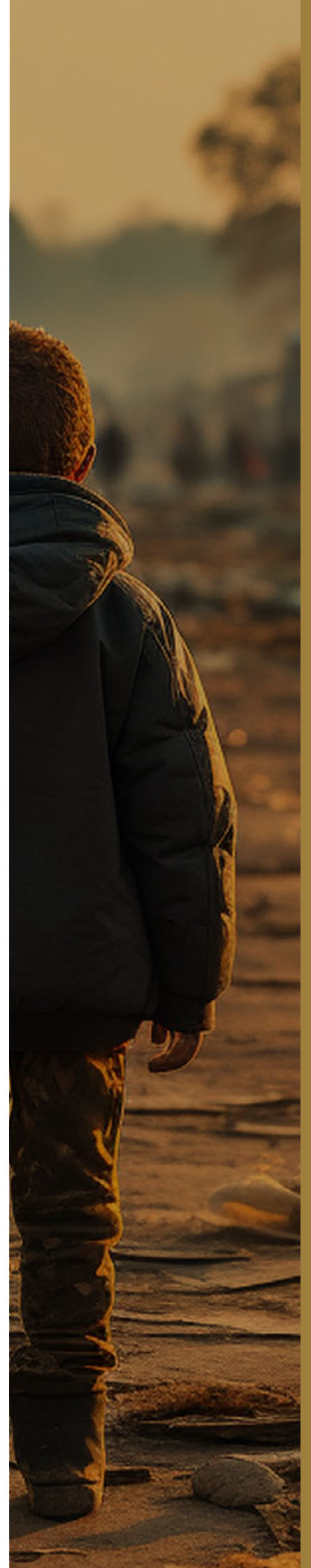
As regards guidance, the border procedure framework established by the Asylum Procedures Directive is judged to be unclear and too complex, at least on account of cross-references to other provisions of the directive and other CEAS instruments. The Asylum Procedures Directive 2013/32/EU, which was recast and has been applicable since July 2015, was aimed at harmonising standards for granting

246. Refworld, 'The Concept of First Country of Asylum' (Refworld) accessed from <<https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=4bab55da2>> accessed 25 February 2022.

247. Asylum Procedures Directive (EC) 2013/32/EU (2013), Article 31 (3).

248. M. Mouzourakis, 'We Need to Talk About Dublin: Responsibility under the Dublin System as a blockage to asylum burden-sharing in the European Union' (2014) RSC Working Paper Series 4, 21.

249. A. Orav, 'EU Legislation Briefing: Common Procedure for Asylum' (European Parliament, European Union 2021) 1.



and withdrawing international protection by national authorities, per the Qualification Directive. However, the current situation is far from being harmonised and has been criticised for being too complex and leaving the Member States with too much discretion to ensure that similar cases are treated alike.

In the same vein, neither the Asylum Procedures Directive nor the Reception Conditions Directive seems to specify where and under what conditions applicants may be accommodated during a border procedure. The authors of the EPRS²⁵⁰ European implementation assessments also point out that it is important to ensure that border detention facilities meet a dignified standard of living that would support the physical and mental health of applicants.

2.2.5. The recast Reception Conditions Directive (2013/33/EU)

The recast Reception Conditions Directive (Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013) lays down minimum standards for the reception of applicants for international protection. Member States are obligated to ensure that material reception conditions, including food, employment, and health care, are made available to applicants for international protection.²⁵¹ The recast was necessitated by the wide margin of discretion concerning the establishment of reception conditions at the national level that its predecessor, Directive on Minimum Standards for the Reception of Asylum Seekers 2003/9/EC, accorded to the Member States.²⁵²

During consultations on this Directive, the European Parliament took note of the fact that poor material reception conditions and lack of access to the labour market during the asylum procedure could cause isolation, discrimination, and poor integration, which would then, in turn, have a negative impact of the physical and mental health of refugees and asylum seekers.²⁵³ It, therefore, proposed several amendments targeting the specific situation of children and the ac-

250. European Parliamentary Research Service.

251. The recast Reception Conditions Directive (2013/33/EU), Article 17 (2).

252. L. Slingenbergh, 'EU Immigration and Asylum Law and Policy, Political Compromise on a Recast Asylum Reception Conditions Directive: Dignity Without Autonomy?' (EU Migration Blog 2021) accessed from <<https://eumigrationlawblog.eu/political-compromise-on-a-recast-asylum-reception-conditions-directive-dignity-without-autonomy/>> accessed on 20 February 2022.

253. UNHCR, ECRE, 'Directive Laying Down Minimum Standards for the Reception of Asylum Seekers,' accessed from <<https://www.unhcr.org/4a9d129f6.pdf>> accessed 19 March 2022.

cess of asylum seekers to employment.²⁵⁴

While the Directive was aimed at ensuring a dignified standard of living and comparable living conditions in all Member States of the European Union, the Council adopted standards that were lower than those proposed by the Commission. Consequently, there is a lot of divergence in the manner in which the Directive is interpreted, with some Member States adopting restrictive interpretation.²⁵⁵ Asylum seekers in Europe, therefore, face varying reception conditions. However, the recast Receptions Directive is still hailed for some major advancements.

2.2.5.1. Major Advancements of the Recast Reception Conditions Directive

a) *Specific Attention Is Given to Vulnerable People.*

The arrival of vulnerable migrants in the EU, especially children, often challenges national systems when confronted with the need to provide, *inter alia*, qualified staff to address and provide for special needs, and adequate housing as well as additional resources for education and to prevent children from disappearing.²⁵⁶ The same is especially true when dealing with unaccompanied children who face heightened risks of trafficking, human smuggling,²⁵⁷ and physical, psychological, and sexual abuse before and/or after their arrival on the EU territory.²⁵⁸ The recast Reception Conditions Directive features more extensive provisions to protect vulnerable persons. It provides a non-exhaustive list of groups that the Member States must consider when implementing the Directive. These include persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women,

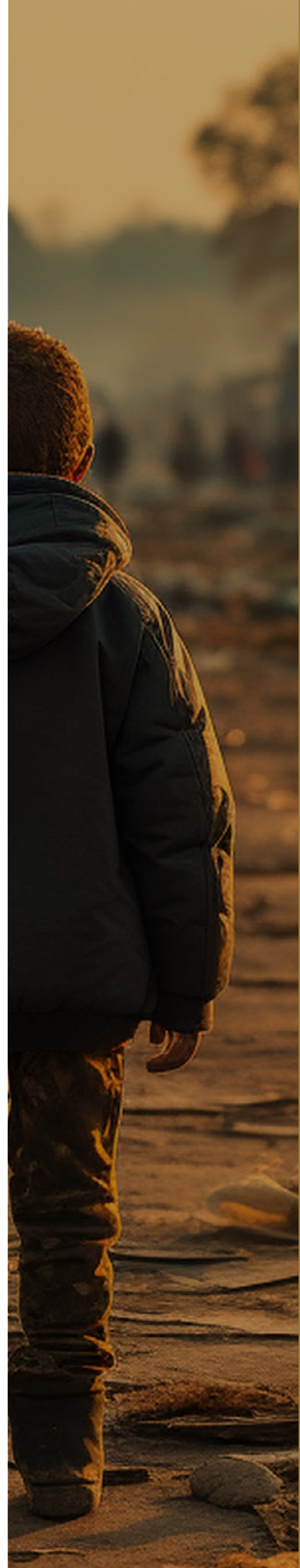
254. UNHCR, ECRE, 'Directive Laying Down Minimum Standards for the Reception of Asylum Seekers,' accessed from <<https://www.unhcr.org/4a9d129f6.pdf>> accessed 19 March 2022.

255. UNHCR, ECRE, 'Directive Laying Down Minimum Standards for the Reception of Asylum Seekers,' accessed from <<https://www.unhcr.org/4a9d129f6.pdf>> accessed 19 March 2022.

256. EASO, 'EASO Guidance on reception conditions for unaccompanied children: operational standards and indicators' (EASO 2018) <<https://euaa.europa.eu/sites/default/files/>> accessed 19 March 2022.

257. Asylum in Europe, 'Netherlands: Special Reception Needs of Vulnerable Persons' (Asylum in Europe 2021) accessed from <<https://asylumineurope.org/reports/country/netherlands/reception-conditions/>> accessed 19 March 2022.

258. EASO, 'EASO Guidance on reception conditions for unaccompanied children: operational standards and indicators' (EASO 2018) <<https://euaa.europa.eu/sites/default/files/>> accessed 19 March 2022.



single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders, and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence such as victims of female genital mutilation in the national law implementing this Directive.²⁵⁹

The Member States are required to assess whether the applicant has special reception needs within a reasonable period and the special needs must be addressed even when they become apparent at a later stage in the asylum procedure. Only vulnerable persons identified in Article 21 may be considered to have special reception needs and thus benefit from specific support.²⁶⁰

b) *Specific Provisions for Vulnerable People.*

While material reception needs, including the provision of an adequate standard of living, are guaranteed to all applicants, the recast Reception Conditions Directive specifically mandates the Member States to ensure that this standard of living is met in the specific situation of vulnerable persons.²⁶¹ Member States are also required to take into consideration the gender and age-specific concerns and the situation of vulnerable persons concerning applicants within the premises and accommodation centres at border and transit zones.²⁶² Further, applicants with special reception needs are entitled to the necessary medical or other assistance, including appropriate mental health care where needed.²⁶³ Victims of torture, rape, or other serious acts of violence are entitled to receive the necessary treatment for the damage caused by such acts, in particular, access to appropriate medical and psychological treatment or care.²⁶⁴

c) *Specific Provisions for Minors.*

For children, in particular, it mandates the Member States to consider their best interests when imple-

259. The recast Reception Conditions Directive (2013/33/EU), Article 21.

260. The recast Reception Conditions Directive (2013/33/EU), Article 22.

261. The recast Reception Conditions Directive (2013/33/EU), Article 17 (2).

262. The recast Reception Conditions Directive (2013/33/EU), Article 18 (3).

263. The recast Reception Conditions Directive (2013/33/EU), Article 19.

264. The recast Reception Conditions Directive (2013/33/EU), Article 25 (1).

menting the provisions that involve minors.²⁶⁵ Member States are further required to ensure a standard of living adequate for the minor's physical, mental, spiritual, moral, and social development. When assessing their best interests, Member States are mandated to consider the following factors:

- i) Family reunification possibilities;
- ii) The minor's well-being and social development, taking into particular consideration the minor's background;
- iii) Safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking;
- iv) The views of the minor per his or her age and maturity.²⁶⁶

This was reiterated in the case of *Tarakhel v Switzerland*, where the ECtHR found that reception conditions for asylum-seeking children must be adapted to their age, to ensure that those conditions do not “create for them a situation of stress and anxiety with particularly traumatic consequences.”²⁶⁷

Member States are also required to ensure that minors have access to leisure activities appropriate to their age as well as open-air activities.²⁶⁸ They must further ensure that minors have access to rehabilitation services.²⁶⁹ In pursuit of family unity, it also mandates the Member States to ensure that minor children of applicants or applicants who are minors are lodged with their parents, their unmarried minor siblings, or with the adult responsible for them whether by law or by the practice of the Member State concerned, provided it is in the best interests of the minors concerned.²⁷⁰

d) Specific Conditions for UAMs.

Article 24 of the recast Reception Conditions Directive specifically contemplates the rights of UAMs. UAMs are entitled to legal representation, placement

265. The recast Reception Conditions Directive (2013/33/EU), Article 23 (1).

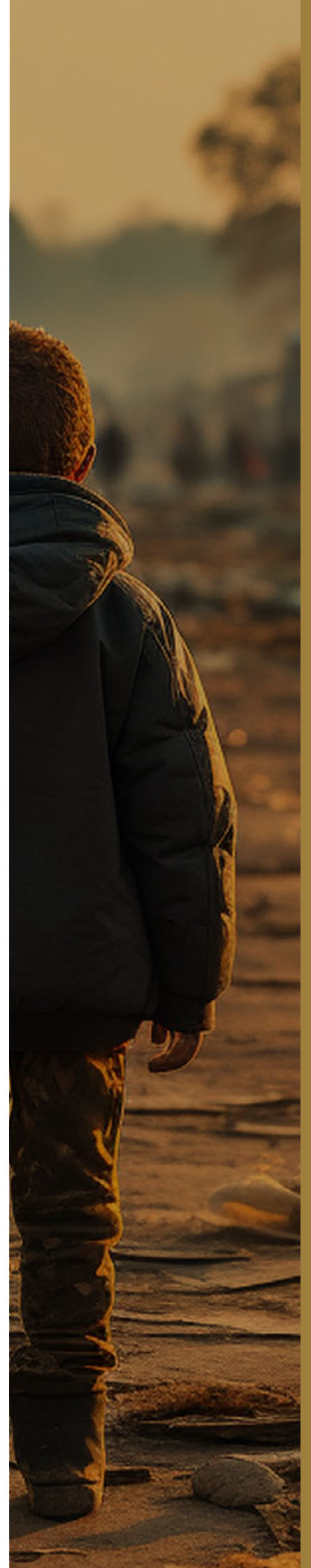
266. The recast Reception Conditions Directive (2013/33/EU), Article 23 (2).

267. *Tarakhel v Switzerland* (2014) ECtHR, para 119.

268. The recast Reception Conditions Directive (2013/33/EU), Article 23 (3).

269. The recast Reception Conditions Directive (2013/33/EU), Article 23 (4).

270. The recast Reception Conditions Directive (2013/33/EU), Article 23 (5).



with adult relatives, foster families, and accommodation centres with special provisions for minors, or in other accommodations suitable for minors, and - as far as possible - to be placed together with their siblings. The Member States must begin family tracing as soon as possible after an application for international protection is made, whilst protecting their best interests. They are also required to offer appropriate training to those working with UAMs.²⁷¹

2.2.5.2. Weaknesses of the recast Reception Conditions Directive

a) *Exclusion of Unaccompanied Married Children from the Definition of Family Members.*

When defining family members in Article 2 (c), the recast Reception Conditions Directive excludes unaccompanied married children whose spouse is not present in the EU Member State. This, in certain cases, may run contrary to the best interests of the child principle of Article 3 (1) of the Convention on the Rights of the Child, especially where the child is dependent on the family for support.

b) *Exclusion of Families Formed During or After a Flight from the Definition of Family Members.*

Similarly, the definition of “family members” in recast Article 2 (c) (i) is limited to “in so far as the family already existed in the country of origin.” This fails to accommodate family ties, which may have been formed during or after a flight, or in refugee camps, thus excluding children born from those relationships from the guarantees laid down in the Directive, for example regarding the maintenance of family unity.²⁷²

c) *The Possibility of Detaining Vulnerable People.*

The recast Reception Conditions Directive maintains the possibility to detain an applicant for international protection to decide, in the context of a procedure, the applicant’s right to enter the territory. The UNHCR finds this problematic depending on its implementation and application, which may create

271. The recast Reception Conditions Directive (2013/33/EU), Article 24.

272. UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast): To assist with transposition and implementation, accessed from <<https://www.refworld.org/pdfid/5541d4f24.pdf>>.

the risk of widespread detention in the context of border procedures and appears to be contradictory with the elaborated position that persons cannot be detained for the sole reason of seeking international protection.²⁷³

2.2.6. Directive 2008/115/EC (the Return Directive)

The Return Directive contains common standards and procedures in the Member States for returning illegally staying third-country nationals. This Return Directive was enacted as part of the mission to create an effective and well-managed European migration policy.²⁷⁴ The Directive is a return policy containing common standards and procedures to be applied to third-country nationals who have failed to fulfil the conditions of entry, stay, or residence in an EU Member State. This excludes Denmark, Ireland, the United Kingdom, and the four Schengen-associated states (Switzerland, Norway, Iceland, and Liechtenstein). The standards and procedures are aimed at ensuring compliance of return decisions and procedures with principles of international law including human rights and refugee protection.²⁷⁵ In this regard, Member States looking to apply this directive are required to have efficient asylum systems that respect the principle of non-refoulement.²⁷⁶

2.2.6.1. Salient Features of the Return Directive

Under the Directive, asylum seekers including child asylum seekers who have applied for asylum in a Member State are not to be considered as illegally staying until a negative decision is made on their application.²⁷⁷ Where such a decision has been made, or in any other circumstance where a person's stay is considered illegal, voluntary return is to be applied unless there is a reasonable need for forced return.²⁷⁸ This is especially necessary for vulnerable groups including child asylum seekers.

273. UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast): To assist with transposition and implementation, <<https://www.refworld.org/pdfid/5541d4f24.pdf>>.

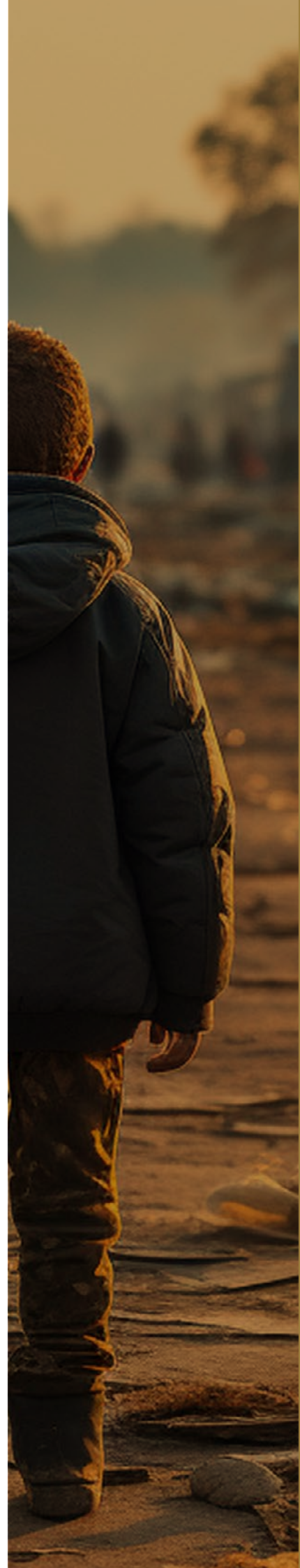
274. Directive (2008/115/EC), Article 1 (4).

275. Directive (2008/115/EC), Article 1.

276. Directive (2008/115/EC), Article 1 (8).

277. Directive (2008/115/EC), Article 1 (9).

278. Directive (2008/115/EC), Article 1 (10).



In implementing the Directive, Member States are required to take into account the best interest of the child where minors are involved.²⁷⁹ They are also required to consider the right to family life of the child and the state of their health.²⁸⁰ In this regard, the court in *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* held that a fundamental element of family life is the mutual enjoyment by parent and child of each other's company.²⁸¹ Thus, Member States are required to ensure that family unity is maintained as far as possible.

Further, under the Directive, where a return decision is issued, a period for voluntary departure of between seven to thirty days is to be provided.²⁸² However, in some circumstances, the Member State involved may extend the period for voluntary departures, for example when there are children attending school, or where there exists family or other social links with other legally staying individuals.²⁸³ This is to be done on a case-by-case basis.

a) *Return and Removal of UAMs.*

The Directive requires that before a return decision is issued in respect of a UAM, assistance should be provided to the minor from appropriate bodies other than those that shall enforce the return decision. Such assistance should be given in consideration of the best interests of the minor.²⁸⁴

In addition, States are required to ensure that before removing a UAM from their territory, they are satisfied that the minors will be returned to a member of their family, a nominated guardian or that the State of their return has adequate reception facilities.²⁸⁵

In *Mubilanzila Mayeka*, a five-year-old UAM was deported following a return decision against the minor. The Belgian authorities only went as far as providing an assistant to accompany the minor to customs at the airport. The minor had to travel alone as no

279. Directive (2008/115/EC), Article 5 (a).

280. Directive (2008/115/EC), Article 5 (a, b).

281. *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* (2006), ECtHR.

282. Directive (2008/115/EC), Article 7 (1).

283. Directive (2008/115/EC), Article 7 (2).

284. Directive (2008/115/EC), Article 10 (1).

285. Directive (2008/115/EC), Article 10 (2).

adult was assigned to travel with her. Further, no proper arrangements had been made in the child's country of origin, Congo, except for the child's uncle being merely informed of her arrival. The uncle did not show up and the child had to wait for six hours before the Congolese authorities improvised a solution. The European Court of Human Rights (ECtHR) found fault in the Belgian authorities' failure to provide adequate preparation, supervision, and safeguards for the child's deportation. The Court found that the deportation conditions the child was subjected to were bound to cause her extreme anxiety and was a demonstration of a lack of humanity on the part of the Belgian authorities. Such treatment of an unaccompanied minor of her age amounted to inhuman treatment.²⁸⁶

b) *Procedural Safeguards.*

The Directive contains procedural safeguards regarding return and entry-ban decisions. It is a requirement for such decisions to be delivered in writing with reasons of fact and law, together with information on available remedies.²⁸⁷ Persons subject to the decision given may request for translation of the main elements of the decision itself.²⁸⁸ Aggrieved persons may appeal or seek a review of the decision from a competent judicial or administrative authority in place.²⁸⁹

c) *Safeguards Pending Return.*

During the period provided for voluntary departure or where a postponement of removal decision has been made, special principles apply, and these relate to vulnerable persons including minors. Member States are required to observe that family unity is maintained among family members present in the State concerned and that emergency healthcare is available for the persons affected by the decisions.²⁹⁰

Further, the Member States concerned are required to ensure that the minors are granted access to ba-

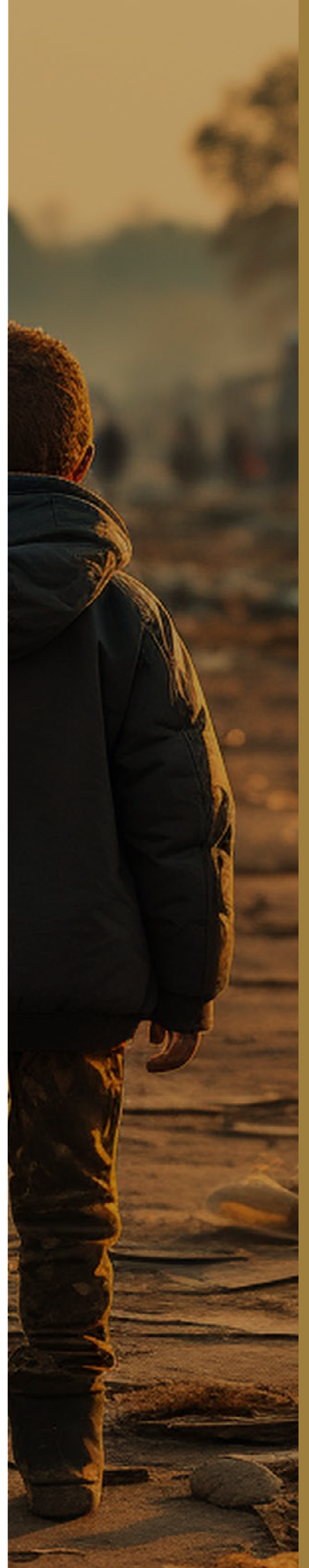
286. *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* (2006), ECtHR.

287. Directive (2008/115/EC), Article 12 (1).

288. Directive (2008/115/EC), Article 12 (2).

289. Directive (2008/115/EC), Article 13 (1).

290. Directive (2008/115/EC), Article 14 (1) (a) and (b).



sic education for the period of their stay.²⁹¹ Where any kind of vulnerable persons are involved, their special needs are to be considered by the Member States.²⁹²

d) *Detention for Removal.*

Member States may decide to keep in detention third-country nationals who are subject to return procedures in preparation for their return or removal. However, this only applies where the individual poses a risk of absconding the return or removal or avoids or derails the preparation processes leading up to such return or removal.²⁹³ Several general conditions exist regarding such detention, such as the provision of emergency healthcare where the need arises, access by the detainees to their families and representatives, and access by detainees to information regarding their rights and obligations.²⁹⁴

e) *Detention of Minors and Families.*

There also exists a separate and additional set of detention condition requirements where minors are involved. This includes the requirement that minors are to be detained only as a measure of last resort and for the shortest period.²⁹⁵ Minors are also to be provided with access to education as well as access to, and facilities for leisure, play, and recreational activities appropriate to their age.²⁹⁶ Where UAMs are involved, their accommodation should have personnel and facilities that take into account their special needs.²⁹⁷

In this regard, it was held in *Defence of Children International v the Netherlands* that even where minors are found to have illegally entered or stayed in a country, those minors retain their fundamental rights, nevertheless, including the right to adequate housing. It was further held that a temporary supply of shelter could not be considered adequate. The State in question should ensure the accommodation possesses all basic amenities such as sanita-

291. Directive (2008/115/EC), Article 14 (1) (c).

292. Directive (2008/115/EC), Article 14 (1) (d).

293. Directive (2008/115/EC), Article 15 (1).

294. Directive (2008/115/EC), Article 16.

295. Directive (2008/115/EC), Article 17 (1).

296. Directive (2008/115/EC), Article 17 (3).

297. Directive (2008/115/EC), Article 17 (4).

tion facilities, water, heating, waste disposal, and electricity. It must also be structurally secure and free from overcrowding.²⁹⁸

Moreover, in the case of *Mubilanzila Mayeka* the five-year-old unaccompanied child who lacked the requisite travel documents when she arrived in Belgium, seeking to unite with her mother, was detained in a centre that had initially been designed for adults, and no one was assigned to look after her. No measures were taken to provide her with proper counselling or educational assistance by qualified personnel. The ECtHR found that owing to her age and being unaccompanied, she was effectively left to her own devices, rendering her extremely vulnerable. The court held that the fact that the child had received legal assistance and daily telephone contact with her mother, or her uncle was barely sufficient. It held that the state of Belgium's treatment of the child demonstrated a lack of humanity and amounted to inhuman treatment.²⁹⁹

2.2.6.2. Shortfalls of the Return Directive

To begin with, it is important to note that the Return Directive received a lot of criticism during its enactment. Many International and Non-Governmental Organisations took issue with several provisions, questioning their compatibility with human rights standards, most notably the Directive's 18-month detention period.³⁰⁰ The UNHCR, for example, released a position paper stating that it could not support the Directive for failure to provide proper safeguards to ensure safe, dignified returns, and the presence of the provision allowing for an inordinately long 18-month detention period.³⁰¹ At the time, many organisations and many EU citizens opposing the Directive signed an appeal of 'No to the Outrageous Directive'.³⁰²

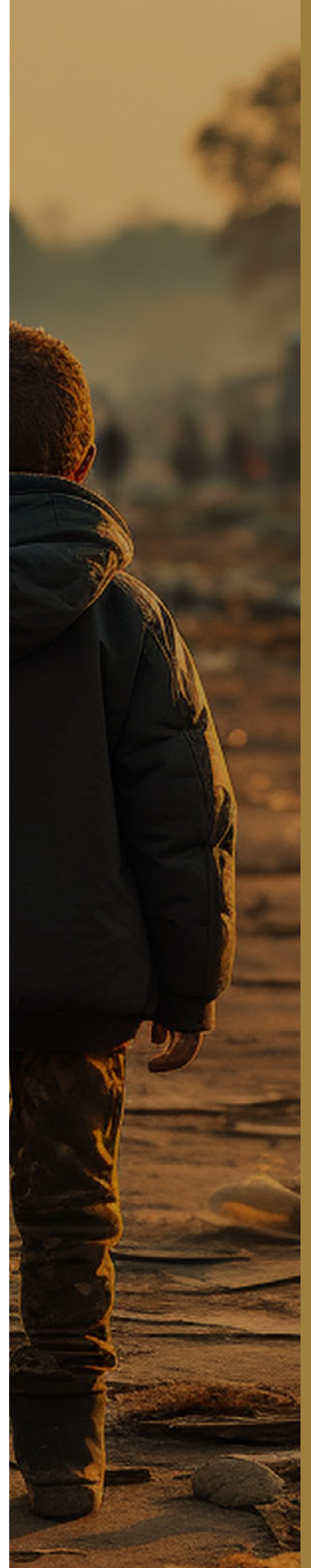
298. *Defence of Children International v the Netherlands* (2008), European Committee of Social Rights

299. *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* (2006), ECtHR.

300. European Parliamentary Research Service (EPRS), *The Return Directive 2008/115/EC: European implementation assessment*, 2020, 4.

301. UNHCR, *UNHCR position on the proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals*, 2008.

302. European Parliamentary Research Service (EPRS), *The Return Directive 2008/115/EC: European implementation assessment*, 2020, 4.



Regarding its shortfalls ever since its enactment, many continue to abound especially with the current refugee and asylum seekers influx in Europe. The need to aggressively apply the Return Directive as the surge of asylum seekers continues has brought with it the exacerbation of the already existing implementation challenges and the rise of new challenges. Some of these challenges are the following:

a) *On Return Decisions.*

It has been noted that the risk of returning asylum seekers to persecution (refoulement) is not systematically addressed when return decisions are being considered and determined. This is due to the assumption that the assessment has already been made at the time of the asylum procedure; yet such procedures assess only the conditions for granting the refugee or the asylum status.³⁰³

It has also been argued that the fact that in most countries an appeal against a return decision does not automatically grant a stay or suspension of execution of the decision, decreases the efficiency of the Directive - as it increases the administrative burden on States. This is because another appeal for suspension has to be filed.³⁰⁴

b) *On Enforcement of Return Decisions.*

As the number of asylum seekers in Europe has continued to spike, there has been a focus on return rates as a primary indicator of the effectiveness of the Return Directive.³⁰⁵ A major selling point of the 2017 “renewed action plan on a more effective return policy in the EU” was that it provided measures “to substantially improve return rates.”³⁰⁶ Such an approach runs the risk of incentivizing “return at all costs without consideration of many factors such as human rights, foreign relations, and administrative costs among others.”³⁰⁷

303. European Parliamentary Research Service (EPRS), The Return Directive 2008/115/EC: European implementation assessment, 2020, 17.

304. European Parliamentary Research Service (EPRS), The Return Directive 2008/115/EC: European implementation assessment, 2020, 17.

305. EU Law Analysis, The implementation of the EU Return Directive: The European Parliament aligns the EU expulsion policy with recommendations of UN human rights expert mechanisms, 18 January 2021.

306. European Commission, Communication from the commission to the European Parliament and council on a more effective return policy in the European Union: A renewed action plan, 2017.

307. European Parliamentary Research Service (EPRS), The Return Directive 2008/115/EC: European implementation assessment, 2020, 17.

c) *On the External Dimension of the Return Policy.*

Member States of the EU mostly resort to informal cooperation with a Third-Country National's (TCN) country of origin in enforcing return decisions.³⁰⁸ This informal means of cooperation has played a big part in the increased emphasis on the prominence of European Border and Coast Agency (Frontex) pushbacks and other privatised pushbacks.³⁰⁹ Pushbacks are measures by which migrants are forced back over a border, usually immediately after they cross it, without consideration of their circumstances and without the possibility of applying for asylum.³¹⁰ Such pushbacks are illegal under international law as they violate the principle of Non-refoulement. Indeed, the ECtHR in *Hirsi Jamaa and others v Italy* recognized the extra-territorial scope of the principle by holding that jurisdiction is established where a State exercises continuous and exclusive (*de jure* and *de facto*) control.³¹¹

d) *On Detention of Children: Does Not Prohibit Administrative/Immigration Detention of Children.*

Despite offering several safeguards for minors concerning detention, the Return Directive falls short of providing the maximum and ideal protection to minors. It fails to provide a blanket prohibition on the detention of children. Indeed, increasingly, and authoritatively, it is now widely acknowledged within and without human rights circles that the use of detention against minors is in direct conflict with the principle of the best interests of the child. As a result, it is now considered a violation of the rights of the child.

To wit, in 2015 the special rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment, made a conclusion that detention of minors based on their or their parent's migration status "is

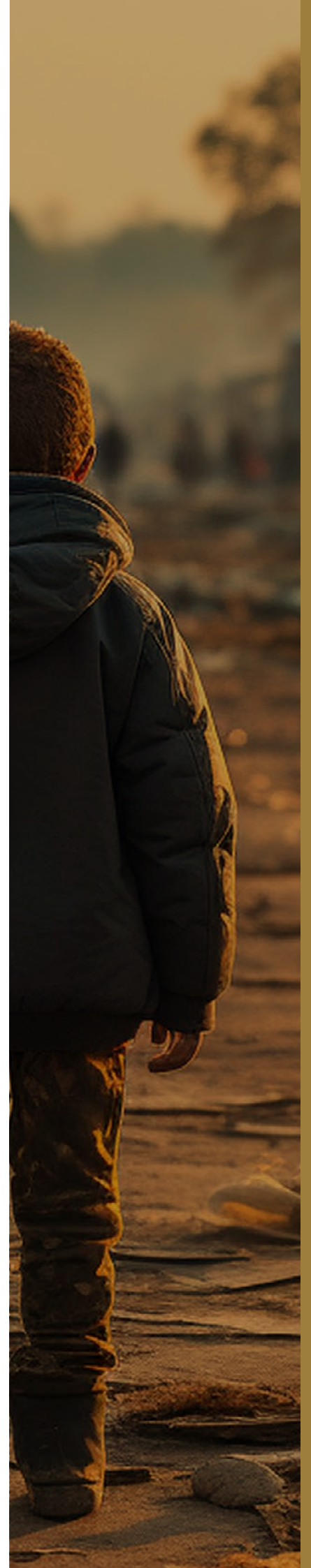
308. European Parliamentary Research Service (EPRS), The Return Directive 2008/115/EC: European implementation assessment, 2020, 19.

309. Kingsley P, 'Privatised pushbacks: How merchant ships guard Europe' New York Times, 20 March 2020, <<https://www.nytimes.com/2020/03/20/world/europe/mediterranean-libya-migrants-europe.html>> on 4 August 2020;

Kingsley P, Willis H, 'Latest tactic to push migrants from Europe? A private, clandestine fleet' New York Times, 30 April 2020, <<https://www.nytimes.com/2020/04/30/world/europe/migrants-malta.html>> on 4 August 2020.

310. ECHR Glossary, accessed from <<https://www.ecchr.eu/en/glossary/push-back/>> accessed on 4 August 2020.

311. *Hirsi Jamaa and Others v Italy* (23 Feb 2012), (ECtHR).



never in the best interest of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman and degrading treatment of migrant children”.³¹² In addition, in a 2017 joint general comment, the Committee on Rights of the Child (CRC), which monitors the implementation of the Convention on the Rights of the Child and the UN Committee on Migrant Workers (CMW), asserted that children should never be detained for reasons related to their or their parent’s migration status. They also stated that States should expeditiously eradicate immigration detention and declare such detention as forbidden by law.³¹³

Further, in the recent ECtHR case of *M.D and A.D. v France*, the court, in reaching its decision, referred to the principle advocated by the UN High Commissioner that “children should never be deprived of their liberty based on their migration status or that of their parents.”³¹⁴ Mr. Germain Haumont has argued that this decision is a milestone toward a principled prohibition on the immigration detention of children. He comments that the judgement has brought forth three developments that effectively protect the dignity of children and that offer a pathway to the prohibition of child immigration detention.³¹⁵ These are the following: that the criterion of the age of children supersedes the material conditions or duration of detention, that there is an international consensus against the detention of migrant children, and that there is a loss of importance of migratory reasons in the court’s reasoning in considering child detention.³¹⁶

312. Report of the Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment, Juan E. Mendez, A/HRC/28/68 (2015), Para 80.

313. Joint general comment no. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, para 5.

314. *M.D. and A.D. v France* (22 October 2021) (ECtHR).

315. Germain Haumont, ‘*M.D. and A.D. v France*: Milestone towards a principled prohibition on the immigration detention of children?’, (2022) <<https://strasbourgobservers.com/2022/02/11/m-d-and-a-d-v-france-milestone-towards-a-principled-prohibition-on-the-immigration-detention-of-children/>> accessed 19 April 2022.

316. Germain Haumont, ‘*M.D. and A.D. v France*: Milestone towards a principled prohibition on the immigration detention of children?’.

2.2.6.3. Triumphs of the Return Directive

- a) *Mainstreaming Similar and Uniform Procedures.*
By providing common standards and procedures for returning illegally staying TCNs, the Directive has increased the uniformity of return procedures in the Member States. Although individual countries have their national standards, most of them are derived from the Directive or otherwise in strict compliance with it. This has led to TCNs in various Member States being treated a little more uniformly in their general asylum and return procedures.
- b) *More Compliance with Human Rights Standards.*
Although the road to proper and strict observance of human rights standards in the European asylum policy remains long, the Directive has been instrumental in increasing observance. The standards and procedural safeguards in the Directive were established for this purpose. This has been enhanced by the development of jurisprudence across international and national courts concerning the implementation of the Directive. The European Court of Human Rights has delivered judgments that have been useful in shaping return policy and new action plans.

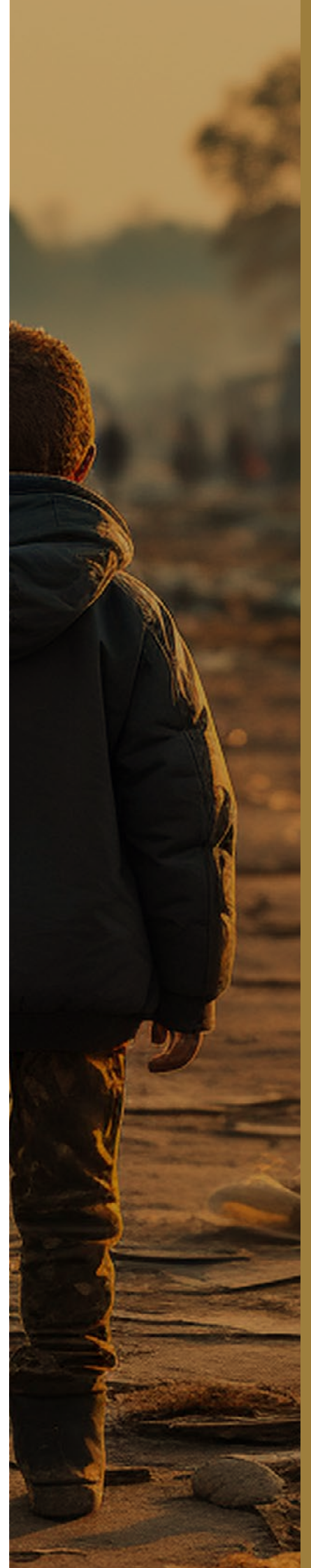
2.2.7. Temporary Protection Directive (C2001/55/EC)

As the name suggests, the Temporary Directive is aimed at providing temporary protection to immigrants in the event of an emergency mass influx of (refugees) into the territories of the EU Member States. The directive was created after the Balkan wars in the 1990s as an emergency tool to deal with the mass influx of people arriving in the EU.³¹⁷ Apart from establishing the minimum standards of temporary protection for asylum seekers in mass influx situations, it is aimed at enabling fair sharing of responsibility between Member States in receiving those asylum seekers and bearing the ensuing consequences.³¹⁸ Worthy of noting is that the Directive envisions and applies to situations where the mass influx is of such nature that the normal asylum system would be unable to operate efficiently in the interests of those who seek protection.³¹⁹

317. Krayem L, 'The EU response to the 2015 refugee flows: A missed opportunity to use the Temporary Objective?' 7 IALS student law review 1, 2020, 35.

318. Temporary Protection Directive (EC) 200/55/EC (2001), preamble (8), Article 1.

319. Temporary Protection Directive (EC) 200/55/EC (2001), Article 2 (a).



For the Directive to apply, the EU Council must establish by a majority decision that there is an existence of a mass influx of immigrants, on a proposal from the EU Commission to make such a finding.³²⁰ The duration of temporary protection is a year but can be extended automatically by 6 monthly periods for a maximum of one year.³²¹ The immigrants or ‘displaced persons’ who qualify for this protection are those who either fled areas of armed conflict or endemic violence or are at serious risk or have been victims of systemic or generalised violations of their human rights.³²²

Member States have certain obligations to persons enjoying temporary protection including providing them with temporary residence permits,³²³ authorization to engage in employed or self-employed activities,³²⁴ suitable accommodation or means to obtain housing, social welfare and means of subsistence,³²⁵ medical care³²⁶ and necessary care for the vulnerable or those with special needs.³²⁷ The Directive also provides a guarantee of access to the asylum procedure to persons under temporary protection. Member States must permit the lodging of applications for asylum by such persons.³²⁸

When temporary protection ends, Member States are required by the Directive to allow and facilitate the voluntary return of persons who had enjoyed temporary protection. Such facilitation is to be done with respect for human dignity.³²⁹ Importantly, Member States are to ensure that those making voluntary returns do so with full knowledge of what is going on in their home country.³³⁰ In this regard, the Member States may allow those persons to make exploratory visits to the families in their home country.³³¹ Where there is a need for forced returns, they are to be done with respect to human dignity.³³²

320. Temporary Protection Directive (EC) 200/55/EC (2001), Article 5 (1).

321. Temporary Protection Directive (EC) 200/55/EC (2001), Article 4 (1).

322. Temporary Protection Directive (EC) 200/55/EC (2001), Article 2 (c).

323. Temporary Protection Directive (EC) 200/55/EC (2001), Article 8 (1).

324. Temporary Protection Directive (EC) 200/55/EC (2001), Article 12.

325. Temporary Protection Directive (EC) 200/55/EC (2001), Article 13 (2).

326. Temporary Protection Directive (EC) 200/55/EC (2001), Article 13 (2).

327. Temporary Protection Directive (EC) 200/55/EC (2001), Article 13 (4).

328. Temporary Protection Directive (EC) 200/55/EC (2001), Article 17 (1).

329. Temporary Protection Directive (EC) 200/55/EC (2001), Article 21 (1).

330. Temporary Protection Directive (EC) 200/55/EC (2001), Article 21 (1).

331. Temporary Protection Directive (EC) 200/55/EC (2001), Article 21 (1).

332. Temporary Protection Directive (EC) 200/55/EC (2001), Article 22.

2.2.7.1. Provisions Relating to Minors

Under the Directive, Member States are required to provide medical or other assistance to vulnerable persons enjoying temporary protection such as unaccompanied minors.³³³ Children are also to be provided with access to education under the same conditions as nationals of the host country.³³⁴ Where children are separated from their families, the Member States concerned should take positive steps to reunite the children with their families, considering the children's best interest.³³⁵

The Directive also takes care of unaccompanied minors by requiring Member States to take measures to ensure the representation of minors by legal guardians or by organisations that are responsible for the care or well-being of minors or other appropriate measures.³³⁶ Regarding the accommodation or placement of such minors, the Directive requires their placement with either: an adult relative, a foster family, a reception centre with facilities suitable for minors, or the person who looked after the child when fleeing.³³⁷ Further, the Directive makes provision for Member States to allow minors to continue and complete their current school period when the period of temporary protection elapses.³³⁸

2.2.7.2. Shortfalls of the Directive

Since its adoption in 2001 until just recently in March 2022, the TPD had never been activated and applied. Therefore, a practical examination of its application and a determination of its triumphs and failures is not possible. However, this non-activation is a cause of concern in itself because, since the adoption of the TPD, the EU has faced several refugee crises where migrants have arrived in the EU en masse. For instance, in the 2010-2011 period following uprisings in Libya and Tunisia, Libyan and Tunisian refugees arrived in Malta and Italy tens of thousands crossed the

333. Temporary Protection Directive (EC) 200/55/EC (2001), Article 13 (4).

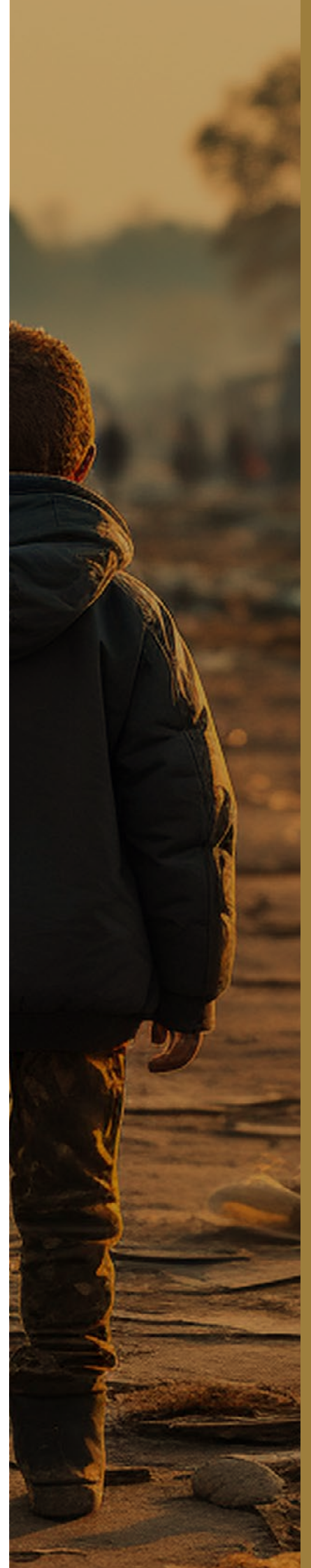
334. Temporary Protection Directive (EC) 200/55/EC (2001), Article 14.

335. Temporary Protection Directive (EC) 200/55/EC (2001), Article 15 (1) to (4).

336. Temporary Protection Directive (EC) 200/55/EC (2001), Article 16 (1).

337. Temporary Protection Directive (EC) 200/55/EC (2001), Article 16 (2).

338. Temporary Protection Directive (EC) 200/55/EC (2001), Article 22 (2).



Mediterranean.³³⁹ The two European States submitted a formal request for the activation of the TPD, but the Member States in the Justice Home Affairs Council rejected the request. The reasons for this were that the conditions established in the Directive had not been met and that its provisions applied to people in need of protection and not regular migrants.³⁴⁰

More recently, there was the Syrian refugee crisis in Europe following the civil war in Syria that persists to date. At the height of the refugee crisis in Europe in 2015, 1.3 million Syrians requested asylum in Europe.³⁴¹ At least on the face of it, there was a mass influx of displaced persons into Europe. Nevertheless, despite calls by commentators and academics for the activation of the TPD, no EU Member State made any attempts to trigger the activation of the Directive.³⁴² Ms. Elisabetta Gardini, a member of the European People's Party, further asked the Commission whether the refugee crisis had met the conditions in the TPD hence warranting the submission of a proposal to activate the TPD. The answer was negative.³⁴³

This has been the trend over the years regarding the activation of the TPD; a reluctance to do so. In fact, in 2020, the European Commission, in proposing the New Pact on Migration concluded that the TPD “no longer responds to the current reality of Member States and needs to be

339. A. Greenblatt, ‘Libyan war creates far-reaching refugee crisis’ (2011) <<https://www.npr.org/2011/04/29/135806865/libyan-war-creates-far-reaching-refugee-crisis>> accessed 20 April 2022; Council of Europe, ‘The large-scale arrival or irregular migrant refugees on Europe’s southern shores’, (2011) <<https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=13121&lang=en>> accessed 20 April 2022; Mason Richey, ‘The North African revolutions: A chance to rethink European externalisation handling of non-EU migrant inflows’ (2013) 9 Foreign Policy Analysis 4, 4.

340. European Parliament News, ‘MEPs suspicious about Schengen rules review’ (2011) <<https://www.europarl.europa.eu/news/en/press-room/20110502IPR18530/meps-suspicious-about-schengen-rules-review>> accessed 17 April 2022; Deniz Genc & Ash Sirin Oner, ‘Why not activated? The Temporary Protection Directive and the mystery of temporary protection in the European Union’, (2019) International Journal of Political Science & Urban Studies, 7; Maltem Ineli-Ciger, ‘Time to activate the Temporary Protection Directive’, 18 European J Migration & Law 1, 13

341. World vision, Syrian refugee crisis: ‘Facts, FAQs, and how to help’ (2021) <<https://www.worldvision.org/refugees-news-stories/syrian-refugee-crisis-facts#>> accessed 17 April 2022.

342. D. Gluns & J. Wessels, ‘Waste of paper or useful tool? The potential of a temporary protection directive in the current “Refugee Crisis”’ (2017) 36 Refugee Survey Quarterly 2, 59.

343. M. Ineli-Ciger, ‘EU Temporary Protection Directive’ in David James Cantor (eds) Temporary Protection in Law and Practice, 10 Int. Refugee Law series (2018), 159; See Libe Newsletter, Issue 7, 20 February 2015, 5 <https://www.europarl.europa.eu/cmsdata/73022/issue7_LIBEnews.pdf> accessed 20 April 2022.

repealed.”³⁴⁴ However, recently in March 2022, following the Russian invasion of Ukraine, which has caused the displacement of thousands of Ukrainians and people of other nationalities living in Ukraine, the EU Council decided to activate the TPD.³⁴⁵ In making the decision, the Council referred to an anticipated 1.2 to 3.2 million people who would likely seek international protection as a result of the Russian invasion.³⁴⁶ This reference is significant in so far as it indicates the number of displaced persons that would qualify the previously evasive definition of “mass influx of displaced persons” in the TPD.

This Activation of the TPD has been received with different reactions with some scholars and commentators condemning and questioning why the EU Council activated the TPD when over the previous years it had chosen not to do so while providing no satisfactory reasons.

Dr. Meltem Ineli, a prominent interrogator of the TPD has argued that it is now apparent that the EU Council had failed to activate the TPD previously in the 2011 and 2015 refugee crises because it lacked the political will to do so.³⁴⁷ More specifically, she states that the main reason is that Ukrainians are Europeans but Syrians, Afghans, Tunisians, Libyans, other North-African-Country nationals and Iraqis are not.³⁴⁸ In this regard, Mr. Steve Peers also questions the apparent double standards in applying the Directive. He notes that while the response to the 2011 and 2015 crises was pushbacks, detention of asylum seekers, and dubious agreements with non-EU transit countries such as

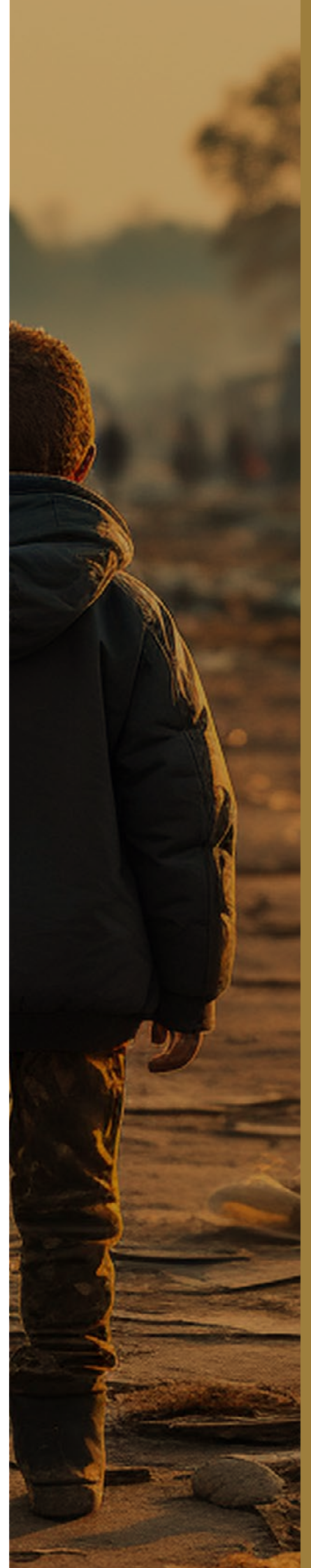
344. Commission staff working document, ‘Proposal for a regulation of the European Parliament and of the council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed regulation (EU) XXX/XXX (Asylum and Migration Fund)’ (2020), 64 <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020SC0207&from=en>> accessed 20 April 2022.

345. Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, Official Journal of the European Union, 4 March 2022, 2, para 10-11 <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:-32022D0382&from=EN>> accessed 21 April 2022.

346. Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, 2, para 6.

347. M. Ineli Ciger, ‘5 reasons why: Understanding the reasons behind the activation of the Temporary Protection Directive in 2022’ (2022) EU Immigration and Asylum Law and Policy, <<https://eumigrationlawblog.eu/5-reasons-why-understanding-the-reasons-behind-the-activation-of-the-temporary-protection-directive-in-2022/#more-8261>> accessed 21 April 2022.

348. M. Ineli Ciger, ‘5 reasons why: Understanding the reasons behind the activation of the Temporary Protection Directive in 2022’.



Turkey and Libya to hold back immigrants from reaching the EU territory, the response to Ukrainians fleeing their country has been warm and gracious.³⁴⁹

Further, it cannot be overlooked that the first time the TPD was activated, it was for the ‘predominantly white, Christian population’ despite the previous conflicts and civil wars that caused mass displacement of other peoples of the world since the TPD was introduced.³⁵⁰ Therefore, the recent activation of the TPD points to a double standard in its application with apparent motivations of racism and xenophobia.³⁵¹

This double standard is made clearer by the listed categories of people who are protected by the activation of the TPD. The EU Council listed only the following categories:³⁵²

- a) Ukrainian nationals residing in Ukraine before 24 February 2022
- b) Stateless persons, and nationals of third countries other than Ukraine, who benefited from international protection or equivalent national protection in Ukraine before 24 February 2022; and,
- c) Family members of persons referred to in points (a) and (b) above.

This means that stateless persons, asylum seekers, and other third-country nationals staying legally and even illegally in Ukraine, such as students, were not included in the scope of temporary protection.³⁵³ This has not been made any better by the on-the-ground treatment of non-whites

349. Steve Peers, ‘Temporary protection for Ukrainians in the EU? Q and A’ EU Law Analysis, (2022) <<http://eulawanalysis.blogspot.com/2022/02/temporary-protection-for-ukrainians-in.html>> accessed 21 April 2022.

350. Fenix Humanitarian Legal Aid, ‘Europe’s selective solidarity: The emerging double standard applied to those seeking safety in the EU’ (2022) <<https://www.fenixaid.org/articles/europes-selective-solidarity-the-emerging-double-standard-applied-to-those-seeking-safety-in-the-eu>> accessed 22 April 2022.

351. Amnesty International, ‘EU: Temporary protection is needed for everyone fleeing Ukraine’ (2022) <<https://www.amnesty.org/en/latest/news/2022/03/eu-temporary-protection-is-needed-for-everyone-fleeing-ukraine/>> accessed 22 April 2022; Fenix Humanitarian Legal Aid, ‘Europe’s selective solidarity: The emerging double standard applied to those seeking safety in the EU’.

352. Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, Article 2(4).

353. Amnesty International, ‘EU: Temporary protection is needed for everyone fleeing Ukraine’.

attempting to flee Ukraine into other European Countries. Nationals of African countries and India have experienced discrimination in their fleeing attempts, from being denied entry into or being forced out of trains, to being out-rightly denied entry to other EU Member States.³⁵⁴

2.2.8. New EU Pact on Migration and Asylum

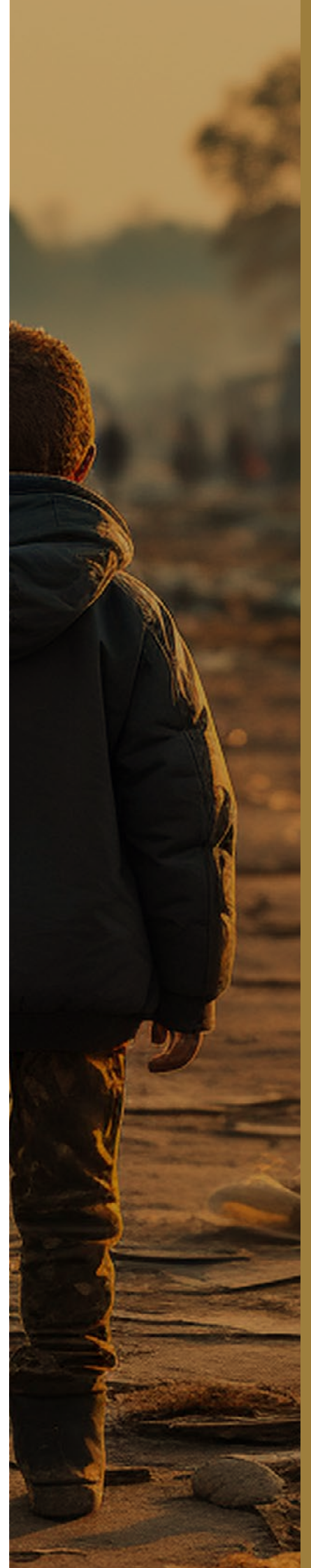
As launched in September 2020 by the European Commission, the EU Pact on Migration and Asylum (referred to as “the Pact”) is a policy document that lays down the EU agenda on migration for the coming years and presents a set of legislative proposals.

- a) **Proposed Screening Regulation.**
 Puts in place a pre-entry screening procedure and uniform rules applicable to all third-country nationals present at the external border of a Member State to establish identity through biometric data, health checks, vulnerability checks, and security risks.³⁵⁵ Unfortunately, this proposed regulation has the following defects:³⁵⁶
 - i) No guarantee or mention that children will have access to legal assistance.
 - ii) No guarantee or mention that a guardian will be appointed for UAMs.
 - iii) No provisions to safeguard children whose age is under dispute.
 - iv) Requires children to be detained during the screening procedure, despite the international consensus and ECtHR decisions advising strongly against the detention of minors, as is discussed in the subsequent sections of this publication.
- b) **Proposed Amended Asylum Procedures Regulation.**
 It unifies the operation of the proposed Screening Regulation, the proposed Asylum and Migration Management Regulation, the proposed amended

354. Human Rights Watch ‘Ukraine: Unequal treatment of foreigners attempting to flee’ (2022) <<https://www.hrw.org/news/2022/03/04/ukraine-unequal-treatment-foreigners-attempting-flee>> accessed 22 April 2022.

355. European Commission Communication (EC) COM (2020) 612 Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, EU 2018/1240 and (EU) 2019/817 (2020).

356. PICUM, ‘The EU Migration Pact: Questions and Answers’ (PICUM 2021) accessed from <<https://picum.org/eu-migration-pact-questions-answers/#~:text=The%20EU%20Pact%20on%20Migration%20and%20Asylum%20is%20a%20policy,of%20legislative%20proposals%20and%20recommendations>> accessed 20 April 2022.



EURODAC Regulation, and the proposed crisis preparedness and management regulation in the spirit of enhancing a common EU asylum system. The EU Commission notes the importance of this particular reform because the Member States' asylum, reception, and return systems remain disharmonized although there has been increased cooperation at the EU level together with support from EU agencies.³⁵⁷

The Platform for International Cooperation on Undocumented Migrants (PICUM) states that this proposal:

i) Grants children with families fewer safeguards than UAMs, based on the assumption that being accompanied by parents sufficiently protects them from harm. For instance, children under 12 years and UAMs are exempt from border procedures while children between 12 and 18 are not, even if they are accompanied by adults who are responsible for them.

ii) There is no obligation for a Member State to assess the best interest of children in families regarding intra-European transfers for return sponsorship.³⁵⁸ There are no specific provisions on adequate protection for children in families within the sponsoring State, while this is required for UAMs.

iii) Will cause the detention of children to a much wider degree than is required by the current EU asylum law and ECtHR jurisprudence

iv) Does not limit the return of children to when it is in their best interests and the impact on their rights and well-being are not assessed before a return decision is issued or implemented.

c) Proposed Crisis Preparedness and Management Regulation.

357. European Commission Communication (EC) COM 611 Amended proposal for Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing 2013/32/EU (2020), 1.

358. The return sponsorship mechanism is introduced by the EU Pact on Migration and Asylum. It involves the "sponsoring" state that will facilitate the voluntary return or deportation of an undocumented person living in another country ("benefitting state"), including through return counselling, reintegration assistance, liaising with third countries, and chartering flights.

See: <<https://picum.org/eu-migration-pact-questions-answers/#:~:text=The%20EU%20Pact%20on%20Migration%20and%20Asylum%20is%20a%20policy,of%20legislative%20proposals%20and%20recommendations>> accessed 20 April 2022.

This Regulation is designed to support the implementation of the other proposed regulations to address situations of crisis and force majeure in the field of migration and asylum.³⁵⁹ It stipulates a set of principles to measure and assign responsibilities to respective actors including the EU Member States, EU Council, EU Commission, European External Action Service, and EU Agencies. The proposal further contains a Migration Preparedness and Crisis Blueprint that provides for two main stages of crisis preparedness and management, that is, the Monitoring and Preparedness Stage (stage one) and the Migration and Crisis Management Stage (stage two).

d) Proposed Asylum and Migration Management Regulation.

It will replace the Dublin Regulation and relaunch the CEAS by establishing a uniform policy framework for migration management that will be adjustable to different migratory challenges faced by the Member States to enhance responsibility sharing. The Regulation includes improved rules for examining asylum applications.³⁶⁰

e) Proposed Amended EURODAC Regulation.

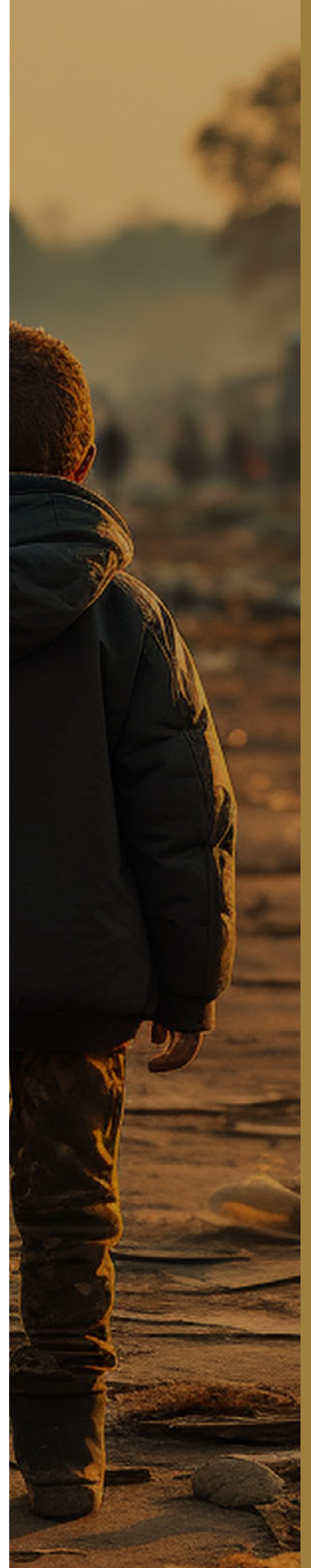
It enlarges the scope of the current EURODAC Regulation by adding new categories of persons for the storage of data, allowing its use to identify irregular migrants, lowering the age for fingerprinting, allowing the collection of identity information and biometric data, and extending the data storage period.³⁶¹ The proposed regulation hopes to take the real-time changes in world migration and address the structural challenges by linking the EU asylum, reception, and return systems for seamless operations and providing important safeguards for protecting minors.

PICUM observes that the regulation would require the collection of data for children older than six years old and they may be coerced into complying

359. Commission Recommendation (EC) 2020/1366 on an EU mechanism for preparedness and management of crises related to migration (2020) OJ L 317/26, p.1.

360. European Commission Communication (EC) COM 610 Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX (Asylum and Migration Fund) (2020).

361. European Commission Communication (EC) COM 614 Amended proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of biometric data (2020), 1.



at a level that respects the dignity and physical integrity of the child.³⁶² PICUM concludes that this directly contradicts the 2005 UN guiding principles on the treatment of unaccompanied and separated children outside their country of origin and the FRA position which both respectively provide that arguments based on migration control cannot override the best interests of the child and that no child should not be fingerprinted for return purposes.³⁶³

The Pact's main objective is to replace the Dublin Regulation by consolidating policies regarding migration, asylum, integration, and border management to build a system that manages and normalises migration for the long term and is founded on European values and international law.³⁶⁴ It was created against the backdrop of the 2015-2016 EU refugee crisis that made elaborate the interdependence of EU Member States in the asylum system and the differences between the Member States that contribute to the present challenges including disproportionate responsibility sharing.

Communication on the Pact makes it clear that the European Commission is aware of the particular vulnerability of children in migration, and, as a such, the reform of EU asylum laws helps to strengthen their rights and protection standards, with particular concern for:³⁶⁵

- a) The promotion of children's rights in international law and the EU Charter of Fundamental Rights, especially the right to be heard, non-discriminatory access to education and early integration services.
- b) Taking the best interest of the child as a primary consideration.
- c) Exemption of UAMs under the age of 12 from the border procedure.
- d) Adequate accommodation and assistance during the asylum process including the time-efficient ap-

362. PICUM, 'The EU Migration Pact: Questions and Answers' (PICUM 2021) accessed from <<https://picum.org/eu-migration-pact-questions-answers/#:~:text=The%20EU%20Pact%20on%20Migration%20and%20Asylum%20is%20a%20policy,of%20legislative%20proposals%20and%20recommendations>> accessed 20 April 2022.

363. PICUM, 'The EU Migration Pact: Questions and Answers' (PICUM 2021) accessed from <<https://picum.org/eu-migration-pact-questions-answers/#:~:text=The%20EU%20Pact%20on%20Migration%20and%20Asylum%20is%20a%20policy,of%20legislative%20proposals%20and%20recommendations>> accessed 20 April 2022.

364. European Commission Communication (EC) COM 609 Communication from the Commission on New Pact on Migration and Asylum (2020).

365. European Commission Communication (EC) COM 609 Communication from the Commission on New Pact on Migration and Asylum (2020), 7.

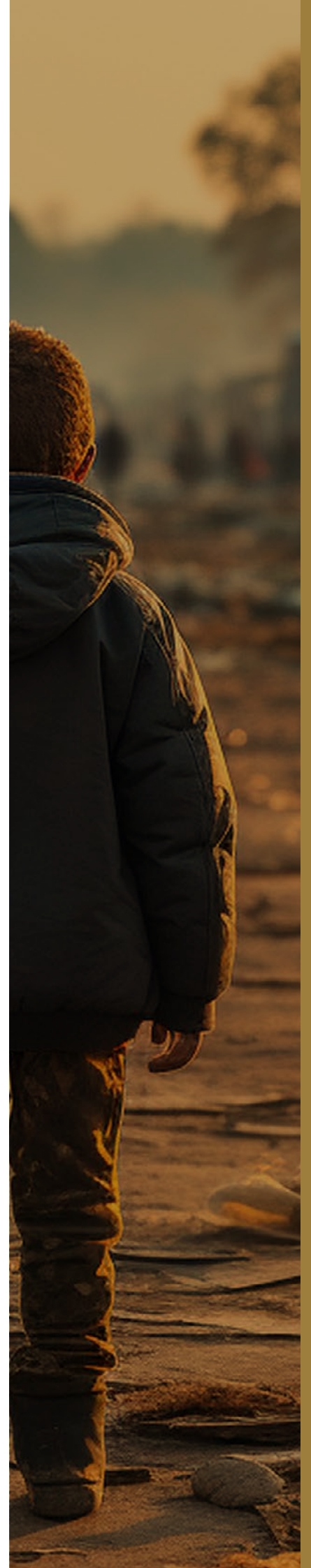
pointment of guardians with access to sufficient resources to function as representatives for UAMs.

In 2021, the Platform for International Cooperation on Undocumented Migrants (PICUM) concluded that the proposed legislation in the Pact may pose great harm to undocumented and migrant children living and arriving in Europe because of the above-identified weaknesses which render the Pact inadequate in protecting them from harm.³⁶⁶

EuroMed Rights shares a similar conclusion on the Pact: its 2021 study indicates that it does not consider the reality of migration policies and practices in different EU countries and will not create a proper solidarity system among the Member States, whereas the first countries of arrival will continue having the responsibility for asylum-seekers and asylum-seekers and migrants will continue having their fundamental rights diminished.³⁶⁷

366. PICUM, 'The EU Migration Pact: Questions and Answers' (PICUM 2021) accessed from <<https://picum.org/eu-migration-pact-questions-answers/#:~:text=The%20EU%20Pact%20on%20Migration%20and%20Asylum%20is%20a%20policy,of%20legislative%20proposals%20and%20recommendations>> accessed 20 April 2022.

367. G. Romeo, 'The new Pact on Migration and Asylum' (EuroMed Rights, Belgium 2021), 30.







CHAPTER 3

ASYLUM-SEEKING CHILDREN AS VULNERABLE PERSONS



ASYLUM-SEEKING CHILDREN AS VULNERABLE PERSONS

3.1. DEFINITION OF KEY CONCEPTS

Under the EU asylum acquis, asylum seekers are defined as applicants for international protection, whether recognized as a refugee, subsidiary protection beneficiaries or another protection status on humanitarian grounds.³⁶⁸ The 1951 Refugee Convention, as read with the 1967 Protocol, establishes a three-pronged test that must be fulfilled for an asylum applicant to be granted the status of refugee. First, asylum applicants must have a well-founded fear of persecution. Second, there must be a clear nexus between the persecution and belonging to a protected class based on race, religion, nationality, membership to a particular social group, or political opinion. Finally, they must prove that the fear of persecution inhibits them from availing themselves of protection in their country of nationality or their country of former residence.³⁶⁹ Since it is a conjunctive test, asylum applicants have to fulfil all three requirements, and it is only then that they are granted refugee status.³⁷⁰

The ECtHR recognized asylum seekers as “a particularly underprivileged and vulnerable population group in need of special protection.”³⁷¹ However, beyond this intrinsic vulnerability within the entire population of asylum seekers, there exist certain groups whose vulnerability is undoubtedly heightened. The Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013, provides an open-ended list of such vulnerable people, including minors, UAMs, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation.³⁷² Minors and UAMs are the focus of this paper.

368. M. Mouzourakis, K. Pollet, C. Woollard, ‘The concept of vulnerability in European asylum procedures’ (ECRE, Brussels 2017) 7.

369. Convention Relating to the Status of Refugees (1951), Article 1 and Protocol Relating to the Status of Refugees (1967), Article 1.

370. The Asylum Procedures Directive (2013/32/EU), Article 2 (g).

371. *M.S.S. v. Belgium and Greece* (2011), (ECtHR), para. 251.

372. The recast Reception Conditions Directive (2013/33/EU), Article 21, .

In the context of asylum, a minor is defined as “a third-country national or stateless person below the age of 18 years.”³⁷³ Such a minor is recognized as a vulnerable member of society who needs special safeguards and care, including the need to grow up in a family environment for the full and harmonious development of his or her personality.³⁷⁴ State Parties to the UNCRC are therefore mandated to ensure that children are not separated from their parents against their will, except when such a separation is deemed necessary for the best interests of the child.³⁷⁵

While all children are considered vulnerable because of their physical and mental immaturity,³⁷⁶ minors seeking asylum have a particularly heightened level of vulnerability that necessarily denotes a bigger obligation on the part of State officials to protect their rights and fundamental freedoms. Their extreme vulnerability is recognized as a decisive factor taking precedence over any considerations regarding their (lack of) legal status. This is due to their specific needs arising not only from their age and lack of independence but also from their asylum-seeker status.

3.2. CHILDREN AS VULNERABLE PERSONS UNDER EU ASYLUM LAW

Neither the concept of vulnerability nor the term “vulnerable person” is expressly defined within the EU Directives, however, they are categorised as “applicants with special reception needs” within the recast Reception Conditions Directive (2013/33/EU).

Article 21 of the recast Reception Conditions Directive stipulates the general principle that in their national laws implementing the Directive, Member States must consider the specific situation of the vulnerable persons listed therein including minors, UAMs, and single parents with minor children. Article 22 further requires the Member States to assess whether the asylum-seeker is vulnerable (without prejudice to the assessment of their asylum application) and if so, to ensure the provision of support throughout the asylum procedure while monitoring their situation. In addition, the concept of vulnerability is recognized within the Asylum Procedures Directive (2013/32/EU), as read with Article 21 of the recast Reception Conditions Directive. Article 15 of the

373. The recast Reception Conditions Directive (2013/33/EU), Article 2 (d).

374. United Nations Convention on the Rights of the Child (1989), Preamble, .

375. United Nations Convention on the Rights of the Child (1989), Article 9 (1).

376. United Nations Convention on the Rights of the Child (1989), Preamble.



Asylum Procedures Directive requires the Member States to consider the asylum seeker's vulnerability, among other aspects, during the personal interview process. Article 31 of the aforementioned Directive further requires the Member States to prioritise the examination of asylum applications for vulnerable applicants (after conducting the vulnerability assessment),³⁷⁷ particularly UAMs.

Vulnerability, therefore, connotes a process of identification and assessment, where the state apparatus encounters the individual asylum seeker.³⁷⁸ Similar to the recast Reception Conditions Directive, international human rights treaties such as the UNCRC recognize the need for special safeguards and care for children due to their vulnerability that stems from physical and mental immaturity.³⁷⁹ In *MSS v Belgium and Greece*, the Court qualified asylum seekers as an inherently vulnerable class of persons that is rooted in their disadvantaged legal positions compared to other groups or nationals.³⁸⁰ Beyond this categorical qualification, the ECtHR confirms that certain categories of asylum seekers are particularly vulnerable independently of their qualification in the EU asylum system, specifically children. Thus, ECtHR case law is evidence of the consideration of children as extremely vulnerable, and such factor takes precedence over any considerations regarding their lack of legal status.³⁸¹ Most importantly, in *GB and Others v Turkey* and *Sh.D and Others v Greece and Others*, the ECtHR reasons that the extreme vulnerability inherent to a child's physical and mental functions takes precedence over the status of an "illegal alien",³⁸² whether or not he or she is accompanied.

It is important to note that the lack of a uniform definition for vulnerability and vulnerable persons has been viewed as an aspect that may create grounds for procedural fragmentation in the EU and at the national level among the Member States.³⁸³

377. The recast Reception Conditions Directive (2013/33/EU), Article 22.

378. M. Mouzourakis, K. Pollet, C. Woollard, 'The concept of vulnerability in European asylum procedures' (ECRE, Brussels 2017) 7.

379. United Nations Convention on the Rights of the Child (1989), Preamble.

380. M. Mouzourakis, K. Pollet, C. Woollard, 'The concept of vulnerability in European asylum procedures' (ECRE, Brussels 2017) 11.

381. M. Mouzourakis, K. Pollet, C. Woollard, 'The concept of vulnerability in European asylum procedures' (ECRE, Brussels 2017) 11.

382. *GB and Others v Turkey* (17 October 2019), (ECtHR) and *Sh.D and Others v Greece, Austria, Croatia, Hungary, Northern Macedonia, Serbia, and Slovenia* (13 June 2019) (ECHR).

383. M. Mouzourakis, K. Pollet, C. Woollard, 'The concept of vulnerability in European asylum procedures' (ECRE, Brussels 2017) 7.

3.3. REASONS WHY CHILDREN SEEK ASYLUM

There are several reasons why children seek asylum. For this study, these reasons have broadly been categorised into two: grave violations against children in armed conflict and gendered violence, which are discussed below:

3.3.1 Grave Violations against Children during Armed Conflict

“All wars, whether just or unjust, disastrous or victorious, are waged against the child.”

-Eglantyne Jebb, the founder of Save the Children International.

Wars are an integral and relentless part of life, as we know it. There is not a single moment in history where a conflict has not been present. While the carnage of war is faced by those on the frontline, the effects of war are much more far-reaching. Women often lose their husbands, fathers, sons, and brothers, but the children are those who bear the greatest brunt in the aftermath.³⁸⁴ In 1999, the UN Security Council identified six main grave violations against children in armed conflict,³⁸⁵ which are discussed below.

a) *Killing and Maiming.*

These heinous actions often occur because of direct targeting or indirect actions, including torture that can occur through crossfire, landmines, cluster munitions, improvised or other indiscriminate explosive devices, or even in the context of military operations, house demolitions, search-and-arrest campaigns, or suicide attacks.³⁸⁶

During wars, children are often tortured as a military tactic. Their detention and torture may be used as punishment to the community, as a vehicle to extract information from the children or their families, and, worst of all, as a means of entertainment.³⁸⁷ These children are often subjected to solitary confinement while naked or blindfolded, beatings, elec-

384. MC. Plunkett, DP. Southall, 'War and children' (Arch Dis Child, 1998) 78, 72–77.

385. United Nations Security Council, Resolution 1261 (1999) Adopted by the Security Council at its 4037th meeting, on 25 August 1999.
<[<https://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1261%20\(1999\)>](https://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1261%20(1999))>.

386. UNICEF, 'Six grave violations against children in times of war' (UNICEF 2022) <<https://www.unicef.org/stories/children-under-attack-six-grave-violations-against-children-times-war>> accessed 29 March 2022.

387. MC. Plunkett, DP. Southall, 'War and children' (Arch Dis Child, 1998) 78, 72–77.



trical shocks, or even hosing down with cold water.³⁸⁸ This torture often ends in the killing or maiming of the children. Between 2005 and 2016, at least 73,023 children were maimed or killed, or both, across 25 conflicts with at least 10,068 of these numbers being recorded in 2016 alone.³⁸⁹

In Afghanistan, data from the United Nations recorded at least 26,025 children who were maimed or killed between 2005 and 2019. In 2019 alone, 874 Afghan children were killed and 2275 maimed.³⁹⁰ Similarly, in Saudi Arabia, at least 10,000 children have been killed or maimed since the escalation of the conflict between a pro-government Saudi-led coalition, and Houthi rebels.³⁹¹ The number of killings and maiming is exacerbated by the employment of both old and new weapons in wars. Indeed, the last two decades have seen an increased use of drones and improvised explosive devices, which may target children in schools or on the streets, but there has also been an equal resurgence in the use of machetes, cluster munitions, and landmines.³⁹² Other times children are killed as a means of ethnic cleansing.

Children may also be forced to witness their families being tortured, with their lives being spared primarily for conscription, domestic servitude, sexual exploitation, or kidnapping for revenge or ransom. Those who manage to escape wind up seeking asylum.

b) *Conscription.*

The CRC places the minimum age of recruitment of children into the armed forces at 15 years.³⁹³ The Optional Protocol to the CRC on Involvement of Children in Armed Conflict further urges State Parties to raise

388. MC. Plunkett, DP. Southall, 'War and children' (Arch Dis Child, 1998) 78, 72–77.

389. M. Kirollos, C. Anning, G.K. Fylkesnes, J. Denselow, 'The War on Children Report,' Save the Children International (Oslo 2018) <<https://www.savethechildren.org/content/dam/usa/reports/advocacy/war-on-children-report-us.pdf>> accessed 10 January 2022.

390. BBC News, 'Afghanistan war: 26,000 Afghan children killed or maimed since 2005' (BBC News 2020) <<https://www.bbc.com/news/world-asia-55039535>> accessed 10 January 2022.

391. UN News, 'Yemen: Four children killed or maimed a day, as war grinds on' (UN News 2021) <<https://news.un.org/en/story/2021/11/1104842>> accessed 10 January 2022.

392. M. Kirollos, C. Anning, G.K. Fylkesnes, J. Denselow, 'The War on Children Report,' Save the Children International (Oslo 2018) <<https://www.savethechildren.org/content/dam/usa/reports/advocacy/war-on-children-report-us.pdf>> accessed 10 January 2022.

393. Convention of the Rights of the Child (1924), Article 38.

this minimum age to 18 years but makes an exception if the recruitment is genuinely voluntary.³⁹⁴ Different countries maintain different standards regarding the minimum age at which children may be legally recruited into the armed forces. The drive behind recruiting child soldiers is that they are cheap to maintain, often more compliant than their adult counterparts and that they are easier to dispense. In longer conflicts, the supply of adult soldiers may be exhausted, and children may be forced to join the war.³⁹⁵

Conscripted children serve various roles from combatants to messengers, porters, and domestic servants. They are also often ordered to commit other acts of violence as grave as murder. Being conscripted into war often overlaps with other grave violations against children including sexual violence, killing and/or maiming, and torture. These egregious violations of their rights often drive them to flee in search of better living conditions.

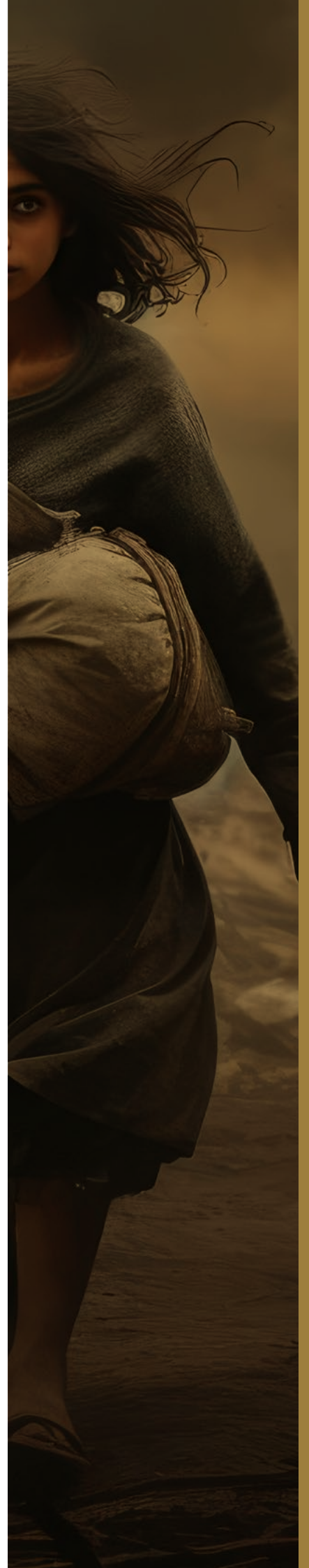
According to the annual UN Security Council Working Group on Children and Armed Conflict (UN CAAC) reports, there were at least 49,460 verified cases of children recruited by armed forces between 2005 and 2016. In 2020, a total of 8,521 children were recruited and used by parties to a conflict, with the highest numbers verified in the Democratic Republic of the Congo, Somalia, the Syrian Arab Republic, and Myanmar.³⁹⁶ In particular, children in several countries affected by major crises, namely, the Central African Republic, Iraq, Israel/State of Palestine, Nigeria, South Sudan, and the Syrian Arab Republic, were exposed to the most egregious violations. In Somalia, the federal and state security forces, as well as clan militias and al-Shabaab, recruited 1716 children in armed conflict, in violation of national law.³⁹⁷ Non-state armed group al-Shabaab forcibly recruited children as young as age

394. Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict (2000), Article 3.

395. MC. Plunkett, DP. Southall, 'War and children' (Arch Dis Child, 1998) 78, 72–77.

396. UN General Assembly, 'Report of the Special Representative of the Secretary-General for Children and Armed Conflict' (UN 2021)
<https://www.un.org/ga/search/view_doc.asp?symbol=A/76/231&Lang=E&Area=UN-DOC> accessed 10 January 2022.

397. US Department of Labour, 'Child Labor and Forced Labor Reports, 2020 Findings on the Worst Forms of Child Labor, Minimal Advancement – Efforts Made but Continued Practices that Delayed Advancement: Somalia' (US Department of Labour 2020)
<<https://www.dol.gov/agencies/ilab/resources/reports/child-labor/somalia>> accessed 10 January 2022.



eight into its ranks and recruited about 1407 children in 2020. They not only fine parents who refuse to surrender their children to them for recruitment, but they also force communities to produce male children for conscription. These children are often used to plant explosive devices, conduct suicide attacks and assassinations, and function as human shields.³⁹⁸ The al-Qaeda group recruited vulnerable children such as the mentally disabled, street children, and orphans to conduct suicide attacks against the government forces.³⁹⁹

c) *Sexual Violence.*

It is used as a means of ethnic cleansing such as through deliberate and forced impregnations. Genocidal rape traces its roots back to World War I and II when Soviet Armies systematically raped German women as a retaliatory tactic.

Children are also at heightened risk of sexual violence, which is a known tactic of war. It is used to humiliate and weaken the morale of civilians. The Sexual Violence in Armed Conflict (SVAC) database reveals that, between 1989 and 2009, 35% of conflicts involved some form of sexual violence against children globally. These acts of violence include rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization/abortion, sexual mutilation, and sexual torture.⁴⁰⁰ Between 2005 and 2016, there were at least 17,515 reported and confirmed cases of sexual violence against children. In 2020, most incidents of sexual violence occurred in Somalia, the Democratic Republic of the Congo, and the Central African Republic. About 1268 boys and girls were affected, which was a 70% increase from 2021.⁴⁰¹

398. US Department of Labour, 'Child Labor and Forced Labor Reports, 2020 Findings on the Worst Forms of Child Labor, Minimal Advancement – Efforts Made but Continued Practices that Delayed Advancement: Somalia' (US Department of Labour 2020) <<https://www.dol.gov/agencies/ilab/resources/reports/child-labor/somalia>> accessed 10 January 2022.

399. M. Kirolos, C. Anning, G.K. Fylkesnes, J. Denselow, 'The War on Children Report,' Save the Children International (Oslo 2018) <<https://www.savethechildren.org/content/dam/usa/reports/advocacy/war-on-children-report-us.pdf>> accessed 10 January 2022.

400. M. Kirolos, C. Anning, G.K. Fylkesnes, J. Denselow, 'The War on Children Report,' Save the Children International (Oslo 2018) <<https://www.savethechildren.org/content/dam/usa/reports/advocacy/war-on-children-report-us.pdf>> accessed 10 January 2022.

401. UN General Assembly, 'Report of the Special Representative of the Secretary-General for Children and Armed Conflict' (UN 2021) <https://www.un.org/ga/search/view_doc.asp?symbol=A/76/231&Lang=E&Area=UN-DOC> accessed 10 January 2022.

d) *Abductions.*

According to the 2015 UN CAAC report, “the abduction of children had primarily been a precursor to other violations, such as killing and maiming, recruitment and use, or sexual violence.” Between 2005 and 2016, at least 14,327 verified cases of children who have been kidnapped have been recorded, with cases reaching a peak in 2015 when at least 3,421 children were reported to have been abducted, with the highest number from South Sudan. The Lord’s Resistance Army in the Central African Region was also notorious for such abductions.⁴⁰²

In 2020, abduction was recognized as the violation which recorded the highest increase from 2019. There were 3202 verified instances of abducted children which was a 90% increase from the 1683 verified abductions recorded in 2019.⁴⁰³ Somalia was responsible for about half of the abduction cases, followed closely by the Democratic Republic of the Congo, the Syrian Arab Republic, and the Lake Chad Basin.⁴⁰⁴

Additionally, many girls from the Yazidi sect were kidnapped by the ISIL in Iraq and kept by fighters as slaves. These numbers are likely to only be a small indication of the real total, in part because abduction often overlaps with other violations – particularly child recruitment and sexual violence.

e) *Attacks Against Protected Areas.*

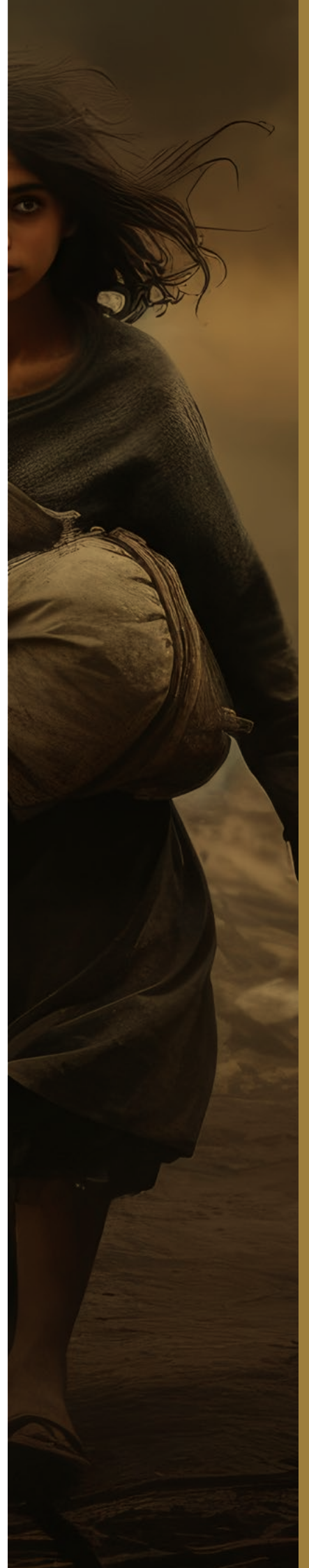
Unlike the ancient wars that took place over battlefields, in today’s armed conflict cities have become the new battlefields, and wars have moved dangerously closer to the lives of ordinary people.⁴⁰⁵ The change in topography and definition of wars over time means that towns and cities populated by ci-

402. M. Kirollos, C. Anning, G.K. Fylkesnes, J. Denselow, ‘The War on Children Report,’ Save the Children International (Oslo 2018) <<https://www.savethechildren.org/content/dam/usa/reports/advocacy/war-on-children-report-us.pdf>> accessed 10 January 2022.

403. UN General Assembly Security Council, ‘Children and armed conflict’ (UN 2020) <https://www.un.org/sg/sites/www.un.org.sg/files/atoms/files/15-June-2020_Secretary-General_Report_on_CAAC_Eng.pdf> accessed 10 January 2022.

404. UN General Assembly Security Council, ‘Children and armed conflict’ (UN 2020) <https://www.un.org/sg/sites/www.un.org.sg/files/atoms/files/15-June-2020_Secretary-General_Report_on_CAAC_Eng.pdf> accessed 10 January 2022.

405. Maurer P, ‘War in Cities; What is at Stake?’ International Committee of the Red Cross, 4 April 2017 - <https://www.icrc.org/en/document/war-cities-what-stake-0>



vilians are no longer exempt from the effects of war. Consequently, children in conflict zones are vulnerable in areas that should be protected, such as schools and hospitals.

Between 2005 and 2016, there were 15375 attacks on schools and hospitals, which was a 100% increase over the decade. In 2020 alone, a total of 856 attacks were verified, with the Democratic Republic of the Congo, Afghanistan, the Syrian Arab Republic, and Burkina Faso recording the highest number of attacks. Protected persons, such as teachers, doctors, children, and patients, were abducted, threatened, detained, injured, or even killed. These attacks further exacerbated pre-existing challenges for children in terms of accessing education and health services.⁴⁰⁶ In Yemen, at least 460 schools have been attacked in the past five years, including those caught in the crossfire.⁴⁰⁷ Between 2017 and 2018, The Global Coalition to Protect Education from Attack identified at least 30 reports of military use of schools in Yemen. In 2020, more than 60% of children whose schools came under attack did not return to the classroom.⁴⁰⁸

Beyond the military attacks, children are also forced out of school when their classrooms are occupied by armed groups or used as collective shelters for displaced families. Schools are also used as military launch sites and for child recruitment and indoctrination. For instance, in 2015, ISIL tortured and killed a female teacher in Ninawa, Iraq, for refusing to use their curriculum.⁴⁰⁹

f) *Denial of Humanitarian Access.*

Today's conflicts are marked by the besieging of civilian populations and the denial of humanitarian access. It consists of blocking the free passage of

406. UN General Assembly Security Council, 'Children and armed conflict' (UN 2020) <https://www.un.org/sg/sites/www.un.org.sg/files/atoms/files/15-June-2020_Secretary-General_Report_on_CAAC_Eng.pdf> accessed 10 January 2022.

407. UNICEF, Impact of the conflict on children's education in Yemen (UNICEF, Yemen 2021) <<https://www.unicef.org/yemen/media/5546/file/EDUCATION%20DISRUPTED%20Report.pdf>>.

408. H. Okasheh, Will I see my children again? (Save the Children, Online 2021) <<https://resource-centre-uploads.s3.amazonaws.com/uploads/AOE-19102021.pdf>>.

409. M. Kirolos, C. Anning, G.K. Fylkesnes, J. Denselow, 'The War on Children Report,' Save the Children International (Oslo 2018) <<https://www.savethechildren.org/content/dam/usa/reports/advocacy/war-on-children-report-us.pdf>> accessed 10 January 2022.

humanitarian assistance to civilian populations or delaying the delivery of such assistance through the military use of humanitarian premises, attacks on essential civilian infrastructure, bureaucratic impediments, and restrictions on movements. It may also entail the deliberate attack on humanitarian workers through killings, assaults, and arbitrary detention.⁴¹⁰

In January 2018 for instance, suicide attackers detonated explosives before storming the offices of the Save the Children charity in the eastern Afghan city of Jalalabad,⁴¹¹ where the lives of four aid workers were lost.⁴¹² Consequently, Save the Children was forced to temporarily suspend all its programs across Afghanistan and close its offices. In 2019, there were 4400 verified incidents of this violation. This was the highest increase in the number of incidents verified for any violation, compared with 2018.⁴¹³ Non-state actors especially in Yemen, Mali, the Central African Republic, and the Syrian Arab Republic were the main perpetrators of such violations.⁴¹⁴ Outside of Gaza, about 2,127 children were delayed and/or denied access to specialised medical care. In 2020, there were 4156 violations of humanitarian access, with 661 being perpetrated by Israeli forces in the occupied West Bank, including East Jerusalem, and Gaza.⁴¹⁵ The violation of denial of humanitarian access has increased by 1500% since 2010.⁴¹⁶

410. UN General Assembly Security Council, 'Children and armed conflict' (UN 2020) <https://www.un.org/sg/sites/www.un.org.sg/files/atoms/files/15-June-2020_Secretary-General_Report_on_CAAC_Eng.pdf> accessed 10 January 2022.

411. Save the Children offices attacked in Jalalabad, Afghanistan 24 January 2018, <<https://www.bbc.com/news/world-asia-42800271>>.

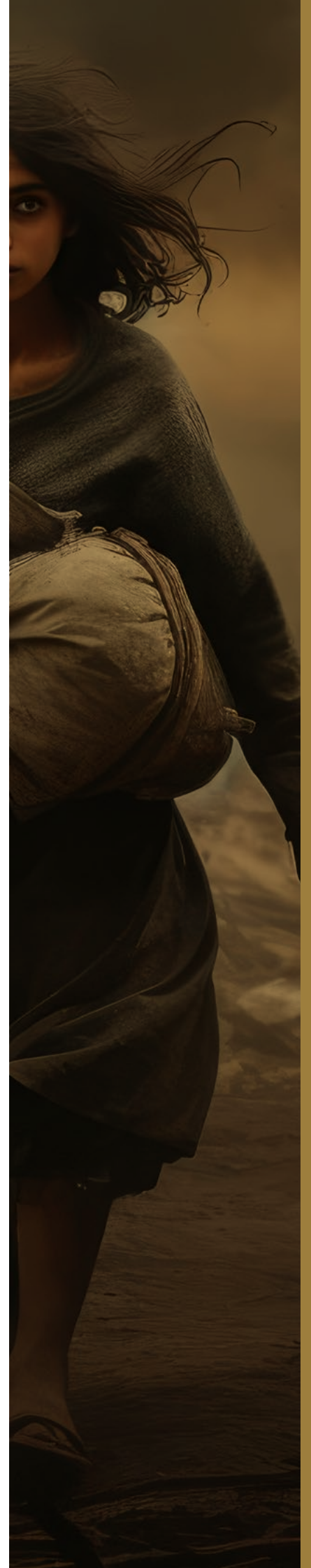
412. M. Kirollos, C. Anning, G.K. Fylkesnes, J. Denselow, 'The War on Children Report,' Save the Children International (Oslo 2018) <<https://www.savethechildren.org/content/dam/usa/reports/advocacy/war-on-children-report-us.pdf>> accessed 10 January 2022.

413. UN General Assembly Security Council, 'Children and armed conflict' (UN 2020) <https://www.un.org/sg/sites/www.un.org.sg/files/atoms/files/15-June-2020_Secretary-General_Report_on_CAAC_Eng.pdf> accessed 10 January 2022.

414. UN General Assembly Security Council, 'Children and armed conflict' (UN 2020) <https://www.un.org/sg/sites/www.un.org.sg/files/atoms/files/15-June-2020_Secretary-General_Report_on_CAAC_Eng.pdf> accessed 10 January 2022.

415. UN General Assembly Security Council, 'Children and armed conflict' (UN 2021) <https://www.un.org/ga/search/view_doc.asp?symbol=S/2021/437&Lang=E&Area=UNDOC> accessed 10 January 2022.

416. M. Kirollos, C. Anning, G.K. Fylkesnes, J. Denselow, 'The War on Children Report,' Save the Children International (Oslo 2018) <<https://www.savethechildren.org/content/dam/usa/reports/advocacy/war-on-children-report-us.pdf>> accessed 10 January 2022.



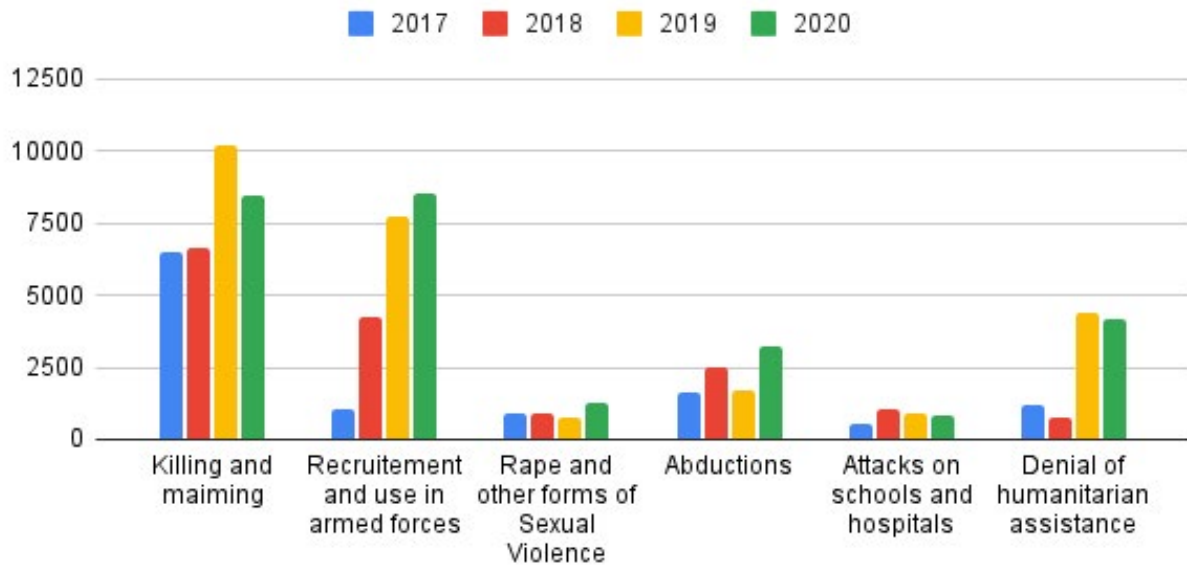
While such incidents are often a collective punishment to all civilians, children are the biggest bearers of the aftermath. Often denial of humanitarian access leads to more deaths of children through hunger and disease than from the direct impact of the violence itself.⁴¹⁷ For instance, in the occupied West Bank including East Jerusalem, and Israel, children in need of medical treatment faced obstacles caused by the suspension of coordination between the authorities of the State of Palestine and Israel in response to the plans by Israel to annex parts of the occupied West Bank. Around 28% of the permit applications to Israeli authorities for children to exit through the Erez crossing to access specialised medical treatment outside Gaza were delayed and 3% were denied. This affected a total of 659 children with three Palestinian children dying while waiting for permission to access medical care outside Gaza.⁴¹⁸

These are some of the reasons children in armed conflict seek asylum. The figure below shows trends in grave violations against children in the armed conflict committed over four reporting years.

417. M. Kirolos, C. Anning, G.K. Fylkesnes, J. Denselow, 'The War on Children Report,' Save the Children International (Oslo 2018) <<https://www.savethechildren.org/content/dam/usa/reports/advocacy/war-on-children-report-us.pdf>> accessed 10 January 2022.

418. UN General Assembly Security Council, 'Children and armed conflict' (UN 2021) <https://www.un.org/ga/search/view_doc.asp?symbol=S/2021/437&Lang=E&Area=UNDOC> accessed 10 January 2022.

Grave Violations against Children in Armed Conflict



*Data retrieved from UN Children and Armed Conflict Reports 2018 - 2021

3.3.2. Gendered Persecution

Gendered violence is one of the most controversial reasons behind the flight for asylum. It can take many forms including domestic violence, female genital mutilation, trafficking for sexual exploitation, honour killings, and forced marriage, which are discussed below.⁴¹⁹

a) *Female Genital Mutilation (FGM).*

Around 20,000 women and girls from countries that practice FGM seek asylum in Europe every year and at least 1,000 asylum claims are directly related to FGM.⁴²⁰ Between 2012 and 2020, four studies to map FGM, conducted by the European Institute for Gender Equality (EIGE) found that there are victims (or potential victims), in at least 16 EU countries: Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Cyprus, the Netherlands, Luxembourg, Malta, Austria, Portugal, Finland, and Sweden.⁴²¹

419. K Musalo, 'Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to Principled Action' [2007] VJSPL 119, 119.

420. R Shreeves, 'Zero tolerance for female genital mutilation (European Parliament 2022)' <<https://www.europarl.europa.eu/RegData/etudes/ATAG/2017/595916/>> accessed 16 January 2022.

421. European Institute for Gender Equality (EIGE), 'Female genital mutilation (EIGE)' <<https://eige.europa.eu/gender-based-violence/female-genital-mutilation>> accessed 16 January 2022.

b) *Trafficking for Sex Work.*

In 2015, the European Commission reported that out of 30,000 registered trafficking victims in the EU in only three years between 2010 and 2012, 70% were victims of sexual exploitation. 95 % of these victims were women and girls. While there were victims from outside the EU, including Nigeria, Brazil, China, Vietnam, and Russia, over 60% of the victims were trafficked internally from countries like Romania, Bulgaria, and Poland.⁴²²

c) *Honour Killing.*

Honour killing is “the killing of women for suspected deviation from sexual norms imposed by society.”⁴²³ This extreme act of violence is not only perpetrated upon a woman who has broken her own code through fornication, adultery, or divorce, it also extends to women who have been the victims of male violations of their sexual “honour” and they have fallen pregnant as victims of incest and rape. By 2003, honour killings had been documented in Bangladesh, Brazil, Ecuador, Egypt, India, Israel, Italy, Jordan, Morocco, Pakistan, Sweden, Turkey, Uganda, and the UK.⁴²⁴ In Germany alone, a study on cases between 1996 and 2005 identified at least seven to ten honour killings every year.

Children, especially girl children are not exempt from this life-or-death moral code. Underage pregnancy, or even having a boyfriend is enough to be sentenced to death in the name of honour.⁴²⁵ Consequently, women and children flee from their families in an attempt to stay alive.

d) *Forced Marriage.*

Any marriage that occurs without the consent of one or both parties to the union is classified as forced. Therefore, any child marriage amounts to forced marriage because it is universally considered that children under 18 years cannot consent to such a

422. A Zobnina, ‘Women, Migration, and Prostitution in Europe: Not a Sex Work Story’ [2017] DJAEV <<https://doi.org/10.23860/dignity.2017.02.01.01>>.

423. F. Faqir, ‘Intrafamily femicide in defence of honour: the case of Jordan’ [2001] TWQ, 65-82.

424. IJ. Sajid, ‘Honour Killing: a crime against Islam’ (Muslim Council of Britain 2003) <<http://www.mcb.org.uk/jalil-sajid.html>>.

425. A. Windmann, ‘Immigrants Flee Families to Find Themselves’ (Spiegel International 2012) <<https://www.spiegel.de/international/germany/young-immigrant-women-flee-their-families-a-826648.htm>> accessed 15 January 2022.

union.⁴²⁶ By 2016, the International Labour Office (ILO) reported that an estimated 15.4 million people, with 13 million comprising women and girls, were living in forced marriage, with the majority of them taking place in Africa, followed closely by Asia. For adults, the difficulty with proving that forced marriage is indeed a form of violence stems from the recognition that many societies practise arranged marriages.⁴²⁷ Of all the victims of forced marriages, 37% of them were children at the time the marriage took place, and 44% were forced into marriage before the age of fifteen.⁴²⁸ 96% of the victims were girls, with the youngest child victim in the studied sample being nine years old.⁴²⁹

In 2016, the Norwegian Directorate for Children, Youth and Family Affairs (Bufdir) revealed that 61 applicants for asylum in the Scandinavian country were under the age of 18 and were married to older men. The youngest child bride was only eleven years old, and at least two young girls were expecting their second baby. Most of the child brides seeking asylum usually come from Syria, Iraq, and Afghanistan.⁴³⁰ Similarly, 49 % of the women and girls who were seeking asylum in Cyprus were victims of one or more forms of Sexual and Gender-Based Violence, including trafficking for sexual exploitation and forced marriages.⁴³¹

Yet regardless of the proliferation of these atrocities, and their undoubted risk to the lives of women and children, many still hold the standpoint that the Refugee Convention and its Protocol were not meant to extend their protection to women and children fleeing gendered persecution. The reasons behind this standpoint include: First, they maintain that the

426. International Labour Organization (ILO), Global estimates of modern slavery: forced labour and forced marriage (ILO, Switzerland 2017) 17.

427. International Labour Organization (ILO), Global estimates of modern slavery: forced labour and forced marriage (ILO, Switzerland 2017) 45.

428. International Labour Organization (ILO), Global estimates of modern slavery: forced labour and forced marriage (ILO, Switzerland 2017) 10.

429. International Labour Organization (ILO), Global estimates of modern slavery: forced labour and forced marriage (ILO, Switzerland 2017) 46.

430. 'Norway refugees child brides' (Sputnik News) <<https://sputniknews.com/20160203/norway-refugees-child-brides-1034168385.html>>, accessed 21 June 2022.

431. UNHCR, 'UNHCR launches report on sexual and gender-based violence among asylum-seekers in Cyprus' (UNHCR 2021) <<https://www.unhcr.org/cy/2021/12/03/>> accessed 16 January 2022.



harms included under gendered violence do not amount to persecution because they are caused by cultural or religious norms. Second, they contend that for the claims to be valid, the persecution must be government inflicted. Therefore, family-inflicted persecution may not be considered valid. Finally, the last argument is that violence against women and girls because of their gender does not fall under any of the protected classes, and therefore lacks a nexus between the act of persecution and the protected class.⁴³²

The lack of recognition of the claims of victims of gendered violence and prosecution contravenes the provisions of The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, also known as the Istanbul Convention, which recognizes gender-based violence against women as a form of persecution giving rise to international protection. It has been ratified by thirty-four Member States of the Council of Europe and signed by twelve Member States – along with the European Union.⁴³³ It is also in direct contravention of Article 9 (2) of the EU Qualification Directive (2011/95/EU) which lists “acts of a gender-specific or child-specific nature” among possible acts of persecution.⁴³⁴

3.4. CATEGORIES OF ASYLUM-SEEKING CHILDREN

In their quest for international protection, asylum-seeking children fall into either one of two major categories: unaccompanied minors (UAMs) or accompanied minors. The consequence of this categorization is that the minors are subjected to different procedural steps in their application process for asylum. These procedural steps arise from EU law in conjunction with the national laws of an individual Member State and are designed to consider the best interest of the minors in each category.

432. K Musalo, ‘Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to Principled Action’ (2007) VJSPL 119, 119.

433. The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), Article 60.

434. The recast Qualification Directive (2011/95 EU), Article 9 (2).

3.4.1. Unaccompanied Minors (UAMs)

In EU law an “unaccompanied minor” (UAM) arrives on the territory of a Member State of the EU unaccompanied by an adult responsible for them whether by law or the practice of that Member State and for as long as they are not effectively taken into the care of such a person.⁴³⁵ This definition includes minors who are left unaccompanied after they have entered the territory of a Member State.

A minor becomes a UAM as a result of a variety of situations. It could occur during the move to seek asylum, a time in which family separation is sometimes inevitable. It may occur deliberately when parents send their children to foreign countries to seek asylum because of the hardship in their home country.⁴³⁶ It may also arise when parents entrust the care of their children to others, or accidentally, including during flight or when seeking shelter and assistance.

When circumstances force families to flee on short notice, some family members, especially young children, older relatives, or persons with disabilities, may be left behind or accidentally separated from the family. Consequently, sometimes a minor may arrive in the territory of the EU Member State unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned or may be left unaccompanied after he or she has entered the territory of the Member State. For as long as he or she is not effectively taken into the care of the adult responsible for him or her, the child is considered a UAM.

UAMs are further sub-categorized into two; separated minors and married minors.

a) Separated Minors.

This category includes children who are separated from both parents or their previous legal or customary guardians and arrive in the territory of Member States by themselves with no accompanying

435. The recast Qualification Directive (2011/95 EU), Article 2 (l) and 2 (m).

436. AA. Arian, ‘Why are so many Iranian minors seeking asylum in Europe?’ (Aljazeera 2019) <<https://www.aljazeera.com/opinions/2019/1/19/why-are-so-many-iranian-minors-seeking-asylum-in-europe/>> accessed 16 January 2022.



adult.⁴³⁷ There is no legal definition for a separated minor, nonetheless, the story of Abed, an 11-year-old asylum seeker provides a good example of a UAM:⁴³⁸

“Abed was just 11 years old when he left his parents and siblings in Iran and began the long and dangerous journey to Europe...Initially, he travelled with an uncle. They walked after nightfall, and at one point were forced to run for their lives to escape gunfire and imprisonment. When they finally arrived in Turkey, they spent months living in cramped conditions at the behest of smugglers. It took four months to successfully cross the Aegean from Turkey to Greece. “We had to take a boat from Turkey with 40 people...it was so scary”. Abed finally arrived on the island of Lesbos in 2019. At this point, his uncle left him to fend for himself and he became one of more than 1,000 unaccompanied asylum-seeking children in Greece...”

The category also includes children separated from both parents or their previous legal or customary guardians but arrive at the territory of a Member State accompanied by relatives or unrelated adults not responsible for them.⁴³⁹

b) Married Minors.

This category of minors has neither a straightforward definition nor express meaning in international legislation. A reason for this could be the different viewpoints of looking at married minors. For one, a married minor could be already married and seeking asylum on account of forced marriage, with their country of origin being unwilling or unable to protect them from child marriage. Secondly, a married minor could be legally married in their state of origin and is seeking reunification with either their parents or guardians or with their spouses.

The Dublin Regulation remotely gives meaning to the term “married minor.” Under the Dublin Regulation, the parents or other adults responsible for a married

437. CRC, General Comment No. 6 Treatment of Unaccompanied and Separated Children Outside their Country of Origin (CRC, 39th Session 2005) para. 8.

438. L Donovan, ‘Lone refugee children go from homeless in Greece to new lives across Europe’ (UNHCR 2021) <<https://www.unhcr.org/news/stories/2021/12/61b875a94/>> accessed 16 January 2022.

439. CRC, General Comment No. 6 Treatment of Unaccompanied and Separated Children Outside their Country of Origin (CRC, 39th Session 2005) para. 8.

minor are not considered family members of the minor, to determine the responsible Member State for the application.⁴⁴⁰ Yet this applies only where the spouse of the minor is legally present in the territory of an EU Member State.⁴⁴¹ The married minor and their spouse are taken to no longer be part of the nuclear family they formed with their parents but to have established their own nuclear family with their spouse.⁴⁴² In any case, the Dublin Regulation alludes to the second description of a married minor.

As to their asylum-seeking categorization, married minors are considered UAMs in a majority of the EU Member States.⁴⁴³ However, in seven EU Member States (Denmark, Estonia, Spain, France, Hungary, Italy, and Slovenia), married minors may be considered accompanied depending on their age, the national laws, or the individual assessments undertaken.⁴⁴⁴

As elaborated in the preceding chapter, due to the high nature of their vulnerability, UAMs are subject to a distinct set of special procedural guarantees in their application for asylum. These include the right to have a representative assigned to them to assist them in the asylum procedures to ensure the best interests of the minor are met.⁴⁴⁵ UAMs are also given priority in the examination and processing of their applications to restrict the period of their vulnerability. Further, under Article 6 (4) of the Dublin Regulation Member States of the EU must search and identify the family members or relatives of the minor in the other Member States to determine in which state the minor's application will be determined.⁴⁴⁶

In addition, Article 25 of the EU Council Directive 2013/32/EU imposes a draft of obligations on the Member States

440. Dublin Regulation (EU) No 604/2013, Article 2 (g).

441. Dublin Regulation (EU) No 604/2013, Article 8 (1).

442. A. Walz, 'The human rights responsibilities of host states in relation to child marriages involving refugees, a study of European responses to the European refugee crisis' (University of Cape Town, 2019) 58.

443. These countries include Austria, Belgium, Switzerland, Cyprus, Germany, Greece, Finland, Ireland, Lithuania, Netherlands, Norway, Poland, Sweden, and Slovakia. See EASO, 'EASO Report on asylum procedures for children' (EASO 2019), 15.

444. EASO, 'EASO Report on asylum procedures for children' (EASO 2019), 15 <<https://euaa.europa.eu/sites/default/files/EASO-Report-asylum-procedures-for-children-EN.pdf>> accessed 16 January 2022

445. Dublin Regulation (EU) No 604/2013, Article 6 (2); Asylum Procedures Directive (EC) 2013/32/EU [2013], Article 2 (n).

446. Dublin Regulation (EU) No 604/2013, Article 6 (4).

concerning the special protection of UAMs. These include the obligations to ensure: that the minor's representative has the necessary expertise,⁴⁴⁷ that the representative is present during the minor's interview,⁴⁴⁸ that the person conducting the personal interview has the necessary knowledge of the needs of minors,⁴⁴⁹ that UAMs and their representatives are provided with free legal and procedural information⁴⁵⁰ among others. Moreover, where a return decision is issued against a UAM, the Member States through appropriate bodies other than authorities enforcing a return decision, are required to assist them.⁴⁵¹

Detention of UAMs is urged against but is allowed only as a matter of last resort.⁴⁵² Member States should provide UAMs with accommodation with personnel and facilities that take into account their special needs.⁴⁵³ In *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, a five-year-old child who was travelling with her uncle was apprehended at the Brussels airport for not having the requisite travel papers. The purpose of the journey was for the child to rejoin her mother who had obtained refugee status in Canada. The child was detained for two months in a centre intended for adults with no counselling or educational assistance from a qualified person, pending a determination on whether she could be allowed entry into Belgium. The ECtHR found that owing to her young age and the fact that she was unaccompanied by her family, the child was extremely vulnerable. The authorities had failed to take adequate measures to discharge their obligation to take care of the child and to prevent her detention, which demonstrated a lack of humanity.⁴⁵⁴

Despite the presence of special guarantees for unaccompanied children, there still exist several challenges facing this category of minors. Of the 16,700 child asylum seekers who arrived in Europe (Bulgaria, Cyprus, Greece, Italy, Malta, and Spain) in 2020, 10,000 were UAMs,⁴⁵⁵ account-

447. Asylum Procedures Directive (EC) 2013/32/EU [2013], Article 25 (1) (a).

448. Asylum Procedures Directive (EC) 2013/32/EU [2013], Article 25 (1) (b).

449. Asylum Procedures Directive (EC) 2013/32/EU [2013], Article 25 (3) (a).

450. Asylum Procedures Directive (EC) 2013/32/EU [2013], Article 25 (4).

451. Directive (2008/115/EC), Article 10 (1).

452. Directive (2008/115/EC), Article 17 (1).

453. Directive (2008/115/EC), Article 17 (4).

454. *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* (2006) (ECtHR).

455. UNHCR, 'Global Trends in Forced Displacement - 2020' (UNHCR The UN Refugee Agency 2020). <<https://www.unhcr.org/flagship-reports/globalreport/>> accessed 16 January 2022.

ing for a percentage of 59.9%. This high figure provides a useful indication of the magnitude of efforts that need to be directed to solve the challenges that face this particular category of minors.

3.4.2. Accompanied Minors

There is no express definition for an “accompanied minor” in the EU asylum *acquis* but a definition may be inferred contrary to that of a UAM as a minor is one who arrives on the territory of a Member State accompanied by their parent(s) or an adult responsible for them whether by law or by the practice of the Member State concerned and for as long as they are effectively taken into the care of such a person.⁴⁵⁶ According to the UNHCR, about 6,700 of the 16,700 children seeking asylum in Europe in 2020 were accompanied minors.⁴⁵⁷

Despite the lack of an express definition in the EU asylum *acquis*, a large number of Member States have established their national definitions with varying similarities to the definition contrary to that of “unaccompanied minor.” It is only in Austria, Spain, Lithuania, and Romania where an express definition of the term has not been established.⁴⁵⁸

An accompanied minor can make their application on their behalf if they have the legal capacity according to the law of the Member State concerned or through their parents or other adult family members or an adult responsible for them.⁴⁵⁹ Where the application is made by an adult responsible for the minor, the minor’s application status is indissociable from that of the adult(s) responsible for them.⁴⁶⁰

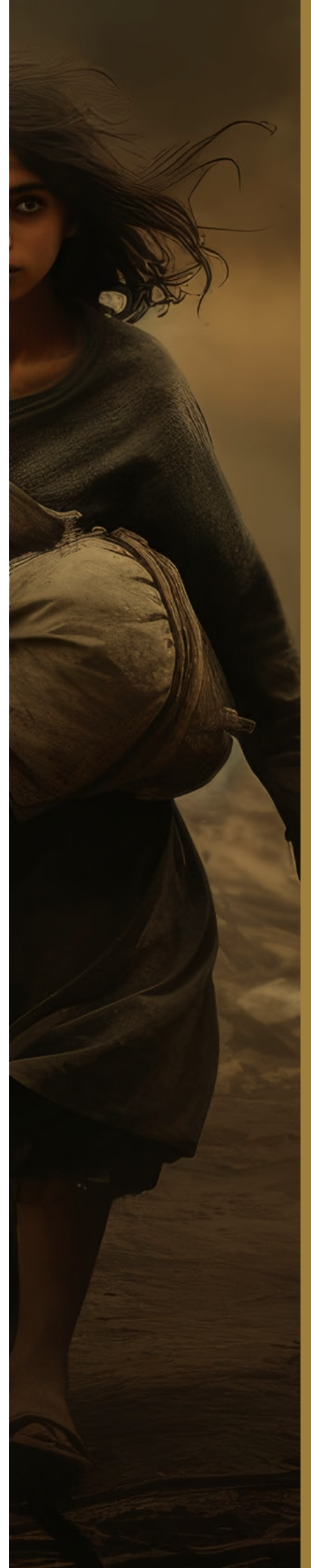
456. EASO, ‘EASO Report on asylum procedures for children’ (EASO 2019), 8.

457. UNHCR, ‘Global Trends in Forced Displacement - 2020’ (UNHCR The UN Refugee Agency 2020). <<https://www.unhcr.org/flagship-reports/globalreport/>> accessed 16 January 2022.

458. EASO, ‘EASO Report on asylum procedures for children’ (EASO 2019), 9.

459. Asylum Procedures Directive (EC) 2013/32/EU [2013], Article 7 (3).

460. Dublin Regulation (EU) No 604/2013, Article 20.







CHAPTER 4

OBSTACLES FACED BY CHILDREN SEEKING ASYLUM IN THE EUROPEAN UNION



OBSTACLES FACED BY CHILDREN SEEKING ASYLUM IN THE EUROPEAN UNION

With the knowledge of EU Asylum law and the reasons why children seek asylum, it is now imperative to dwell on the disconnect between their actual application in the EU Member States while considering their national laws. This chapter contains a general outline of the asylum-seeking procedure in the EU followed by an in-depth analysis of the child-related weaknesses identified in each fundamental stage of the process. The particular manifestation of these weaknesses will be illustrated using case studies based on Germany, France, and Spain as the specific EU Member States, with a comparative study of the US.

4.1. BREAKDOWN OF THE GENERAL ASYLUM-SEEKING PROCEDURE IN THE EU

These are the distinct categories of asylum procedures offered within the EU Member States as provided for under the Asylum Procedures Directive (2013/32/EU) and Dublin Regulation No 604/2013). Not much information can be found on the specific procedures, but guidance on time-limits and procedural safeguards are indicated within the aforementioned Directive and Regulation.

a) Regular Asylum Procedure.

According to Article 31 (1) of the Asylum Procedures Directive, it is an application for asylum protection in the first instance, with the examination of protection that needs to be concluded within six months of being lodged or from the moment the responsible Member State is determined. There are various provisions for the extension of the time limit, but the Member States are required to conclude the examination of the procedure within a maximum time limit of 21 months from the lodging of the application with consideration of the basic principles and guarantees of Chapter II of the Asylum Procedures Directive, which include the procedural safeguards required for vulnerable applicants.⁴⁶¹

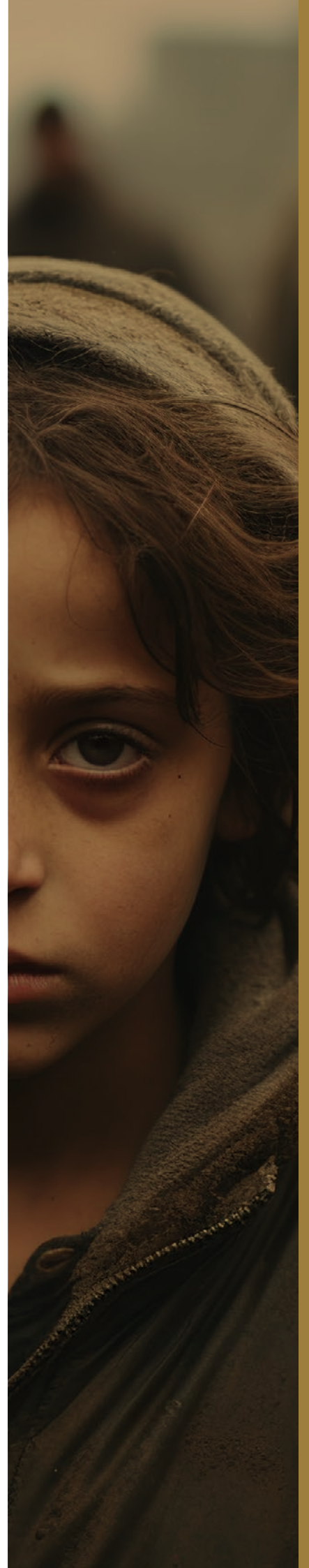
b) Special Asylum Procedures.

461. Asylum Procedures Directive (EC) 2013/32/EU (2013), Article 31 (5) and 31 (7).

i) Accelerated Procedure.

The examination of protection needs of unfounded or security-related cases which are conducted at the border or in the transit zones, as stated in Article 31 (8) of the Asylum Procedures Directive. It is indicated therein as an application for asylum protection in the first instance that may be conducted at the border or in transit zones per Article 43 provisions (border procedure) if:

- The applicant, in submitting his or her application and presenting the facts, has only raised issues that are not relevant to the examination of whether he or she qualifies as a beneficiary of international protection under the recast Qualification Directive; or
- The applicant is from a safe country of origin within the meaning of the Asylum Procedures Directive; or
- The applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents concerning his or her identity and/or nationality that could have affected the decision; or
- It is likely that, in bad faith, the applicant has destroyed or disposed of an identity or travel document that would have helped establish his or her identity/nationality; or
- The applicant has made inconsistent and contradictory, clearly false, or obviously improbable representations which contradict sufficiently verified country-of-origin information, thus making his or her claim clearly unconvincing concerning whether he or she qualifies as a beneficiary of international protection under the recast Qualification Directive; or
- The applicant has introduced a subsequent application for international protection that is not inadmissible; or
- The applicant is making an application merely to delay or frustrate the enforcement of an earlier or imminent decision which would result in his or her removal; or
- The applicant entered the territory of the Member State unlawfully or prolonged his or her stay unlawfully and, without good reason,



has either not presented himself or herself to the authorities or not made an application for international protection as soon as possible, given the circumstances of his or her entry; or

- The applicant refuses to comply with an obligation to have his or her fingerprints taken per the EURODAC Regulation; or
- The applicant may, for serious reasons, be considered a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security or public order under national law.⁴⁶²

ii) Admissibility Procedure.

In addition to cases in which an application is not examined under the Dublin Regulation, Member States are not required to examine whether the applicant qualifies for international protection per the recast Qualification Directive where an application is considered inadmissible under Article 33 of the Asylum Procedures Directive.⁴⁶³

It involves the examination of admissibility (but not protection needs) of asylum-seekers who may be the responsibility of another country or have lodged repetitive claims.⁴⁶⁴ Member States may consider an application for international protection as inadmissible only if:

- Another Member State has granted international protection; or
- A country that is not a Member State is considered as the first country of asylum for the applicant; or
- A country that is not a Member State is considered a safe third country for the applicant; or
- The application is a subsequent application, where no new elements or findings relating to the examination of whether the applicant qualifies as a beneficiary of international protection under the recast Qualification Directive have arisen or have been presented by the applicant; or

462. Asylum Procedures Directive (EC) 2013/32/EU (2013), Article 31 (8).

463. Asylum Procedures Directive (EC) 2013/32/EU (2013), Articles 33 (1).

464. Asylum Procedures Directive (EC) 2013/32/EU (2013), Articles 33 - 34.

- A dependant of the applicant applies after he or she has consented to have his or her case be part of an application lodged on his or her behalf, and there are no facts relating to the dependant's situation which justify a separate application.⁴⁶⁵

c) Dublin Procedure.

This procedure has been analysed within the Dublin Regulation section above. The examination of claims (but not protection needs nor admissibility) of asylum-seekers who may fall under the responsibility of another EU Member State.

d) Border Procedure.

As per involves the accelerated examination of admissibility or merits at borders or in transit zones to determine:

- The admissibility of an application made at such locations; or
- The substance of an application in a procedure.⁴⁶⁶

A decision must be made within a reasonable time, however, if it is not made within four weeks, then the applicant is granted entry to the territory of the Member States for proceedings of their application in line with the relevant procedure that applies.⁴⁶⁷ Moreover, where there are many applicants at the border or transit zones, they are accommodated nearby,⁴⁶⁸ hence the reception centres.

4.2. OBSTACLES FACED BY ASYLUM-SEEKING CHILDREN IN THE EU

Each of the aforementioned types of asylum applications has difficulties that are intertwined. The EU asylum system has been the subject of criticism from scholars and the UNHCR who recently declared the jurisdiction has the ability to play a leading role in protecting refugees by establishing a common response system to securely and humane-

⁴⁶⁵. Asylum Procedures Directive (EC) 2013/32/EU (2013), Article 33 (2).

⁴⁶⁶. Asylum Procedures Directive (EC) 2013/32/EU (2013), Article 43 (1).

⁴⁶⁷. Asylum Procedures Directive (EC) 2013/32/EU (2013), Article 43 (2).

⁴⁶⁸. Asylum Procedures Directive (EC) 2013/32/EU (2013), Article 43 (3).

ly manage arrivals and host them.⁴⁶⁹ How can one gauge suffering or claim violation of their human rights within the EU asylum system? The CJEU specifies there has to be a minimum level of severity before Article 3 of the ECHR or Article 4 of the CFREU can be invoked. Essentially, the contributors of this publication conducted a review of different EU Member State asylum laws and procedures resulting in the findings presented in this section which outline the obstacles unique to asylum-seeking children in the current system that go against their best interests and fulfil the CJEU threshold of “extreme material poverty that undermines physical or mental health or puts a person in a state of degradation incompatible with human dignity.”⁴⁷⁰ While the ECtHR has not expressly provided minimum qualifications for the attainment of this threshold, they examine it in each case on an individual basis to determine the fulfilment of the threshold. Many of these cases are examined within this section to present the obstacles asylum-seeking children face due to the varied application of procedures within asylum systems in the EU Member States.

4.2.1. During the Asylum-Seeking Procedure

a) **Non-Compliance With Age Assessment Legal Standards by the Member States.**

Under the United Nations Convention on the Rights of the Child (UNCRC), Member States are required to take the best interests of the child as the primary consideration in all actions and decisions regarding minors.⁴⁷¹ The Committee on the Rights of the Child (CRC) has noted in General Comment No. 6 (2005) that this requirement encompasses the standard that in conducting age assessments, states should not only consider the physical appearance of an individual but also his or her psychological maturity.⁴⁷² The General Comment further states that in the event there remains uncertainty the individual must be accorded the benefit of the doubt so that if there is a possibility that the individual is a child, they should be treated as such.⁴⁷³

469. UNHCR, ‘UNHCR’s key calls to the European Union to Better Protect Refugees’ (UNHCR 2022) <<https://www.unhcr.org/europeanunion/>> accessed 31 March 2022.

470. *Abubacarr Jawo (2019 Case C-163/17)* (Grand Chamber of Germany).

471. United Nations Convention on the Rights of the Child (1989), Article 3.

472. Committee on the Rights of the Child, General comment no. 6 on the treatment of unaccompanied and separated children outside their country of origin (2005), Part V.

473. Committee on the Rights of the Child, General comment no. 6 (2005), Part V.

The EU Asylum Procedures Directive also provides similar standards for age assessment. It first requires Member States to consider general statements and other relevant indications by/of the individual in question.⁴⁷⁴ Where doubts remain after such a procedure, Member States may then use medical examinations to determine the age of the individual.⁴⁷⁵ Such examination is to be carried out by a qualified professional with full respect to the individual's dignity and in the least invasive manner. And if doubts still linger, the individual is assumed to be a minor.⁴⁷⁶

These provisions of the Convention and the Asylum Procedures Directive indicate a three-step process in age assessments. These are considerations of the general statements and relevant indications (physical and psychological maturity), medical assessments, and the benefit of the doubt principle.

Despite the clarity of these provisions on age assessment, several EU Member States continue to fail to adhere to them. This non-adherence manifests in two ways: prioritisation of medical assessments and disregard of the benefit of the doubt principle.

i) Prioritisation of Medical Age Assessment Tests.

A couple of EU Member States such as Italy, Spain and Austria have shown a tendency of over-reliance on medical examinations over the other legally recommended means in the EU asylum law. This is despite the presence of national laws that encompass the three-step process provided in the UNCRC and the asylum procedures directive. In Italy, age assessment is still conducted using wrist X-rays even where the individual possesses identity documents and other relevant documents and there exists no reasonable doubt as to the minor's age.⁴⁷⁷

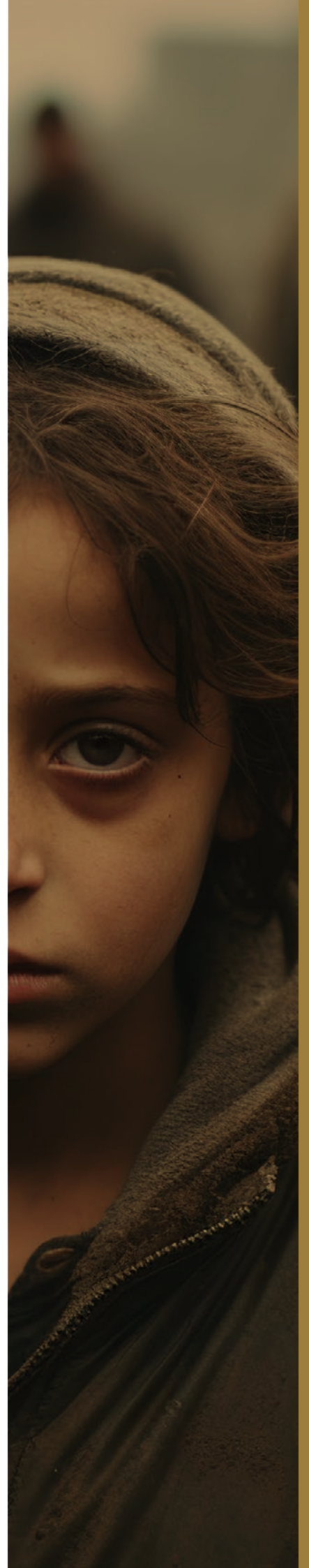
In Austria, the international principles of age assessment are not complied with despite their presence in national law. The Austrian Asylum Act requires medical examinations to be undertaken as a meas-

474. Asylum Procedures Directive (EC) 2013/32/EU [2013], Article 25 (5).

475. Asylum Procedures Directive (EC) 2013/32/EU [2013], Article 25 (5).

476. Asylum Procedures Directive (EC) 2013/32/EU [2013], Article 25 (5).

477. AIDA, 'Country Report: Italy' (Asylum in Europe, 2019), 76 <https://asylumineurope.org/wp-content/uploads/2020/05/report-download_aida_it_2019update.pdf> accessed on 14 April 2022. Asylum Information Database (AIDA), Country report: Italy, 2019, 76.



ure of last resort, but this is not usually adhered to. Asylum authorities in the country do not acknowledge relevant documents submitted to them nor do they allow sufficient time to obtain such documents. Hence medical examinations are conducted in three main ways: A general medical exam, a wrist x-ray, and a dental examination. If these do not prove conclusive, a clavicle x-ray is conducted.⁴⁷⁸

An analogous situation is present in Spain where despite the presence of good laws on age assessment, medical exams are used as a rule rather than as an exception. They are applied to all children (documented or undocumented) no matter if they manifestly are children.⁴⁷⁹ The medical tests are by way of X-rays.⁴⁸⁰

ii) Disregard for the “Benefit of the Doubt” Principle. “The benefit of the doubt” principle requires that if after considering all relevant considerations in age assessment including documentation, physical and psychological maturity, and results of a medical examination, there still exists uncertainty, the individual in question should be assumed to be a minor. That is, the individual must be given the benefit of the doubt. Again, all through these processes, the individual in question should be considered a minor pending the results of the assessment. This principle is a requirement of the UNCRC and the EU asylum procedures directive. Some EU countries fail to comply with this principle as a result of over-reliance on medical examinations.

In Spain for example, minors are not given the benefit of the doubt even if they present official identity documentation or if they manifestly are children. This is the same case when they present documentation with contradictory dates of birth.⁴⁸¹ This is especially detrimental to the minors since they are

478. AIDA, ‘Country Report: Austria’ (Asylum in Europe, 2020), 59
<https://asylumineurope.org/wp-content/uploads/2021/04/AIDA-AT_2020update.pdf> accessed on 14 April 2022.

479. AIDA, ‘Country Report: Spain’ (Asylum in Europe, 2019), 59
<https://asylumineurope.org/wp-content/uploads/2020/07/report-download_aida_es_2019update.pdf> accessed on 14 April 2022.

480. AIDA, ‘Country Report: Spain’ (Asylum in Europe, 2019), 57
<https://asylumineurope.org/wp-content/uploads/2020/07/report-download_aida_es_2019update.pdf> accessed on 14 April 2022.

481. AIDA, ‘Country Report: Spain’ (Asylum in Europe, 2019), 57
<https://asylumineurope.org/wp-content/uploads/2020/07/report-download_aida_es_2019update.pdf> accessed on 14 April 2022.

presumed not to be minors pending the outcome of age assessments. Therefore, the special procedural safeguards available to minors such as non-detention are hence not available to such individuals.

b) Privatised Pushbacks at Sea and Land at Member States' Borders.

Prior to 2012, owing to the growing number of immigrants seeking access to Europe, many European Member States in flagrant violation of the principle of non-refoulement had started adopting pushback measures to reduce immigration numbers. Pushbacks are “a set of measures by which migrants are forced back over a border – generally, immediately after they crossed it – without consideration of their individual circumstances and without the possibility to apply for asylum or to put forward arguments against the measures taken”.⁴⁸² However following the ECtHR case of *Hirsi Jamaa and Others v Italy* where it was declared that such pushbacks were a violation of the principle of non-refoulement, some Member States, directly and indirectly, adopted privatised pushbacks.⁴⁸³ These pushbacks have mainly been carried out at the Mediterranean Sea off the coast of Spain, Italy, and Malta.

An example of such pushbacks is the *Nivin* case submitted to the Human Rights Committee against pushbacks by Italy and other European states.⁴⁸⁴ In that case, a Spanish surveillance aircraft that had spotted a migrant ship carrying migrants informed the Libyan and Italian coast guards to intercept and pull back the ship. The Libyan coast guard was unable to perform this task and the Italian coast guard contacted the *Nivin*, a merchant (commercial) ship, to intercept and return the migrants to Libya.⁴⁸⁵ The *Nivin* crew conducted this task albeit deceptively by lying to the migrants that they would be taken to Spain. The migrants were returned to Libya where

482. European Centre for Constitutional and Human Rights (ECCHR) Glossary, <<https://www.ecchr.eu/en/glossary/push-back/>> accessed 5 March 2022.

483. *Hirsi Jamaa and Others v Italy* (23 Feb 2012), (ECtHR).

484. Global Legal Action Network, ‘Complaint filed with UN body over Italy’s role in privatised pushbacks to Libya resulting in migrant abuse’ (2019) <<https://www.statewatch.org/media/documents/news/2019/dec/glan-italy-libya-18-12-19.pdf>> accessed 5 March 2022.

485. Heller C, ‘Privatised push-back of the *Nivin*’ (2019) Forensic oceanography <<https://forensic-architecture.org/investigation/nivin>> accessed 7 March 2022.

they were violently removed by teargas, rubber bullets, and live ammunition and were detained and subjected to ill-treatment including torture.⁴⁸⁶

In 2020, Malta engaged in pushback by deploying merchant ships to intercept and return migrants to Libya.⁴⁸⁷ On 12th April 2020 for example, Maltese authorities enlisted and dispatched three commercial ships, *the Slave Regina*, *the Tremar*, and *Dar Al Salam 1* to forcefully return migrants to Libya. These Maltese pushbacks along with the prevention of search and rescue efforts in the Mediterranean were conducted amidst fear and disruption caused by the COVID-19 pandemic.⁴⁸⁸

Children have also been at the detrimental end of these pushbacks. In 2020 for example, at the Spanish-Morocco border, 42 individuals including two children were indiscriminately pushed back from the Spanish Chafarinas islands.⁴⁸⁹ This is despite the decision rendered by the CRC in its *Advisory Opinion on DD v Spain*, where a migrant minor's rights were considered following his pushback by Spain. DD had arrived in Spain as a UAM after his irregular attempt to cross the border by climbing a fence structure at the border. He was arrested and immediately returned to Morocco without receiving any assistance on asylum procedures. He received no language or legal assistance, no initial assessment of his age and his unaccompanied status, no interview, or any assessment of his circumstances and vulnerabilities. The Committee held that apart from mandatorily providing these types of assistance, state parties should not return a child “to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child” or serious violations of his or her rights including the risk of insufficient provision of food or

486. Global Legal Action Network, Complaint filed with UN body over Italy's role in privatised pushbacks to Libya resulting in migrant abuse (2019), 1; Heller C, 'Privatised push-back of the Nivin' Forensic oceanography (2019).

487. United Nations News, 'UN Rights Office concerned over migrant pushbacks in the Mediterranean' (2020) <<https://news.un.org/en/story/2020/05/1063592>> accessed 6th March 2022.

488. United Nations News, 'UN Rights Office concerned over migrant pushbacks in the Mediterranean' (2020).

489. Humanium, 'Children in border and asylum procedures: Pushbacks of migrant children at the border' (2021) <<https://www.humanium.org/en/children-in-border-and-asylum-procedures-push-backs-of-migrant-children-at-the-border/>> accessed 6 March 2022.

health services. The committee also categorically held that minors should be guaranteed the right to access the territory regardless of the documentation they have or lack, and to be referred to authorities to assess their needs to ensure their procedural safeguards.⁴⁹⁰

c) **The Conundrum of Family Tracing.**

Concerning asylum-seeking minors, family tracing is usually in play when the asylum-seeking minor is unaccompanied. Although family tracing is desirable to enable a family unit, the dynamics of asylum application and qualification present various challenges to UAMs. To take account of the best interest of the child, the interrelation between family relations and the prospect of family tracing needs to be understood on a case-by-case basis. Yet a proper accurate assessment of family relations is made harder by the fact that UAMs fear the possible repercussions for their families at home when they reveal details about their families and for their asylum request.⁴⁹¹ On the one hand, the narrow parameters in the qualification directive which would secure a permit to stay, urge the minors to deny contact with their families. On the other hand, minors may yearn for familial contact or otherwise look forward to rescuing their families.⁴⁹²

This conundrum causes UAMs to create different narratives about their families. These narratives may later prove detrimental to their asylum application as they are required to provide an accurate and nuanced account of their reasons for not being able to return to their country of origin.⁴⁹³

490. CRC, Communication No. 4/2016 DD v Spain, (2019), 12
<<https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCA-qhKb7yhstxAhF7AKLEBHOm9oNbPXjRbZXghX2rG9PNDfiNsxuZ1JfrZfOYZDB35c5r-cQfaOCXZ58Plz9OT6fhOgnmHwxtJKwY8RkiuowkGe43osSTn>> accessed 6 March 2022.

491. International Juvenile Justice Observatory, 'Children on the move, family tracing and needs assessment' (2014), 58.
<<https://www.fundaciondiagrama.es/sites/default/files/netforu-report-childrenonthe-move.pdf>> accessed 7 March 2022.

492. International Juvenile Justice Observatory, 'Children on the move, family tracing and needs assessment' (2014), 58.

493. CM. Smyth, 'The common European asylum system and the rights of the child: an exploration of meaning and compliance', (DPhil thesis, University of Leiden 2009), 117.

d) **Lack of Adequate Legal Assistance.**

Great strides have already been made on the issue of the representation of minors. Indeed, the qualification directive provides for the representation of UAMs in asylum procedures as a matter of right.⁴⁹⁴ Many European states have made good efforts to comply with this requirement, but some challenges still abound concerning the representation of minors.

In Malta, for example, a recent 2021 national law, the Minor Protection (Alternative Care) provides for the legal representation of UAMs by requiring the appointment of a legal guardian and a child advocate to protect the best interest of the child during the asylum procedures.⁴⁹⁵ The legal guardian is required to inform the minor about the meaning and consequences of the personal interview, prepare them for it, and also attend the status interview. However, it has been noted that in practice information and advice regarding asylum procedures are provided by NGOs rather than legal guardians.⁴⁹⁶

Further in other countries, concerns have been raised over the quality of legal representation provided to minors. In Austria for example in 2018 there were concerns raised regarding the legal representation provided by a special coordination office in Lower Austria. The best interests of a UAM were not adequately considered when a minor's application was rejected but he was not informed of such rejection. As a result, the minor did not seek assistance from another organisation to appeal the decision.⁴⁹⁷

In Greece, national law provides for the appointment of a guardian for UAMs to ensure their best interests are met at all times after they enter into the country. The responsibilities of the guardian include representing and assisting the minor in all judicial and ad-

494. Asylum Procedures Directive (EC) 2013/32/EU (2013), Article 25.

495. AIDA, 'Country Report: Malta' (Asylum in Europe, 2020), 52 <https://asylumineurope.org/wp-content/uploads/2021/05/AIDA-MT_2020update.pdf> accessed on 14 April 2022.

496. AIDA, 'Country Report: Malta' (Asylum in Europe, 2020), 52 <https://asylumineurope.org/wp-content/uploads/2021/05/AIDA-MT_2020update.pdf> accessed on 14 April 2022.

497. AIDA, 'Country Report: Austria' (Asylum in Europe, 2020), 64 <https://asylumineurope.org/wp-content/uploads/2021/04/AIDA-AT_2020update.pdf> accessed on 14 April 2022.

ministrative procedures.⁴⁹⁸ However, in practice, the implementation of the guardianship system has not taken root well. Worsened by the COVID-19 pandemic courts in Greece have preferred to appoint lawyers as guardians leaving guardians who are private citizens and well-trained without active protections, while the lawyers get many active protections.⁴⁹⁹ This has only been to the detriment of the UAMs who would benefit more from personalised relationships with guardians who have no other active protections in progress.⁵⁰⁰

4.2.2. Obstacles Faced in Closed Asylum Reception Centres

a) **Administrative Detention of Asylum-Seeking Children.**

The detention of children is unacceptable and goes against their fundamental rights making them more susceptible to mental and physical harm. Children in the asylum process are an extremely vulnerable group, not only because they are asylum-seekers, but because of other compounding vulnerabilities that exist as a result of their varied reasons for seeking international protection.

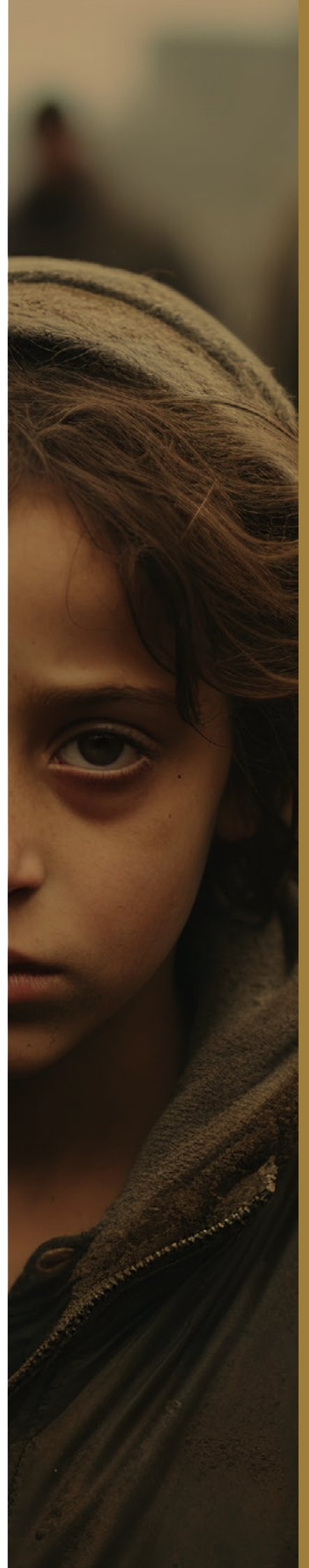
The pattern evident in the EU Member States is the administrative detention⁵⁰¹ of asylum-seeking minors as a matter of policy, without much consideration for other aspects. Article 28 of the Dublin Regulation, Article 8 (1) of the Recast Reception Conditions Directive, and Article 26 of the Asylum Procedures Directive do not demand the detention of asylum-seeking individuals for the sole reason that he/she is subject to the procedure. The Article specifies that detention is not mandatory unless there is a significant risk of absconding. Article 2 (n) defines “risk of absconding” as the existence of reasons in an individual case that is based on objective criteria defined by law, to believe that an applicant or third-country national or stateless

498. AIDA, ‘Country Report: Greece’ (Asylum in Europe, 2020), 123 <https://asylumineurope.org/wp-content/uploads/2021/06/AIDA-GR_2020update.pdf> accessed on 14 April 2022.

499. R. Barn, RT. Di Rosa, T. Kallinikaki, ‘Unaccompanied Minors in Greece and Italy: An Exploration of the Challenges for Social Work within Tighter Immigration and Resource Constraints in Pandemic Times’ (2021) SS, 1, 6.

500. R. Barn, RT. Di Rosa, T. Kallinikaki, ‘Unaccompanied Minors in Greece and Italy: An Exploration of the Challenges for Social Work within Tighter Immigration and Resource Constraints in Pandemic Times’ (2021) SS, 1, 6.

501. Detention without any criminal charge against the individual.



person who is subject to a transfer procedure may abscond. The two aforementioned provisions require the Member States to establish objective criteria for determining the existence of “a significant risk of absconding.” Moreover, Article 8 (3) of the recast Reception Conditions contains the grounds for the detention of an applicant, which must also be laid down in national law. Moreover, Article 28 (3) of the Dublin Regulation provides that in the case detention is necessary, then it shall be for as short a period as possible and no longer than the reasonable time (no longer than two months) to fulfil the necessary administrative procedures with due diligence.

Greece has increased the detention of asylum seekers under the Entry and Social Integration Law (L.3386/2005) which can prolong the period of detention simply for being an asylum-seeker. Greece also recently passed the International Protection Act (L.4636/2019) which, on the surface, seems to put those who apply for asylum while in detention in a worse position than those who apply while not in detention, but that is not the case in practice.⁵⁰² Oxfam reports that 3,000 migrants were in administrative detention as of July 2021 without any criminal charges with approximately 46% being detained for more than six months, including pregnant women, children (UAMs), and people with vulnerabilities, without the appropriate access to healthcare and legal aid.⁵⁰³ In the case of UAMs, they have been detained under horrible conditions in Greece police stations under the rouse of “protective custody” despite this practice being banned by the ECtHR (*HA and Others v Greece*) since it is against the best interest of the child and violates Article 5 (1) ECHR.⁵⁰⁴ Greece is constantly reproved by the international community including the European Committee of Social Rights and ECRE, however, as recently as 2021, Oxfam reports there were 21 UAMs in protective custody notwithstanding the legal abolishment of this practice in 2020.⁵⁰⁵

502. V. Papastergiou, ‘Detention as the default’ (Oxfam International, Oxford 2021) 8.

503. V. Papastergiou, ‘Detention as the default’ (Oxfam International, Oxford 2021) 8.

504. ECRE, ‘Country Report: Greece’ (ECRE, 2020), 213
<https://asylumineurope.org/wp-content/uploads/2021/06/AIDA-GR_2020update.pdf> accessed on 14 April 2022.

505. Article 43, Law on Abolition of Protective Custody (L.4760/2020), ECRE, ‘Country Report: Greece’ (ECRE, 2020), 20
<https://asylumineurope.org/wp-content/uploads/2021/06/AIDA-GR_2020update.pdf> accessed on 14 April 2022.

Greece is proof that the laws in place are not only ineffective but have the potential to violate children's rights when there is no efficient accountability mechanism where Greek police currently detain asylum-seekers without involving impartial actors.

As reported by Oxfam, a UAM in Greece testified as follows:

"Mohammed was a child when he arrived in Greece. He asked to join his family in another European country. His application was successful, but his flight to join his family was cancelled due to the start of the pandemic. While waiting for COVID-19 restrictions to be lifted, he turned eighteen and had to leave the child protection services and move into an apartment. After an incident, he rang the police fearing for his safety. Instead of helping him, the police put him in detention. He was in detention for months as the family reunification unit was unable to find him due to the Greek authority's administrative failures. His mental health deteriorated, and he attempted suicide. Despite Mohammed's poor physical and mental health, the authorities put him back in a cell after his hospitalisation. Following many interventions by GCR, he was finally allowed to be reunited with his family after eight months of being detained."*⁵⁰⁶

Detention of an asylum-seeker also heavily relies on their age, which is determined by an age assessment conducted in the Member State. The lack of uniformity in age assessment has also led to the wrong age determinations of asylum-seekers who are consequently detained simply because they are over the age of 18 years and deemed to be adults. Such is evident in the UK before Brexit in 2014, where the Court of Appeal (Civil Division) in *R v Secretary of State for the Home Department* ruled it unlawful to detain an unaccompanied asylum-seeking child, even in the reasonable belief that he was an adult. The basis for this belief was the indication of the wrong date of birth indicated on the screening form in the UK together with the government's indication that the child's appearance suggested he was significantly over 18 when in reality the child was 17.⁵⁰⁷ This slight discrepancy may not

506. V. Papastergiou, 'Detention as the default' (Oxfam International, Oxford 2021) 8.

507. *R (on the application of AA (Sudan)) v Secretary of State for the Home Department* (2017) (UK Court of Appeal, Civil Division).

mean much to the ordinary person, but to an asylum-seeking child, it indicates the direct transition from child to adult, thus not receiving the rights and privileges specific to asylum-seeking children, such as the freedom from detention.

In addition, the period of detention of UAMs is not a matter of dispute, but rather the conditions and vulnerability status are of importance. In *Rahimi v Greece*, the ECtHR found the Greece authorities in breach of Article 3 of the ECHR on several grounds, including the placement of the UAM in a detention facility together with adults with had very poor accommodation, hygiene, and infrastructure that undermined the very meaning of human dignity, although the UAM was only detained for two days.⁵⁰⁸ Of importance was that the applicant was a minor who was unaccompanied and the Greek authorities left him to fend for himself after his release, thus the authorities were found in breach of Article 3 ECHR due to their inactions.⁵⁰⁹

The Committee on Legal Co-operation (CDCJ) established the Committee of Experts on Administrative Detention of Migrants (CJ-DAM) to draft a single and specific instrument detailing a set of international rules on administrative detention to combat the instance of diverging legal regimes and help build universally applicable standards. The first draft of this codifying instrument is available on the Council of Europe's online portal.⁵¹⁰ Unfortunately, there have been no further updates. While alternatives to child detention exist (such as community and caste management), the EU Member States continue to rely on more and longer detention which creates an overly oppressive system that may also be inefficient in encouraging asylum-seekers to cooperate.⁵¹¹

508. *Rahimi v Greece* (2011) (ECtHR).

509. *Rahimi v Greece* (2011) (ECtHR).

510. Council of Europe, 'Administrative detention of migrants' (Council of Europe Portal) <<https://www.coe.int/en/web/cdcj/activities/administrative-detention-migrants>> accessed 14 April 2022.

511. PICUM, 'Child Immigration Detention in the EU' (PICUM, 2019) 4, <<https://picum.org/wp-content/uploads/2019/06/Child-Immigration-Detention-in-the-EU-ENG.pdf>> accessed on 14 April 2022.

b) **Accommodation of Separated Asylum-Seeking Children.**

The recast Reception Conditions Directive contains the minimum standards for the reception of asylum seekers, including food, employment, and health-care. The Directive specifically gives special attention to vulnerable persons who comprise minors, UAMs, and single parents with minor children to prevent them from running or disappearing from the reception centres. As seen in the previous section, in some jurisdictions, children are forced to be homeless due to the poor reception and accommodation conditions in the EU Member States. This is easier said than done.

Tracing the location of an asylum-seeking child's family members is part of the process used to determine the responsible Member State according to the Dublin Regulations. Article 11 expresses the rules to follow for the avoidance of separation during the asylum application process. Separation often occurs on the move to the EU or during the asylum application process if family members submit separate applications in one EU Member State. Separated asylum children are placed in different forms of accommodation within the EU Member States pending the processing of their asylum application, age assessment tests, and family tracing and reunification process (if it is in the best interest of the child). It is therefore important to point out that the vulnerability of separated children lies precisely in their separation from their family environment.⁵¹²

EU human rights law dictates that all actions relating to children, whether taken by public authorities or private institutions, must consider the child's best interest as a primary consideration.⁵¹³ Every child who is capable of forming his or her views has the right to express those views freely in all matters affecting them and such views must be given due weight according to the age and maturity of the child.⁵¹⁴ These provisions are similar to those in the UNCRC and this implicates their importance in protecting the rights of children.

512. FRA, Separated, 'Asylum-Seeking Children in European Union Member States: Comparative Report' (FRA, Luxembourg 2011) 56.

513. Charter of Fundamental Rights of the EU (2000), Article 24 (2), and Dublin Regulation (EU) No 604/2013, Article 8.

514. Convention on the Rights of the Child (1924), Article 12 (1).

In light of these provisions, a 2009 research study by the EU Agency for Fundamental Rights (FRA) concluded that many of the rights of separated asylum-seeking children which are often not clearly reflected in EU legal provisions are not always fulfilled. A subsequent 2010 research study by FRA concluded that forms of closed accommodation and detention centres, hostels, and hotels are not suitable for asylum-seeking children, and neither is it appropriate to mix children with adults in such accommodation.⁵¹⁵ This has resulted in mixed reactions from children, some who like their accommodation while others complain about the living conditions (sanitation, overcrowding, mixing with adults, food quality and quantity).

There are different forms of reception and accommodation centres across the EU where children are placed pending the determination of their asylum application:

- Open accommodation centres
- Closed accommodation centres
- Protected reception (or detention facilities)
- Residential care centres for local children
- Foster care
- Semi-independent accommodation

Within these different settings, children face varied difficulties which directly infringe on their rights and meet the CJEU threshold of invoking the violation of Article 3 ECHR or Article 4 CFREU: “a situation of extreme material poverty that does not allow him to meet his most basic needs, such as food, personal hygiene and a place to live, and that undermines his physical or mental health or puts him in a state of degradation incompatible with human dignity.”⁵¹⁶

i) Overcrowding and Poor Sanitary Conditions.

Some asylum-seeking children in Malta who await the determination of their age-assessment tests are placed in adult detention centres which are overcrowded and unsafe.⁵¹⁷ Other asylum-seeking children and vulnerable persons are placed in detention

515. FRA, Separated, ‘Asylum-Seeking Children in European Union Member States: Comparative Report’ (FRA, Luxembourg 2011) 7.

516. *Abubacarr Jawo (2019 Case C-163/17)* (Grand Chamber of Germany).

517. FRA, Separated, ‘Asylum-Seeking Children in European Union Member States: Comparative Report’ (FRA, Luxembourg 2011) 27.



upon entry into the territory, as was the case in Lithuania following legislative changes.⁵¹⁸ Such treatment forces some asylum-seeking children to live on the street where they are extremely vulnerable, as is the case in France, particularly in Paris and Marseille. Fortunately, prevention teams are sent out to protect the children at night.⁵¹⁹ The FRA details multiple experiences of asylum-seeking children within the accommodation and reception centres, nevertheless, the responses from the Member States are similar concerning overcrowding and overwhelmed federal agencies⁵²⁰ which may be attributed to the lack of effective responsibility-sharing in the absence of a regional EU approach particularly evident within the new Migration and Asylum Pact.⁵²¹

Greece and Italy have particularly received an increase in UAMs since the beginning of the COVID-19 pandemic due to their proximity to North Africa and the Middle East. Consequently, health protocols resulted in asylum-seekers (minors and adults) staying together for an extended period in emergency structures leading to overcrowding and lack of sanitary isolation which triggered protests, expulsions and police interventions.⁵²² The Court in *MSS v Belgium and Greece* expresses the particular state of insecurity and vulnerability in which asylum-seekers are known to live in Greece, which led to finding Greece authorities responsible because of their inaction that led to the achievement of the threshold of severity required by Article 3 of the ECHR.⁵²³

The ECtHR in *Rahimi v Greece* and *Khan v France* concludes that placing minors in living conditions that are unsuitable for them because of their young

518. FRA, 'Migration: Key Fundamental Rights Concerns' (FRA, Luxembourg 2021), 33 <https://fra.europa.eu/sites/default/files/2021-12/fra-2021-migration-bulletin-3_en.pdf>.

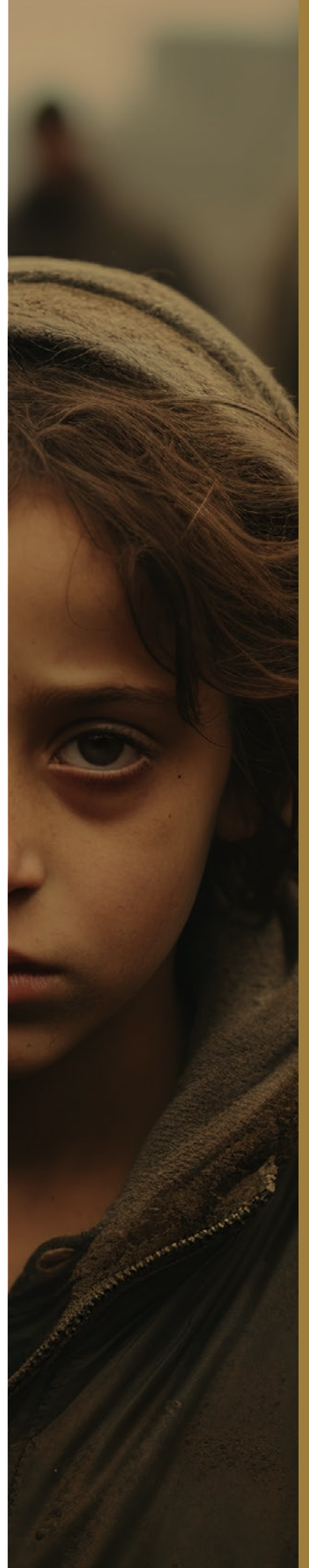
519. FRA, Separated, 'Asylum-Seeking Children in European Union Member States: Comparative Report' (FRA, Luxembourg 2011) 27.

520. FRA, Separated, 'Asylum-Seeking Children in European Union Member States: Comparative Report' (FRA, Luxembourg 2011) 27.

521. D. Panayotatos, 'Undermining Protection in the EU: What Nine Trends Tell Us About The Proposed Pact on Migration and Asylum' (Refugees International 2021) <<https://www.refugeesinternational.org/reports/2021/6/1/undermining-protection-in-the-eu-what-nine-trends-tells-us-about-the-proposed-pact-on-migration-and-asylum>>, accessed 13 April 2022.

522. R. Barn, RT. Di Rosa, T. Kallinikaki, 'Unaccompanied Minors in Greece and Italy: An Exploration of the Challenges for Social Work within Tighter Immigration and Resource Constraints in Pandemic Times' [2021] SS, 1, 4.

523. *Rahimi v Greece* (2011) (ECtHR).



age exposes them to multiple dangers, and inhuman or degrading treatment (in breach of Article 3 ECHR).⁵²⁴ The 2015 *France Administrative Tribunal of Lille* (Jean-François Molla, judge for “emergency interim relief measures”) showed the importance of a State providing positive assistance to asylum-seekers within their territory (despite their legal status) by its judgement that required the “illegal” settlers near the Calais Camp to identify vulnerable minors and provide hygiene, cleanliness and emergency vehicle access.⁵²⁵

ii) Challenges Accessing Education.

Minors and especially UAMs face dire challenges concerning their education during the process of seeking asylum. The Luxembourg Administrative Tribunal affirms the right to education is an aspect that must be taken into consideration while assessing the best interest of the child, especially UAMs.⁵²⁶ At the reception centres of Member States, many obstacles that contribute to the lack of education for child asylum seekers abound. UAMs in Greece have been particularly affected by the lack of access to education caused by the suspension of integrated schools.⁵²⁷ The European Union Agency for Fundamental Rights (FRA) recently voiced its concern about asylum-seeking children being effectively excluded from school denying them their right to education because of numerous obstacles including insufficient staffing, lack of school transport and community hostility among others.⁵²⁸

The FRA and the Croatian Red Cross further report that in Croatia, UAMs face numerous difficulties in accessing education because of a lack of documentation on previous education, inordinately long school enrolment processes, and lack of cooper-

524. *Khan v France* (2019) (ECtHR)

525. *Administrative Tribunal of Lille, France* [2 November 2015], <<https://www.asylumlawdatabase.eu/en/case-law/france-administrative-tribunal-lille-2-november-2015-association-medecins-du-monde-et-al-no#content>> accessed on 14 April 2022.

526. *Administrative Tribunal, Luxembourg* [21 April 2017], <<https://www.asylumlawdatabase.eu/en/case-law/luxembourg-administrative-tribunal-21-april-2017-2017-04-2139131#content>>, accessed 14 April 2022.

527. R. Barn, RT. Di Rosa, T. Kallinikaki, ‘Unaccompanied Minors in Greece and Italy: An Exploration of the Challenges for Social Work within Tighter Immigration and Resource Constraints in Pandemic Times’ (2021) SS, 1, 5.

528. FRA, ‘Migration: Key Fundamental Rights Concerns’ (FRA, Luxembourg 2021), 27 <https://fra.europa.eu/sites/default/files/2021-12/fra-2021-migration-bulletin-3_en.pdf>, accessed 28 April 2022.

ation by guardians among others, even for those granted international protection.⁵²⁹

iii) Limited Access to Healthcare.

The right to health is a core human and child right enshrined in Article 25 of the UDHR and Article 17 of the CRC. The latter provision explicitly emphasises mental and physical health. UNICEF affirms this finding in their 2017 Advocacy Brief that explains poor physical health occurs among asylum-seeking and migrant children as a result of persecution, torture, abuse, and injuries.⁵³⁰ While on the move, children continue to suffer after exposure to physical and psychological trauma, dehydration, nutrition disorders, hypothermia, and infectious diseases.

After arriving in EU reception centres, children's vulnerability increases due to limited access to healthcare and elevated levels of stress caused by uncertain legal and economic status, family separation and poor housing conditions. Article 23 of the 1951 Convention indicates that refugees are entitled to the same treatment as nationals in the host country, and such provision is interpreted to include asylum seekers.⁵³¹ Unfortunately, the entitlement of the right to healthcare differs with each EU Member State under their national laws.

A recent medical research study concludes that children on the move in Europe have significant health risks and needs that differ from children in the local population, and thus credits this to major knowledge gaps in interventions and policies to treat and promote their health and well-being.⁵³² Hence, asylum-seeking children originating from low and middle-income countries are often exposed to health conditions that are rare in the high-income

529. FRA, 'Migration: Key Fundamental Rights Concerns' (FRA, Luxembourg 2021) 27 <https://fra.europa.eu/sites/default/files/2021-12/fra-2021-migration-bulletin-3_en.pdf>, accessed 28 April 2022.

530. UNICEF, 'Refugee and Migrant Crisis in Europe: Is Health Care Accessible?' (UNICEF, 2017) 1.

531. UNICEF, 'Refugee and Migrant Crisis in Europe: Is Health Care Accessible?' (UNICEF, 2017) 2.

532. A. Kadir, A. Battersby, N. Spencer, A. Hjern, 'Children on the move in Europe: a narrative review of the evidence on the health risks, health needs and health policy for asylum seeking, refugee and undocumented children' [2019] BMJ. <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6361329/>>, accessed on 20 April 2022.

EU Member States.⁵³³c) **Mental Health Consequences of Family Separation and Administrative Detention.**

Vulnerability assessment tests fail to take into consideration the susceptibility of asylum-seeking children to deteriorating mental health. Child detention and family separation are the largest contributory factors to mental health consequences among asylum-seeking children. In 2012, the UNCRC concluded administrative detention aggravated trauma experienced in the home or transit country, and the constant control and surveillance may be very disturbing for a child, increasing already high levels of mental distress.⁵³⁴ At that, separation from the community or detained parents and the outside world leads to an increased sense of isolation. These few instances create a sense of deprivation and powerlessness among children, often resulting in mental health issues that affect their life post-detention,⁵³⁵ Thus neither detention nor separation is in the best interest of the child.

The earlier quoted testimony by a UAM (Mohammed*) in Greece is one among many regarding the deteriorating mental health conditions of asylum-seeking children. The CRC and numerous ECtHR decisions affirm that children are considered inherently extremely vulnerable due to their mental and physical functions. Unfortunately, the consideration of mental health conditions is not an express legal requirement. Article 23 (2) of the recast Reception Conditions Directive (2013/33/EU) requires the Member States to take the best interest of the child into primary consideration when implementing its provisions and take due account of the stipulated factors. Specifically, the factor indicated in Article 23 (2) (b) denotes the consideration of the minor's background, well-being, and social development.

533. A. Kadir, A. Battersby, N. Spencer, A. Hjern, 'Children on the move in Europe: a narrative review of the evidence on the health risks, health needs and health policy for asylum seeking, refugee and undocumented children' [2019] BMJ. <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6361329>>, accessed on 20 April 2022.

534. H. Gros, Y. Song, 'No Life for a Child: A Roadmap to End Immigration Detention of Children and Family Separation' (University of Toronto Faculty of Law, Canada 2016) 1.

535. H. Gros, Y. Song, 'No Life for a Child: A Roadmap to End Immigration Detention of Children and Family Separation' (University of Toronto Faculty of Law, Canada 2016) 1 and 5

A social study conducted in Australia, although not in the EU, depicted asylum-seeking children's drawings that depict their experiences of living in detention indicating their sadness, suffering, confinement in prison-like conditions, and the awareness of the loss of childhood experiences.⁵³⁶ While this Australian study cannot be used to speak for all asylum-seeking children, it may still be used to formulate the idea of how such treatment affects their development and outlook on the society into which they will one day integrate. UNICEF states there is a dire need to strengthen and increase the provision of psychosocial services for refugees and migrants, especially because trauma can have long-term effects on children's health.⁵³⁷

d) Overlooking Single Parents with Minor Children.

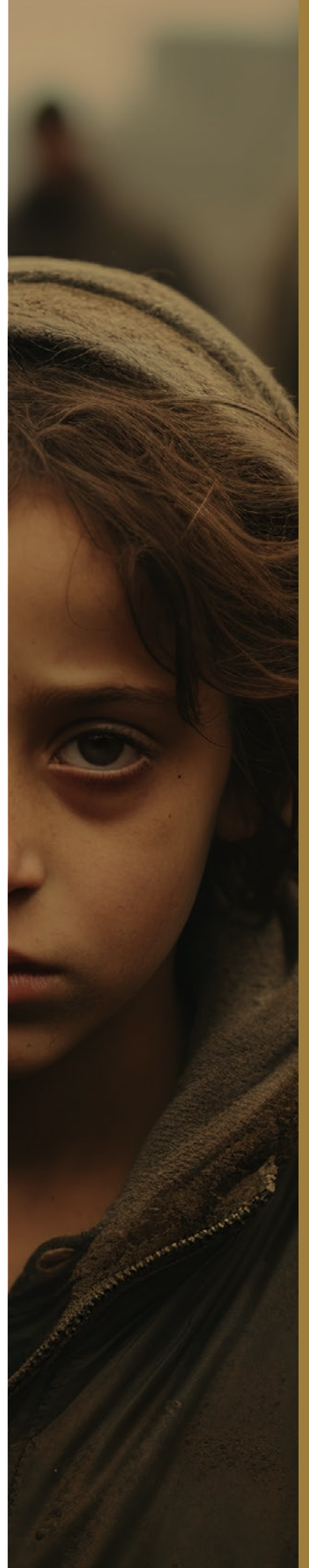
The general principle in Article 21 of the Recast Reception Conditions Directive recognizes single parents with minor children as vulnerable persons with special reception needs. Inversely, the Asylum Procedures Directive does not make any mention of single parents with minor children as persons in need of procedural guarantees. The difference in this aspect between the aforementioned EU law that forms part of the CEAS causes a lack of efficient recognition and protection of single parents with minor children.

However, due to the margin of discretion of EU Member states in transposing the Directives, there are slight discrepancies in the categories of vulnerable persons. Some EU Member States explicitly recognize single parents with minor children as vulnerable persons within their national asylum law. These States are identified as Belgium, Bulgaria, Cyprus, Spain, Croatia, Hungary, Ireland, Italy, Malta, Poland, and Austria.⁵³⁸ Recital 27 of the Proposed Screening Regulation of the New Pact on Asylum and Migration emphasises that special attention should be given to single-parent families and UAMs, among others. The Pact has yet to be enforced for the effects of these proposals to be examined.

536. C. Lenette, P. Karan, D. Chrysostomou, A. Athanasopoulos, 'What is it like living in detention? Insights from asylum seeker children's drawings' [2017] *AJHR* 42, 52 - 53.

537. UNICEF, 'Refugee and Migrant Crisis in Europe: Is Health Care Accessible?' (UNICEF, 2017) 6.

538. M. Mouzourakis, K. Pollet, C. Woollard, 'The concept of vulnerability in European asylum procedures' (ECRE, Brussels 2017) 16.



Such recognition and protection are crucial because the reality of the matter is that a minor who is accompanied by an adult does not necessarily lessen their vulnerability. Just as the ECtHR stated in *MSS v Belgium and Greece*, all asylum seekers are inherently vulnerable, and vulnerability is not a factor that decreases with time. From case law, single parents with minor children are often overlooked which has detrimental effects on them. As earlier mentioned, *The Refugee Appeals Board in Denmark* ruled on a case regarding a single mother who was forced to live on the streets of Italy with her young children after not receiving any help from the authorities where she was exposed to the threat of rape and resulted in a PTSD diagnosis that rendered her unable to care for her children.⁵³⁹

The Dublin transfer of single parents with children appears to be another contentious matter. On this, the Federal Constitutional Court of Germany requires that the competent authorities must clarify facts and secure suitable guarantees to ensure the well-being of a minor when transferred to the responsible Member State, including making inquiries on the existence of relatives in the receiving country.⁵⁴⁰ By doing so, the competent authorities must always consider family unity and the best interest of the child.

e) **Inconsistencies in Vulnerability Assessments and Treatment of Unique Children.**

Article 2 (k) of the recast Reception Conditions Directive defines an “applicant with special needs” as a vulnerable person according to its Article 21 criteria and who requires the special guarantees contained in its provisions. Article 22 (1) of the Directive requires the assessment of an applicant to determine their special reception needs (otherwise known as a vulnerability assessment). The same Article provides no express procedure for conducting such vulnerability assessment, save for Article 22 (2) which indicates it need not take the form of an ad-

539. The Refugee Appeals Board, Denmark [30 November 2017] <<https://www.asylumlawdatabase.eu/en/case-law/denmark-refugee-appeals-board%E2%80%99s-decision-30-november-2017#content>> accessed on 13 April 2022.

540. Federal Constitutional Court, Germany [17 September 2014] <<https://www.asylumlawdatabase.eu/en/case-law/germany-%E2%80%93-federal-constitutional-court-17-september-2014-2-bvr-179514#content>>, accessed 28 April 2022.

ministrative procedure. Nevertheless, the concept of vulnerability lacks a clear definition despite it being explored by the ECtHR in numerous cases.⁵⁴¹

Discrepancies are evident regarding when vulnerability assessments should be conducted. In Italy, visibly vulnerable persons are identified at the port (for example, pregnant women and UAMs) while those with non-visible vulnerabilities (such as victims of trafficking and torture) are often identified much later in the regional hub.⁵⁴² In Cyprus, it is conducted when asylum seekers are about to leave the emergency reception centre and not upon their arrival which infers they spend several months without the necessary support or referral for early release.⁵⁴³ The European Union Agency for Asylum (EUAA) has formulated guides that form the basis of good practice in EU Member State asylum practices. These guides will be considered in the case study section of this publication.

Furthermore, a unique category of asylum-seeking children is those who are part of the LGBTQ community since they are not recognized as vulnerable persons and their sexual orientation often forms a basis for declining their applications even though they form a group of persons with specific needs due to their sexual orientation. For the ECtHR, the concept of vulnerability operates as a lens through which harm experienced by asylum applicants is magnified, thus enabling the court to better recognize human rights violations, despite this view being from a hetero-normative aspect.⁵⁴⁴ Reports suggest a significant number of LGBTQ persons fleeing persecution for their sexual orientation, war, or political strife and seeking asylum in Europe.⁵⁴⁵ Research

541. D. Venturi, 'The Potential of a Vulnerability-Based Approach: Some Additional Reflections Following OM v Hungary' (Strasbourg Observers 2016) <<https://strasbourgobservers.com/2016/10/25/the-potential-of-a-vulnerability-based-approach-some-additional-reflections-following-o-m-v-hungary/>> accessed 29 April 2022.

542. M. Mouzourakis, K. Pollet, C. Woollard, 'The concept of vulnerability in European asylum procedures' (ECRE, Brussels 2017) 31.

543. FRA, 'Migration: Key Fundamental Rights Concerns' (FRA, Luxembourg 2021), 27 <https://fra.europa.eu/sites/default/files/2021-12/fra-2021-migration-bulletin-3_en.pdf>, accessed 28 April 2022.

544. R. Wieland, EJ. Alessi, 'Do the Challenges of LGBTQ Asylum Applicants Under Dublin Register With the European Court of Human Rights?' (2020) SLS 1, 1.

545. R. Wieland, EJ. Alessi, 'Do the Challenges of LGBTQ Asylum Applicants Under Dublin Register With the European Court of Human Rights?' (2020) SLS 1, 2.

shows cultural construction of childhood suggests children are innocent and vulnerable non-agents who should be protected from key aspects of adult life, especially sexuality, politics, and work.⁵⁴⁶ As a result, LGBTQ asylum-seeking children are viewed as having an adult-like way of life while in reality, their sexual orientation heightens their vulnerability to the colonality of power in the asylum adjudication process and the risk of exposure to violence in this process.⁵⁴⁷

OM v Hungary was the first case where the ECtHR recognized the specific protection needs of LGBTQ asylum seekers such as the individual assessment of cases and the consideration of the detention of LGBTQ persons with others who come from countries with widespread cultural or religious prejudice against them.⁵⁴⁸ On the other hand, the ECtHR did not limit itself to considering sexual orientation as an aspect exposing asylum seekers to a higher risk in detention, rather it is framed as a continuum that begins from the country of origin to the country of asylum.⁵⁴⁹ The problem with this aspect is the open-ended nature of the vulnerable group which risks undermining the importance of vulnerability which cannot successfully be defined because it is a nuanced, flexible, and layered notion.⁵⁵⁰ The lack of protection and recognition of LGBTQ asylum-seeking children opens up an avenue for psychological and physical abuse alongside human rights violations or even the arbitrary denial of asylum due to their sexual orientation.

Additionally, the recast Reception Conditions Directive equally requires special attention to be given to UAMs who face a heightened risk of trafficking,

546. E. Stubberud, D. Akin, SHB. Svendsen, 'A Wager For Life: Queer children seeking asylum in Norway' [2019] NTNU 445, 448.

547. E. Stubberud, D. Akin, SHB. Svendsen, 'A Wager For Life: Queer children seeking asylum in Norway' [2019] NTNU 445, 457.

548. *OM v Hungary* (2016) (ECtHR).

549. D. Venturi, 'The Potential of a Vulnerability-Based Approach: Some Additional Reflections Following *OM v Hungary*' (Strasbourg Observers 2016) <<https://strasbourgoobservers.com/2016/10/25/the-potential-of-a-vulnerability-based-approach-some-additional-reflections-following-o-m-v-hungary/>> accessed 29 April 2022.

550. D. Venturi, 'The Potential of a Vulnerability-Based Approach: Some Additional Reflections Following *OM v Hungary*' (Strasbourg Observers 2016) <<https://strasbourgoobservers.com/2016/10/25/the-potential-of-a-vulnerability-based-approach-some-additional-reflections-following-o-m-v-hungary/>> accessed 29 April 2022.

smuggling, and abuse. It is also important to point out that there still exists uncertainty concerning victims of gender-based violence and the determination of their asylum claims. The vague wording of the 1951 Refugee Convention coupled with the varied recognition of victims of GBV as members of a particular social group among the EU Member States adds further confusion to this particular aspect. This issue is discussed in an earlier publication by The Thinking Watermill Society, *The Right to Asylum from a Gender Perspective*.⁵⁵¹

The EUAA provides the Special Needs and Vulnerability Assessment (SNVA) Tool that presents a collective understanding and step-by-step guide on how to conduct a vulnerability assessment through a questionnaire. It is not clear whether state authorities use this tool and, if so, how frequently.


Recital 27 of the Proposed Screening Regulation of the New Pact on Asylum and Migration emphasises that special attention should be granted to persons with an immediate identifiable physical or mental disability and persons having visibly suffered psychological or physical trauma, among others. The Pact has yet to be enforced for the effects of these proposals to be examined.

4.2.3. Obstacles Faced at Integration After Receiving Refugee Status

a) Lack of Belonging in Society.

Refugee children often come from a background of untold hardships, and the risk of abuse, neglect, violence, exploitation, trafficking, or military recruitment, does not end upon resettlement. Education may function as a stabilizing force in their lives from refugee backgrounds by protecting them from recruitment into armed groups, sexual exploitation, and child marriage; by creating community resilience; and empowering them with the skills and knowledge necessary to live meaningful lives. However, students from refugee backgrounds may face challenges integrating into school systems, where they may struggle to attain a sense of belonging

551. C. Toroitich, K. Mureithi, M. Maina, 'The Right to Asylum from a Gender Perspective' (The Thinking Watermill Society, Italy 2021) <<https://thethinkingwatermill.com/the-right-to-asylum-from-a-gender-perspective/>>.



amongst their peers, their teachers, and within their community. This is a consequence of, inter alia, biased media portrayals, prejudice, racism, and a general lack of understanding. Deprivation of belonging leads to negative outcomes, including emotional distress and increased health problems (Anderman, 2002). This is especially problematic for adolescents from refugee backgrounds who are already struggling with daily adversity in their lives, in addition to managing lingering mental, physical, and emotional stress they and their families may be experiencing from exposure to trauma.

A recent study called the RESPOND Project (2017-2020) compared Germany, Sweden, Austria, United Kingdom, Greece, Italy, and Turkey and how migrants in each of these countries felt about “belonging in” It found that comprehensive, inconsistent, or absent integration policies all lead to fraught belonging for Europe’s refugees. Even in countries with clear policies focused on civic or social integration and language learning, for instance in Germany, Sweden, and Austria, the absence of legal security, lack of employment, and experience of social hostility left migrants feeling that they did not belong. One migrant in Germany related, “The state of being constantly anxious regarding one’s status makes it feel like deportation is perhaps just around the corner...this has an impact on life in general, including language learning and overall living conditions.”

Similarly, in Austria, the situation of being in legal limbo meant that migrants felt as though they only were partial members or even non-members of the society. They could not establish solid expectations about the future and felt that they could not decide about their destiny. In countries with fragmented, uneven, or non-existent integration policies, such as the United Kingdom, Greece, Italy, and Turkey, migrants also struggle to feel a sense of “belonging.” An asylum seeker in Greece explained that a societal change was needed, and locals should seek out contact with refugees: “Instead of listening to the television, the [political] parties who are against immigration and the refugee crisis, or even the church, they should speak to the refugees themselves, go to the camps.

b) **Falling Behind on Education.**

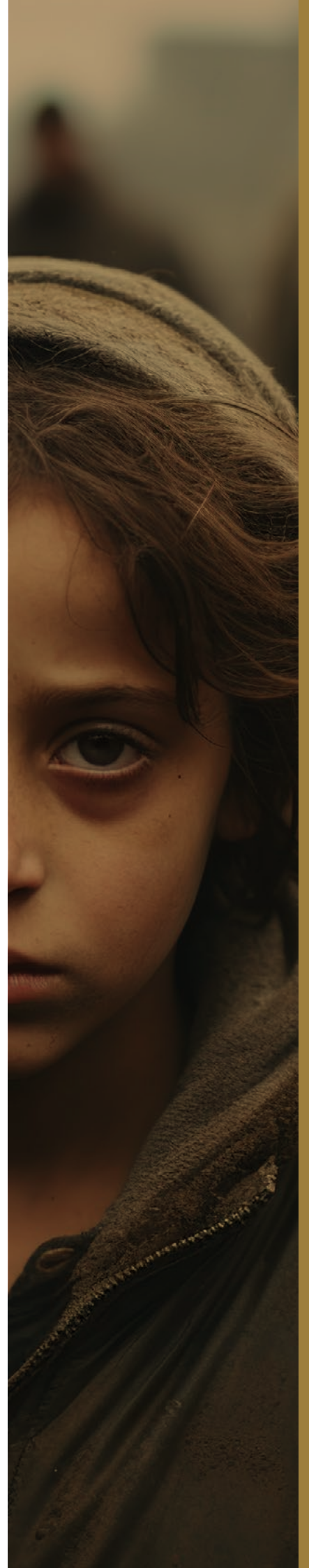
The influx of refugee children in Europe has placed increased pressure on the EU Member States to develop strategies for effectively integrating these new arrivals into society. Most of these provisions are short-term ones including housing, language courses, and food. However, given the fact that a large share of these refugees is made up of children, adolescents, and young adults who need education, there is a need for middle and long-term provisions to ensure the social and structural participation of these children. Education is not only one of the most important aspects of integration but also due to these children as a matter of right. Further, young refugees are at a heightened level of vulnerability and face certain economic, social, and emotional challenges that education can help them buffer. However, high numbers of refugees coming into Europe often force institutions to adopt ad-hoc measures for educational integration according to their specific financial and structural capabilities. This leads to some challenges including the following.


i) Late enrolment in schools.

Refugees should be brought to school as early as possible to promote their educational success. Article 14 (2) of the Directive 2013/33/EU of the European Parliament and Council specifically provides that access to the education system shall not be postponed for more than 3 months from the date on which the application for international protection was lodged and that preparatory classes, including language classes, shall be provided to minors where it is necessary to facilitate their access to and participation in education. However, because of multiple relocations, difficulties in finding a school place, and administrative procedures, it may assume to 6 months or even longer for children to enter a stable school setting. It is only a few countries that have regulations mandating a shorter waiting period. Sweden, for instance, mandates that education should be provided within 1 month upon arrival.

ii) Language Barriers.

The policies and procedures of language instruction for refugees vary vastly across countries. For instance, Germany provides second language instruction in elementary schools, and special immer-





sion classes also in secondary schools. In Sweden, refugee children receive language support through immersion classes and must be granted some teaching hours in regular classes until they can make the transition. In Greece, language courses are provided as part of the Reception Facilities for Refugee Education curriculum. Turkey, on its part, initiated a large-scale project to improve Turkish language instruction for Syrian refugees while integrating Temporary Education Centers into the public education system.

However, children often face challenges in making sense of the lessons taught in these languages. Consequently, they end up being placed in lower grades than those they attended in their former countries. These “detours” in educational trajectories contribute to the risk of early school leaving.

iii) Different Quality of Education.

Article 14 (1) of the Directive 2013/33/EU of the European Parliament and Council moreover provides that children of asylum seekers and unaccompanied minors should be granted access to the education system “under similar conditions as nationals of the host Member State.” However, in reality, access to education is particularly compromised in immigration detention facilities. A survey conducted by the Fundamental Rights Agency (FRA) revealed that in nine out of 14 EU Member States that the survey covered, children in detention centres lacked access to any kind of formal education – if at all, it was provided by volunteers or NGOs. Moreover, even when language courses were offered, they did not match up to the intensity and duration of regular schooling.

iv) Strict Age Limits.

When countries adopt a strict application of the age limit for compulsory education, most commonly around age sixteen, this often results in truncated educational careers, especially among UAMs who fled from their countries before completing their first degree. On arrival in the EU Countries, the countries may use their age to limit their possibility of completing a degree because of their age. Since a significant percentage of UAMs coming into the EU are sixteen and older and are often relegated to various streams of vocational training, the reach of formal

education to refugees is highly limited. Those older than eighteen face even greater challenges in entering the educational system, although they might need only a brief period to obtain at least a secondary education degree.

4.3. CASE STUDY: GERMANY, SPAIN, AND FRANCE

Asylum applications in the EU have been gradually rising since 2021 with a total of 535,000 first-time asylum applicants of which 31.2% comprise minors (under 18 years)⁵⁵² which triggers a need for investigation on the processes and procedures they undergo. The UNHCR and Eurostat both report that the United States of America (US) was the world's highest recipient of new asylum applications, followed by the EU Member States, Germany, Spain, and France.⁵⁵³ These three EU Member States are also reported to have the highest share of pending applications at the end of 2021,⁵⁵⁴ making these jurisdictions a point of focus for the case studies within this section.

This section looks into the legal asylum framework, the national application of EU asylum directives, and the procedures that impact asylum-seeking minors. There is a distinct focus on the identification of vulnerable persons, age assessment tests, grounds for detention, access to education, and family reunification, which the contributors of this study viewed as the most contentious processes in the varied treatment of asylum-seeking children.

4.3.1. GERMANY

Germany is a Member State of the European Union, located to the West of the region which makes it one of the first points of access for asylum seekers, hence the large volume of applications it receives for international protection. In 2020 and 2021, Germany received a large number of new individual asylum claims.⁵⁵⁵ Furthermore, in 2020,

552. Eurostat, 'Annual Asylum Statistics' (Eurostat 2022) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Annual_asylum_statistics#Number_of_asylum_applicants:_increase_in_2021> accessed 16 May 2022.

553. United Nations High Commissioner for Refugees, 'Global Trends in Forced Displacement - 2020' (UNHCR The UN Refugee Agency 2020).

554. Eurostat, 'Annual Asylum Statistics' (Eurostat 2022) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Annual_asylum_statistics#Number_of_asylum_applicants:_increase_in_2021> accessed 16 May 2022.

555. UNHCR, 'Global Trends in Forced Displacement - 2020' (UNHCR The UN Refugee Agency 2020); Eurostat, 'Annual Asylum Statistics' (Eurostat 2022) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Annual_asylum_statistics#Number_of_asylum_applicants:_increase_in_2021> accessed 16 May 2022. <<https://www.unhcr.org/statistics/unhcrstats/60b638e37/global-trends-forced-displacement-2020.html>> accessed 11 January 2022.

Germany was the second-largest refugee-hosting country in Europe⁵⁵⁶ and has risen to the first position in 2022⁵⁵⁷ which makes the jurisdiction an interesting point of focus for the case study.

Germany has a federal law system where the general asylum system is regulated on the federal level (*Bund*), leaving the reception and accommodation systems to each German State (*Land*). The main legislation governing the asylum and migration process are the German Constitution, the Asylum Act, the Residence Act, and the Asylum Seekers Benefits Act which serves as an implementation of the recast Reception Conditions Directive (2013/33/EU). The right to asylum is recognized in the German Constitution (Article 16a) for persons persecuted on political grounds, which does not preclude their obligations arising from the 1951 Refugee Convention, the Convention for the Protection of Human Rights and Fundamental Freedom, and international agreements of the European Union.⁵⁵⁸

The Asylum Act of Germany applies to all seeking international protection within the Federal State and contains a list of the acts and grounds for the persecution that one may seek asylum for, including acts directed against children.⁵⁵⁹ It outlines the rights and obligations of asylum seekers and responsible authorities, where the Federal Office for Migration and Refugees (BAMF) is granted the responsibility of receiving, examining, and determining asylum applications in the territory for both the Dublin procedure and the Airport procedure.⁵⁶⁰

The UNHCR notes the general asylum application procedure for both accompanied and unaccompanied children in Germany. The procedure is the same for UAMs (under 18 years old) with assistance from the Youth Welfare Office which helps them find accommodation with relatives, or they are placed in a suitable foster home or an institution

556. UNHCR, 'Global Trends in Forced Displacement - 2020' (UNHCR The UN Refugee Agency 2020) <<https://www.unhcr.org/statistics/unhcrstats/60b638e37/global-trends-forced-displacement-2020.html>> accessed 11 January 2022.

557. World Population Review, 'Refugees by Country 2022', (World Population Review 2022), <<https://worldpopulationreview.com/country-rankings/refugees-by-country/>> accessed on 11 March 2022.

558. Basic Law for the Federal Republic of Germany, Article 16a (1) and (5).

559. Asylum Act (Germany) in the version promulgated on 2 September 2008, Section 3a (2) (6).

560. UNHCR, 'Asylum seeking process Germany' (UNHCR The UN Refugee Agency) <<https://help.unhcr.org/germany/asylum-in-germany/unaccompanied-children/>> accessed 11 March 2022.

that specialises in minors.⁵⁶¹ Further, the juvenile court appoints a legal guardian to legally represent them in filing their asylum application and accompany the child to his/her interview at BAMF. It is only when a UAM is granted international protection as a refugee that they can have their immediate family members join them in Germany by an application made within three months of receiving refugee status.⁵⁶²

A 2021 research study on the German asylum system accordingly affirms that the jurisdiction has inconsistently applied the legal duties towards vulnerable asylum-seekers as stipulated in respective EU directives and international law, resulting in varied treatment of these individuals.⁵⁶³ Scholarly works have pointed out that Germany's method of applying the 1951 Refugee Convention resulted in a restrictive asylum system turning away many asylum seekers and directing them to less secure States where they will face persecution, an act that violates both the principles of the Refugee Convention and the ECHR.⁵⁶⁴ The effects of not addressing this restrictive approach will cause difficulty to many minors seeking asylum in Germany, where 71,421 (50%) of 142,509 first asylum applications filed in 2019 were by children, while 2,632 (1.8%) were by UAMs.⁵⁶⁵ The variation of regulations and practices among the German Federal States is owed to the jurisdiction's federal law system destabilising any chances of a uniform asylum system. The subsequent paragraphs are an analysis of particularly problematic discrepancies that affect asylum-seeking children in Germany.

a) **Identification of Vulnerable Persons.**

The understanding of vulnerable persons in Germany stems from the Asylum Act and Residence Act. The Asylum Act provides special criteria for vulner-

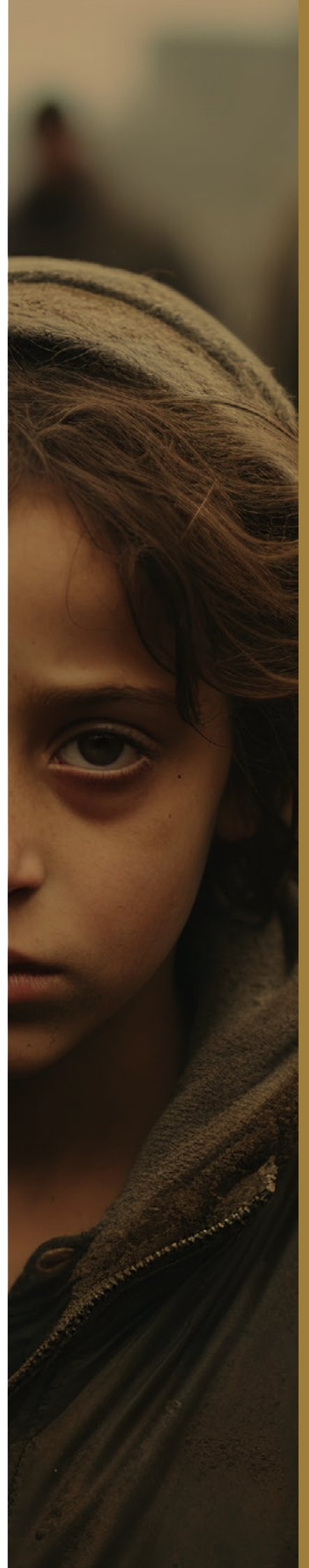
561. UNHCR, 'Asylum seeking process Germany Unaccompanied Minors' (UNHCR The UN Refugee Agency) <<https://help.unhcr.org/germany/asylum-in-germany/unaccompanied-children/>> accessed 11 March 2022.

562. UNHCR, 'Asylum seeking process Germany Unaccompanied Minors' (UNHCR The UN Refugee Agency) <<https://help.unhcr.org/germany/asylum-in-germany/unaccompanied-children/>> accessed 11 March 2022.

563. W. Kluth, H. Heuser, J. Junghans, Addressing Vulnerabilities of Protection Seekers in German Federalism (Martin-Luther-University Halle-Wittenberg, Germany 2021) 4.

564. M. Fullerton, 'Failing the Test: Germany Leads Europe in Dismantling Refugee Protection' [2001] TILJ 231, 234.

565. Bundesamt für Migration und Flüchtlinge (BAMF), 'Aktuelle Zahlen', (BAMF 2019), accessed from <<https://www.bamf.de/SharedDocs/Anlagen/DE/Statistik/AsylinZahlen/aktuelle-zahlen-dezember-2019.html>>.



able persons, including minors, and the special responsibilities owed to them. Germany Social Code No. 8 explicitly regulates the treatment of unaccompanied minors in line with their rights stipulated in Article 24 of the Recast Reception Conditions Directive (2013/33/EU). The Residence Act contains a reference to two particular categories of vulnerable persons, the first being those who are identified either after being granted asylum (to enhance their social integration) or those whose applications have been denied and deportation or detention is required (as per the unique requirements of the Return Directive). Collectively, the German national asylum system and the existing EU Directives do not contain a comprehensive approach to identifying vulnerable persons.

Instead, the internal BAMF guidelines refer to the Asylum Procedures Directive (2013/32/EU) and the recast Reception Conditions Directive (2013/33/EU) when stipulating its staff to identify vulnerable persons at any stage of the asylum procedure and provide them with necessary assistance.⁵⁶⁶ The German Asylum Act also obliges the Federal States and Offices to provide relevant information to other respective authorities regarding an applicant's impairments which are needed to conduct a personal interview.⁵⁶⁷ The lack of comprehensive identification criteria coupled with measures to accelerate asylum procedures, particularly in Berlin, cause personnel to skip the personal interview stage. Recent practice shows that where an applicant shows the need for special procedural guarantees, BAMF assigns special officers for the interview with no consideration for asylum seekers' lack of support or time to prepare for it.⁵⁶⁸

German authorities state that BAMF or social welfare organisations offer two stages of counselling, the first which is a group session before the formal lodging of an application and the second is an individ-

566. European Commission, European Migration Network, AD HOC QUERY ON 2021.28 Detection of vulnerabilities in the international protection procedure Part 1 (European Commission, Luxembourg 2021) 29.

567. European Commission, European Migration Network, AD HOC QUERY ON 2021.28 Detection of vulnerabilities in the international protection procedure Part 1 (European Commission, Luxembourg 2021) 29 - 30.

568. AIDA, ECRE, 'Country Report: Germany: Identification' (AIDA 2022) <<https://asylumineurope.org/reports/country/germany/asylum-procedure/guarantees-vulnerable-groups/identification/>> accessed 13 March 2022.

ual session.⁵⁶⁹ ECRE claims the existence of BAMF counselling services is also limited to asylum-seekers who make individual appointments causing partial identification of vulnerable asylum-seekers,⁵⁷⁰ especially minors who are accompanied by adults. Hence, even though there is a mandatory requirement of the Federal States to notify BAMF when they detect vulnerabilities,⁵⁷¹ This may occur when there has been some violation of the applicant's rights. This is true whereas Germany states direct personal contact with the applicants only takes place when the formal asylum application is lodged and there is no mandatory procedure to guarantee the follow-up of the applicant.⁵⁷²

Despite these discrepancies, it is important to recognize Germany for its providence of different procedural safeguards tailored to specific vulnerabilities. For example, UAMs' applications are prioritised in Germany with their interviews conducted by specially-trained caseworkers who are guided by mandatory procedural safeguards including the use of child-friendly questions and the presence of a guardian or lawyer.⁵⁷³ The special guarantees offered are further guaranteed through a quality assessment system in place for every single decision made in an asylum case (dual control principle) at the Federal Office (BAMF), which also applies to cases from vulnerable applicants.⁵⁷⁴

b) **Age Assessment.**

Age assessment tests are conducted to aid in the determination of the best interests of the child if an

569. European Commission, European Migration Network, AD HOC QUERY ON 2021.28 Detection of vulnerabilities in the international protection procedure Part 1 (European Commission, Luxembourg 2021) 30.

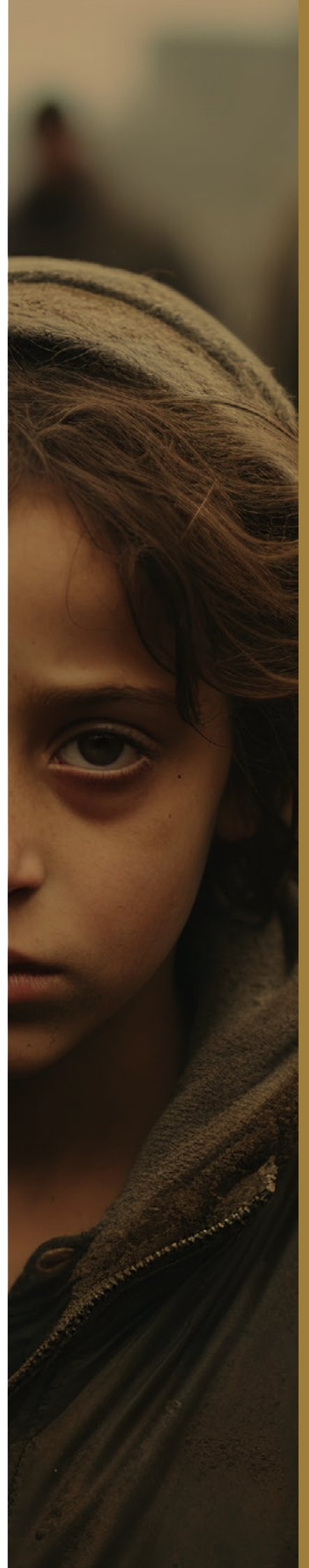
570. AIDA, ECRE, 'Country Report: Germany: Identification' (AIDA 2022) <<https://asylumineurope.org/reports/country/germany/asylum-procedure/guarantees-vulnerable-groups/identification/>> accessed 13 March 2022.

571. European Commission, European Migration Network, AD HOC QUERY ON 2021.28 Detection of vulnerabilities in the international protection procedure Part 1 (European Commission, Luxembourg 2021) 30.

572. European Commission, European Migration Network, AD HOC QUERY ON 2021.28 Detection of vulnerabilities in the international protection procedure Part 1 (European Commission, Luxembourg 2021) 31.

573. European Commission, European Migration Network, AD HOC QUERY ON 2021.28 Detection of vulnerabilities in the international protection procedure Part 1 (European Commission, Luxembourg 2021) 32.

574. European Commission, European Migration Network, AD HOC QUERY ON 2021.28 Detection of vulnerabilities in the international protection procedure Part 1 (European Commission, Luxembourg 2021) 32.



applicant is found to be a child (below the age of 18 years according to the UNCRC).

There is no stipulated age assessment law or mechanism within EU asylum law, thus each Member State has its methods, which causes a variety of outcomes that have mostly been negative considering that the outcome of the test has legal consequences for asylum-seekers like access to youth welfare, education, and child-specific rights. Germany has no national law or mechanism for age assessment tests within its asylum procedure, except in the case of UAMs, who take an official age assessment test in line with the Act on the Improvement of Care Arrangements for Foreign Children and Juveniles. This Act increased the age of the majority from 16 to 18 which allows unaccompanied minors to access legal representation within the Asylum Act.

The Bavarian Administrative Court holds that standardised determination of minor status is set out in the German Social Code Book 8 requiring initial identification through official documents. If such documents are missing, then a self-assessment of the person is considered through testimony.⁵⁷⁵ A qualified inspection follows the assessment where the reason for doubt is raised. If further doubt, then a medical examination is conducted.⁵⁷⁶ BAMF sends all unaccompanied asylum-seekers to the youth welfare office for age assessment, which has different age assessment methods that have been subject to contentious debates.

A public debate in 2018 involved German politicians calling for legally mandatory age assessment tests while specialists rejected the proposal on the grounds of the susceptibility of these tests to inaccuracy and medical error. This debate indicates the effect of the lacuna regarding age assessment tests in the asylum procedure. The Federal Minister of the Interior stressed that age assessment tests should not be left to the discretion of individual authorities

575. German Social Code Book 8, Sozialgesetzbuch (SGB) VIII.

576. Germany- Bavarian Administrative Court (2016)
<<https://www.asylumlawdatabase.eu/en/case-law/germany-%E2%80%93-bavarian-administrative-court-12-cs-161550-16082016>> accessed 13 March 2022.

to have doubts and take action.⁵⁷⁷ Instead, he states that “There should be clear rules stipulated that in cases where no official and genuine document can be presented, other measures must be taken to assess a person’s age, e.g. through a medical examination, *if necessary*.”⁵⁷⁸

The lack of uniform age assessment testing methods causes objections as to the accuracy of information. The director of the Hamburg University Clinic in Eppendorf, Klaus Püschel, explains that over the last few years, two-thirds of the people examined were proven to be much older than they had stated.⁵⁷⁹ Nevertheless, the Bavarian Administrative Court allows for a grey area of two to three years on top of the medically-determined age.⁵⁸⁰ Germany is presently examining the use of ultrasound age tests on unaccompanied refugees.⁵⁸¹

c) **Grounds for Detention.**

Another variation of the German asylum procedure from general EU law is on grounds for detention of asylum seekers. The Dublin III Regulation requires the Member States to detain asylum seekers only if there is a significant risk of absconding alongside on an individual assessment.⁵⁸² In the same light section 62 of the German Residence Act contains provisions for detention in the course of Dublin procedures and provides most grounds for detention based on a “rebuttable assumption for a risk of absconding within the meaning of Article 2 of the Dublin III Regulation”. The problem identified is that the grounds indicated within the German Residence Act are vaguely worded which raises questions on

577. J. Tangermann, P. Hoffmeyer-Zlotnik, ‘Unaccompanied Minors in Germany: Challenges and Measures after the Clarification of Residence Status’ (Federal Office for Migration and Refugees, 2018) 25.

578. J. Tangermann, P. Hoffmeyer-Zlotnik, ‘Unaccompanied Minors in Germany: Challenges and Measures after the Clarification of Residence Status’ (Federal Office for Migration and Refugees, 2018) 25.

579. C. Hauswedell, ‘How is the age of asylum seekers determined?’ (InfoMigrants 2018) <<https://www.infomigrants.net/en/post/6851/how-is-age-of-asylum-seekers-determined>> accessed 13 March 2022.

580. Germany- Bavarian Administrative Court (2016) <<https://www.asylumlawdatabase.eu/en/case-law/germany-%E2%80%93-bavarian-administrative-court-12-cs-161550-16082016>> accessed 13 March 2022.

581. K. Brady, ‘Germany looks into ultrasound age tests on unaccompanied minor refugees’ (Deutsche Welle (DW) 2019) accessed 19 March 2022.

582. Dublin Regulation (EU) No 604/2013, Article 28.

whether they constitute significant reasons to assume a risk of absconding.

Moreover, asylum seekers are apprehended and *de facto* detained in the transit zone of an international airport for the duration of the airport procedure which is a deviation from general practice.⁵⁸³ It seems that the main area of contention is the understanding of “the risk of absconding” of an asylum seeker which the proposal to the Reception Conditions Directive tried to amend by defining “absconding”. Yet again, the definition of absconding in the EU Commission proposal reveals a worrying trend of criminalization of asylum seekers in the EU Legal framework taking into consideration the varied interpretations of Article 8 (3) (e) of the Recast Reception Conditions Directive by the Member States.⁵⁸⁴ The unpredictable effects are seen in the lack of strict adherence to the timelines in the Dublin Regulation whereas German authorities continuously face criticism for the failure to conduct Dublin transfers in good time. For example, none of the total 32,482 deportations (returns or Dublin transfers) scheduled for 2019 occurred.⁵⁸⁵

d) Access to Education.

In Germany, the Federal Office (BAMF) is only responsible for the asylum procedure, whereas the reception lies within the responsibility of the Federal States.⁵⁸⁶ The right to education is universal and this is reflected in Article 14 (1) of the recast Reception Conditions Directive expressly indicates that the Member States shall grant asylum-seeking minors access to education under similar conditions as their nationals, for so long as an expulsion measure against them or their parents are not enforced, and that such education may be provided

583. AIDA, ECRE, ‘Country Report: Germany: Grounds for Detention’ (Asylum in Europe 2022) <<https://asylumineurope.org/reports/country/germany/detention-asylum-seekers/legal-framework-detention/grounds-detention/>> accessed 19 March 2022.

584. AIDA, ECRE, ‘The detention of asylum seekers in Europe: Constructed on shaky ground?’ (ECRE, 2017) 8, <https://www.ecre.org/wp-content/uploads/2017/06/AIDA-Brief_Detention-1.pdf> accessed on 19 March 2022.

585. AIDA, ECRE, ‘Country Report: Germany: Overview of the main changes since the previous report update’ (Asylum in Europe 2022) <<https://asylumineurope.org/reports/country/germany/overview-main-changes-previous-report-update/>> accessed 19 March 2022.

586. European Commission, European Migration Network, AD HOC QUERY ON 2021.28 Detection of vulnerabilities in the international protection procedure Part 1 (European Commission, Luxembourg 2021) 30.

in education centres, and that it the Member state may stipulate that such access must be confined to the State education system.⁵⁸⁷ However, where this is not possible due to the specific situation of the minor, the Member States must offer the education arrangements per their national law and practice.⁵⁸⁸ Member States concerned are obligated not to withdraw secondary education for the sole reason that the minor has reached the age of majority.⁵⁸⁹

Some of the major variations in Germany's application of EU Asylum law begin with the access to education for asylum-seeking children in Germany. The integration of UAMs into education is a priority and all are entitled to education in Germany, yet access to the schools is regulated differently among the individual German Federal States. All German Federal States have adopted special programs for the integration of children and juveniles who have recently entered the country, including UAMs. Nevertheless, the Federal Government reports that UAMs still have poorer education facilities than German children and juveniles.⁵⁹⁰ Various NGOs note that several initial reception centres only had very basic schooling and no access to the regular school system during the asylum-seeking children's stay, thereby causing them to fall behind in education after receiving refugee status.⁵⁹¹

First, asylum-seeking children face disruption of their education. The general German compulsory education system begins at age six and ends at the age of 12 or upon reaching adulthood. In other cases, compulsory education ends at age 16, which does not grant asylum-seeking minors between ages 16 to 18 the right to access educational facilities as they should within EU law and the UNCRC, as is evident in North Rhine-Westphalia. While age limits for compulsory education are frequently not

587. The recast Reception Conditions Directive (2013/33/EU), Article 14 (1).

588. The recast Reception Conditions Directive (2013/33/EU), Article 14 (3)

589. The recast Reception Conditions Directive (2013/33/EU), Article 14 (1).

590. J. Tangermann, P. Hoffmeyer-Zlotnik, 'Unaccompanied Minors in Germany: Challenges and Measures after the Clarification of Residence Status' (Federal Office for Migration and Refugees, 2018) 58.

591. AIDA, ECRE, 'Country Report: Germany: Access to Education' (Asylum in Europe 2022) <<https://asylumineurope.org/reports/country/germany/reception-conditions/employment-and-education/access-education/>> accessed 19 March 2022.

applied too strictly in ongoing educational trajectories, they can make quite a difference when newly arrived youth are placed into the existing system or denied access at all due to the present age limit.⁵⁹²

In addition, article 14 of the recast Reception Conditions Directive requires that access to the education system shall not be postponed for more than three months from the date on which the asylum application was lodged by the minor or on their behalf. Minors are also required to receive preparatory classes, including language classes to facilitate their access to and participation in the education system.⁵⁹³ The Fundamental Rights Agency (FRA) indicates that asylum-seeking children in nine out of 14 EU Member States have no access to any kind of formal education and, if available, it is provided by NGOs.⁵⁹⁴ In Germany, there is a prominent early school leaving among young refugees and social class proves to be a stronger determinant for school careers than migration background. Even so, there is no obligation in Germany to provide a support person for refugee pupils following the principle of equity for them to have access to the same services as national pupils. Yet, they appear not to be well-equipped to meet the needs of refugee pupils.⁵⁹⁵

The UNHCR issued the Framework for the Protection of Children in 2012, which is complemented by the UNHCR Education Strategy (2012-2016) to ensure access to quality education (with or without documentation) by emphasising the role it plays in a child's development. The Education Strategy advocates for the integration of refugee children into national education systems as one of its objectives.⁵⁹⁶

The UNHCR framework proposes the recognition of education certificates by the Country of Origin and the Country of Asylum⁵⁹⁷ so asylum-seeking

592. C. Koehler, J. Schneider, 'Young refugees in education: the particular challenges of school systems in Europe' [2019] CMS 1, 15.

593. The recast Reception Conditions Directive (2013/33/EU), Article 14 (2).

594. C. Koehler, J. Schneider, 'Young refugees in education: the particular challenges of school systems in Europe' [2019] CMS 1, 8.

595. C. Koehler, J. Schneider, 'Young refugees in education: the particular challenges of school systems in Europe' [2019] CMS 1, 10.

596. UNHCR, 'A Framework for the Protection of Children' (UNHCR, Geneva 2012) 11.

597. UNHCR, 'A Framework for the Protection of Children' (UNHCR, Geneva 2012) 25.

children may resume their education from the level where it was interrupted rather than solely focusing on their age as a means to exclude them from accessing the national education system.

e) **Family Reunification.**

The reunification of a family member with a person in one place is essential for the restoration or maintenance of a family unit. Article 22 (2) of the UNCRC and Article 24 of the Charter on the Fundamental Rights of the EU affirms the right to family reunification and the right for children to have a personal relationship and direct contact with their parents if it is in line with the child's best interests. Family reunification forms one of the criteria to determine the responsible Member State within the Dublin Regulation while Article 23 of the recast Reception Conditions Directive requires an assessment of family reunification possibilities for the benefit of minors in consideration of their best interests.

The Germany Welfare Law and Residence Act allows for family reunification of asylum-seeking children but contains uncertainty in the face of other regulations. The former describes the legal framework in which youth welfare offices seek to affect a family reunification of unaccompanied minors with their families within Germany or an EU Member State.⁵⁹⁸ The Residence Act stipulates family reunification to be the subsequent immigration of parents, siblings or other family members to Germany from abroad to restore and maintain the family community in Germany.⁵⁹⁹ Generally, the Youth Welfare Office is responsible for assessing family reunification possibilities within Germany and the other Member States. A family reunification assessment is conducted by the Youth Welfare Office at the preliminary stage to determine the child's accommodation since living with family members is in their best interest. An internal discrepancy appears in the existence of uncertainty in the Residence Act on who migrates between the

598. J. Tangermann, P. Hoffmeyer-Zlotnik, 'Unaccompanied Minors in Germany: Challenges and Measures after the Clarification of Residence Status' (Federal Office for Migration and Refugees, 2018) 80.

599. J. Tangermann, P. Hoffmeyer-Zlotnik, 'Unaccompanied Minors in Germany: Challenges and Measures after the Clarification of Residence Status' (Federal Office for Migration and Refugees, 2018) 80.

family or the minor for reunification⁶⁰⁰ considering the Dublin Regulation and its Implementing Regulation entitles the family members to be transferred to the minor's location.⁶⁰¹

Germany also appears to slightly vary from EU asylum requirements by suspending family reunifications for beneficiaries of subsidiary protection and those who have protection under asylum law (refugee status) and are exempt from some requirements on the application for family reunification under residence law. It is difficult for minors with subsidiary protection since 2018 which was replaced with a provision according to which 1,000 relatives shall be granted a visa (which has extensively long waiting periods) to enter Germany each month.⁶⁰² The long waiting periods have particularly problematic effects on family reunification procedures of UAMs considering Article 29 of the Dublin Regulation requires transfer for family reunification must be carried out within six months of a Member State's acceptance of a take-charge or take-back request. In several decisions, the Administrative Court of Berlin has argued that the right to family reunification (i.e. reunification with one's parents) ends when the subsidiary protection status holder becomes an adult.⁶⁰³ The delay in procedures, in particular on the part of local authorities, might put the reunification of young persons with their parents at risk, which shows little or no consideration for the best interest of the child as required by the UNCRC and Dublin III Regulation. To safeguard the right to family reunification, the Administrative Court of Berlin has repeatedly asked authorities to prioritise procedures for UAMs who were approaching their 18th birthday.⁶⁰⁴

600. J. Tangermann, P. Hoffmeyer-Zlotnik, 'Unaccompanied Minors in Germany: Challenges and Measures after the Clarification of Residence Status' (Federal Office for Migration and Refugees, 2018) 6.

601. Dublin Regulation, Article 22 (7) and 29 (1); Dublin Implementing Regulation, Article 8 (1).

602. AIDA, ECRE, 'Country Report: Germany: Criteria and conditions' (Asylum in Europe 2022) <<https://asylumineurope.org/reports/country/germany/content-international-protection/family-reunification/criteria-and-conditions/>> accessed 19 March 2022.

603. AIDA, ECRE, 'Country Report: Germany: Criteria and conditions' (Asylum in Europe 2022) <<https://asylumineurope.org/reports/country/germany/content-international-protection/family-reunification/criteria-and-conditions/>> accessed 19 March 2022.

604. Decision 38 L 502.19 V (16 January 2020) and Decision 38 L 442.19 V, (26 November 2019) (Administrative Court, Berlin).

The Wiesbaden Administrative Court emphasises the high priority of family unity and the best interests of the child held within the Dublin Regulation application. The case in question involved a Syrian minor who applied for international protection in Germany but has family members in Greece who are entitled to family unity with them in Germany. The Administrative Court affirmed that the period for reunification begins from the acceptance of a request and the right to be transferred within six months is a subjective right, which must be respected by the German authorities since it is possible to oblige BAMF to transfer certain persons.⁶⁰⁵

4.3.2. SPAIN

Spain is an EU Member State that received 22,373 asylum applications from children in 2019 out of 140,637 total applications. Within that year, there were no applications made by UAMs.⁶⁰⁶ In 2020, Spain was recorded as the second EU Member State with the highest receipt of first-time applications (a total of 88,762 asylum applications)⁶⁰⁷ of which 870 were accompanied children who arrived by sea and land and the other 329 were UAMs.⁶⁰⁸ On the other hand, the German daily journal, *Die Welt*, cited unpublished and undisputed numbers from EASO claiming that Spain had surpassed Germany and was the top destination for asylum seekers in 2020.⁶⁰⁹ Overall, from 2010 to 2020, UAMs accounted on average for 15.4% of the total number of first-time applicants aged less than 18⁶¹⁰ which makes it a fundamental jurisdiction of focus for a case study.

605. Wiesbaden Administrative Court, Germany [15 September 2017] <<https://www.asylumlawdatabase.eu/en/case-law/germany-%E2%80%93-wiesbaden-administrative-court-6-l-4438-17wi-15-september-2017>> accessed 20 March 2022.

606. AIDA, ECRE, 'Country Report: Spain: Statistics' (Asylum in Europe 2022) accessed 20 March 2022.

607. UNHCR, 'Spain Asylum Applications' (UNHCR 2020) <<https://data2.unhcr.org/en/documents/details/84741>> accessed 20 March 2022.

608. UNHCR, UNICEF, IOM, Factsheet on refugee and migrant children Jan-June 2020 (UNICEF, 2020) 1.

609. E Schumacher, 'Spain eclipses Germany as top destination for asylum-seekers: report' (Deutsche Welle 2020) <<https://www.dw.com/en/spain-eclipses-germany-as-top-destination-for-asylum-seekers-report/a-53422966>> accessed 12 May 2022.

610. Eurostat, 'Children in migration - asylum applications' (Eurostat 2020) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Children_in_migration_-_asylum_applicants> accessed 26 April 2022.

Spain's national asylum legislation comprises an integration of legislative acts, implementing decrees, and administrative regulations relevant to the implementation of asylum processes and procedures. The main legislation is the Law 12/2009 of October 2009 (as amended by Law 2/2014) which regulates the law of asylum and subsidiary protection (Asylum Act). The Organic Law 4/2015 contains the rights and liberties of aliens in Spain and their social integration together with the protection of citizen security (Aliens Act and Citizen Security Act). Organic Law 39/2015 (Administrative Procedure Act) govern the Administrative Procedure of Public Administrations.

Spain, just like Germany, offers 5 asylum procedures (Regular, Border, Admissibility, Accelerated, and the Dublin Procedure). Generally, upon the arrival of an asylum seeker at the border checkpoint, they are required to notify the National Police or Civil Guard of the intention to apply for asylum, and lodge such application through the Office of Asylum and Refugee, Aliens' Office (OAR) which is responsible for determining the responsible Member State for the application in line with the Dublin Regulation criteria. The presence of the asylum-seeker in an Immigration Detention Facility (CIE) or a penitentiary facility may also notify the management of the intention to make an application for international protection. A personal interview is conducted with the assistance of an interpreter, if necessary, and with a lawyer who may be either hired privately, provided for free (public defender), or through a specialised NGO that provides free legal advice (for example, the Mercy Migrations and Welcome Network).

If the application is admissible and Spain is found to be the responsible Member State for the application, then the OAR reviews the application in line with the 1951 Refugee Convention alongside the Spanish Asylum Act (Law 12/2009) and provides a decision within a maximum period of six months or, if an urgent procedure, within three months. Where such an application is accepted, the asylum-seeker is granted refugee status in Spain, and if there is rejection, there is recourse to an appeal through judicial means in the High National Court and the Supreme Court in the second instance.

If Spain is not the Member State responsible for examining the application according to the Dublin criteria, the OAR issues a denial notification to the applicant accompanied by a compulsory order to leave Spanish territory (within

15 days), deportation order or request to transfer to the Member State responsible for examining the application. An administrative appeal within the Ministry of Interior may be made to challenge this decision.⁶¹¹

The Spanish Asylum Act (Law 12/2009) provides that asylum seekers have the right to documentation indicating their application status (White Card or Red card), free legal assistance and an interpreter, the right to have their application reported to UNHCR, the right to non-refoulement, medical assistance, social benefits, to access their asylum records and to work in Spain after the lapse of six months since lodging asylum application.⁶¹²

Asylum-seeking minors (accompanied and unaccompanied) are recognized as part of a vulnerable group within the Spanish Asylum Act which requires specialised treatment through protection measures and assistance services,⁶¹³ that are not expressly specified. Consequently, these measures are difficult to implement in practice. The main aspects of Spanish national law that differ from EU asylum law regarding asylum-seeking children are as follows.

a) Identification of Vulnerable Persons.

As earlier mentioned, Article 22 of the Recast Reception Conditions Directive (2013/33/EU) requires the Member States to recognize the vulnerability of minors, especially UAMs, which can only be determined through an efficient identification process. The vulnerability detection framework is established in the Organic Law 1/996 on Legal Protection of Minors, Asylum Act, and the Law on Protection Against Gender Violence.

Spain has a legal and procedural framework for identifying vulnerable persons. To begin with, the statement of motives in the Organic Law 1/996 on Legal Protection of Minors states that its provision regulates the general principles of action in situations of social vulnerability, and the obligation of any person who detects a situation of risk of a minor

611. UNHCR, 'Applying for asylum at border checkpoints and Immigration Detention Facilities (CIE)' (UNHCR) <<https://help.unhcr.org/spain/en/solicitar-asilo-en-espana/solicitud-de-asilo-en-puestos-fronterizos-y-en-centros-de-internamiento-de-extranjeros-cies/>> accessed 18 April 2022.

612. UNHCR, 'Rights and Obligations as an Asylum Seeker' (UNHCR) <<https://help.unhcr.org/spain/en/solicitar-asilo-en-espana/solicitantes-de-asilo/>> accessed 18 April 2022.

613. Spain Asylum Act (Organic Law 12/2009), Article 46.

to provide immediate assistance and report to the authority or its agents.⁶¹⁴ It contains regulations of general principles of actions to be taken in situations of social vulnerability of the minor after the risk or possibility of abandonment is detected, with the best interest of the child being the primary consideration.⁶¹⁵ Most importantly, this legislation reinforces the participation of children in decision-making processes that influence their lives.

The Spanish Asylum Law (12/2009) is important national legislation in the EU region as it expressly recognizes persecution based on gender and sexual orientation in Articles 6 and 7 which indicates the State's willingness to recognize them as vulnerable persons in the asylum process. They have also adopted the Organic Law 1/2004 on Comprehensive Protection Measures against Gender Violence with the recognition that situations of violence against women also affect minors within the family environment as either direct or indirect victims.⁶¹⁶

Spanish asylum law needs improvement to provide for vulnerability identification processes and extend basic protections and rights to vulnerable persons to facilitate their integration and contribution to their host communities, especially for UAMs and LGBTQ+ individuals.⁶¹⁷ Spain does not have a standardised formal procedure or mechanism for the detection of vulnerable profiles, so the responsibility falls, in most cases, on the European Asylum Support Office (EASO) which has a protocol for the elaboration of common standards for the detection of vulnerabilities as part of the EU CEAS. They conduct vulnerability assessments that, according to Amnesty International, fail to detect probable future threats to vulnerable persons, like victims of human trafficking and UAMs.⁶¹⁸ In this regard, major shortcomings

614. Organic Law 1/996 on Legal Protection of Minors, Statement of Motives, two.

615. Organic Law 1/996 on Legal Protection of Minors, Article 12 - 13.

616. Organic Law 1/2004 on Comprehensive Protection Measures against Gender Violence, Statement of Motives, II.

617. D. Panayotatos, 'Reform Past Due: COVID-19 Magnifies Need to Improve Spain's Asylum System' (Refugees International 2020) <<https://www.refugeesinternational.org/reports/2020/7/22/reform-past-due-covid-19-magnifies-need-to-improve-spains-asylum-system>> accessed 12 May 2022.

618. Amnistía Internacional, 'Canarias: Quince años de continua degradación del derecho al asilo' (Amnistía Internacional 2021) <<https://www.es.amnesty.org/en-que-estamos/noticias/noticia/articulo/canarias-quince-anos-de-continua-degradacion-del-derecho-al-asilo/>> accessed 18 April 2022.

appear especially regarding victims of trafficking. Spain has adopted two National Plans against the Trafficking of Women and Girls for Sexual Exploitation, and a Framework Protocol on the Protection of Victims of Human Trafficking, aiming at coordinating the activities of all involved actors to guarantee protection for the victims, but several obstacles still exist. For example, Spain has not yet adopted a policy tackling all forms of trafficking and any victim, and the fight against trafficking is focused on girls and women trafficked for sexual exploitation.⁶¹⁹

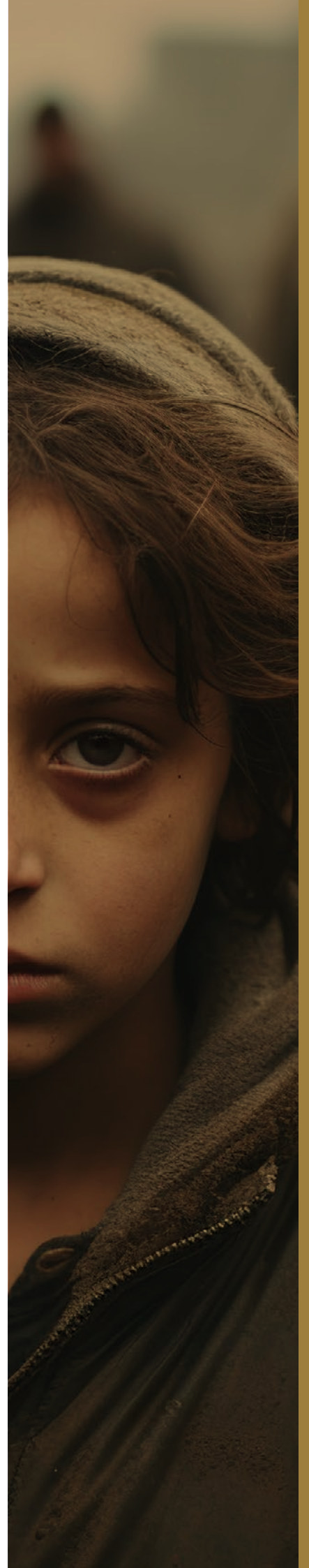
Spain has been subject to further criticism by Amnesty International due to the undignified and degrading treatment of vulnerable asylum-seekers such as minors,⁶²⁰ which is owed to the lack of adequate and early protocol to identify vulnerable persons as required within Article 21 of the recast Reception Conditions Directive. This difficulty is coupled with the pushbacks at the border that led to the case of *DD v Spain*. UAM, identified as DD, was immediately handcuffed after arriving in Spain and returned to Morocco without any question of his age, name, or providence of any lawyer, translator, or social worker.⁶²¹ The CRC clarified the necessity of an initial assessment to be conducted before any removal, which has to include an age and vulnerability assessment. Spain must work on enacting national law to address this gap in the event of future pushbacks that will affect asylum-seeking minors' child rights and right to seek asylum.

In addition, the increase in the number of asylum seekers since 2017 has exacerbated difficulties in the identification of vulnerabilities. The lack of a protocol for the identification and protection of persons with special needs (including children) in Migrant Temporary Stay Centres has always been criticised and continues to be a concern because they cannot be adequately protected in these centres leading to

619. AIDA, ECRE, 'Country Report: Spain: Identification' (Asylum in Europe 2022) <<https://asylumineurope.org/reports/country/spain/asylum-procedure/guarantees-vulnerable-groups/identification/>> accessed 19 April 2022.

620. Amnistía Internacional, 'Canarias: Quince años de continua degradación del derecho al asilo' (Amnistía Internacional 2021) <<https://www.es.amnesty.org/en-que-estamos/noticias/noticia/articulo/canarias-quince-anos-de-continua-degradacion-del-derecho-al-asilo/>> accessed 18 April 2022.

621. *DD v Spain* (2016) (CRC).



violation of their fundamental human rights.⁶²²

This is evident in the earlier mentioned case involving a minor, JAB, where the CRC held that Spain had failed to protect him against his situation of helplessness, particularly given his high degree of vulnerability as a minor who is unaccompanied and ill.⁶²³ The Committee noted that this lack of protection occurred even after the author submitted identity documents to the Spanish authorities confirming that he was a child. The Committee considered that this constituted a violation of Articles 20 (1) and 24 of the UNCRC. As an additional solution, the Refugees International group recommends that EU leaders must monitor Spain's policies and practices to ensure they comply with regional and international law which is an indication of the disconnect that is the focus of this research study.⁶²⁴

b) **Age Assessment.**

When it comes to asylum-seeking children, their age needs to be ascertained for them to enjoy the protection of a vulnerable person. Yet, the outcomes of these tests take longer than necessary causing abandonment and increasing their risk of harm where there is detention pending the results of an age assessment test.

Similar to Germany, Spain has no express age assessment law or procedure in place. Complaints about Spain's age determination process for young asylum-seekers formed 40% of the CRC cases decided through the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (CRC OP3).⁶²⁵ The nature of the complaints is illustrated in the case of *RYS v Spain* brought by a 16-year-old asylum-seeking girl from Cameroon who testifies that she was forced to un-

622. AIDA, ECRE, 'Country Report: Spain: Identification' (Asylum in Europe 2022) <<https://asylumineurope.org/reports/country/spain/asylum-procedure/guarantees-vulnerable-groups/identification/>> accessed 19 April 2022.

623. CRC, Views adopted by the Committee under article 10 of the Optional Protocol, concerning communication No. 22/2017 (CRC, 2019) 13.

624. D. Panayotatos, 'Reform Past Due: COVID-19 Magnifies Need to Improve Spain's Asylum System' (Refugees International 2020) <<https://www.refugeesinternational.org/reports/2020/7/22/reform-past-due-covid-19-magnifies-need-to-improve-spains-asylum-system>> accessed 12 May 2022.

625. J. Valentine, A. Morlchetti, 'Case Notes: Communication 76/2019 RYS v Spain' (Universiteit Leiden, 2021) <<https://childrensrightsobservatory.nl/case-notes/caseno-76-2019>> accessed 12 May 2022.

dress and have her genitalia examined to ascertain her age⁶²⁶ – an experience which re-traumatized her as she was a victim of sexual abuse. In this case, the CRC found a violation of RYS' rights under Article 16 of the UNCRC.

The CRC issued an opinion in *NBF v Spain*, providing relevant guidance on age assessment. In particular, it stressed that, only in the absence of identity documents and to assess the child's age, states should proceed to a comprehensive evaluation of the physical and psychological development of the child, and such examination should be carried out by specialised professionals such as paediatricians.⁶²⁷ The evaluation should be quickly carried out, taking into account cultural and gender issues, by interviewing the child in a language he or she can understand. States should avoid basing age assessment on medical examinations such as bone and teeth examinations, as they are not precise, have a great margin of error, can be traumatic, and give rise to unnecessary procedures.⁶²⁸ Most importantly, the CRC in *NBF v Spain* establishes the importance of giving persons the benefit of the doubt during the age determination process, in which such benefit can be given by providing them with a legal representative free of charge upon their arrival.⁶²⁹ Failure to do so will imply a violation of their rights under Articles 3 and 12 of the UNCRC.

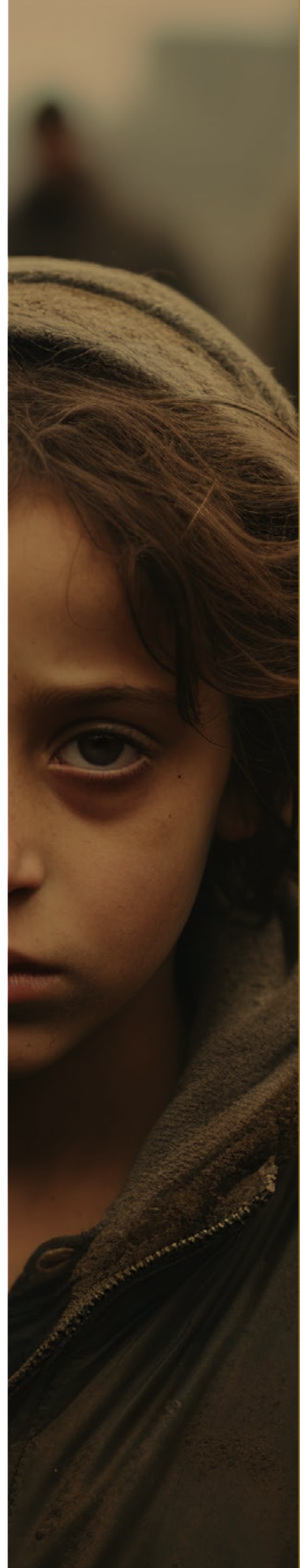
Unlike Germany, Spain once had an age assessment law which was abolished by the Royal Decree 903/201 which modifies the Regulations of the Aliens Act (Organic Law 4/2000). The Royal Decree was adopted after Spain's long implementation of the EU Directives. It abolishes the requirements for migrants under the age of 18 to ascertain their age which is a step toward the end of highly protested age assessment methods which asylum-seeking

626. J. Valentine, A. Morlachetti, 'Case Notes: Communication 76/2019 RYS v Spain' (Universiteit Leiden, 2021) <<https://childrensrightsobservatory.nl/case-notes/casote2021-7>> accessed 12 May 2022.

627. J. Valentine, A. Morlachetti, 'Case Notes: Communication 76/2019 RYS v Spain' (Universiteit Leiden, 2021) <<https://childrensrightsobservatory.nl/case-notes/casote2021-7>> accessed 12 May 2022.

628. J. Valentine, A. Morlachetti, 'Case Notes: Communication 76/2019 RYS v Spain' (Universiteit Leiden, 2021) <<https://childrensrightsobservatory.nl/case-notes/casote2021-7>> accessed 12 May 2022.

629. *NBF v Spain* (2017) (CRC).



children and allows them to access residence and work permits before attaining 18 years, with an extended validity of these permits.⁶³⁰ This legislation is considered a historic step toward the inclusion of children arriving alone in Spain by allowing them to access the labour market and easily integrate into society with less administrative burden.⁶³¹ Unfortunately, this reform does not offer a remedy to those wrongfully identified as adults and could not reap the benefits of special safeguards offered to asylum-seeking minors under Spanish law.

c) **Grounds for Detention.**

Article 28 of the Dublin II Regulation does not require the Member States to detain asylum seekers unless there is a significant risk of absconding. From published studies and ECtHR case law, it is evident that there is a general international consensus on the avoidance of child detention because it is in their best interest.

Articles 53 and 54 of the Aliens Act contain grounds for detention that do not apply to asylum seekers and, therefore, are not allowed in national law and are never detained during regular and Dublin asylum procedures.⁶³² Regardless of this fact, there are exceptions in practice that report the detention of UAMs and victims of trafficking.⁶³³

Furthermore, Article 62 (4) of the Aliens Act indicates the general rule on the avoidance of detaining children. Contrary to this, the Global Immigration Detention Observatory reports some children are detained because they are unable to prove their minor or because they are accompanied by an adult (the latter which is permitted in Spanish law).⁶³⁴ It

630. Royal Decree 903/2021 of October 19 Spain.

631. G. Sanchez, 'El Gobierno aprueba la reforma del reglamento que facilitará los papeles a menores y jóvenes migrantes' (El Diario 2021) <https://www.eldiario.es/desalambre/gobierno-aprobara-martes-reforma-reglamento-facilitara-papeles-miles-menores-jovenes-migrantes_1_8409112.html> accessed 16 May 2022.

632. AIDA, ECRE, 'Country Report: Spain' (AIDA 2021) <https://asylumineurope.org/wp-content/uploads/2022/04/AIDA-ES_2021update.pdf>, p. 137.

633. AIDA, ECRE, 'Country Report: Spain' (AIDA 2021) <https://asylumineurope.org/wp-content/uploads/2022/04/AIDA-ES_2021update.pdf>, p. 12.

634. Global Detention Project, 'Country Report: Immigration Detention in Spain: A Rapid Response to COVID-19' (Global Detention Project Geneva 2020) p. 14.

appears that detention in Spain commonly occurs at the border where all adults arriving on the mainland by boat are placed in police detention for up to 72 hours, including women travelling with children for identification and processing.⁶³⁵ This practice appears to be reasonable and for good reason. In reality, this time limit is often surpassed without a judicial decision established by law and with difficulty receiving effective access to NGOs and UNHCR for assistance while detained.⁶³⁶

In 2020, the Spanish government announced the end of immigration detention for those who could not be returned to their countries of origin. There are some contradictory practices reported within Spain that indicate variance from the national law, such as the January 2020 reported detention of a 16-year-old child in the Valencia CIE, even though the authorities had proof of his minority through legal documents.⁶³⁷

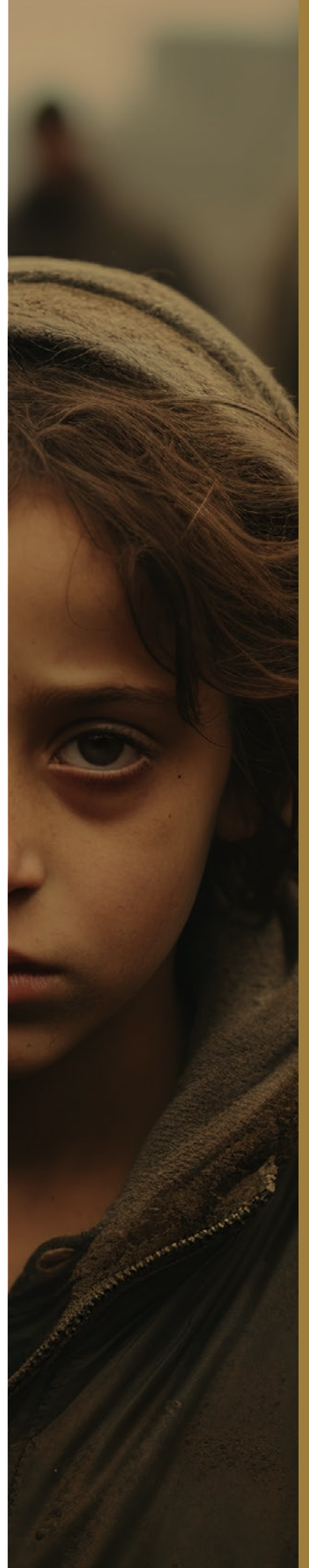
d) **Access to Education.**

Article 14 of the recast Reception Conditions Directive (2013/33/EU) aims to ensure asylum-seeking minors have access to schooling and the host State's education system. The right to education is explicitly indicated in articles 10, 13, and 27 of the Spain Constitution (1978) as guaranteed to every child despite their legal status. This right is not explicitly indicated within the Spanish Asylum Act, but it is indicated as a guarantee under Article 10 of Organic Act 1/1996 on the legal protection of children and young people. Articles 1 and 2 of the aforementioned Act indicate its provisions apply to people under the age of 18 years within the Spanish territory with special consideration of the best interest of the child to ensure equality where the child is an asylum seeker. Additionally, article 10 of the Organic Act 1/1996 cites the right to education of foreign minors residing in Spain must be under the same terms as Spanish minors. A 2019 UNESCO

635. AIDA, ECRE, 'Country Report: Spain' (AIDA 2021) <https://asylumineurope.org/wp-content/uploads/2022/04/AIDA-ES_2021update.pdf>, p. 42.

636. AIDA, ECRE, 'Country Report: Spain' (AIDA 2021) <https://asylumineurope.org/wp-content/uploads/2022/04/AIDA-ES_2021update.pdf>, p.44, p.86.

637. Global Detention Project, 'Country Report: Immigration Detention in Spain: A Rapid Response to COVID-19' (Global Detention Project, Geneva 2020) p. 15.



report recognizes this guarantee of the right to education is expressed in a less assertive way within its legislation.⁶³⁸

There is not much up-to-date information on the laws and procedures regarding access to education for asylum-seeking children in Spain. Nevertheless, it is reported that the asylum-seeking children present in Ceuta and Melilla had difficulty accessing education because of the restrictive enrollment process that required them to prove legal residence in Spain. In February 2022, the European Commission announced that the Ombudsman and Prosecutor's Office for Minors enacted regulation changes to break down the present barriers for these minors by specifically allowing these minors to be enrolled in school through other means of proof admitted by law.⁶³⁹

e) **Family Reunification.**

There is not much detailed information on the family tracing process and procedures in Spain as compared to Germany. Nonetheless, family reunification in Spain appears to be in line with Article 23 of the Recast Reception Conditions Directive which emphasises the best interest of the child as a primary consideration.

Family tracing in Spain is based on the principle that all minors, independent of their nationality or origin, should be integrated into their family and social surroundings as long as it does not conflict with their best interest.⁶⁴⁰ Article 39 of the Spanish Asylum Law (12/2009) reiterates the importance of maintenance of the family unit among refugees and beneficiaries of international protection. Article 40 allows for the

638. UNESCO, 'Enforcing the right to education of refugees: A policy perspective' (Publication 8, UNESCO, Paris 2019) p. 26.

639. European Commission, 'Regulation changes to ensure access to education for children in Spanish enclaves' (European Commission 2022) <https://ec.europa.eu/migrant-integration/news/regulation-changes-ensure-access-education-children-spanish-enclaves_en>; and I. Zafra, 'El Ministerio de Educación cambia su normativa para garantizar la plena escolarización de los niños en Melilla' (El País 2022) <https://elpais.com/educacion/2022-02-17/el-ministerio-de-educacion-cambia-su-normativa-para-garantizar-la-plena-escolarizacion-de-los-ninos-en-melilla.html?ssm=TW_CC> accessed 17 May 2022.

640. EMN, Unaccompanied Minors- an EU comparative study (Directorate-General for Home Affairs) p. 57 <https://www.ab.gov.tr/files/ardb/evt/1_avrupa_birligi/1_9_politika-lar/1_9_8_dis_politika/Polices_on_reception_return_and_integration_for_and_numbers_of_unaccompanied_minors.pdf>.

extension of the right to asylum or subsidiary protection to family relatives established through their legal or kinship relationship (on account of dependency or for medical reasons in some instances).

The right to family reunification is explicitly denoted in Article 41 of Spanish Asylum Law (12/2009). Contrary to Germany, there is no mention of assessing the possibilities for family reunification in Spanish national law. Rather, applications for family reunification must be made by the sponsor in Spain, though afterwards, family members must approach the embassy or consulate to present the documentation proving the family relationship.⁶⁴¹ Consequently, orphaned UAMs are prevented from being united with siblings in most EU Member states even when this is in their best interest.⁶⁴²

Some of the good practices in Spain are that it highly regards the parent-child relationship as seen in the case of *Saleck Bardi v Spain* where the Court ruled that a parent's right to be reunited with his or her child creates a "positive obligation" for States to take measures to fulfil that objective and that to be effective measures to reunify a parent and child must be put in place promptly since the passage of time can cause irremediable damage to the parent-child relationship if they are separated.⁶⁴³ Similar to Germany, asylum-seeking children in Spain are greatly affected and feel a sense of abandonment when there are delays by authorities in responding to family reunification requests.⁶⁴⁴

The UNHCR reports Spain offers more flexible time frames for a family reunification application and some assistance with travel costs despite requiring a sponsor to first apply on their families' behalf together with evidence of family links.⁶⁴⁵

641. F. Nicholson, 'The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification' (UNHCR, 2018) p. 107.

642. UNHCR, 'Families Together: Family Reunification for Refugees in the European Union' (UNHCR, 2019) p. 13.

643. F. Nicholson, 'The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification' (UNHCR, 2018) p. 136.

644. *Saleck Bardi v Spain* (24 August 2011) (ECtHR).

645. UNHCR, 'Families Together: Family Reunification for Refugees in the European Union' (UNHCR, 2019) p. 19.

4.3.3. FRANCE

France is an EU Member State geographically located between Spain and Germany, thus it comes as no surprise that it is also one of the main countries for first-time asylum applicants in 2021.⁶⁴⁶ Comparatively, UNICEF reports France as being one of the countries that recorded a large number of child asylum seekers in 2020 and received the second-highest applications lodged by UAMs and separated children after Germany,⁶⁴⁷ making the jurisdiction a worthy case study. Nevertheless, it is important to note that AIDA and ECRE⁶⁴⁸ point out that there are discrepancies in statistics on asylum-seeking persons in France, which have hindered our thorough analysis of this particular jurisdiction.

France has a dual legal system (public law and private law), with the Constitution as the hierarchically superior legislation. The French Constitution recognizes the right to seek asylum within section 4 of its Preamble. The national asylum legislation in France is primarily governed by the Code of Entry and Residence of Foreigners and of the Right to Asylum (CESEDA). It provides for refugee protection status according to the 1951 Refugee Convention and subsidiary protection. CESEDA does not specify the definition of “particular social group” and types of persecution.

- a) Amendment 2018-187 of March 2019 allowing for sound application to the European asylum system;
- b) Amendment 2018-778 of 10 September 2018 for managed migration, effective asylum law, and successful integration;
- c) Civil Code;
- d) Code of Administrative Justice;
- e) Code of Social Action and Families; and
- f) Labour Code.

As in Germany and Spain, France offers 5 asylum procedures (Regular, Border, Admissibility, Accelerated, and the Dublin Procedure), where the first step is pre-reception at a local centralised orientation platform, *plateforme d'accueil de demandeurs d'asile* (SPADA) to set an appointment

646. Eurostat, 'Annual Asylum Statistics' (Eurostat 2022) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Annual_asylum_statistics#Number_of_asylum_applicants:_increase_in_2021> accessed 16 May 2022.

647. UNICEF, 'Latest statistics and graphics on refugee and migrant children' (UNICEF) <<https://www.unicef.org/eca/emergencies/latest-statistics-and-graphics-refugee-and-migrant-children>> accessed 9 June 2022.

648. AIDA, ECRE, 'Country Report: France: Statistics' (Asylum in Europe 2022) <<https://asylumineurope.org/reports/country/france/statistics/>> accessed 9 June 2022.

to lodge an asylum application. SPADA fills out an application registration form that will be used to book an appointment and summons for the appointment to take place within 3 to 10 days.⁶⁴⁹ The applicant must then register the asylum application with the *guichet unique de demande d'asile* (GUDA) which has agents of the French Office for Immigration and Integration (OFII). GUDA agents validate the information provided, collect fingerprints, and conduct an individual interview with the applicant to determine the Member State responsible under Dublin III Regulation or the competency of the *Office français de protection des réfugiés et apatrides* (OFPRA) to examine the application through a normal or accelerated procedure. GUDA then issues the asylum claim certification to the applicant that serves as a temporary residence permit that is valid for 1 month in the case of the latter procedure (with the possibility of renewal) or an asylum application in the case of a Dublin procedure. The asylum seeker is then informed of the procedure applicable to their situation.

The asylum applications of accompanied minors are considered to be submitted in the name of the accompanying adult and in that of the child through a single form. If both parents are present on French territory, the children's asylum applications will be linked to that of their mother.⁶⁵⁰

OFII is responsible for conducting vulnerability assessments in the second stage by looking at personal circumstances and offering access to appropriate reception conditions. OFPRA is responsible for issuing a decision that is sent to the asylum-seeker by registered post.

The National Court for Right of Asylum (CNDA) is responsible for appeals of OFPRA decisions in asylum cases and its decisions may be appealed to the Council of State which has the highest administrative jurisdiction.

a) **Identification of Vulnerable Persons.**

France reports having a legal and procedural framework for vulnerability detection, according to its responses to the European Commission and European Migration Network (EMN) Ad Hoc Queries (2021.28 and 2019.70). The 2019.70 Ad Hoc Query

649. OFPRA, 'Demander l'asile en France' (OFPRA) <<https://www.ofpra.gouv.fr/fr/asile/la-procedure-de-demande-d-asile/demander-l-asile-en-france>> accessed 9 June 2022.

650. OFPRA, 'Demander l'asile en France' (OFPRA) <<https://www.ofpra.gouv.fr/fr/asile/la-procedure-de-demande-d-asile/demander-l-asile-en-france>> accessed 9 June 2022.

denotes that the profiles of asylum-seekers arriving in the jurisdiction have changed since the migratory crisis where they have identified there are fewer families and more young non-francophone men and more vulnerable persons such as people suffering from psycho-trauma, victims of sexual exploitation and members of the LGBTI community.⁶⁵¹

As earlier indicated, vulnerability assessment in France is conducted by OFII agents who have the legal authority to do so by dint of Article L.522/1 of CESEDA. These agents have specific training to identify and take special needs into consideration in the asylum application once they become apparent after a vulnerability interview based on a standard questionnaire that was established in 2015 by the Ministry of the Interior and the former Ministry of Social Affairs, Health, and Women's Rights. The OFII also has appointed persons to monitor and raise awareness of vulnerability regularly.⁶⁵²

Article L.531 of CESEDA further indicates vulnerabilities may also be detected after examining the asylum seeker's application statements or during the initial interview by OFPRA agents. OFPRA has a vulnerability detection system that categorises vulnerabilities into 5 categories for special protection needs (UAMs, sexual orientation, and gender identity, trauma, human trafficking, and violence against women). Training sessions are also offered to OFII agents and social workers in the asylum reception centres where the OFII adapts reception conditions, adopts special examination procedures (Article L.531-10 CESEDA), and adopts special procedural guarantees (L.531-17 CESEDA) to suit the specific needs of the vulnerability identified in an asylum-seeker.⁶⁵³

France differs from Germany and Spain in this as-

651. European Commission, European Migration Network, AD HOC QUERY ON 2019.70 Actions undertaken in the EU Member States to improve consideration of asylum seekers' and refugees' vulnerabilities throughout their migratory pathway (European Commission, Luxembourg 2019) p. 24.

652. European Commission, European Migration Network, AD HOC QUERY ON 2019.70 Actions undertaken in the EU Member States to improve consideration of asylum seekers' and refugees' vulnerabilities throughout their migratory pathway (European Commission, Luxembourg 2019) p. 26.

653. European Commission, European Migration Network, AD HOC QUERY ON 2019.70 Actions undertaken in the EU Member States to improve consideration of asylum seekers' and refugees' vulnerabilities throughout their migratory pathway (European Commission, Luxembourg 2019) p. 28.

pect, where there is particular recognition and treatment of prominent vulnerabilities recognized among asylum-seekers they receive, most uniquely, victims of trauma, which indicates recognition of mental health illnesses or disorders among asylum-seekers as a vulnerability. For example, L.531-17 CESE-DA offers a special guarantee of the presence of a mental health professional for asylum seekers with serious mental health illnesses or disorders. This is one commendable aspect that the other EU Member States should learn from.

Moreover, while the application procedure specifically provides for accompanied minors, there is no specific procedure laid out for UAMs. Instead, they are identified as vulnerable persons and thus, receive special procedural and reception guarantees set up by OFPRA such as a shorter period of assessment for their claims (within 4 months), their interviews are conducted by specially trained officers and must be represented in all asylum procedures by either a guardian or an ad hoc administrator (without delay especially at the border). In practice, the appointment of an ad hoc administrator should take between 1 to 3 months. Still, there are some areas in France with insufficient administrators, causing children to wait until they turn 18 to lodge their asylum applications at OFPRA⁶⁵⁴ which is a cause for concern as it hinders their access to the asylum system. In February 2022, the UNHCR announced it signed an agreement with the *Alliance des Avocats pour les Droits de l'Homme* (AADH) to conduct joint research on UAMs' access to the asylum procedure.⁶⁵⁵ Concerning asylum-seeking children, UAMs appear to face a risk of violation of the right to asylum, especially at the border due to this aspect.

For instance, the Administrative Tribunal Nice considered it manifestly unlawful and a breach of a UAMs interest when a child was refused entry at the Franco-Italian border and put on a train to Ventimiglia the same day without any assurance given by the French authorities to Italian authorities that the

654. AIDA, ECRE, 'Country Report: France: Legal Representation of Unaccompanied Minors' (Asylum in Europe 2022)

<<https://asylumineurope.org/reports/country/france/asylum-procedure/guarantees-vulnerable-groups/legal-representation-unaccompanied-children/>> accessed 9 June 2022.

655. UNHCR, 'France Fact Sheet' (UNHCR 2022) <<https://www.unhcr.org/623469bff.pdf>> accessed 9 June 2022.

child would be taken into care upon arrival at Ventimiglia.⁶⁵⁶ The present case went against the applicant's right to appeal the refusal of entry decision within 48 hours and the decision was not done in consultation with OFPRA, even though French law allows border police to exercise refusal of entry procedures.⁶⁵⁷ Moreover, the UAM was not given any specific guarantees such as the consideration of his best interest as required by L.213-2 of CESEDA causing a severe breach of the minor's interests⁶⁵⁸ and risk of violating his human rights since French authorities gave no guarantees to the Italian authorities.

b) **Age Assessment.**

France grants authorities the restrictive power to conduct age assessment tests but has received criticism due to compliance issues with the international framework.

As earlier discussed, age assessment tests are crucial to determine the minority of a child and grant them the special protective guarantees owed to them in the asylum system. Unlike Germany and Spain, France has legal provisions for age assessment tests. Article 388 (1) of the French Civil Code defines a minor as an individual below the age of 18 years, similar to Article 1 of the UNCRC. Article 47 of the Civil Code emphasises that the possession and presentation of identification documents proving the minority should be considered sufficient proof for immigration authorities, subject to the disputable presumption of the authenticity of the documents. Therefore, identification documents must always be examined unless the authorities have doubts about their originality. In this instance, the 2005 France inter-ministerial circular states bone testing can only be performed as a last resort if continuous doubts

656. Nice Administrative Tribunal France (23 February 2018) <<https://www.asylumlawdatabase.eu/en/case-law/france-nice-administrative-tribunal-23-february-2018-1800714>>, accessed 9 June 2022.

657. Human Rights Watch, 'France: Police Expelling Migrant Children' (Human Rights Watch 2021) <<https://www.hrw.org/news/2021/05/05/france-police-expelling-migrant-children>> accessed 9 June 2022.

658. Nice Administrative Tribunal France (23 February 2018) <<https://www.asylumlawdatabase.eu/en/case-law/france-nice-administrative-tribunal-23-february-2018-1800714>>, accessed 9 June 2022.

remain about the individual's minority.⁶⁵⁹

Age assessment procedures differ depending on whether the minor is at the border or within the territory. At the France border, the border police are required to examine the minor's identification documents as presented. In lack thereof, the border police request health services to conduct an age assessment test that corresponds to bone testing, of which the results are shared with the Public Prosecutor who will deliver the final decision on the matter taking into account the margin of error of medical tests.⁶⁶⁰ Within the territory, a multidisciplinary interview is conducted to gather as much information as possible on the individual claiming minority (social evaluation) to determine "social maturity" to estimate whether the individual is under 18 years old as they claim to be.⁶⁶¹ This practice has been endorsed by the French Ombudsman as a practice that should prevail in medical examinations and has also been supported by the Court of Appeal of Lyon in 2007.⁶⁶²

The France age assessment legal framework has been criticised for being restrictive on paper but not being enforced in practice whereas bone analysis is used to determine the age of minors arriving in the territory, despite its unreliability in providing a precise identity date.⁶⁶³ Consequently, the invasive nature of bone testing has been deemed highly intimidating and psychologically harmful to vulnerable children and may add to already existing trauma, especially for UAMs.

Moreover, France officials have been reported for rejecting asylum-seeking minors at the border calling for the respect of children's right to seek asylum and their other rights within the UNCRC. In 2021,

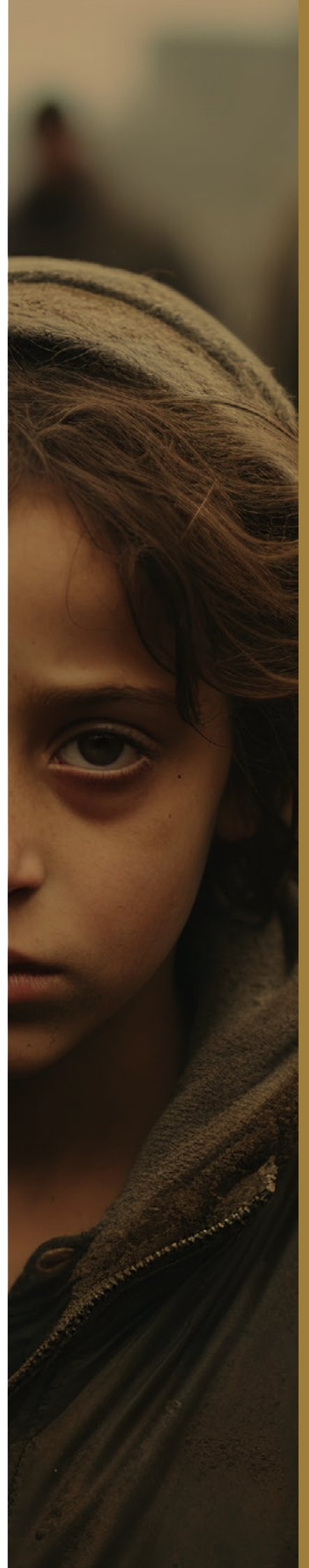
659. Circulaire du 31 mai 2013 (page 5) and Nouvelle Circulaire NOR: JUSF1602101C du 25/01/2016 (pages 3 et 8).

660. M. Gaudard, 'Age Assessment for Unaccompanied Minors in France' (Leiden University, Leiden 2019) p. 16.

661. Decree No. 2016-840 Relating to Reception and Minority Assessment Conditions of Minors Temporarily or Definitely Deprived from the Protection of their Family, 24 June 2016 (2016).

662. M. Gaudard, 'Age Assessment for Unaccompanied Minors in France' (Leiden University, Leiden 2019) p. 16.

663. M. Gaudard, 'Age Assessment for Unaccompanied Minors in France' (Leiden University, Leiden 2019) p. 16.



Human Rights Watch reported that Amnesty International and 10 other NGOs found numerous cases in which French police wrote incorrect birth dates on entry refusal forms and then expelled the youth who told the police they were under the age of 18.⁶⁶⁴ There have also been instances of French national courts ordering police to allow children to re-enter France upon finding that officials had written false dates on expulsion documents.⁶⁶⁵

c) Grounds for Detention.

Similar to Germany and Spain, the general principle in France is that the detention of asylum seekers is not allowed the asylum procedure, except for those who have lodged a request for asylum in an administrative detention centre (*centre de rétention administrative*, CRA) for removal, as well as those detained pending a transfer under Dublin Regulation.⁶⁶⁶ In the first case, Article L.754-3 CESEDA permits the detention of a foreign national who applies for asylum from detention in a CRA if permitted in a written and motivated decision that the asylum claim has only been introduced to prevent a notified or imminent order of removal.⁶⁶⁷

When it comes to UAMs, they are theoretically not meant to be put into detention, yet there have been reports of minors in detention in France, despite the October 2012 assurance given to the CRC that foreign UAMs will be treated with responsibility and the protection of the best interest of the child will prevail.⁶⁶⁸ However, French authorities have not put an end to the systematic detention and forced return of

664. Human Rights Watch, 'France: Police Expelling Migrant Children' (Human Rights Watch 2021)
<<https://www.hrw.org/news/2021/05/05/france-police-expelling-migrant-children>> accessed 9 June 2022.

665. E. Barbezat, 'Mineurs isolés : « Des pratiques contraires à la convention internationale des droits de l'enfant »' (l'Humanité 2020)
<<https://www.humanite.fr/societe/mineurs-etranagers/mineurs-isoles-des-pratiques-contraires-la-convention-internationale-des>> accessed 9 June 2022.

666. AIDA, ECRE, 'Country Report: France: General' (Asylum in Europe 2022)
<<https://asylumineurope.org/reports/country/france/detention- asylum-seekers/general/>>, accessed 9 June 2022.

667. AIDA, ECRE, 'Country Report: France: General' (Asylum in Europe 2022)
<<https://asylumineurope.org/reports/country/france/detention- asylum-seekers/general/>>, accessed 9 June 2022.

668. ANAFE 'Contribution on the detention of children at French border' p. 2.
<https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/FRA/INT_CRC_NGO_FRA_43114_E.pdf>, accessed on 9 June 2022.

children at borders.⁶⁶⁹

France terre d'asile recommends the French government forbid the detention of UAMs arriving in the waiting area and look at alternative solutions such as accommodation in a suitable structure for this vulnerable public or looking for family links in the territory.⁶⁷⁰ In 2021, Human Rights Watch reported that asylum-seeking minor boys whom French police deem to be adults spend the night in detention with adult men they do not know, causing feelings of stress and unsafety.⁶⁷¹ A lawyer based in Nice stated that young people spend up to 13 hours in detention with no blankets, no bed, no lights at night, and no electric outlets to charge phones, spending an average of an hour and a half there, deprived of liberty and without any knowledge of their rights.⁶⁷²

The same situation applies to children accompanied by adults who are subjected to detention. For example, in *Popov v France*, the Court determined that there was improper protection of children's right to liberty under Article 5 of the ECHR because while the children were placed in detention with their parents in a wing reserved for families, their particular situation was not taken into consideration as they were awaiting a flight after the rejection of asylum applications.⁶⁷³

d) Access to Education.

The asylum legislative framework in France does not expressly indicate an asylum seeker's right to education, and neither does the CESEDA. Instead, Article L.131-1 of the Education Code provides that the children of asylum seekers are subject to compulsory education if they are between ages 6 and

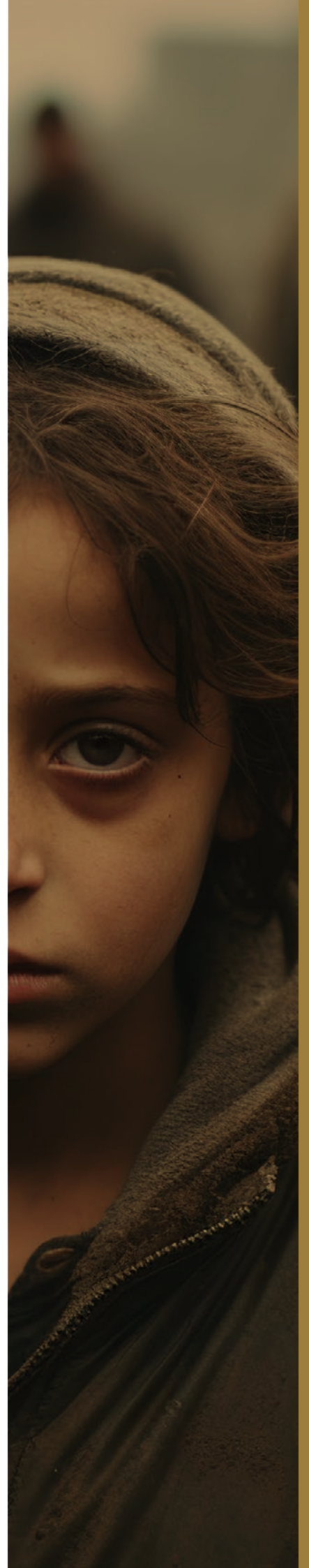
669. ANAFE 'Contribution on the detention of children at French border' p. 2. <https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/FRA/INT_CRC_NGO_FRA_43114_E.pdf>, accessed on 9 June 2022.

670. ANAFE 'Contribution on the detention of children at French border' p. 2. <https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/FRA/INT_CRC_NGO_FRA_43114_E.pdf>, accessed on 9 June 2022.

671. Human Rights Watch, 'France: Police Expelling Migrant Children' (Human Rights Watch 2021) <<https://www.hrw.org/news/2021/05/05/france-police-expelling-migrant-children>> accessed 9 June 2022.

672. Human Rights Watch, 'France: Police Expelling Migrant Children' (Human Rights Watch 2021) <<https://www.hrw.org/news/2021/05/05/france-police-expelling-migrant-children>> accessed 9 June 2022.

673. *Popov v France* (2012) (ECtHR).



16 years, under the same conditions as other French children. The education offered for this age group is in primary and secondary schools and non-native French speakers are used to allow teachers to integrate them.⁶⁷⁴ Education for asylum-seeking children is often provided directly in reception centres.

Asylum-seeking children in France face varied difficulties accessing education. For instance, this right is often hindered where there is discrimination against marginalised or vulnerable persons where France has shown a lack of progress as acknowledged in the *International Association Autism Europe v France*.⁶⁷⁵ Language barrier is another challenge that children in Northern France face difficulties accessing schools due to limited specialised language training or initiation classes together with administrative difficulties caused by uncertain family housing address which is needed to enrol in schools.⁶⁷⁶

e) **Family Reunification.**

France's asylum legislation recognizes the importance of family to children in the asylum procedure. Article L.741-4 CESEDA requires immediate investigations to find UAMs' family members while protecting the minor's best interests. Article L.561-2 CESEDA as amended by Article 3 Law 2018-778 of 10 September 2018 provides the entitlement to family reunification after receiving refugee and subsidiary protection indicating a close familial or dependency relationship, a practice which is analogous with the family reunification practice in Spain. In France, those entitled to family reunification after international protection is granted include children within the year after turning 18 years old and first-degree parents if the beneficiaries are still under 18 years old by the day asylum is granted. UAMs may also be reunited with first-degree parents and their dependent children.

Akin to Spain, the main challenge is gathering documentary evidence to prove familial ties and dependency, especially when it comes to birth certificates. In

674. AIDA, ECRE, 'Country Report: France: Access to Education' (Asylum in Europe 2022) <https://asylumineurope.org/reports/country/france/reception-conditions/employment-and-education/access-education/#_ftn1>, accessed 9 June 2022.

675. KU. Leuven-Katholieke, 'International Legal Protection of the Right to Education for Refugees and Asylum-Seekers' (Leiden University, Leiden 2017).

676. Project Play, 'Overview of the Barriers to Education Facing Children in Northern France' (Project Play) p. 5.

this respect, the ECtHR in *Mugenzi v France* found that family reunification must contain elements that consider the applicant's refugee status and guarantee the best interests of the children, who in this case were suffering from health problems as a result of trauma experienced in Rwanda but faced delayed reunification due to discrepancies in the children's psychological age and that indicated in their birth certificates.⁶⁷⁷

As per Article L.561-2 of CESEDA, there is no time limit for applying for family reunification and neither is it subject to income or health insurance, which is a positive aspect of the French system.

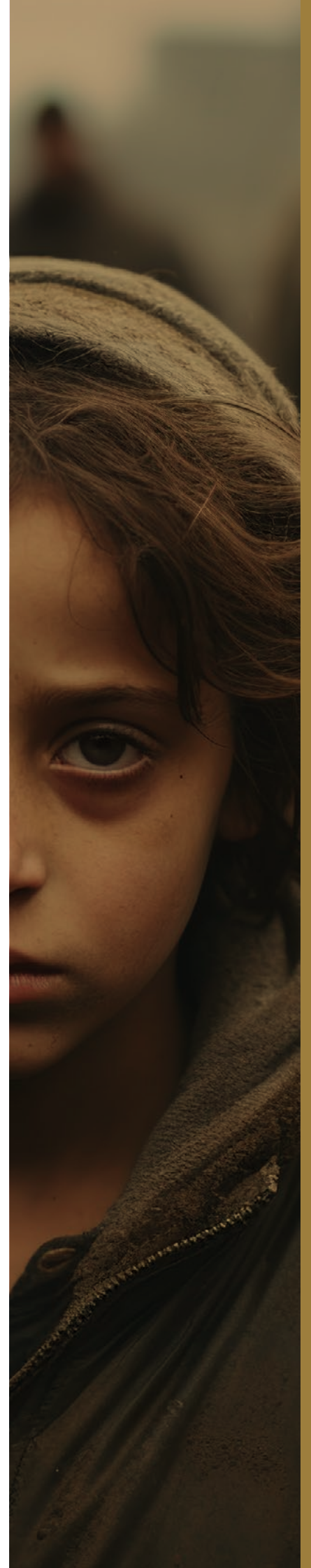
4.4. COMPARATIVE CASE STUDY: UNITED STATES OF AMERICA (US)

The UNHCR and Eurostat both report that in 2020, the United States of America (US) was the world's highest recipient of new asylum applications, followed by the EU Member States, Germany, Spain, and France.⁶⁷⁸ The US makes an interesting comparative case study for this research paper as it has been the subject of criticism from the international community regarding its specific treatment of asylum-seeking children. For instance, in February 2022, Human Rights Watch reported on the US border program's toll on children, where several families with children have been kidnapped after being sent to the Mexican border cities under the "Remain in Mexico" program.⁶⁷⁹ This has also resulted in some parents sending their children to the US alone while they remain on the Mexican side of the border because it is likely the best chance the child has at finding protection. The US is an indication that policy has a drastic effect on the treatment of asylum-seeking children in their quest for protection. This comparative case study will further show the complicated relationship minors have with asylum law and politics of different states, where the law dictates one aspect, but politics causes the opposite intended effect on children's international rights, access to the asylum procedure, and even well-being.

677. *Mugenzi v France* (10 July 2014) (ECtHR).

678. United Nations High Commissioner for Refugees, 'Global Trends in Forced Displacement - 2020' (UNHCR The UN Refugee Agency 2020).

679. Human Rights Watch, 'US: Border Program's Huge Toll on Children' (Human Rights Watch 2022)
<<https://www.hrw.org/news/2022/02/04/us-border-programs-huge-toll-children>> accessed 9 June 2022.



This section will also look into the focus on the identification of vulnerable persons, age assessment tests, grounds for detention, access to education, and family reunification, which the contributors of this study viewed as the most contentious processes in the varied treatment of asylum-seeking children, as done in the case studies of Germany, Spain, and France.

To begin with, it is important to note that the US has not ratified the 1951 Refugee Convention and is only a party to the 1967 Protocol, meaning that it is bound to apply the Convention's provisions which commit to treating refugees per internationally recognized legal and humanitarian standards, including the principle of non-refoulement and grant them with legal status and rights according to the refugee status.⁶⁸⁰ The US is the only country that has not ratified the UNCRC, with some opponents arguing that America already provides the protections included in the Convention when in reality the jurisdiction lacks an extensive framework to protect children's rights and unevenly enforces existing laws across jurisdictions.⁶⁸¹ The US is currently reported to fall short on various social and environmental determinants for children such as access to healthcare and family unification.⁶⁸² Moreover, the lack of ratification of the UNCRC corresponds to the inadequate share of US government funds allocated to child spending and the country's rating as the seventh-highest child poverty rate with a second-last ranking in family benefit spending.⁶⁸³

The US recognizes the right to seek asylum in the Refugee Act of 1980 where Congress adopted key provisions of the 1951 Refugee Convention, including the definition of a ref-

680. UNSW Sydney, 'The 1967 Protocol' (Kaldor Centre for International Refugee Law 2020) <<https://www.kaldorcentre.unsw.edu.au/publication/1967-protocol>> accessed 17 July 2022.

681. Farzad and OCHOA Family Law Attorneys LLP, 'Why Is the U.S. Still the Only Member of the U.N. That Has Not Ratified the Convention on the Rights of the Child?' (Farzad and OCHOA Family Law Attorneys LLP) <<https://farzadlaw.com/united-states-not-ratified-uncrc#>> accessed 22 June 2022.

682. M. Abaya, N. Bajaj, W. Binford, Mi. Blake, C. Dillard, J. Dold, H.e Ferdowsian, W. Lazarus, R. Maki, S. Meek, J. Milner, J. Nagda, V.K.Ramanathan, N.V. Sahovic, J. Todres, 'US High-Level Office for Children is Critical for Children's Rights' (Health and Human Journal 2022) <<https://www.hhrjournal.org/2022/03/us-high-level-office-for-children-is-critical-for-childrens-rights/>> accessed 22 June 2022.

683. M. Abaya, N. Bajaj, W. Binford, Mi. Blake, C. Dillard, J. Dold, H.e Ferdowsian, W. Lazarus, R. Maki, S. Meek, J. Milner, J. Nagda, V.K.Ramanathan, N.V. Sahovic, J. Todres, 'US High-Level Office for Children is Critical for Children's Rights' (Health and Human Journal 2022) <<https://www.hhrjournal.org/2022/03/us-high-level-office-for-children-is-critical-for-childrens-rights/>> accessed 22 June 2022.

ugee found in section 101 (a) (42) of the Immigration and Nationality Act (INA). The term “asylee” is specific to the US and refers to persons granted asylum in the US with legal permission to remain in the jurisdiction without fear of deportation, the ability to qualify for work, travel abroad, and apply for family reunification of a spouse or children under the age of 21.⁶⁸⁴

To apply for asylum in the US, the applicant must be physically present in the jurisdiction or seek entry into the US at a port of entry. The US offers two forms of asylum: affirmative asylum process and defensive asylum. In comparison, Germany, Spain, and France offer 5 forms of asylum procedures (Regular, Border, Admissibility, Accelerated, and the Dublin Procedure).

Affirmative asylum proceedings are applications for asylum through the US government, with the US Citizenship and Immigration Services (USCIS), a division of the Department of Homeland Security (DHS). If the USCIS asylum officer does not grant the asylum application, the applicant is referred to removal proceedings, where they may renew the request for asylum through the defensive process and appear before an immigration judge.⁶⁸⁵ Inversely, defensive asylum refers to an application by an applicant facing removal proceedings. The applicant files the applications with an immigration judge at the Department of Justice’s Executive Office for Immigration Review (EOIR). In other words, asylum is applied for “as a defence against removal from the U.S.”⁶⁸⁶

Other forms of protection available in the US are Withholding of Removal and Relief under the Convention Against Torture. In the latter, an applicant qualifies for asylum if they can prove they will more likely than not be tortured either directly by the government or with the “acquiescence” of the government if returned to their country of origin. “Acquiescence” generally means the government is aware of

684. Rescue.Org, ‘Is it legal to cross the US border to seek asylum?’ (Rescue.Org 2022) <<https://www.rescue.org/article/it-legal-cross-us-border-seek-asylum>>, accessed 17 July 2022.

685. UNHCR, ‘Types of Asylum’ (UNHCR) <<https://help.unhcr.org/usa/applying-for-asylum/types-of-asylum/>>, accessed 17 June 2022.

686. UNHCR, ‘Types of Asylum’ (UNHCR) <<https://help.unhcr.org/usa/applying-for-asylum/types-of-asylum/>>, accessed 17 June 2022.

the torture but does not try to stop it.⁶⁸⁷ In the Withholding of Removal procedure, an applicant is granted this status when they do not qualify for asylum but are allowed to remain and work lawfully in the US after demonstrating that they will, more likely than not (more than 50% chance), suffer future persecution if returned to their home country because of race, religion, nationality, membership in a particular social group or political opinion.⁶⁸⁸

a) **Identification of Vulnerable Persons.**

The US does not have specific mechanisms for identifying vulnerable persons within its legislation. It may be inferred that UNHCR practice handbooks guide the determination and treatment of vulnerable persons in the US through its agents, NGOs, and other organisations.

In the US it appears minors, victims of torture, and members of the LGBTIQ are considered as viewed as persons with special needs. When it comes to minors, as correctly inferred, the US courts and even the US Supreme Court have relied on the UNHCR's interpretations, especially the Handbook on Procedures and Criteria for Determining Refugee Status. US jurisprudence shows the US Courts have an international obligation to construe US statutes in a manner consistent with the US international obligations whenever possible.⁶⁸⁹ In this respect, the US recognizes the international standard of putting the best interest of the child as a primary consideration through interpreting the law in a child-sensitive manner and taking into account a child's "extreme vulnerability" (among other factors) when considering their asylum application, as articulated in the UNCRC.⁶⁹⁰

As a result, the UNHCR reports that the US recognizes the cases of different asylum-seeking children including former child soldiers (*Lukwago v Ashcroft*

687. UNHCR, 'Types of Asylum' (UNHCR) <<https://help.unhcr.org/usa/applying-for-asylum/types-of-asylum/>>, accessed 17 June 2022.

688. UNHCR, 'Types of Asylum' (UNHCR) <<https://help.unhcr.org/usa/applying-for-asylum/types-of-asylum/>>, accessed 17 June 2022.

689. UNHCR 'UNHCR's Views on Child Asylum Claims: Using international law to support claims from Central American children seeking protection in the US' (UNHCR Asylum Lawyers Project November 2016), p. 2 <<https://www.unhcr.org/en-my/582226064.pdf>>.

690. UNHCR 'UNHCR's Views on Child Asylum Claims: Using international law to support claims from Central American children seeking protection in the US' (UNHCR Asylum Lawyers Project November 2016), p. 3 <<https://www.unhcr.org/en-my/582226064.pdf>>.

2003), victims of FGM (*In the Matter of Kasinga*, 2006), family members of those who actively opposed gangs (*Crespin-Valladares v Holder*, 2011), children who are witnesses or informants (*Henrique-Rivas v Holder*, 2013), victims of domestic violence, and persecution on basis of religion (*Matter of SA*, 2000).⁶⁹¹

There are particular difficulties in assessing asylum claims from these different vulnerable classes of asylum-seekers that appear in the US determination of cases, making it unclear under which exact circumstances and standards asylum applications are determined and accepted. This is particularly evident in what exactly constitutes persecution by the membership of a particular social group.

b) **Age Assessment.**

There is not much information on age assessments in the US asylum system. Research shows there is currently no law on age assessment in the US and no standardised protocols that offer guidance regarding the use of age assessment methods for minors. They must be developed with input from physicians, social workers, human rights experts, and other stakeholders who can review scenarios through a child-protection lens.⁶⁹²

Medical age assessment is often conducted through medical examinations, physical measurements, and X-rays. These different tests are criticised based on being inconclusive, invasive, and potentially harmful by exposing minors to harmful unnecessary radiation. The inaccuracy of these tests is also viewed as detrimental in depriving children who are wrongly determined as being over 18 of their child rights such as access to education, health, and protection from abuse. Inaccurate age assessment tests are further linked to the wrongful detention of minors where their safety is at risk.⁶⁹³

691. UNHCR 'UNHCR's Views on Child Asylum Claims: Using international law to support claims from Central American children seeking protection in the US' (UNHCR Asylum Lawyers Project November 2016), p. 5 <<https://www.unhcr.org/en-my/582226064.pdf>>.

692. R. Mishori, 'The Use of Age Assessment in the Context of Child Migration: Imprecise, Inaccurate, Inconclusive and Endangers Children's Rights' (National Library of Medicine 2019) <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6678520/>>, accessed 17 June 2022.

693. R. Mishori, 'The Use of Age Assessment in the Context of Child Migration: Imprecise, Inaccurate, Inconclusive and Endangers Children's Rights' (National Library of Medicine 2019) <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6678520/>>, accessed 17 June 2022.

c) **Grounds for Detention.**

U.S. detention of migrant children has long sparked controversy. The Trump and Biden administrations have faced criticism for violating legal protections.⁶⁹⁴ Most unaccompanied children are detained at or near the U.S. southern border, often turning themselves in to authorities. Their entry into the immigration system triggers a multi-agency response guided by several laws and a court settlement.⁶⁹⁵

Under the Homeland Security Act of 2002, the Departments of Homeland Security (DHS) and Health and Human Services (HHS) share responsibility for unaccompanied children. These agencies must uphold the 1997 Flores Settlement, which was the result of a lawsuit against federal immigration authorities. Flores outlines standards for the care of both accompanied and unaccompanied minors, including access to food and water, emergency medical services, bathroom facilities, and ventilated, temperature-controlled surroundings.⁶⁹⁶

Under a 2015 court decision related to Flores and the 2008 William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPA), which codified certain Flores protections, officials must aim to keep minors for less than one month. Nonetheless, they can hold children longer than this during emergencies, including spikes in migrant arrivals.⁶⁹⁷

d) **Access to Education.**

US Department of Education: All children in the United States are entitled to equal access to a public elementary and secondary education, regardless of their or their parents' actual or perceived national origin, citizenship, or immigration status – with equal access to public education at the elementary

694. Council on Foreign Relations, 'US Detention of Child Migrants' (Council on Foreign Relations) <<https://www.cfr.org/backgrounder/us-detention-child-migrants>>, accessed 17 June 2022.

695. Council on Foreign Relations, 'US Detention of Child Migrants' (Council on Foreign Relations) <<https://www.cfr.org/backgrounder/us-detention-child-migrants>>, accessed 17 June 2022.

696. Council on Foreign Relations, 'US Detention of Child Migrants' (Council on Foreign Relations) <<https://www.cfr.org/backgrounder/us-detention-child-migrants>>, accessed 17 June 2022.

697. Council on Foreign Relations, 'US Detention of Child Migrants' (Council on Foreign Relations) <<https://www.cfr.org/backgrounder/us-detention-child-migrants>>, accessed 17 June 2022.

and secondary level. This includes children such as unaccompanied children who may be involved in immigration proceedings. Under the law, the U. S. Department of Health, and Human Services (HHS) is required to care for unaccompanied children apprehended while crossing the border. While in care at an HHS shelter, such children are not enrolled in local schools but do receive educational services and other care from providers who run HHS shelters. Recently arrived unaccompanied children are later released from federal custody to an appropriate sponsor – usually a parent, relative, or family friend – who can safely and appropriately care for them while their immigration cases proceed. While residing with a sponsor, these children have a right under federal law to enrol in public elementary and secondary schools in their local communities and to benefit from educational services, as do all children in the U.S.⁶⁹⁸

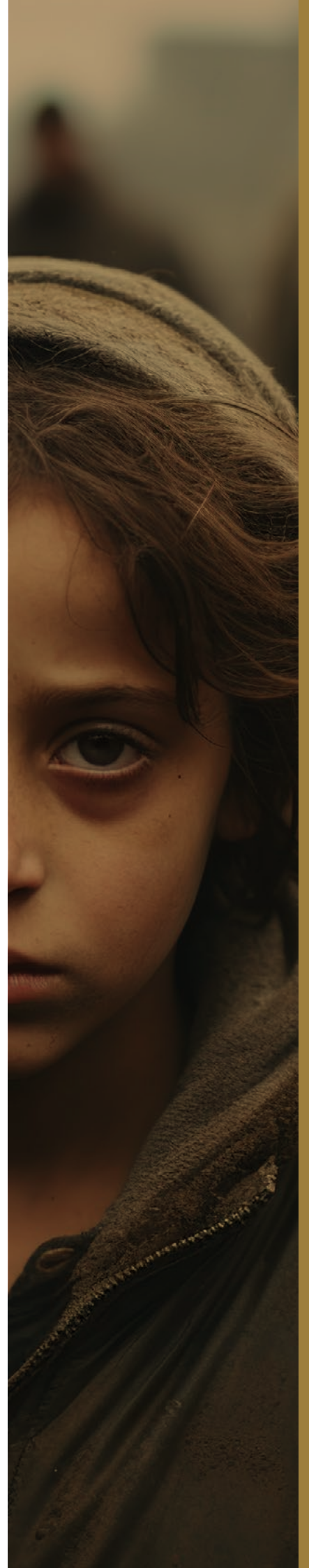
The 2019 UNESCO Report states that for asylum-seeking children in the US, there is an emphasis on processing claims with no clear roles for the providers of health, education, and other key services.⁶⁹⁹

For instance, the promise of access to education is made but not kept under the US “Remain in Mexico Program”: Human Rights Watch: When it initially agreed to the program, the Mexican government promised to provide for the safety of asylum seekers waiting in Mexico, and to ensure that they would have access to work, health care, education, and the justice system. However, Human Rights Watch found that the Mexican government failed to provide these protections, leaving thousands stranded in Mexico unable to support themselves or use basic services, and with no recourse when they suffered abuses from criminal cartels or Mexican authorities.⁷⁰⁰

698. US Department of Education, ‘Educational Services for Immigrant Children and Those Recently Arrived in the United States’ (US Department of Education) <<https://www2.ed.gov/policy/rights/guid/unaccompanied-children.html>>, accessed 17 June 2022.

699. UNESCO, ‘Enforcing the right to education of refugees: A policy perspective’ (Publication 8, UNESCO, Paris 2019) p. 13.

700. Human Rights Watch, ‘Restarting ‘Remain in Mexico’ a Travesty’ (Human Rights Watch 2021) <<https://www.hrw.org/news/2021/12/09/restarting-remain-mexico-travesty>> accessed 17 June 2022.



e) **Family Reunification.**

If you are granted asylum, you may petition to bring your spouse and children to the United States by filing a Refugee/Asylee Relative Petition. To include your child on your application, the child must be under 21 and unmarried. You must file the petition within 2 years of being granted asylum unless there are humanitarian reasons to excuse this deadline. There is no fee to file this petition. The family relationship had to exist before you came to the United States as a refugee or were granted asylum.⁷⁰¹

Despite this, politics in the US highly influences the treatment of asylum-seekers. Family reunification in the US has been in the spotlight in the last few years following the Trump administration's zero-tolerance policy under the Customs and Border Protection (CBP) (8 U.S.C § 1325/1326), along with a third-country transit asylum ban, aimed at separating families and preventing their reunification or return to dangers so severe that family separation occurs as a consequence.⁷⁰² Because of this policy, there are several reports of inadvertent family separation cases. For example, A mother and her three young children fled El Salvador and crossed into the United States near El Paso, Texas. The mother told border patrol agents that she had received death threats and needed asylum. Although she presented the children's birth certificates, immigration officials took her children from her, and they were placed in federal foster care in New York. Agents detained the mother and subsequently convicted her of illegal entry.⁷⁰³

It was only in 2021 during President Biden's administration when the February Executive Order 1401 on the Establishment of Interagency Task Force on the Reunification of Families and its Task Force was created to abolish the policies and practices leading

701. US Citizenship and Migration Services, 'Asylum' (US Citizenship and Immigration Services) <<https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum>>, accessed 17 June 2022.

702. Human Rights First, 'Recommendations to End Separation of Asylum-Seeking and Migrant Families' (Human Rights First January 2022) p.1. <<https://www.humanrightsfirst.org/sites/default/files/HRFCommentFamilySeparationJan2022.pdf>>.

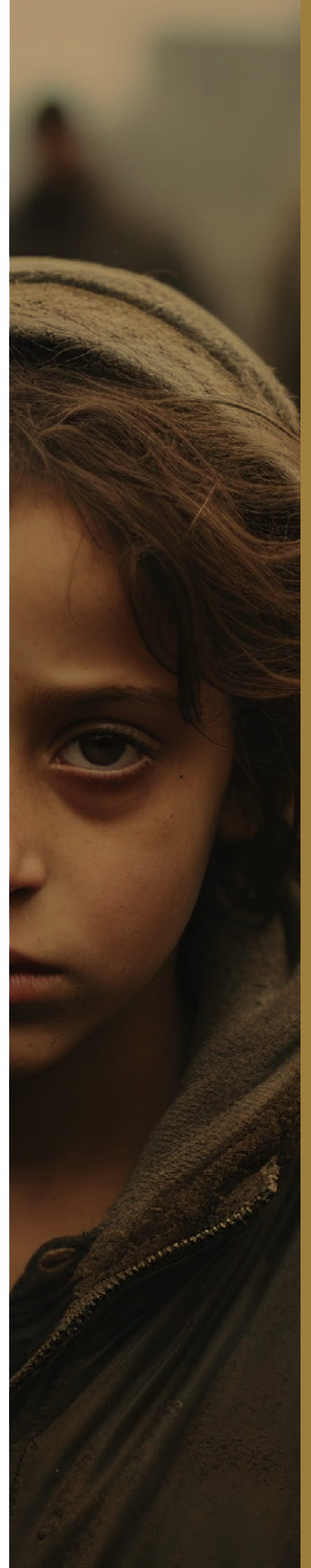
703. Human Rights First, 'Recommendations to End Separation of Asylum-Seeking and Migrant Families' (Human Rights First January 2022) p.5. <<https://www.humanrightsfirst.org/sites/default/files/HRFCommentFamilySeparationJan2022.pdf>>.

to the separation of families.⁷⁰⁴ The effect of family separation led to the recognition and persistence of symptoms of trauma, PTSD or generalised anxiety disorder⁷⁰⁵ even after reunification which added to pre-migration traumas faced by asylum-seeking children before entering the US.⁷⁰⁶

704. Human Rights First, 'Recommendations to End Separation of Asylum-Seeking and Migrant Families' (Human Rights First January 2022) <<https://www.humanrightsfirst.org/sites/default/files/HRFCommentFamilySeparationJan2022.pdf>> accessed 21 June 2022.

705. Relief Web, 'Family Separation Trauma Sustained by Asylum-Seeking Children and Parents Persists After Reunification, Medical Study Finds' (OCHA 2021) <<https://reliefweb.int/report/united-states-america/family-separation-trauma-sustained-asylum-seeking-children-and-parents>>, accessed 21 June 2022.

706. K. Hampton, E. Raker, H. Habbach, L.C. Deda, M. Heisler, R. Mishori, 'The psychological effects of forced family separation on asylum-seeking children and parents at the US-Mexico border: A qualitative analysis of medico-legal documents' (National Library of Medicine 2021) <<https://pubmed.ncbi.nlm.nih.gov/34818368/>>, accessed 21 June 2022.







CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

by Chepina



CONCLUSIONS AND RECOMMENDATIONS

5.1. CONCLUSION

The main conclusion of this research report is that there exists a need to promote the strengthening of the protection of asylum-seeking children as vulnerable persons and their rights within the EU asylum system, as seen from the findings gathered in this research study.

While the 2020 EU Commission Communication on the New Pact expresses the increasing complexity and intense need for coordination and solidarity mechanisms,⁷⁰⁷ the contributors of this research report agree that laws alone cannot work but also political discussion and attitudes. The recommendations given herein are merely suggestions that only solve a small piece of the problem whereas solving major problems faced by children is only a step in protecting their rights within the asylum system as the steps in the asylum process are interlinked.

5.2. RECOMMENDATIONS

5.2.1. REGARDING THE EU COMMON EUROPEAN ASYLUM SYSTEM (CEAS)

- a) The current CEAS does not meet the objectives regarding children, each of the present EU Asylum Directives and Regulations has its faults and successes, as earlier pointed out. What stands out is that they collectively do not address the challenges faced by asylum-seeking children, even while some matters are imperative and against international consensus such as the practice of child detention.
- b) Cooperation between the Member States should always consider the best interest of the child to ensure guarantees are always given to the relevant authorities concerning the transfer of asylum-seeking minors in the case of refused entry to prevent violation of human rights as has been reported at the Franco-Italian border.

707. European Commission Communication (EC) COM 609, Communication from the Commission on New Pact on Migration and Asylum (2020), 3.



- c) 3rd party country agreements with EU Member States are not in decent shape and need to be reconsidered. E.g., France and Morocco. They also do not have the same obligations as EU Member States in their EU asylum law such as the guarantee of the protection of human rights as seen in the agreements with Turkey and Morocco.
- d) Fingerprinting must not be done as a procedural formality and fully informed consent must be given before fingerprinting, with the consideration that the age of fingerprinting has been reduced to 6 years old.
- e) There is a need for international enforcement of responsibility and sanctions for non-compliance with EU law. It is indeed difficult to place responsibility on an international body for international enforcement and sanctions. Yet, it is evident that they lack the incentive to adhere to international laws (especially because of the principle of state sovereignty).

5.2.2. REGARDING BORDER ASYLUM PROCEDURE

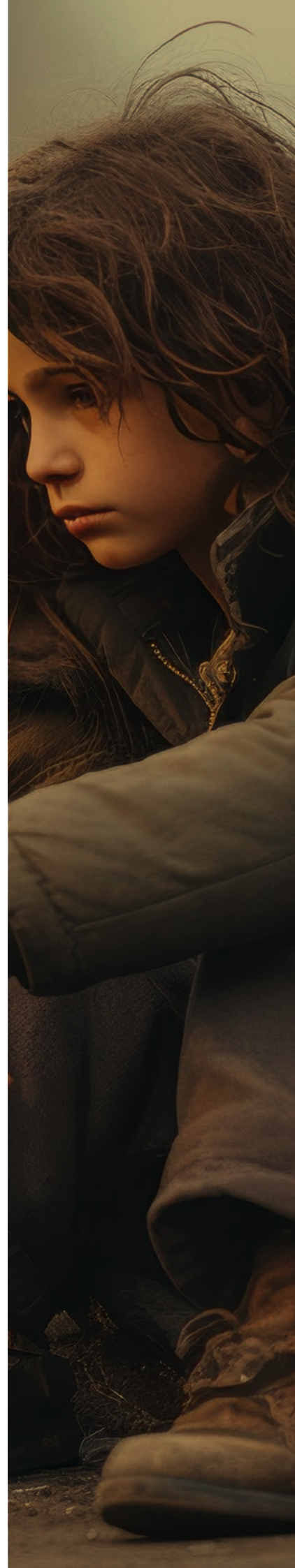
- a) Recommended creation of EU legislation to specifically address private pushbacks that have caused violations of child rights. Private pushbacks remain a challenge because the principle of non-refoulement does not fully cover it.

5.2.3. REGARDING ACCESS TO EDUCATION

- a) It is discernible that minors of age have a universal right to education,⁷⁰⁸ and the 1960 Convention Against Discrimination in Education - Prohibits any discrimination based, inter alia, on social origin, economic condition, or birth, protecting the right to education for everyone including refugees and asylum seekers. 2019 UNESCO report shows proof that⁷⁰⁹ only 10 European Union Member States recognize the right of undocumented children to enter the school system and 5 explicitly exclude them from free schooling. Even where full access to public education is recognized, it is not consistently granted

708. C. Koehler, J. Schneider, 'Young refugees in education: the particular challenges of school systems in Europe' (Comparative Migratory Studies 2019) <<https://comparativemigrationstudies.springeropen.com/articles/10.1186/s40878-019-0129-3#ref-CR6>> accessed 21 June 2022.

709. UNESCO, 'Enforcing the right to education of refugees: A policy perspective' (Publication 8, UNESCO, Paris 2019).



to asylum seekers considering the lengthy application determination process.

- b) Access to education must not only exist in law but in practice, most importantly to lift people and children out of poverty, empowering them and eventually promoting their inclusion in mainstream society to consequently contribute to the economy of the Member State. From the case studies, such access is not expressly provided for by law (as seen in France), it is not well enforced, even though asylum-seeking children are indicated as entitled to it under similar conditions as nationals or despite their legal status. In Germany and Spain (Ceuta and Melilla), this is the case - poor education facilities are causing the children to fall behind. While some reception centres have basic schooling and others have none.
- c) Creation of a fund in the EU Member States for allocation to spending on superior quality education and access to healthcare, nutrition, and recreational facilities which are required for child development and the enhancement of child rights among asylum-seekers.

5.2.4 REGARDING DETENTION OF MINORS

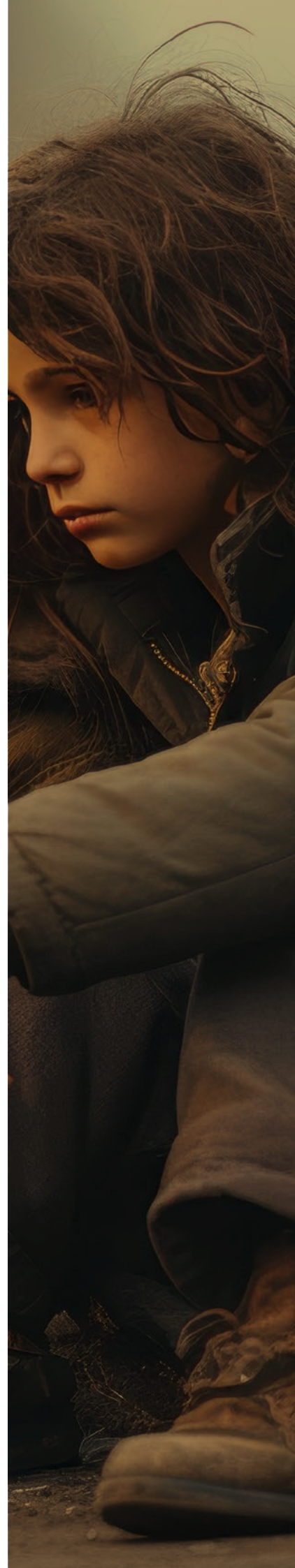
- a) There should be all-around avoidance of child detention. The common observation from our research is that the harmful effects of child detention are almost immediate. Consider the US case study that proves asylum-seeking children have pre-migratory trauma before entering the US, which is compounded by additional mental illness symptoms that are caused by family separation and persist even after reunification.
- b) There is an interconnection between age assessment tests and detention which both have child-right-affecting procedures that cause trauma, mental health illnesses and inhibit access to asylum procedures. Age is seen as a determining factor for detention; thus, age assessment tests must be managed with care to avoid detaining a minor (at all) as there exists the risk of violating their human dignity, liberty, and child rights, among others.
- c) There should be the separation of child and adult asylum-seekers where the detention is for age as-

assessment, transfer, or awaiting adjudication of their application. Children with their families should be housed together in family centres set aside to maintain family relationships that are for the benefit of their mental and psychological well-being. This is as opposed to being detained for identification processing (as seen in Spain where the time limit of 72 hours is surpassed without a judicial decision).

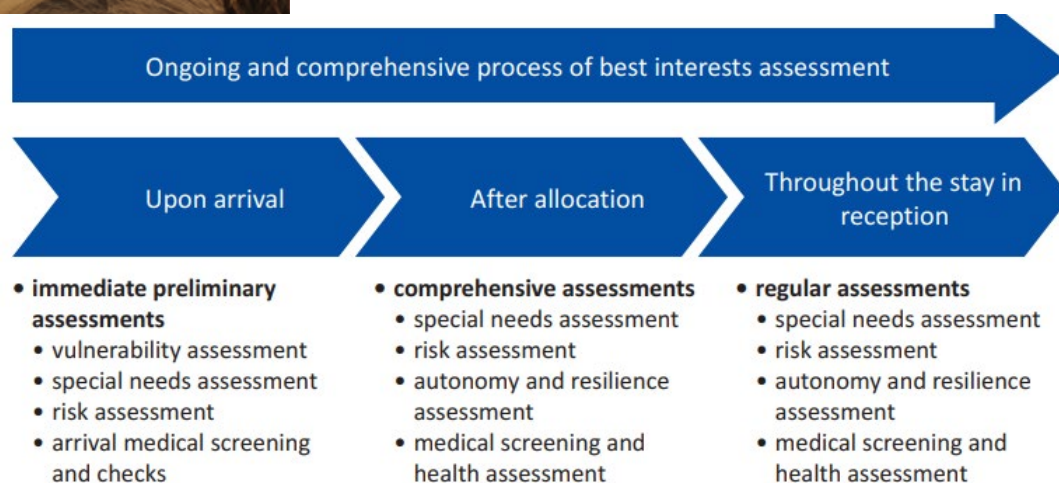
- d) Clarification of the exact standards in EU Regulations to be met under the “significant risk of absconding” before detaining a minor. In Germany, this is based on vague grounds indicated in the Residence Act while in Spain the grounds for detention did not apply to asylum seekers of the regular and Dublin procedures, and in France detention is not allowed to seek asylum other than for those who lodged the request in an asylum administrative detention centre.
- e) Humane treatment of UAMs (other than detention) who indeed satisfy the criteria of a significant risk of absconding only for the shortest period with access to food, healthcare, and recreational facilities.

5.2.5. REGARDING IDENTIFICATION OF VULNERABILITIES

- a) Adherence to the principle of the best interests of the child is imperative for the respect of asylum-seekers’ child rights. The US case study indicates that their non-ratification of the UNCRC may be inadvertently linked to its low spending on children, the country’s high child poverty rate, and its reputation for falling short of general child rights respect concerning asylum-seekers.
- b) Children accompanied by adults should also be considered vulnerable. Some adults suffer from mental health illnesses or difficulties that make it difficult to care for children.
- c) Specific framework on vulnerability assessments within the EU to tackle biases against new vulnerable classes of asylum-seeking minors, such as those affected by Gender-Based Violence in families as either direct or indirect victims. While Spain does not have a standardised formal procedure or mechanism for vulnerability detection (just like Spain and France) legal and procedural vulnerabili-



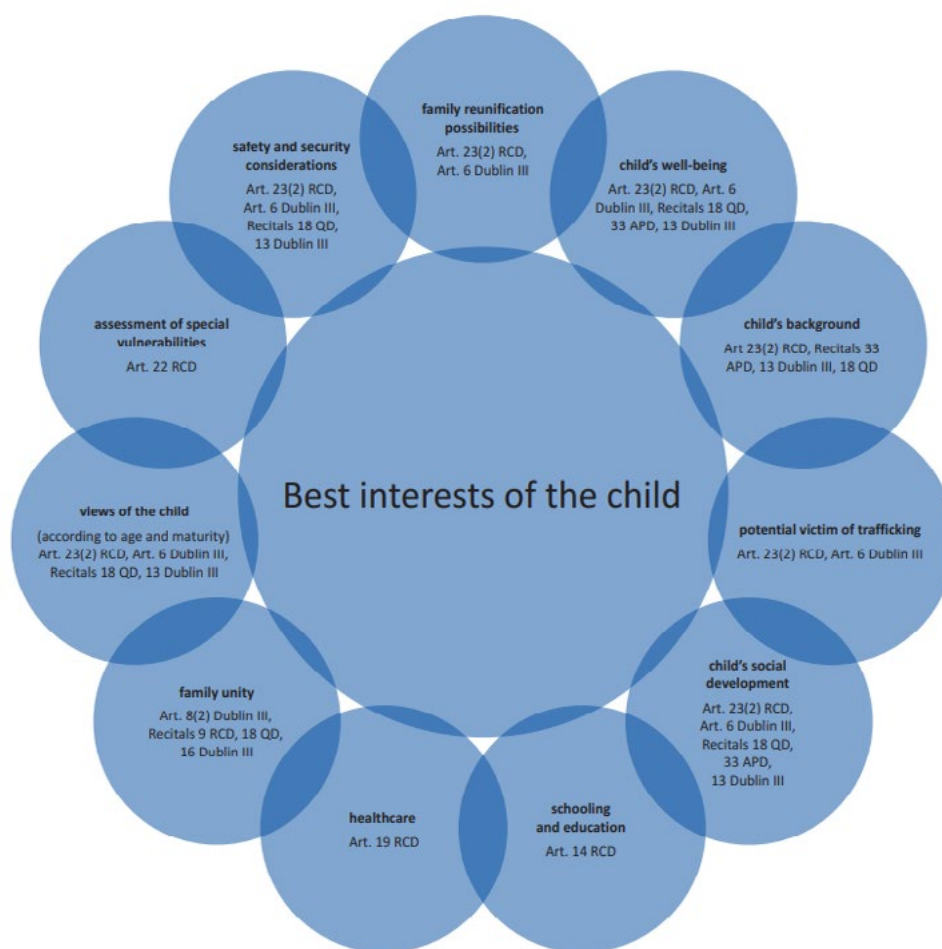
ty framework is a good starting point as it provides for continuous assessment throughout the asylum procedure, especially concerning children, which is in line with the EASO recommended ongoing and comprehensive vulnerability assessments:



(Source: EASO/EUAA)⁷¹⁰

- d) Specific recognition of mental health disorders or illnesses as a vulnerability faced by asylum-seeking minors, as evident in the France case study.
- e) Specific recognition of LGBTIQ individuals as vulnerable is evident in the Spain and France case study.
- f) The need for monitoring and compliance with existing and future frameworks to contribute toward the dignified treatment of minors upon arrival in the host States, especially when there is an influx of asylum-seekers. Best interest assessment tests must revolve around the following aspects as outlined by EASO.

710. EASO, EASO Guidance on reception conditions for unaccompanied children: operational standards and indicators (Publications Office of the European Union, Luxembourg 2018) 9. The European Asylum Support Office (EASO) has since become the European Union Agency for Asylum (EUAA).



(Source: EASO)⁷¹¹

5.2.6. REGARDING AGE ASSESSMENTS

- a) This is a critical aspect of the asylum procedure regarding children as its outcome is used to determine whether the applicant will benefit from the special procedural safeguards and rights owed to asylum-seeking children such as access to youth welfare, education or be assigned a guardian in the case of UAMs, among others.
- b) Most EU Member States do not have a stipulated age assessment law or mechanism which causes diverse treatment of children as seen in Germany which uses ultrasound age tests, and Spain which has been accused of heavily relying on medical examination (which has been recently abolished) on and France that grants its authorities restrictive

711. EASO, 'EASO Guidance on reception conditions for unaccompanied children: operational standards and indicators' (EASO 2018), 9, <<https://euaa.europa.eu/sites/default/files/>> accessed 19 March 2022.

power to conduct age assessment tests, with bone testing as a last resort measure (despite compliance issues).

- c) There should be the primary consideration of identification documents, as specified in international law, with secondary reliance on social evaluation as emphasised in the France case study. Social evaluation will first involve interviews conducted with the minor to get more insight into his/her situation and their level of “social maturity.” The assessment made after the interrogations cannot conclude on a specific age, but the information gathered can help to estimate whether the individual is under 18 as they claim to be.⁷¹²
- d) Medical age assessment tests should be conducted as a last result, in a child-friendly manner, and inform the individual of the procedure to receive free and well-informed consent.
- e) Applicants claiming to be minors should also be given the benefit of the doubt, as indicated in the *NBF v Spain* case. Human and child rights are sensitive and must be respected throughout the procedure. Those claiming to be minors must be granted procedural safeguards unless they are proven to be adults through the legally provided age assessment methods.

5.2.7. REGARDING FAMILY REUNIFICATION

- a) Family reunification is founded on Article 22 (2) of the UNCRC, as long as it is in the best interest of the child. Family reunification is fundamental in child development as evident from reports from Germany and Spain. The parent-child relationship creates a positive obligation on the EU Member States to act promptly in family reunification procedures to avoid irreparable damage to the child. (*Saleck Bardi v Spain*)
- b) The difficulties identified with family tracing are not regarding the law but are practical. For example, in Germany, there is uncertainty as to who should travel for the reunification between the minor or their family members.

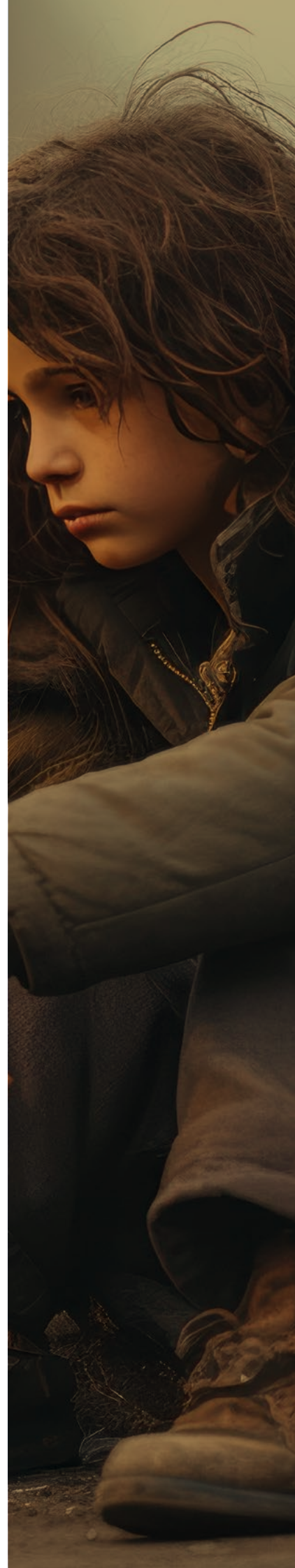
712. M. Gaudard, ‘Age Assessment for Unaccompanied Minors in France’ (Leiden University, Leiden 2019) p. 16.



- c) Authorities need to give specific information on the reason for fingerprinting children e.g., fingerprinting for the ability to conduct family reunification. As opposed to fingerprinting systemically.
- d) There should be no fixed time frame for the application of family reunification, other than if the applicant has already attained the age of 18. France displays this aspect where there is no time frame for application, and neither is the application subject to income or health insurance.

5.2.8. OVERCOMING OBSTACLES IN MENTAL HEALTH

- a) Mental health is forgotten in the EU law and, in international asylum law. While mental illness is viewed as an aspect that makes an asylum seeker vulnerable, there are no facilities or legal provisions for the recognition of mental illness formation during the asylum-seeking process caused by the different difficulties of the process, such as the detention of minors that triggers suicidal tendencies. The closest example of mental health recognition is evident in France where they have identified persons suffering from psycho-trauma as vulnerable applicants for asylum.
- b) Framework for providing mental health services to all children once they arrive in an EU Member State. (ref UNHCR handbook) (As opposed to group counselling which does not effectively serve to identify vulnerabilities such as mental illness, as seen in the Germany case study.







CHAPTER 6

CHAPTER CONTRIBUTION ON BEHALF OF THE COMMONWEALTH OF NATIONS: A CALL FOR STATES' COLLECTIVE ACTION TOWARDS REFUGEE PROTECTION IN AFRICA



A CALL FOR STATES COLLECTIVE ACTION TOWARDS REFUGEE PROTECTION IN AFRICA

Professor Luis G. Franceschi⁷¹³
& **Kimberly W. Mureithi⁷¹⁴**

6.1. ABSTRACT

The universal principle of *non-refoulement* provides that countries that receive refugees have certain legal obligations to assist, protect and not turn away refugees. However, the protection of refugees is more complex than simply upholding this fundamental principle. The provision of care to refugees, processing of refugee applications, settlement and resettlement of refugees is a legally intricate process that may require more than the host country's action. Moreover, the duties of other States to step in and help relieve this burden are less clear in law.

Despite multiple proposals, there remains a gap in legal frameworks, mechanisms, and systems to systematically, proportionally, equitably, and predictably allocate responsibilities between States at a global level, particularly in Africa. This paper will probe that though States have made various commitments there remains a lack of palpable action.

This call to action seeks to analyse the meaning of responsibility-sharing and international cooperation from the perspective of individual States. Further, this research will consider whether responsibility-sharing is a legal obligation, as opposed to a voluntary undertaking by States with a primary focus on states in the African Union.

Furthermore, this paper shall look into the various methods

713. Assistant Secretary-General at The Commonwealth of Nations.

714. Researcher at The Thinking Watermill Society.

of sharing responsibilities for refugee protection in the context of a State's refugee protection obligations. In conclusion, this paper shall additionally make various proposals on how responsibility sharing can be incorporated through the African Union

6.2. INTRODUCTION

"If one lesson can be drawn from the past few years, it is that individual countries cannot solve these issues on their own. International cooperation and action to address large movements of refugees and migrants must be strengthened. Both national and collective responses must address the reasons people leave their homes, their need for safe passage and protection, and both the immediate and long-term needs of those who cross into other countries. In short, all members of the international community must do much better." - Ban Ki-Moon⁷¹⁵

Globally, over the last decade, the number of refugees has increased exponentially.⁷¹⁶ The United Nations Commission for Refugees (UNHCR) reports that there are now over 100 million people forcibly displaced, stating that one in every 78 people on the earth is displaced, and from the same number nearly 27.1 million people are refugees.⁷¹⁷ As of June 2022, the major hosting countries for refugees were Turkey hosting nearly 3.8 million refugees, Colombia 1.8 million, Uganda 1.5 million, Pakistan 1.5 million and Germany 1.3 million refugees.⁷¹⁸ Notably, the number of internally displaced people stood at 51.3 million persons.⁷¹⁹

Further, low and middle-income countries hosted 83% of the world's refugees.⁷²⁰ As of 2021, the number of internal-

715. United Nations General Assembly, In safety and dignity: addressing large movements of refugees and migrants - Report of the Secretary-General (Report, A/70/59, 2016) Ch. 1, Introduction para 3. United Nations General Assembly, 9 May 2016.

716. United Nations, 'More than 100 Million People are forcibly displaced' (United Nations News, 16 June 2022 <<https://news.un.org/en/story/2022/06/1120542>> accessed on 23 December 2022.

717. United Nations, 'More than 100 Million People are forcibly displaced' (United Nations News, 16 June 2022 <<https://news.un.org/en/story/2022/06/1120542>> accessed on 23 December 2022.

718. United Nations High Commissioner for Refugees, Global Trends Forced Displacement 2021 Report (Report, June 2022) Trends at a glance, pg. 2.

719. United Nations High Commissioner for Refugees, Global Trends Forced Displacement 2021 Report (Report, June 2022) Trends at a glance, pg. 2.

720. United Nations High Commissioner for Refugees, Global Trends Forced Displacement 2021 Report (Report, June 2022) Trends at a glance, pg. 2.



ly displaced people in Africa stood at over 30 million people.⁷²¹ In September 2022, it was reported that Sub-Saharan Africa hosts more than 26 % of the world's refugees.⁷²² The T20 Task Force on Forced Migration reported that the economic impact on countries that host refugees is more severe for low and middle-income countries.⁷²³

The above figures illustrate a glaring situation in Africa's humanitarian crisis, particularly that of Sub-Saharan Africa. However, as is always the question, who should bear the responsibility of hosting refugees and further who should shoulder the responsibility of refugee protection mechanisms? Whilst countries that receive refugees (host countries) have various obligations in international law conventions and national law to uphold the *principle of Non-refoulement*, and refugee protection mechanisms, the duties of other States to provide assistance in responsibility sharing for those countries and generally refugee protection mechanisms is unclear.⁷²⁴ Herein lies the dilemma: How can States distribute the responsibility for refugee protection among other States? And what standards and frameworks would they measure responsibility sharing?

This question has been the subject of decades-long discussions and research.⁷²⁵ Though multiple proposals have been given and States have taken various steps towards responsibility sharing, a binding framework to allocate responsibilities between States at a regional level has still not been agreed.

Against this backdrop, this chapter examines the actions of States on the African continent over the past decade to shed light on their understandings of, and positions concerning international responsibility-sharing. It seeks to

721. United Nations High Commissioner for Refugees, Global Trends Forced Displacement 2021 Report (Report, June 2022) Trends at a glance, pg. 2.

722. United Nations, 'Migration Dynamics, Refugees and Internally Displaced Persons in Africa', (United Nations News, <<https://www.un.org/en/academic-impact/migration-dynamics-refugees-and-internally-displaced-persons-africa>> accessed on 28 December 2022

723. Matthias Luecke, Claas Schneiderheinze, More Financial Burden- Sharing for Developing Countries that Host Refugees, (G20 Insights, 10 December 2020) pg. 2.

724. Catherine Phuong, 'Identifying States' Responsibilities towards Refugees and Asylum Seekers' (2018) <<chrome-extension://efaidnbmnnnnibpcajpcglclefindmkaj/https://esil-sedi.eu/wp-content/uploads/2018/04/Phuong.pdf>> accessed on 22 December 2022.

725. Rebecca Dowd, Jane McAdam, 'International Cooperation and Responsibility-Sharing to protect Refugees', (2017), Vol. 66, No. 4 pp. 863-892.

provide a unique insight into the meaning of responsibility-sharing and international cooperation from the perspective of individual States.

6.3. THE PRINCIPLE OF RESPONSIBILITY-SHARING

In the context of refugee protection, the principle of responsibility-sharing has been defined as the principle that the international community, including states and other actors, has a shared responsibility to provide protection and assistance to refugees.⁷²⁶ This principle is based on the idea that the burden of hosting and supporting refugees should not fall solely on the country of first asylum, but should be shared among a wider group of countries and actors. The principle precludes a complete withdrawal of states from the task of providing for refugees, and it asserts that the contribution each state has to make is dependent on the overall task.⁷²⁷ Further, Responsibility sharing has been aptly characterised to amount to “Responsibility by Proximity,” in which only the states in which refugees arrive first are obliged to host them, while all other states can reject any share in the task.⁷²⁸

Drawing from the definitions illustrated above, international cooperation is a term that is synonymous with responsibility sharing.⁷²⁹ International cooperation refers to the collective efforts of countries to work together towards a common goal or to address shared challenges. It involves the sharing of resources, knowledge, and expertise between nations, as well as the coordination of policies and actions.⁷³⁰

International cooperation would propound that though the responsibility for refugees is traditionally borne by the country in which they first seek asylum, international co-

726. Madeline Garlick, ‘*The Sharing of Responsibilities for the International Protection of Refugees*’, (2021) Chapter 25, p. 463 – 482.

727. Dana Schmalz, The principle of responsibility-sharing in refugee protection, (Volkerrechtsblog, 6 March 2019) <<https://voelkerrechtsblog.org/de/the-principle-of-responsibility-sharing-in-refugee-protection/>> accessed on 12 December 2022.

728. Doyle Michael W, Macklin Audrey, ‘Responsibility Sharing and the Global Compact on Refugees.’

729. Rebecca Dowd, ‘International cooperation and responsibility-sharing to protect refugees: What, why and how?’, (2017) 66 (4): 1-30.

730. Alexander Betts, ‘Protection by Persuasion: International Cooperation in the Refugee Regime (Cornell University Press, 2009).



operation mechanisms have been established to promote greater sharing of responsibilities among countries. Notably, responsibility sharing has been seen to be an emerging norm of customary international law.⁷³¹ This proposes that responsibility sharing may be looked at from state practice concerning various commitments made by states, regional bodies/unions, and international organisations.

However, though responsibility sharing has been defined as a major Achilles heel of this term it does discuss the extent to which and the manner states are to collectively share responsibility.

6.4. LEGAL FRAMEWORK FOR RESPONSIBILITY-SHARING IN AFRICA

The 1951 Refugee Convention and its 1967 Protocol relating to the Status of Refugees form the cornerstone of international refugee law defining a refugee, their rights, and the obligations of States towards them. From a responsibility-sharing perspective, the 1951 Convention in Chapter V, provides for administrative measures to be undertaken by States in operationalizing the Convention. However, the Convention places the primary responsibility for providing protection and assistance to refugees on the state in which they find themselves, providing for principles such as non-refoulement and naturalisation.⁷³² However, this responsibility may be shared among states through a variety of mechanisms and forms of cooperation. Further, it is important to note, that the Convention and Protocol are only applicable where ratified by states.

On 19 September 2016, the UN General Assembly held the first high-level summit for heads of State and governments addressing large movements of refugees and migrants. The objective of the Summit was to bring countries together behind a more humane and coordinated approach to refugee protection. At the Summit, heads of state and government pledged to increase multilateral humanitarian assistance by approximately \$4.5 billion. and appeals as well as other international humanitarian organisations. Ad-

731. Dana Schmalz, The principle of responsibility-sharing in refugee protection, (Volkerrechtsblog, 6 March 2019) <<https://voelkerrechtsblog.org/de/the-principle-of-responsibility-sharing-in-refugee-protection/>> accessed on 12 December 2022.

732. Refugee Convention 1951.

ditionally, the General Assembly unanimously adopted the New York Declaration for Refugees and Migrants. In adopting the Declaration Member States of the United Nations expressed profound solidarity with those who are forced to flee; reaffirmed their obligations to fully respect the human rights of refugees and migrants; agreed that protecting refugees and supporting the countries that shelter them are shared international responsibilities and must be borne more equitably and predictably; pledged robust support to those countries affected by large movements of refugees and migrants; agreed upon the core elements of a Comprehensive Refugee Response Framework; and agreed to work towards the adoption of a global compact on refugees and a global compact for safe, orderly and regular migration.

The keynote concerning burden sharing in the New York Declaration for Refugees and Migrants is that Governments specifically acknowledged that the protection of refugees and assistance to host states is a shared international responsibility, which is not to be borne by host countries alone.

In 2018, the United Nations General Assembly adopted the Global Compact on Refugees. The Compact represents a major step forward in efforts to enhance responsibility sharing and improve the lives of refugees, refugees, and communities hosting them. However, the Compact is not binding on States.⁷³³

The Compact has the following objectives of responsibility sharing include to;

- i) ease pressure on host countries;
- ii) enhance refugee self-reliance;
- iii) expand access to third-country solutions; and
- iv) support conditions in countries of origin for return in safety and dignity.⁷³⁴

Further, the Compact propounds that the principles of responsibility sharing, emanate from fundamental principles of humanity and international solidarity and aims to better protect and assist refugees and support host countries and communities.

733. Global Compact on Refugees, 2018, Part III.

734. Global Compact on Refugees, 2018.



The Compact provides a framework for arrangements for burden sharing and responsibility sharing which include global arrangements for international cooperation; and key tools for effecting burden and responsibility sharing. Further, the Compact provides for the areas in need of support which include: the reception and admission of refugees; early warning, preparedness and contingency planning; immediate reception arrangements for refugees; safety and security; registration and documentation; addressing specific needs for persons with specific needs; identifying international protection needs; meeting needs and supporting communities; education; jobs and livelihoods; health; women and girls; children, adolescents and youth; accommodation, energy, and natural resource management; food security and nutrition; civil registries; statelessness; fostering good relations and peaceful coexistence.⁷³⁵

Additionally, the Compact provides solutions which are termed “durable solutions.” These include support for countries of origin and voluntary repatriation; resettlement; complementary pathways for admission to third countries; local integration and other local solutions; support for countries of origin and voluntary repatriation; resettlement; complementary pathways for admission to third countries; local integration and other local solutions. It is worth noting that the Compact recognises that eliminating the root causes of the creation of refugees is the most effective way to achieve solutions. Moreover, political and security cooperation, diplomacy, development and the promotion and protection of human rights are key to resolving protracted refugee situations and preventing new crises from emerging, in line with international law and the Charter of the United Nations.⁷³⁶

In addition to these international instruments, several regional arrangements and agreements also play a role in defining the responsibility for refugee protection and assistance and in fostering cooperation among states. In Africa, these include the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention).

The Kampala Convention in its objectives provides for the establishment of a legal framework for solidarity, cooperation, promotion of durable solutions and mutual support

735. Global Compact on Refugees, 2018.

736. Global Compact on Refugees, 2018.

between the States Parties to combat displacement and address its consequences. One of the key provisions of the Kampala Convention is the principle of responsibility sharing, the collective responsibility of states to protect and assist IDPs and to share the burden of assisting them.⁷³⁷ This principle recognizes that the issue of internal displacement is a regional one and that all states in the region have a shared responsibility to provide protection and assistance to IDPs.

The Kampala Convention calls on states to work together to develop regional and national frameworks for addressing internal displacement, and to coordinate their efforts in providing protection and assistance to IDPs. It also calls on States to provide resources and support to each other to address the needs of IDPs.

The Organisation of the African Union (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa contemplates responsibility sharing, however the term used is burden sharing. In Article 2, the OAU Convention provides that where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international cooperation take appropriate measures to lighten the burden of the Member State granting asylum.⁷³⁸ Notably, to date, no Member State of the OAU has invoked this Article of the Convention and sought support from other Member States. Further, though Article 2 provides the Member States with the ability to invoke the Article and call on support from other Member States, there are no concrete mechanisms with regard to administrative or enforcement mechanisms for responsibility sharing as contemplated under Article 2.⁷³⁹

Having analysed the legal framework for responsibility sharing, the question that arises and has been a subject of considerable debate in international discussions is whether responsibility sharing is an obligation of a voluntary undertaking.

737. African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), 2009.

738. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969, Article 2.

739. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969, Article 2.



More broadly, it has been argued that the principle of international cooperation (as opposed to burden-sharing) has some legal force.⁷⁴⁰ For example, Volker Türk and Madeleine Garlick — two of UNHCR's most senior legal protection officials — maintain that a “legal obligation for States to cooperate with each other in regard to refugee matters, directly among themselves and via cooperation with UNHCR, ... emerges from the UN Charter, UNHCR's Statute, and subsequent relevant UNGA resolutions in conjunction with the 1951 Convention, as well as other international refugee instruments and corresponding State practice.” However, they acknowledge that, without specific elaboration, it is exceedingly difficult to ascertain “precisely what form and content such cooperation would take, and what States' respective contributions thereto should be.”

6.5. MAKING A CASE FOR RESPONSIBILITY SHARING

In the last decade, the African region has seen a gradual but serious erosion of hospitality towards asylum seekers and refugees.⁷⁴¹ This is mirrored across the world, with States questioning their roles in regional bodies with regard to migration challenges. African States have now taken to tightening their borders or containing refugees in special camps and zones as opposed to protecting them.⁷⁴² This has been fuelled by politics, economics and security considerations while negating the humanitarian approach envisioned in refugee protection mechanisms.

Responsibility sharing for refugees offers Member States of the OAU a chance to ensure that the responsibility of hosting and supporting refugees is shared fairly and equitably among countries, rather than being borne primarily by a few countries. This also recognises many Member States' economic status and lack of capacity to bear the impact of the disproportionate distribution of refugee protection mechanisms. Leading to a positive impetus towards protection mechanisms for refugees.⁷⁴³

740. Rebecca Dowd, Jane McAdam, *'International Cooperation and Responsibility-Sharing to protect Refugees'*, (2017), Vol. 66, No. 4 pp. 863-892.

741. Ncumisa Willie, Popo Mfubu, *'Responsibility Sharing: Towards a Unified Refugee Protection Framework in Africa (2016) AHMR, Vol. 2 No 3.*

742. Ncumisa Willie, Popo Mfubu, *'Responsibility Sharing: Towards a Unified Refugee Protection Framework in Africa (2016) AHMR, Vol. 2 No 3.*

743. Ncumisa Willie, Popo Mfubu, *'Responsibility Sharing: Towards a Unified Refugee Protection Framework in Africa (2016) AHMR, Vol. 2 No 3.*

The positives of responsibility sharing include: presenting a concerted effort towards preventing the situations that lead to refugee crises which could lead to the reduction of events that create refugees; maintaining adequate protection for refugees while addressing the responsibilities placed on host states; and promoting effective and efficient solutions for responsibility sharing. This in turn can help to prevent the formation of refugee crises, reduce the strain on host countries, and provide more comprehensive and effective protection to refugees.⁷⁴⁴ Leading to a positive impetus towards protection mechanisms for refugees.⁷⁴⁵

6.6. RESPONSIBILITY-SHARING MECHANISMS

6.6.1. Financial Assistance

The provision of financial assistance to refugee-hosting countries has been described as the “most convenient and common” way for burden-sharing to be effected and as “the easiest form of sharing.”⁷⁴⁶ Indeed, the provision of financial assistance, predominantly through donations to UNHCR, is the most conventional way for States (usually developed countries) to support over-burdened host countries.

In their various statements, host countries have made clear that financial assistance must not only meet the immediate needs of refugees but must also include assistance to minimise the adverse impact of refugee inflows on host countries. This has also been acknowledged by developed States and States collectively. For example, Sweden recognized that since the massive inflows put serious strain on social services, the economy, and the infrastructure of host countries, more needed to be done to share the burden and to enable host countries to continue taking in refugees.

In addition to financial support, several States have called for responsibility-sharing in the form of technical assis-

744. Ncumisa Willie, Popo Mfubu, ‘Responsibility Sharing: Towards a Unified Refugee Protection Framework in Africa (2016) AHMR, Vol. 2 No 3.

745. Ncumisa Willie, Popo Mfubu, ‘Responsibility Sharing: Towards a Unified Refugee Protection Framework in Africa (2016) AHMR, Vol. 2 No 3.

746. Catherine Phuong, ‘Identifying States’ Responsibilities towards Refugees and Asylum Seekers’ (2018) <<https://esil-sedi.eu/wp-content/uploads/2018/04/Phuong.pdf>> accessed on 22 December 2022.



tance. According to Egypt, for example, the provision of assistance to refugees, burdens and responsibilities must be shared. Developed countries should be encouraged to accept more refugees and provide technical and financial assistance to countries emerging from conflicts to help them build their institutional capacities and provide basic services to all their citizens.

The United States has also recognized the importance of information-sharing, noting that global responsibility could not be properly shared without coordinated humanitarian responses. In that connection, data-sharing and coordination with the United Nations system were of key importance.

6.6.2. Physical Responsibility-Sharing

The three 'traditional' durable solutions for refugees are voluntary repatriation, local integration, and resettlement. Providing complementary pathways for the admission (and stay) of refugees can take many different forms, however, including humanitarian visas, work or study opportunities, visa exemptions for certain groups, temporary evacuation schemes, labour mobility schemes and family reunification. This has often been described as the admission and reception of refugees as the most radical and thereby least popular manner to relieve first asylum States from the heavy burden of receiving and protecting refugees. Indeed, developed States appear to be much more inclined to provide financial assistance to host countries than to accept refugees; one statement by Japan even suggests that it understands international cooperation as being synonymous with monetary contributions.

The most common means of physical responsibility-sharing requested by developing and/or host countries has been resettlement, with calls for quotas to be 'commensurate with the number of refugees (and often the size of the population of the host country as well); for the resettlement process to be expedited through increased places; and for "more flexible" resettlement criteria to be adopted. In requesting more resettlement places, some States have explained that voluntary repatriation is slow, and they are unable to provide local integration solutions.

The limited number of developed States that have called for more resettlement places during the meetings examined — including by establishing new programmes — have tended to be resettlement countries themselves. While some of these States were presumably striving to relieve the burden on developing host countries, others appeared to be more interested in minimising their level of commitment: in a 2014 meeting of UNHCR's Executive Committee, for example, Australia stated that 'the burden of resettling refugees and displaced persons should not be restricted to a small group of wealthy countries. All of the countries calling for more resettlement over the past decade were in Europe and focused particularly on the European asylum system.

Although commentators tend to focus on admission to a third country when analysing the 'physical relocation' component of responsibility-sharing, some States have called for international cooperation to facilitate voluntary repatriation and reintegration. For example, Iran has noted that international cooperation with the country of origin was needed in particular to facilitate voluntary repatriation and reintegration.

More generally, many States have called for international cooperation and/or burden- and responsibility-sharing to provide durable solutions, including specifically with respect to protracted situations. Fonteyne argues that the provision of durable solutions may be a more critical aspect of international cooperation than the provision of financial and technical assistance.

6.7. ADDITIONAL CONTRIBUTION: THE KIGALI DECLARATION OF CHILD CARE AND PROTECTION REFORM

In June 2022, the Leaders of the Commonwealth of Nations met in Kigali. Fifty-four countries were represented. At this meeting, which is the highest policymaking gathering of the 56 member countries and a third of the world's population, the Leaders of the Commonwealth decided to adopt the Kigali Declaration on Child Care and Protection Reform.

This declaration, sponsored by Rwanda, had been negotiated over a four-year period between the Commonwealth Heads of Government (CHOGM) hosted by the United



Kingdom in London in 2018, and the Kigali CHOGM of 2022. This document cemented one of the most beautiful values in the Commonwealth. It paved the way for understanding the family as the key provider of education in a context of protection and equal opportunities for the most vulnerable members of our 2.5 billion family – our children.

In this Declaration, leaders of the Commonwealth recognized and highly valued the essential role played by families in the upbringing and education of children. While state and non-state actors may play a subsidiary role in filling up the gaps left by dysfunctional families, leaders expressly recognised that “well-meaning support for institutions through international aid, donations, orphanage volunteering, mission trips or tourist visits, can in some cases lead to unnecessary family-child separation and undermine care reform efforts.”

In this ground-breaking Declaration, leaders also recognised “the importance of providing a range of quality alternative care options, including, inter alia, family and community-based care” and, committed themselves to redirect, where necessary, “resources to family and community-based care services, with adequate training and support for caregivers and robust screening and oversight mechanisms, and progressively replacing institutionalisation”.

Furthermore, leaders also set themselves ambitious targets to be achieved by 2025. Leaders will “prioritise quality care arrangements at the community level, over institutionalisation, including for children with disabilities; support projects which take a holistic and inclusive approach to child protection systems development and family strengthening; provide clear information on how funding supports families and family-based systems of care; amplify and support the voices of children and their families, including the under-represented voices of girls, children with disabilities and other marginalised groups, and support the meaningful participation in society of children, young people, their families and their representative groups; and support inclusive, accessible, quality community services, including all aspects of education, health and social services, that meet the diverse requirements of children and their families, and support the choice, dignity, autonomy and full participation of all children and their families in society, including the most marginalised.”

The Kigali Declaration on Child Care and Protection Reform points in the right direction. It presents us with policy solutions where the family is understood as the pillar and foundation of every child's education, and where any institutional intervention is not more than a stopgap measure to remedy the drama children face within a dysfunctional family, where the family has failed. Children's care, education and protection start at home, and every leader in the Commonwealth has understood this perennial and irreplaceable reality. For children to be protected, the family must be protected.

***Professor Luis G. Franceschi
Assistant Secretary-General,
Commonwealth of Nations.***







CHAPTER 7

EXPERT TESTIMONIES: THE ASYLUM PROCEDURE FOR CHILDREN AND THE CONDITIONS THEY FACE



EXPERT TESTIMONIES: THE ASYLUM PROCEDURE FOR CHILDREN AND THE CONDITIONS THEY FACE

A chapter to be written by professionals who have dealt with and encountered asylum-seeking children in their different capacities. The sections within this chapter will be determined by the contributors.

7.1. REFLECTIONS ON EXPERIENCES WITH ASYLUM-SEEKING CHILDREN

Cesare Fermi⁷⁴⁷

Here are introductory personal reflections based on my almost 20-year experience in the sector of child protection and support to children and young adults “on the move”. I work first-hand with unaccompanied asylum-seeking children (UASC) who are the most desperate of all victims of conflicts. They are without relatives or parents (who might be missing or dead) and have no means of survival within a constant background of violence (in war and during their journey). This is why I want to address them more specifically.

Let us start with a basic but fundamental point. I will call it: my point ZERO. The condition of a Minor Individual Asylum Seeker/Refugee (i.e., a minor affected by war, natural disaster, or violence) should never exist in the first place. Unfortunately, however, the condition of a minor fleeing war has dramatically increased all over the world as asymmetric wars⁷⁴⁸ have been ravaging around the globe. Put simply, the main goal must be the elimination of the targeting of civilians, which too often characterises the present conflicts. Having said this, my next reflections are overall considerations about the situation of minors affected by conflicts/disasters/violence. This is sadly a huge global

747. Director of Operations in Europe for INTERSOS.

748. Asymmetric warfare is the term given to describe a type of war between belligerents whose relative military power differs significantly, or whose strategy or tactics differ significantly (Wikipedia, Jan. 22, 2022).



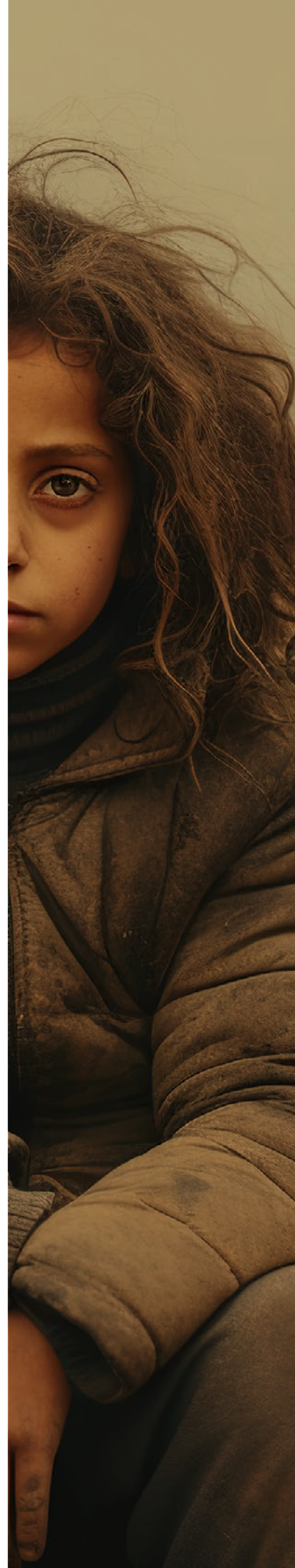
problem. There are many kinds of distressing situations affecting minors and forcing them to move abroad or not (as internally displaced persons - IDPs). However, the minors who flee are a minority. For the vast majority of minors affected by these conflicts, there is no hope to flee at all. It is in fact tragically common that the most vulnerable individuals, like minors, do not have any chance to escape to safe areas and, therefore, they tend to remain in the middle of the conflicts.

One clarification, first. Many of these minors escape from the context of war. But not all of them escape from war. What I mean by that is that many of them flee primarily from domestic violence, as recent assessments have demonstrated, rather than war. Many of them are unaccompanied because of a terrible synergy of familiar and social violence. Therefore, their condition is multi-faceted and complex. And although war is usually the catalyst, they are victims of violence that comes in many different guises. We need to consider all these social and cultural nuances in determining their condition as asylum seekers and to build their “project of life.”

Their journey from violence to a future is “a life within a life.” Every UASC on the move, despite the unexpectedness of the events and being unprepared to face them, has his/her own goal. S/he may wish to join a relative in Europe, to enter a country that shares his/her language or nationality, or a country of his/her childhood dreams, or, simply, s/he is just following the mainstream of fleeing mass of people, hoping soon to meet a familiar face.

If our mission is to truly and properly help UASC, we must consider the universe of the conditions that are around their current situation, their personal background and, importantly, their ambitions. This is an extremely complex task where miracles are rare, but a lot can and should be done starting from a place of extreme humility. In fact, one quite common factor is that UASC just does not trust adults anymore. And how can we blame them? Therefore, establishing a relationship of trust is essential to support them but is extremely difficult, especially while being on the move.

Perversely, but understandably, UASC tend to rely totally on the traffickers’ network, which they consider as the only available system to achieve their goal, as it is frequently controlled by co-nationals and sometimes, at least on the surface, by “trustworthy” individuals. The trafficking busi-



ness invests a lot of resources to buy the confidence and the approval of the local communities of departure that have a strong influence on minors' decisions. In my job, I frequently face what is known as the "protection paradox." On one side, we see the most vulnerable individuals, brutally hit by wars, seeking support from the criminal network of traffickers. And traffickers are very "efficient" in responding to their perceived needs. On the other side, we have a powerful system of international protection that rightly tries to offer a full range of support. It does this in the best way possible according to the "Best Interest of the Child," which is assessed in the most professional and sensitive ways possible. However, this powerful system is not efficient in providing support in a timely manner and in assuring that the international community allows them to reach their goal. But time is of the essence because UASC are always in a panic, they have a desperate will to move, and they do not and cannot wait for our political negotiations, our procedures, and our limited capacity. Offering timely and structured support is extremely expensive and needs huge professionalism available. And, sadly, the international humanitarian community must face multiple European laws and regulations that make the life and journey of an asylum seeker extremely hard.

This kind of support is absolutely needed. But the paradox is that a UASC finds the traffickers as a quick and efficient response to his/her urgent need (escape and move to safe areas), while s/he finds the structured support from the international community as a "foreign" untrustworthy apparatus (sometimes made of those same "foreigners" who brought war to his/her country in the first place) — which is essentially too slow, too complex and too unpredictable for his/her extremely urgent needs. This is what we witness frequently with UASC, not only during their journey but also once they arrive in their presumably "Final Destination Countries" (that rarely remain the same!) and they experience the bureaucracy of the reception system.

A usually overlooked fact: An individual UASC is a minor but typically only for a few years (two or three years at most). This is a crucial factor because the support he/she is provided with is as a minor and not as an adult, and therefore is extremely limited in time. As it happens to every child in the world, during those two to three years, her/his personality and her/his needs will have changed much faster than our ability to keep up with them.

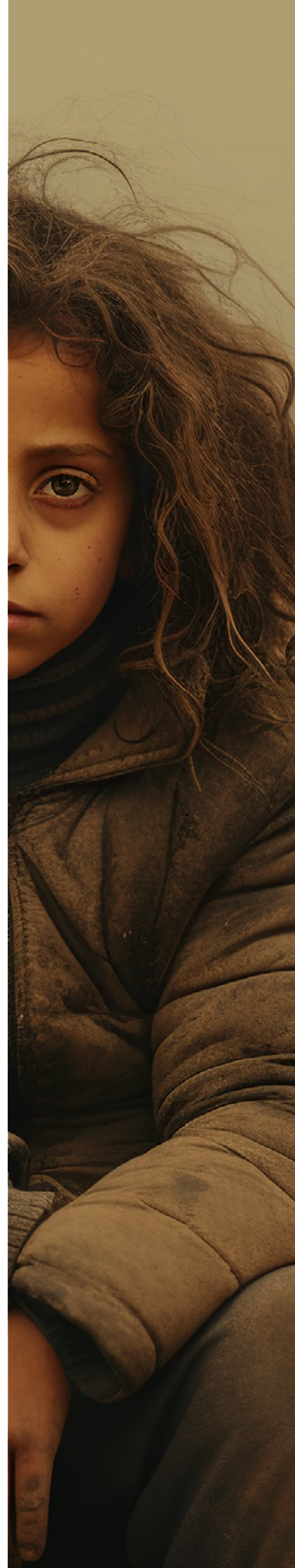


Another overlooked fact: UASC comprise both boys and girls, but unaccompanied girls are extremely rare. The reasons are sadly understandable. It is enormously more difficult for a girl alone to move safely. For this reason, we must pay even greater attention to the conditions of young girls in their countries of origin or the immediately bordering countries. We rarely see young girls arriving alone at the EU, while we see far too many of them disappearing in the Sahel desert or the Libyan traffickers' net.

Protecting a UASC during his/her journey is quite different from protecting them upon their "final" arrival. In the former scenario, it is a matter of protection of a person extremely determined to move and "to take advantage" of his/her minor age to reunite with family/relatives. In the latter scenario, we have a whole national system that needs to step in. UASC must be considered as the most traumatised individuals who need physical and mental protection. They need to be supported in their own (and I want to stress the word "own," not others') project of life and they must be considered as a resource, not as a burden for the welcoming society.

Unfortunately, when they arrive in the EU or other safe countries, the main issue for the national lawmakers seems to be the determination of the age of minors. This is, of course, to prevent abuse of the asylum request process. The terror of the "pull factor" fills the nightmares of all the Western world. It is always and every time a matter of the pull factor. On the contrary, as international Conventions state, we should first presume the condition of a minor and consider them, among all refugees, as the ones with more positive potential for the economy and the society. But this is rarely the attitude of the media, policymakers and, consequently, the population of the receiving countries.

Thankfully, there are some positive cases. For example, the recent Italian law in support of minors foresees a participating process in age determination. Instead of relying solely on medical determination (like the use of an X-ray on the wrist, which is not highly reliable), it involves other professionals like psychologists and social service professionals who participate with doctors to determine the age of the individual. And, if needed, the system provides support beyond the age of 18 years old, up to the 21 years old. There is also a system of voluntary guardians that is a significant help in the evolution of the protection of minors. Even so, also in Italy, problems remain regarding the appli-



cation of the law: the reception system, the rare controls on the reception centres' procedures and management, and the endless timing of a byzantine bureaucracy in providing legal assistance to minors. Worse still, in other countries of the "civilised" EU, like Greece, minors were "dealt with" by putting them in jail as recently as just a few months ago.

And now to the main issue of all: the mental health of minors who flee from war. This is a crucial element that is hard to overestimate. I have worked on this topic for many years now and I still am. This is a giant and scarcely explored gap in terms of giving these minors a future of dignity and autonomy but, so far, there are very few instruments that are efficient with such a complex topic.

The reality is that every UASC carries a wide background of violence, terror, fear, and suffering that affect his/her present and future. It is not at all easy and, some would argue, not fair to enter the inner world of the mental health of any individual, even in the easiest of conditions. It is a risky move for many psychological reasons. With a minor who moves, thinks, and runs fast, it is almost impossible. But this is the most principal factor to secure support successfully and to a winning and lasting approach. We still have a lot to try in terms of appropriate frameworks to deal with the mental health of these minors. If we can at least imagine doing a few things for a minor moving, fleeing, and arriving with a severe mental disorder caused by violence, we can surely do a lot for him/her in terms of social integration. We can help him/her to find a job and to build a life in autonomy.

Many years ago, while speaking with an Italian politician in the south of Italy, she told me: "We, as the State, invest a lot of money for the foreign minors' protection. But we lose it all when they turn 18 years old. They leave the protected system when they reach adulthood, but they still do not have a job. So, at the end of the day, all the costs for the Italian language courses and all the training we provided them will end up going in favour of organised crime or the black labour market as they are the ones who give them an immediate income." So, not only do we face the concrete difficulty in supporting a minor fleeing during his/her journey or in terms of mental health, but we also must do a lot more to ensure that they smoothly enter the labour market in a protected way.

I do want to enter too much into the issues related to the



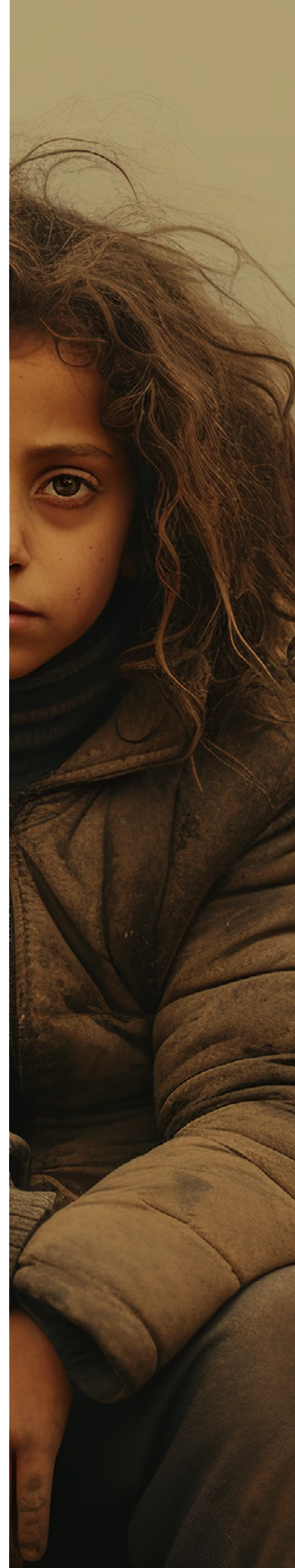
different approaches in the reception systems in Western countries, but I want to add a consideration. We all know that there is no possibility of protection, legally speaking, for UASC who, for whatever reason, are out of the reception system. They remain on the streets under the control of illegal networks and traffickers. However, something can be done. For example, INTERSOS opened a centre for UASC in Rome in 2010. As of today, it has hosted more than 6,000 UASC who were “on the move” from Afghanistan, Pakistan, the Middle East, and Africa. We hosted them for a few days, which was enough to convince them to come out of their “hidden” status and continue their journey in safety. They were considered as having “disappeared” by the media and the authorities, but, in reality, they were only UASC with a strong determination to proceed with their journey from Italy to other European countries where they had relatives or friends.

Despite tons of pleasant words, the EU System had not provided them with an effective tool to move in security and they continued to move along the traffickers’ network. A tragic case in point: A guy we hosted in this centre in Rome, although his right to be joined with his brother in Germany according to the EU law had been recognized, had been waiting an exceptionally long time for the never-ending EU procedure. Frustrated by the process, he decided instead to go to Germany on his own. As he was crossing the border near Bolzano along the railway, he was hit by a train and died.

And now to my last point. It is always easier to focus on the problems, so I want to end on a positive note. At INTERSOS, we have just started a novel support programme for UASC. We are only at its first pilot, but we believe it will be successful. The programme is called “Pagella in Tasca”⁷⁴⁹ and this is why and how we produced it. We were supporting a group of Sudanese UASC in Agadez in Niger. We saw their desperate condition, with no hope for a future. They were confined in their centre for UASC, well protected but far from any hope of movement before their adult age. They had come from Libya, and some of them had even been refouled⁷⁵⁰ from Italy. Recognizing their tragic situation, we decided to try to use what the Italian law already provides: the possibility of an entry visa to Italy for

749. INTERSOS, Pagella in Tasca - Canali di studio per minori rifugiati” accessed from <<https://www.intersos.org/pagella-in-tasca-canali-di-studio-per-minori-rifugiati/>>.

750. Refoulement is the forcible return of refugees or asylum seekers to a country where they are liable to be subjected to persecution.



“reasons of study.” That is an option that is already foreseen and not exceptional. Nobody had ever tried this option because it is extremely difficult to put all the pieces of the puzzle together: you need the support of the UNHCR in Niger, the Italian Embassy in Niger, and the Ministry of Interior. You then also need support from the UNHCR in Italy, the Italian Ministry of Foreign Affairs, and the Italian Ministry of Labour and Interior, together with the agreement of the social services of the hosting community that will deal with the UASC. And guess what...you need a lot of money to connect all these dots. But, we managed to put together all these pieces and the project has now started.

I will stop here for now. Thanks for the opportunity to express my views. Apologies if I might have come across as too self-confident, but I have lived this reality for almost 20 years now and I feel very enthusiastic about it.



7.2. NUTRITIONAL STATUS OF MIGRANT AND REFUGEE CHILDREN IN THE EU

Professor Manon Khazrai⁷⁵¹ & Chiara Spiezia⁷⁵²

In 2017, the Office of the United Nations High Commissioner for Refugees (UNHCR) estimated that 30 million children in the world lived outside their country of birth, with 13 million being refugees or asylum seekers. Most of these children resided in low or middle-income countries that were close to zones currently at war.⁷⁵³ In fact, the number of refugees worldwide has increased due to ongoing wars, national instability, political persecution, and food insecurity.⁷⁵⁴

Data relating to the immigration of children to the European Union (EU) and European Free Trade Association (EFTA) countries during the period 2011-2021 show that in 2021, the total number of asylum seekers in the EU, under the age of 18 years old was 166,760.⁷⁵⁵

In addition, 97,745 children received protection status, while the asylum applications of 20,965 children were rejected. At the end of 2021, 177,425 children were waiting for a decision on their asylum application in the EU. Children accounted for 31.2% of the total number of first-time asylum seekers registered in the EU, most were male (58. %), and 13.9% were unaccompanied minors.⁷⁵⁶

Comparing the period from 2011 to 2021, data shows that the number of first-time asylum applicant children has increased in France, Austria, and Spain, while the numbers have decreased in Sweden, Hungary and, to a

751. Dietician and Full Professor of Food Diet and Human Nutrition of the Master's Degree Course in Food and Human Nutrition Sciences at the Campus Bio-Medico University of Rome.

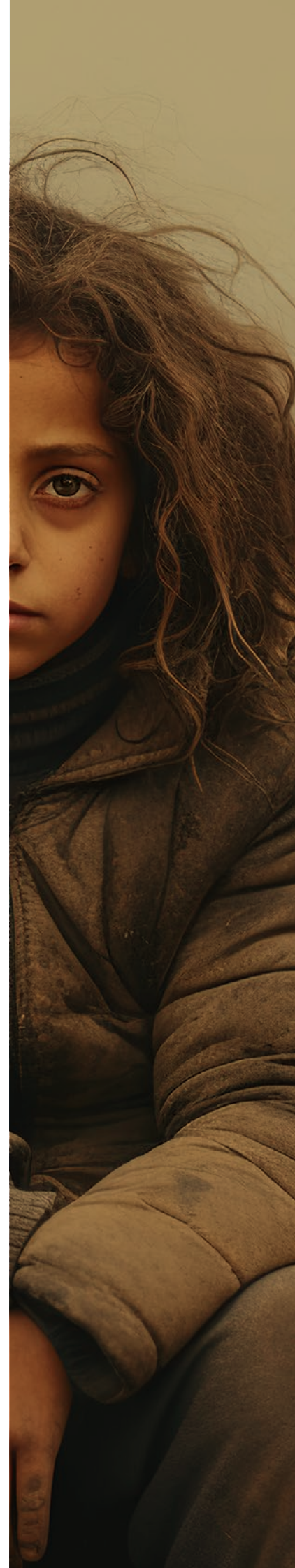
752. Nutrition Biologist at the Campus Bio-Medico University of Rome.

753. UNHCR, 'Global Trends: Forced Displacement in 2017' (UNHCR The UN Refugee Agency 2018) <<https://www.unhcr.org/5b27be547.pdf>> accessed January 2023.

754. A. Baauw, J. K. Holthe, B. Slattery, M. Heyman, M. Chinapaw, H. van Goudoever, 'Health needs of refugee children identified on arrival in reception countries: a systematic review and meta-analysis' (2019) *BMJ Paediatrics Open* <<https://bmjpaedsopen.bmj.com/content/3/1/e000516>>.

755. European Commission, 'The Atlas on Migration' (European Commission 2022) <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life/statistics-migration-europe_en#the-atlas-on-migration> accessed January 2023.

756. European Commission, 'The Atlas on Migration' (European Commission 2022) <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life/statistics-migration-europe_en#the-atlas-on-migration> accessed January 2023.



lesser extent, Germany.⁷⁵⁷

These children arrive after long and difficult journeys with limited or no access to care and inadequate access to food, water, sanitation, and other basic services, which increases their risk of contracting communicable diseases, particularly measles, and food and waterborne diseases.⁷⁵⁸

Furthermore, migrant children are subjected to a variety of risks during all stages of the journey: from departure from the country of origin, through the journey of settlement in the country of destination.⁷⁵⁹

The reasons why children leave their home countries can be many: they are often fleeing wars and conflicts or suffering human rights violations, such as torture, sexual violence, or extreme poverty.⁷⁶⁰ Added to this, health care in conflict zones is often interrupted, resulting in greater vulnerability to vaccine-preventable diseases, high rates of dental caries, nutritional deficiencies, chronic infections, and nutritional deficiencies, chronic infections and non-communicable diseases.⁷⁶¹

Even while travelling, the child is forced to face different challenges depending on the route, method, and duration of the journey. Many children have drowned because of overcrowded boats capsizing during the crossing of the Aegean Sea between Turkey and Greece, the Mediterranean Sea between Turkey and Greece, and the Mediterranean

757. European Commission, 'The Atlas on Migration' (European Commission 2022) <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-of-life/statistics-migration-europe_en#the-atlas-on-migration> accessed January 2023.

758. European Commission, 'The Atlas on Migration' (European Commission 2022) <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-of-life/statistics-migration-europe_en#the-atlas-on-migration> accessed January 2023.

759. ISSOP Migration Working Group, 'ISSOP position statement on migrant child health' (2017) National Library of Medicine <<https://pubmed.ncbi.nlm.nih.gov/28736840/>>. See also, C. Zimmerman, L. Kiss, M. Hossain, 'Migration and Health: A Framework for 21st Century Policy-Making' (2011) PLOS Medicine <<https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1001034>>.

760. B.D. Gushulak, D.W. MacPherson, 'Health Aspects of the Pre-Departure Phase of Migration' (2011) PLOS Medicine <<https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1001035>>.

761. B.D. Gushulak, K. Pottie, J.H. Roberts, S. Torres, M. DesMeules, 'Migration and health in Canada: health in the global village' (2011) Canadian Collaboration for Immigration and Refugee Health <<https://pubmed.ncbi.nlm.nih.gov/20584934/>>. See also F.N. Jaeger, M. Hossain, L. Kiss, C. Zimmerman, 'The health of migrant children in Switzerland' (2012) International Journal of Public Health <<https://pubmed.ncbi.nlm.nih.gov/22699954/>>.



an Sea between Libya and southern Europe.⁷⁶²

Many babies born during the voyage are at increased risk of serious and life-threatening diseases, including hypothermia, septicaemia, meningitis, and pneumonia.⁷⁶³ Some children suffer from poor nutrition, especially mothers who fail to breastfeed them during the voyage. Others, however, suffer from dehydration and dermatological issues, and traumatic lesions due to poor hygiene, crowding, violence, and accidents.⁷⁶⁴

Unfortunately, the risks and uncertainties experienced by these children do not stop at departure and during the journey but continue even after reaching the country of destination. The living conditions of children and families during this period are often stressful, including frequent housing transfers, limited access to school, social isolation from peers, and pressured caregivers. Associated with these factors is also the xenophobia on the part of local populations and peer groups, and difficulty accessing education that make migrants' stay incredibly stressful.⁷⁶⁵

All these factors make migration a risk factor for mental disorders in children.⁷⁶⁶

Consequently, nutritional interventions need to be implemented that aim to improve the immediate food security and nutritional well-being of refugees, especially by identifying the type of malnutrition (wasting, stunting or overweight) and addressing the immediate and underlying

762. Over 1200 migrant children deaths recorded since 2014, true number likely "much higher". Assessment report: borders, health situation at EU's southern borders: migrant, occupational, and public health. (Geneva: International Organization for Migration 2015) <<https://www.iom.int/news/un-migrationagency-over-1200-migrant-children-deaths-recorded-2014-true-numberlikely-much>> accessed January 2023.

763. Assessing the burden of key infectious diseases affecting migrant populations in the EU/EEA.

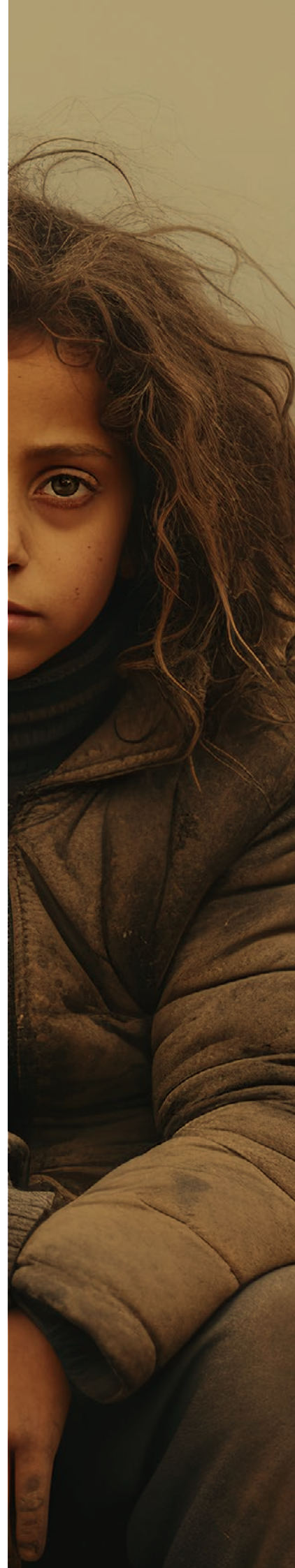
(European Centre for Disease Prevention and Control 2014)

<<https://ecdc.europa.eu/en/publications-data/assessing-burden-keyinfectious-diseases-affecting-migrant-populations-eueea>> accessed January 2023.

764. M. Kulla, F. Josse, M. Stierholz, B. Hossfeld, L. Lampl, M. Helm, 'Initial assessment and treatment of refugees in the Mediterranean Sea (a secondary data analysis concerning the initial assessment and treatment of 2656 refugees rescued from distress at sea in support of the EUNAVFOR MED relief mission of the EU)', (2016), Scand J. Trauma Resusc Emerg Med. <<https://pubmed.ncbi.nlm.nih.gov/27206483/>> accessed January 2023.

765. A. Hjern, L. Rajmil, M. Bergstrom, M. Berlin, P.A. Gustafsson, B. Modin, 'Migrant density and well-being--a national school survey of 15-year-olds in Sweden' (2013) Eur J Public Health <<https://pubmed.ncbi.nlm.nih.gov/23873870/>>. See also M. Vervliet, J. Lammertyn, E. Broekaert, I. Derluyn, 'Longitudinal follow-up of the mental health of unaccompanied refugee minors' (2013) Eur Child Adolesc Psychiatry <<https://pubmed.ncbi.nlm.nih.gov/23979476/>>.

766. M. Alegria, K. Alvarez, K. DiMarzio, 'Immigration and Mental Health' (2017) Curr Epidemiol Rep. <<https://pubmed.ncbi.nlm.nih.gov/29805955/>>.



causes of malnutrition.

The table below describes the three types of malnutrition:⁷⁶⁷

WASTING	STUNTING	OVERWEIGHT
Wasting refers to a child who is too thin for his or her height. Wasting is the result of recent rapid weight loss or the failure to gain weight.	Stunting refers to a child who is too short for his or her age. Children affected by stunting can suffer severe irreversible physical and cognitive damage that accompanies stunted growth.	Overweight refers to a child who is too heavy for his or her height. This form of malnutrition results when energy intake from food and beverages exceeds children's energy requirements.

In conclusion, services must be efficient to prevent the risk of malnutrition from increasing. A person's nutritional status is strongly influenced by the environment in which he or she lives, water sanitation and hygiene (WASH), access to health services, food and nutrition security and assistance, and housing. If these factors are inadequate, the risk of malnutrition increases.⁷⁶⁸ It is indeed appropriate to provide advice and assistance on the ground, intervene nutritionally to prevent malnutrition, and always ensure safe food and nutritious food sufficient to maintain a healthy and active life.⁷⁶⁹

It is necessary to eliminate cultural barriers with the possibility of having an interpreter when needed and more support for newcomers to enable them to register for the health systems. Early diagnosis and treatment will bring benefits as they are associated with less treatment costs in the long

767. Table 1 Description of three types of malnutrition: World Health Organization, 'Levels and trends in child malnutrition: UNICEF/WHO/The World Bank Group joint child malnutrition estimate: key findings of the 2021 edition' (World Health Organization 2021) <<https://www.who.int/publications/item/9789240025257>> accessed January 2023.

768. UNHCR, 'Nutrition in camps: Key points' (UNHCR The UN Refugee Agency) <<https://emergency.unhcr.org/entry/31375/nutrition-in-camps>> accessed January 2023.

769. UNHCR, 'Nutrition in camps: Key points' (UNHCR The UN Refugee Agency) <<https://emergency.unhcr.org/entry/31375/nutrition-in-camps>> accessed January 2023.



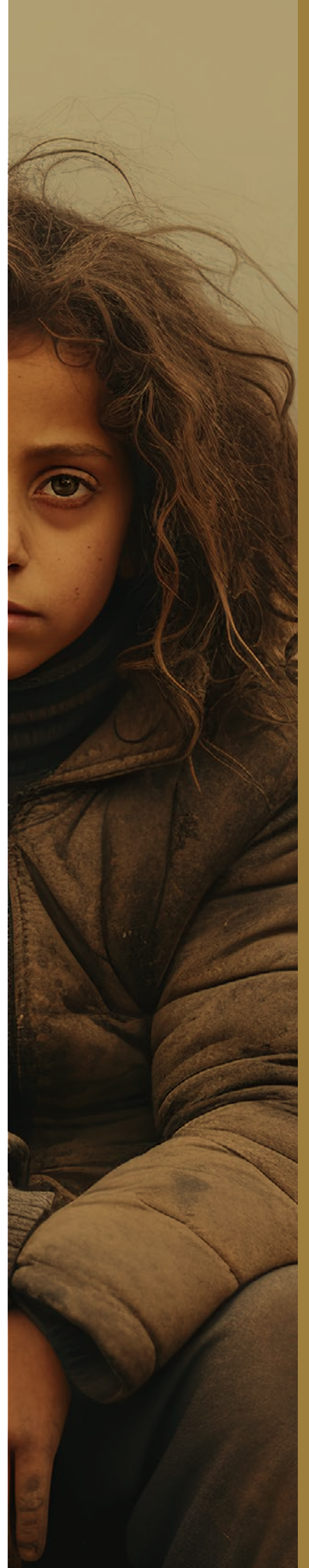
term and less access to emergency care services.⁷⁷⁰

Today's asylum seekers and refugees will become tomorrow's citizens.

It is appropriate that there is a paradigm shift with an emphasis on child health and development that will help this vulnerable group of children integrate into their new environment.⁷⁷¹

770. The Lancet eClinical Medicine, 'Migrants' health and persisting barriers to accessing health-care systems' (2022) The Lancet eClinical Medicine. <[https://www.thelancet.com/journals/eclinm/article/PIIS2589-5370\(22\)00051-7/fulltext](https://www.thelancet.com/journals/eclinm/article/PIIS2589-5370(22)00051-7/fulltext)>.

771. A. Baauw, J. K. Holthe, B. Slattery, M. Heyman, M. Chinapaw, H. van Goudoever, 'Health needs of refugee children identified on arrival in reception countries: a systematic review and meta-analysis' (2019) BMJ Paediatrics Open <<https://bmjpaedsopen.bmj.com/content/3/1/e000516>>.



7.3. THE ROLE OF THE FAMILY IN THE FACE OF THE PANDEMIC AND THE DRAMA OF WAR REFUGEES

Professor Héctor Franceschi⁷⁷²

7.3.1. Introduction

In the midst of one of the harshest moments of the pandemic, in which Italy and almost all the countries of the world were suffering the second wave, and we could say that practically the whole world was posing the problem of how to act to contain it, with various lockdowns, shops, schools and churches closed or partially open, teaching only from a distance, and great suffering in millions of families who were moving into extreme poverty, the urgency of a global pact became evident, both because it must involve all nations from the richest to the poorest, and because this pact should involve all subjects — families, schools, young people and children, governments and religions — in the process of rebirth, since in the pandemic situation we have experience, all the shortcomings and all the consequences of a divorce, I would almost say of a chasm that has always expanded, between the two main active subjects of a society's healthy growth processes, have manifested themselves, sometimes dramatically: the family on one hand and the school, civil society and State on the other hand.

This awareness regained from the dramatic situation has shown itself again in the new crisis that has affected the whole of humanity, something that we will see more and more clearly as the months go by, with the armed conflict involving Ukraine and Russia, which is having serious consequences in more and more countries: the grain blockade, the increase in fuel prices, the millions of refugees that have poured in all over Europe.

I will preface my speech by referring at various points to speeches by recent Pontiffs, which does not mean that my speech is Catholic and for Catholics, since the words I will refer to are words addressed to the whole of society and the world, often encouraging a global pact between states, confederations, churches, and religions, to meet the crisis created by the current situation in the world. They lead us to a global and renewing rethinking of the human person, which, in my opinion, attempts to overcome the myth of the super-man and trans-humanism, which in recent decades have attempted, with bad consequences, to propose

772. Full Professor of Family Law at the Pontifical University of the Holy Cross (Rome).

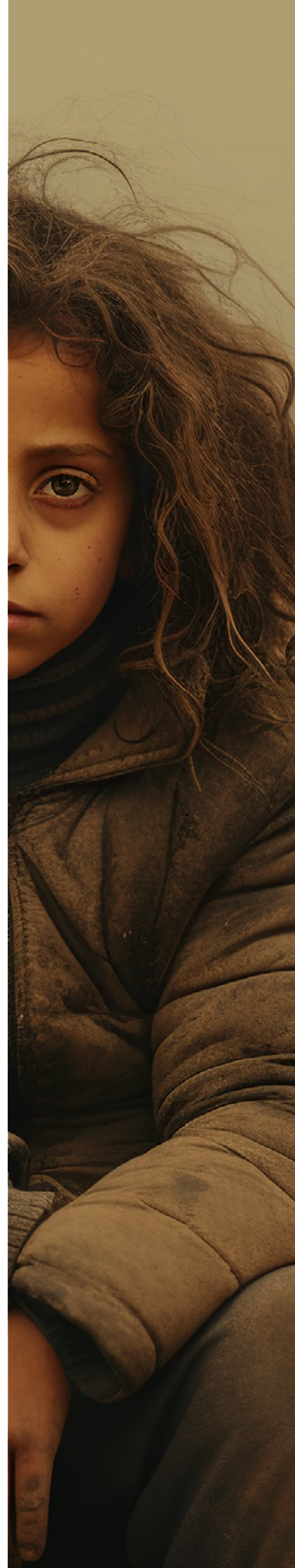


to us a “re-creation” of man, in the image of himself and self-sufficient.

Returning to the theme of this brief contribution, as I was saying: the crisis of the pandemic, not yet totally overcome, was added, for millions of families, the drama of the war with its consequences: disappearance or death of key family members, destruction of the family nucleus, mass migration, often separating family members. Once again, we have seen how the problem of the pandemic, not yet totally resolved, together with massive migration, has put our Europe in check: how can we meet the basic needs of these families? How can the right to asylum of war be applied? In an individualistic way or by considering the importance of the family as the place where the person acquires his roots forms a solid identity? The perspective one follows will undoubtedly determine the *modus agendi* of Europe and its Member States.

In this contribution, since other specialists will develop the issues of international law, I will attempt to focus on the irreplaceability of the family as an educational and welcoming community, and this for the very being of the human person, which is by its very nature a family being in a relationship. Hence the importance for community policies to take account of the family as a social subject in meeting the serious difficulties that have arisen from both the pandemic and the war. Some of the means would include, for example: the wider use of family reunification to allow refugee women, children and young people to be reunited with their families; the simplification of adoption processes — always in the best interests of minors — to give a family to those children and young people who have been left alone, aware of how lacking and often disastrous the policies that focus on reception centres for minors or so-called “family homes” are. Experience, confirmed by the studies of various sciences — evolutive psychology, psychiatry, pedagogy, anthropology, and relational sociology — shows that children need clear parental figures for adequate and harmonious personal integration, development, and maturation.

I will therefore briefly outline how the pandemic and the current family emergencies created by the war are teaching us how the family founded upon marriage is essential, fundamental, and irreplaceable to resolve the profound crisis and challenges created by these situations, always keeping in mind the family/school binomial, both fundamental



realities, to give a future to all people, especially children and young people, who both because of the pandemic and the war, have seen their family life cut short.

We have seen how the closure of schools of all kinds and levels has practically left out of the educational process many boys and girls belonging to families living in a situation of great hardship, often caused by the separation of the family group, material or spiritual poverty, the absence of one or both parental figures or their sometimes total unpreparedness to educate their children, social isolation, etc.

There is no doubt that the world is changing, and that Europe and the West will not be the same after this multifaceted crisis. As we know, there is even talk of a “Great Reset.” I cannot say to what extent this is really a dream of some of the world’s elites, but there is no doubt that in the processes underway there is also, as we can clearly see in various aspects of the changes that are being proposed, an irreconcilable aspect with a truly humanistic vision of the person that is worrying in no small measure and that, as has often happened throughout human history – but perhaps not with the aggressiveness we find today – has the family as the fulcrum of its attack right from its roots. Without going to the excesses of some – and always with the optimism of those who trust in the truth – I believe it is worth reflecting on this issue.

This is what I shall attempt to do in this speech, focusing precisely on the need for that global educational pact which, contrary to the predictions of doomsayers of the overcoming of the family, as if we could get out of these serious emergencies without it, requires the participation of all social subjects, starting with the family, and which is not possible in a State that cancels or replaces the family as the genome of any society that cares about the dignity of every human being, who by nature is a family subject, before any other relationship.

Faced with this challenge, we must ask ourselves some questions to which I shall attempt to provide answers from a legal perspective in the deepest sense, such as what, as a true right/duty, parents must do in respect of their children’s educational process, that is, in determining what is right in the upbringing of their offspring, which very often, forgetting the essential, very personal and inalienable rights/duties, parents have often delegated completely to



the Church and the school from the earliest age of their children.

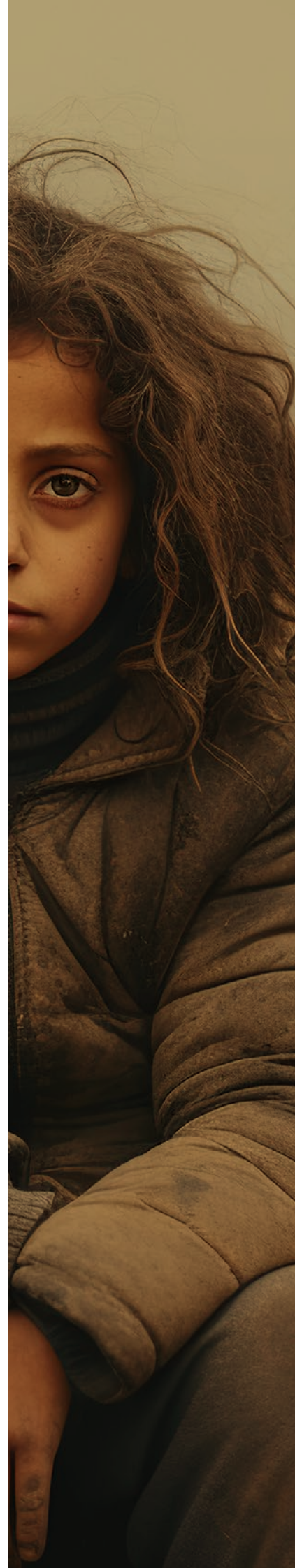
Some of the questions to which I will attempt to give an outline of an answer, which I hope will at least serve to understand the origins and gravity in which the educational processes of children and young people everywhere find themselves today, include an emergency that the pandemic and war have not created, but have simply made them more evident, putting them before everyone's eyes: the State, the families themselves: what has happened in recent decades with the natural family/school binomial? Why have families increasingly withdrawn from the educational and socialisation processes of the school, leaving it alone to educate children and then young people? Can and should one speak, in the light of today's situation, of an urgent recovery of the 'family dimension' of schools? Finally, how can that educational pact mentioned earlier be made operational? What would be the ways and means by which the family could resume its essential role in educating its children? and not in competition with the school or the State structures, but in fruitful and effective cooperation in which the main subject should always be the family, supported and helped by the school, be it religious or secular, public or private.

7.3.2. A Starting Point for Dialogue: The Family Dimension of Schools from An Interdisciplinary Perspective

In post-modern society we are witnessing an increasingly strong privatisation of the family, which has serious consequences, both for the family itself, which becomes a deconstructed subjectivity determined by the most varied feelings and desires, and for society, from which the family find itself increasingly marginalised, and, therefore, left out of the educational process of individuals: no longer people bound by personal relationships, starting with family relationships, which would give each person their own, unrepeatable identity.

This vision makes it almost impossible to understand what the "familial dimension of the school" is, since the family, a now completely privatised reality that depends solely on cultural models, seems to have no other task than to give meaning to its members that, however, has nothing to do with "the public", that is, with society.

Instead, school is understood as that structure that deals with preparing the individual for social life understood as



the economic structure of production and consumption. Thus, neither the family nor the school would be natural spheres of relationship and humanisation of the human person. They would be two worlds that sometimes meet when they do not clash, but which certainly do not support and complement each other.

As Donati explains well: “Many claim that educating to ethicality is a task for the family, while the school should only educate the future producer-consumer for the market (and therefore should not be a place of ethical education). Those who hold this view do not realise that they are giving the family an impossible task to perform. Those who separate family and school radicalise that separation between public and private that is leading modern society to self-destruct.”⁷⁷³

Faced with this reality, I would first of all like to focus attention, still within the framework of the juridical anthropology of the family⁷⁷⁴, on the theme of the relationship between the family and the school, that is, on the “family dimension of the school”, wanting in some way to indicate the need to rediscover the inseparable link that there should be between family and school in order to be able to fully form children, then young people, and finally adults, as good citizens, good parents, “good people”, that is, virtuous people. This becomes especially urgent regarding the millions of war-displaced people.

The need for this interaction between school and family became apparent in numerous ways on a worldwide level, I would say, when schools in practically all countries had to close because of the pandemic caused by COVID-19 and had to switch to online teaching, the so-called DAD or distance learning. This type of teaching must, in any case, be something exceptional, as far as to educate is not to transmit knowledge but to shape, to accompany children and adolescents in their growth, somehow put the family in the front row. Parents have found themselves having to act as their children’s “teachers”, not being able to delegate everything to the school, and it has become clear how much better things work now that the family has been invested once again in the educational role as the prima-

773. P. Donati, ‘La famiglia. Il genoma che fa vivere la società,’ Rubbettino, (Soveria Mannelli 2013), p. 225.

774. H. Franceschi – J. Carreras, ‘Antropología jurídica de la sexualidad,’ ETDB, (Caracas 2000).



ry role — because that is how it has been perceived by so many families. It has worked much better in well-structured families, so much so that it has triggered alarm bells in many states on the need to reach out to the weakest, which often correspond to those children or adolescents who do not have a stable family and often live on the poverty line.

Therefore, by placing the family at the centre of civil society, we will succeed in recovering the true meaning of the process of educating people, not as a mere transmission of “useful” information, but as a process that makes it possible that, with the synergy and complementarity between family and school, young people achieve that perfection to which they are called by their very being as persons, that of being good persons, virtuous persons, that is, being more fully persons, recalling that well-known definition of nature by Aristotle, who defined nature as “what everything comes to be at the end of its development.”⁷⁷⁵

In my opinion, families must know how to promote and interact with other families, so to speak schools of “families for families”, in which, most naturally, one overcomes that false dichotomy between private and public, and is able to clearly see the school, if understood as an environment of socialisation and the establishment of true and profound interpersonal relationships, as a sphere of preparation for the “good life”, as a natural complement that only in interacting with families will succeed in forming good citizens. In this way, children will become people with a solid network of interpersonal relations that will make them unique, and not just subjects to be included in the market, as Donati points out, either as producers or as consumers.⁷⁷⁶

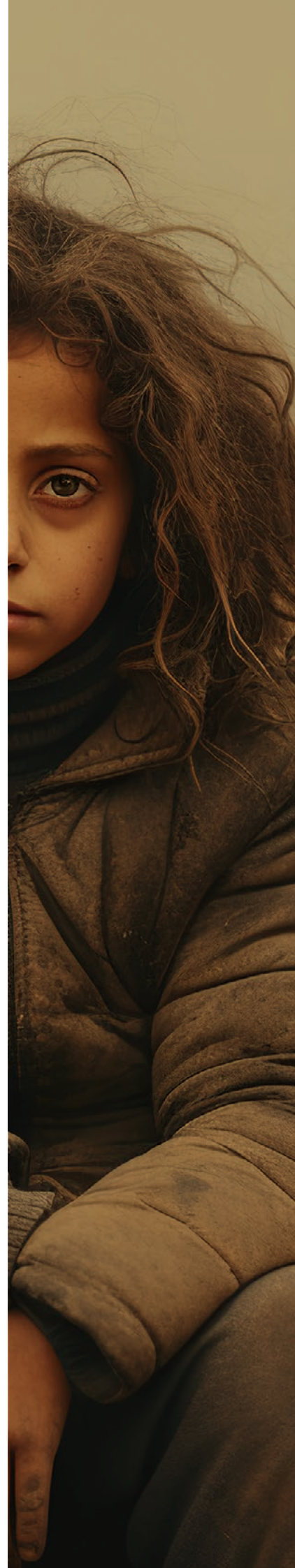
From this general perspective, I think these issues should be approached from an interdisciplinary perspective.⁷⁷⁷

We should try to regain a positive approach of integration and complementarity between the family and the school, overcoming a vision of confrontation that is spreading more and more in the Western world, especially in Europe, where the very people most concerned, i.e. the children, have no say, as do the parents, arriving at a kind of dicta-

775. Aristotele, *‘Politica,’* I, 2, 1252, b 32-34. For an interesting study of the concept of nature, see R. Spaemann, *‘Lo natural y lo racional,’* Rialp, (Madrid 1989); ID., *‘Concetti morali fondamentali,’* Piemme, (Casale Monferrato 1993).

776. Cf. P. Donati, *‘La famiglia. Il genoma che fa vivere la società,’* cit.

777. I. Lloréns (editor), *‘La dimensione familiare della scuola,’* Edusc, (Rome 2020).



torship of the omnipresent and relativist state in the world of schools. Then, let us not forget the ever-increasing pressure from immensely powerful groups that want to impose their model of person, family, and parenting on all members of society, even against the will of parents and against the rights enshrined in most of the Constitutions of democratic states.

The family is an educational reality, and the school, to be successful in its function of forming and shaping children, and then young people, must be in alliance with the family, and with parents. The subject must be addressed with the help of specialists in various sciences, who have studied the need for this covenant, presenting that same reality — family and school — in the light of the other sciences. This can only shed more light on the unique reality that is being studied by different sciences. But let us not forget that reality is not in ideas, but in being, in the essence of things, some simple, others multifaceted and complex.

The relationship between family and school, even in these times of pandemic and war, can be studied from different perspectives. This is nothing other than emphasising that without a true covenant between family and school, which also involves all the spheres and all the subjects that act in this sphere in whatever capacity — civil society, the Churches, the State — it will not be possible to find a way out of this emergency that has been greatly aggravated by the pandemic and wars. Any effort that attempts to leave out the family made up of father, mother and children, and many times other members of the couple's family of origin is doomed to failure or, certainly, to the emptying out of the diminishing and unrepeatability of each person, who would become mere replaceable parts of the economic processes typical of consumerism.

A fundamental characteristic of this educational alliance, Premoli⁷⁷⁸ argues, could be explained with three verbs used by Bueb⁷⁷⁹ as a motion for educators that also applies to parents: "In the third chapter of his booklet on *The Nine Rules for Schooling*, Bernard Bueb prescribes a motto for the educator that is: "trust, demand and protect" and it seems to me that it also perfectly represents a model for

778. P. Premoli De Marchi, *'Il rapporto educativo genitori-figli dalla prospettiva dell'antropologia filosofica,'* in *Ibid.*, p. 39-68.

779. B. Bueb, *'Le nove regole della scuola,'* Rizzoli, (Milano 2009).



educational relations within the family.”⁷⁸⁰ These are attitudes that, in both the family and the school, must work in harmony with each other, being closely linked to the fundamental notion of *auctoritas*, both between parent and child and between teacher and learner.

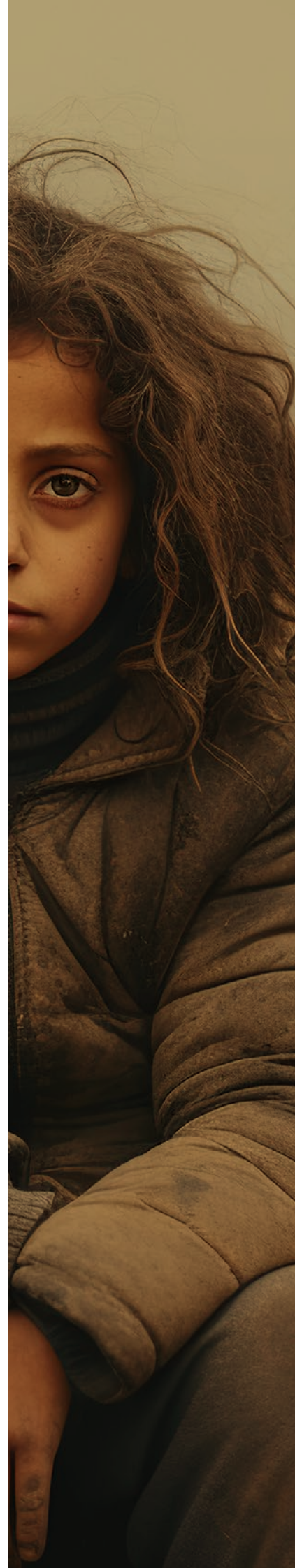
The family is the pivot of the educational process; if the family as the educational subject is missing, it will be difficult for the state, the school, or the churches to fill that great void. In this sense, much has been written in recent decades about the grave injustice of wanting to impose on young people visions of the world, of ethical and moral life, and of being a person, contrary to the convictions of their families of origin.

In this regard, I believe that the only way to overcome the differences of opinion or even the clash between family and civil authority that exists today in not a few Western countries, and between family and school, is to overcome the ideologized attitudes that frequently underlie the clashes. Rediscovering the being and meaning of the family as an intrinsically relational reality and creator of authentic relational values, and rediscovering the intrinsically familial dimension of the school, whether it be public, or promoted by citizens themselves, especially parents, private. In this regard, the words with which Aguiló concludes one of his speeches on the promotion of family rights in schools are very enlightening: “Those who know a little about the debates on rights and freedoms in education know that these are neither simple nor obvious issues. And they also know that it is easy to form “ideological blocs” in which there is no openness to the ideas of others, but only the thoughtless defence of stereotypes traditionally close to one’s own ideology. This is why, in the case of education, it is particularly important to recognise the complexity of things and avoid the tendency to simplify the opinions of others so that they can be easily refuted. There are usually no easy answers to difficult problems. And as far as education is concerned, there are usually neither simple questions nor easy answers.”⁷⁸¹

Lastly, I would like to conclude this section by quoting Donati, who in one of his writings on the family and civil society from the perspective of relational sociology, succeeds in formulating an adequate understanding of the intrinsic

780. P. Premoli De Marchi, *‘Il rapporto...’* cit., 65.

781. A. Aguiló, *‘La promozione dei diritti della famiglia in ambito scolastico, in I. Lloréns, La dimensione familiare della scuola,’* cit., 134. The translation is mine.



juridical dimension of the family and overcomes a positivist view of law, re-proposing the family as the generator of healthy interpersonal relations: “the natural normo-constituted family is and remains the vital source of society. Globalised society demands increasingly, not less and less, of the multiple mediating roles that the family is called upon to play in making personal and social virtues flourish. The detachment from the norm-constituted family and its deconstruction through the multiplication of legal schemes that ambiguously and simultaneously privatise the family on the one hand and publicise it on the other, do not improve people’s existential condition, if anything they worsen it. Family mediation is neither a private nor a public relationship, but a communitarian one. The law is called upon to rediscover it.”⁷⁸²

7.3.3. Family In Times of Crisis

The urgency of developing the educational alliance between all the subjects involved in the process of educating young people, always starting with the family, is shown to us in all its urgency in the situation we are experiencing worldwide with the pandemic and, particularly in Europe, with the confrontation in Ukraine and the mass migration it is causing.

Regarding the pandemic, it is striking how different the assessments of its consequences on families and educational processes are, not only in the media but also in the scientific world. Many things have been said: some say, for example, that the pandemic has ruined many families; others say that it has been an opportunity to meet again, to rediscover the family. I think, on the other hand, that what the pandemic has done is to make the different family situations evident, that is, to unite more families living in a way, let us say, consistent with their reality of being a family. In this sense, let us not forget that famous call made by the great John Paul II when speaking to families all over the world, he told them: «Family becomes what you are!»⁷⁸³

In other cases, on the other hand, the pandemic has done nothing but highlight separations, crises, discomfort, and situations of poverty that have caused children belonging to these families to fall behind their schoolmates or even drop out of school. As far as schools are concerned, I

782. P. Donati, *‘Il genoma sociale della famiglia e i suoi beni relazionali (pro manuscripto).’* The translation is mine.

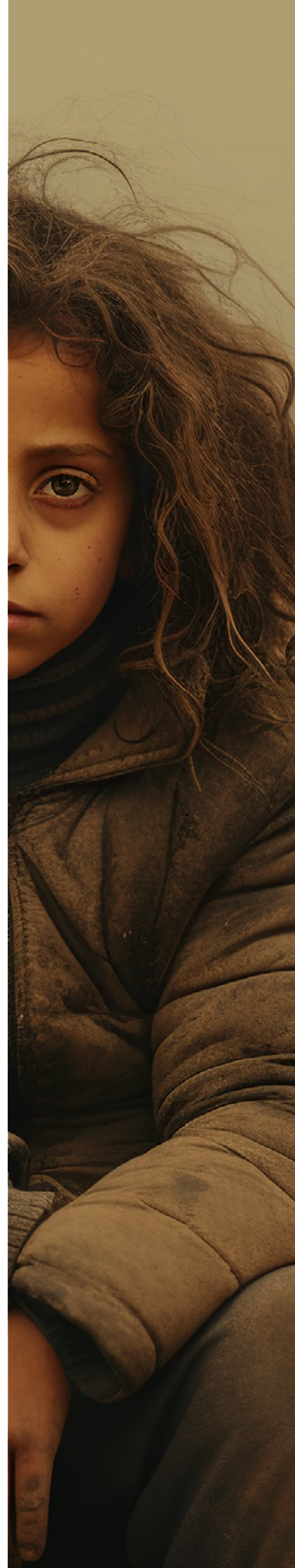
783. John Paul II, *‘Familiaris consortio, title of n. 17.’*



think that, obviously, the obligation of having to do practically all lessons at a distance and seeing children only via the screen has forced many schools to modernise their resources in order to be able to continue to offer quality teaching, but it has been seen from the outset that school is not primarily a place for transmitting theoretical content but rather a complement to the family in the process of children's maturation and socialisation, something that practically disappears with distance teaching. This teaching, especially at kindergarten, elementary and middle school levels, was much more effective in those schools where families, through various concrete and real resources, were already very present in their children's schools, aware of their primary responsibility and the need for complementary interaction between family and school.

Many parents, finding themselves with children at home without warning, were able to interact with teachers to recreate a healthy environment at home in which there was a balance between lessons, the interaction between parents and children, finding new — often old and forgotten — ways of having fun, etc. So, families found themselves with children at home, with lessons to follow and homework to do, and whether they liked it or not, they found themselves at the forefront of their children's education. I think we cannot overlook the fact that there are two subjects, family and school, complementary educational agencies that support each other, that is, one without the other does not work. It is therefore absurd that in some countries, attempts are being made to practically exclude the family from the educational paths of children and adolescents.

I believe that the only way out of the crisis we are experiencing is not only direct support to schools so that they can better equip themselves for distance learning or welcoming refugees, but first and foremost direct help to families, since many families are unable to take advantage of the educational that is offered due to their poverty, or the unpreparedness in which so many parents have found themselves when faced with new situations and needs. On the contrary, the very situation we are experiencing has shown how important it is for there to be a family and for it to function so that the effort made by so many schools is not made in vain. It is now evident that the presence of parents is irreplaceable in the children's schooling process. Because of this, the State has a real obligation — not just as a concession — to provide support, including direct economic support, to families with children of school age:



paid leave, babysitting bonus, etc., precisely because they are the first and principal educators, and because the family, as the original juridical subject, has the right to be supported in a society that seeks the common good.

Regarding the emergency created by the massive immigration of Ukrainian families, unlike what has been happening in recent decades with emigration from poverty or war, with the creation by countries of large reception centres that often differ little from real prisons, in this situation European families, mainly Christian ones, in an unprecedented way have opened their doors to refugees, many third sector organisations have worked to find them accommodation, work and integration, and children who have lost their parents a new host family. This has been seen admirably in countries like Poland, Austria, Spain, Hungary, and Italy. Many families stepped forward without being asked to take in refugees. Undoubtedly, the family has been ahead of the states in solving immigration problems, and not a few professionals and private or church institutions have set to work to solve the legal problems.

In the case of families displaced by war, the policies of European states should therefore not only aim at a welfarist solution but should seek effective means, where possible, for families to be kept together and for both parents and children to be integrated into the educational world, in some cases by setting up temporary schools in their own languages until they can integrate into their new societies, in other cases, by integrating the families, parents and children, with appropriate help, into the educational world of the host country.

Returning to the pandemic, whose ultimate end date is still unknown, the wish of many is that, after it, the online school will once again be replaced by the school as a community of persons, but with a new awareness, that is, that the only way for it to truly be *seminarium rei publicae*, forging good citizens, will be to regain full awareness that the school is not made up of individuals, by individuals who go it alone, but it is also a community of people made up of families, to the point where the school sees itself as a community of families united by a common purpose, that of giving their children an education in harmony with that which in conscience parents believe they should pass on to their children because only memory and tradition will make a future with solid roots possible.

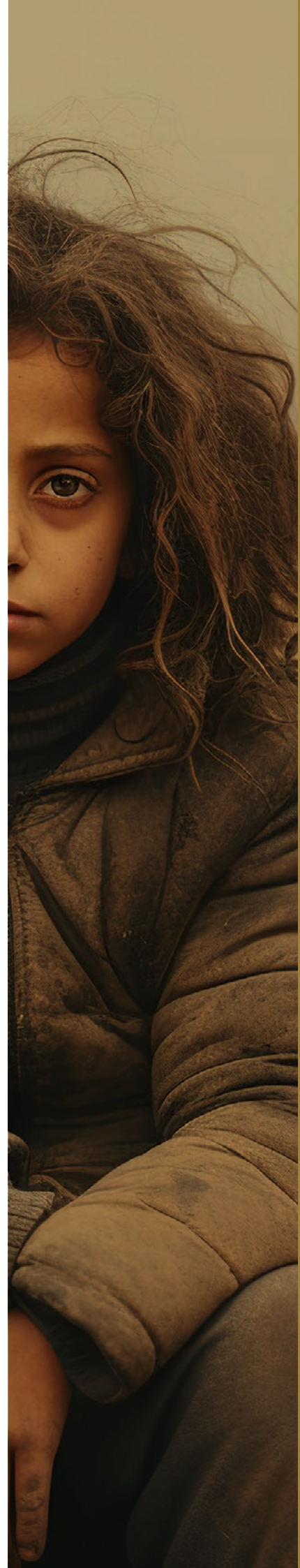


It seems to me that, for the success of the global educational alliance that I referred to at the beginning of this speech, this alliance cannot fail to take into account the fact that the main protagonist, since by right they are primarily responsible for education, are their parents. They have a serious right and duty to watch over the education of their children, both in the familial context and in the educational context, which in this time of emergency often intersect.

However, it must be borne in mind that, especially for children and adolescents, physical presence is fundamental, because it is only through it that values and virtues can be transmitted, through dedication and example of life, a central aspect of the educational process, which cannot be reduced to a set of knowledge, but which must take into account all the dimensions of the human person: the power of example, growth together with others, the acquisition of social virtues, all things that online teaching cannot transmit. In this sense, one can understand the strong pressures that exist in almost all countries for in-person teaching not to be discontinued, especially at those ages when one most needs to interact with others, as is the case in primary and middle school.

After more than two years of this experience of the pandemic and then the war, I want to underline the irreplaceability of the family. We know that today there are extraordinarily strong attacks against the family. The other day I was reading one of the most important newspapers in Italy which, in its literature section, praised a well-known American author who said that the family is hell. I thought: “I don’t know what kind of family this writer must have had, but my family was like a little piece of paradise,” a large family — 10 brothers and sisters — very united and with extraordinary parents, who now all grown up and scattered around the world: from Venezuela to England, to the United States, passing through Rome and Geneva continue to be very united, also thanks to new technologies. The family must be defended because it is fundamental since it is in it that a person’s identity is forged. Within it is, “the genealogy of the person.”⁷⁸⁴ Only thus will it be possible to achieve the common good of the family, which is not simply the individual good of each member, but the common good of what we can call the first and original society

784. John Paul II, *‘Letter to Families,’* 9: (Through the communion of persons, which is brought about in marriage, man and woman begin the family. With the family is connected the genealogy of every man: the genealogy of the person).



of persons, without which it is impossible to build a more human society.⁷⁸⁵

These common good demands respect for the demands of justice of each of the founding family relationships: the conjugal relationship, the relationship between parents and children, and the fraternal relationship. It is in them that family identity is built. It is through them that the child, and then the adolescent, naturally grows and reaches maturity, through a process of formation in the virtues that is not achieved through theoretical discourses but is learnt from family life, from the example of parents and siblings: responsibility towards one's neighbour and one's obligations, knowing how to share, generosity, the fortitude to achieve what is worthwhile, respect for the intimacy of others, so important for a balanced and mature growth of one's sexuality.

7.3.4. Conclusion: The Family as An Intrinsically Educational Objective Reality in a World in Crisis. Overcoming The Pandemic and The Consequences of War and Rebuilding a Lost Harmony Between Man and The World

As I have attempted to explain from different perspectives throughout this contribution, it becomes clear that if the family works, and is well structured, we will have the most effective defence and antidote for young people, who will grow up with a healthy sense of realism and with the maturity necessary to understand the world and, at the same time, accept that they cannot carry it on their shoulders, that they must try to change what is within their reach, that they are not alone in this task, and, finally, that changing the world begins with changing ourselves, and this is particularly true for the urgent 'ecological conversion', in which the family also has a fundamental and irreplaceable role, made up of a thousand small things that we learn at home or will never learn. And this ecological conversion, to be genuine, must be open to the dignity of every human person and their transcendence. Otherwise, it would be false and poor, as far as it closes in on itself and claims to pit nature against man, and man against nature, in an irreconcilable dialectical vision.

Hence the importance of defending an objective vision, with an intrinsic ethical, moral and juridical content, of the family and the interpersonal relationships that shape it, if we want to save our society — especially young people —

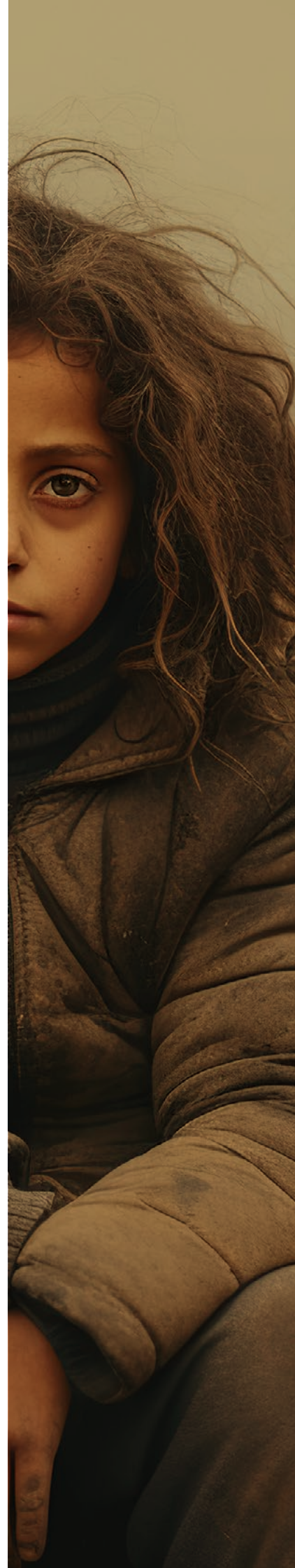
785. P. Donati, *'Il genoma sociale della famiglia e i suoi beni relazionali (pro manuscripto).'* The translation is mine.



and not leave it at the mercy of caprices or unstructured desires, without a basis in reality, of individuals who live only for their own interests. The best remedy, therefore, is respect for the truth of man and creation as a gift given by God to man himself, as John Paul II reminds us: “Not only has God given the earth to man, who must use it with respect for the original good purpose for which it was given to him, but man too is God’s gift to man. He must therefore respect the natural and moral structure with which he has been endowed.”⁷⁸⁶

I want to finish by stressing that, even in this area of integral ecology, the only way to recover harmony between man and the environment is to recover the harmony of interpersonal relationships, starting with the most fundamental, which are family relationships. Today too, amid the global pandemic, in the face of the dramas of war, through the defence and promotion of the family we can turn these challenges into an opportunity, faithful to the innate humanising vocation of the family, since the family can and must contribute to grasping this situation not with the catastrophic vision that some see, but as an opportunity to rethink the scale of our values, to rediscover the importance and irreplaceability of the family founded on marriage, as a fundamental way out of this situation and to find the strength to create new models of behaviour that serve to rebuild the harmony lost between mankind and the rest of creation, between man and the habitat in which he lives.

786. John Paul II, *‘Enc. Centesimus annus,’* 38.



7.4. SARS-CoV-2 REFLECTIONS

Doctor and Professor Massimo Ciccozzi⁷⁸⁷

We are afraid of what we do not know — for example, viruses.

We are even more afraid of a changing virus.

Science tells us that all viruses mutate, but we do not listen to it. “Blame the school,” they say. “Blame the newspapers,” it is repeated. The fact is, that if we talk about mutations to the average Italian, he immediately thinks of the X-Men and GMOs (Genetically Modified Organisms). But the former belongs to the realm of comics, and the latter are not born from natural mutations.

The COVID-19 emergency has confirmed, after AIDS, Ebola and the first SARS, that we know too little about these ribonucleic acid filaments. As was established in 2013, the evolutionary history of coronaviruses extends much further back in time than our knowledge.

There is talk of thousands or millions of years of evolution in the phylogeny of the coronavirus. The speech becomes intriguing. Like many other DNA and RNA viruses - including herpesviruses, lentiviruses, filoviruses, and frothy viruses. “Coronaviruses seem to be an ancient viral lineage,” admit the researchers, who, reasoning on the jumps of species that lead these viruses to infect humans, speak openly of co-evolution and convergence between the avian species and avifauna and humankind.

The mutation of the Spike protein, as has been ascertained, has allowed the jump of bat-human species but also the greater contagiousness of European strains compared to the primitive Asian strain of SARS-CoV-2. The subsequent mutations of the virus influenced the evolution of the symptoms, as well as the contagiousness of SARS-CoV-2: typically, in Italy, the infection causes respiratory and cardiovascular problems, myalgia and neurological symptoms, such as loss of taste and smell. In severe cases, in addition to respiratory insufficiency, serious complications such as acute coronary syndrome, pulmonary thromboembolism, myocarditis and potential arrhythmic effects of medical treatment can be added to the appearance of interstitial pneumonia.

⁷⁸⁷. Doctor and Full Professor, Head of Medical Statistics and Epidemiology Unit, Faculty of Medicine at the Campus Bio-Medico University of Rome.



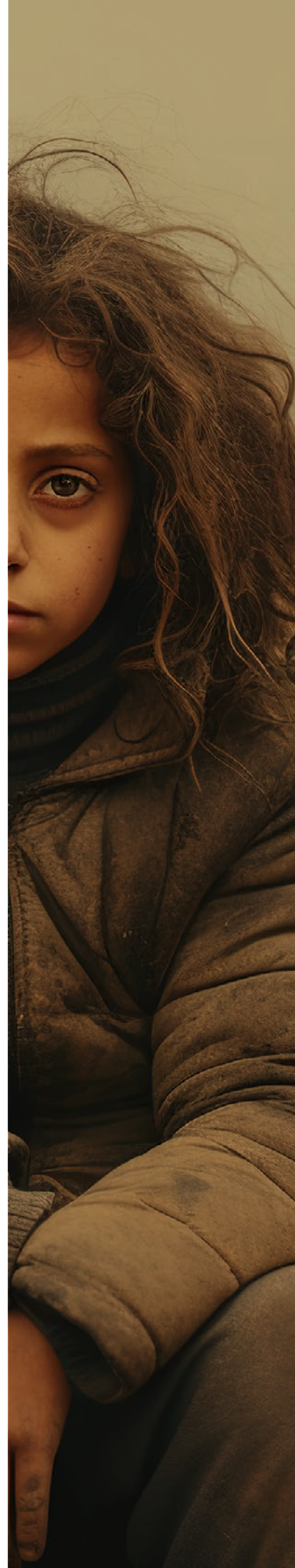
It must be remembered that, before March 2020, sixty million Italians had heard of a plague only from Alessandro Manzoni. In short, stuff from four centuries ago. The pandemic closest to us, that of AIDS, which affected the planet since 1981. It demonstrated the importance of information, but it is difficult to say if it triggered a similar competitive advantage. This is because the AIDS transmission mechanism, which in that case was and is sexual, could be blocked more effectively by devices, compared to a virus that spreads in many ways, from aerosol to faeces.

For the sake of brevity, let's say that the advance of HIV, from 1981 onwards, has been contained by a mode of social distancing that consists in changing sexual habits and avoiding - *absit iniuria verbis* - categories at risk, where SARS-CoV-2 requires a real physical distancing between all people of the human species, an invisible and universal barrier, made of distance and insulating materials. We can say that this emergency leaves behind a few million citizens who are more scientifically informed than before. Who has not heard, for example, of the Spike, the anti-receptor that is located on its surface of SARS-CoV-2 and draws its crown shape? It is the protein that allows you to "open" the cell because it recognizes angiotensin receptors.

Here, at this precise point, Facebook no longer knows what to say. Not so much because he does not know that the target of the Spike is not the whole cell. We who see people sick, dying, being burned and relatives crying think that the Spike is a kind of shrapnel bomb — a fragmentation device — which destroys everything when it arrives. In contrast, this protein does not shoot into the pile. He takes it with an enzyme, which is precisely the angiotensin converter, called ACE2.

Few months ago, when it all began, few were able to grasp the importance of the links of SARS-CoV-2 with the coronavirus of Severe Acute Respiratory Syndrome (SARS-CoV) and with that of Middle East Respiratory Syndrome (MERS-CoV). Instead, as we will see, these links are especially important to understand why COVID-19 has caused hundreds of thousands of deaths and millions of infected.

Every viral pandemic poses an extinction risk to the human species. Struggle for life: Charles Darwin called it that — a fight for life. Time is an important variable in this challenge where the absence of a vaccine to eradicate the disease, serves to buy time for the enemy.



In the second fortnight of April 2020. In Italy, the contagion curve was beginning to take its breath. After climbing the mountain of the dead and fear, we were faced with a plateau. Pressed by Confindustria (General Confederation of Italian Industry) and traders, the Government loosened the grip of the lockdown, which was effectively broken on 4 May. It began on the evening of 9 March.

A long analysis that started from genetic studies that were demonstrating the evolution of the Coronavirus, its sensitivity to high temperatures, the positive outcome of the selective pressure exerted by the blocking strategies that the whole world was implementing, but also the absolute randomness of those mutations that, leading to an adaptation of the virus, they caused a simultaneous appeasement on the clinical level.

The reduction in pressure for new hospitalizations of serious cases of COVID is the expected consequence of the social distancing decree that has led to requiring the entire population to stay at home, to suspend many economic activities and to close schools and universities. It has also allowed us to interrupt the further spread of the epidemic, but certainly not the attenuation of the virulence of SARS-CoV-2.

In the USA, Italy, and Spain, it was shown that at least one of the mutations identified until then in the sick had imposed itself and had become structural, making the virus more contagious. This had happened in the passage of the infection from Asia to Europe, The Spike D614G mutation (a frequency of 3,577 times) began to spread in Europe in early February, and when introduced in new regions it quickly became the dominant form.

Already in February, there were as many as “ninety-three mutations on the entire genome of SARS-CoV-2 identified. In the USA, Italy, and Spain, it was shown that at least one of the mutations identified until then in the sick had imposed itself and had become structural, making the virus more contagious. This had happened in the passage of the infection from Asia to Europe. Mutations in the spike could induce its conformational changes on which the immune system’s reaction depends.

In short, the virus changes and, changing, influences the response of our body. This is called viral fitness. It represents the ability of the virus to be comfortable in a species that

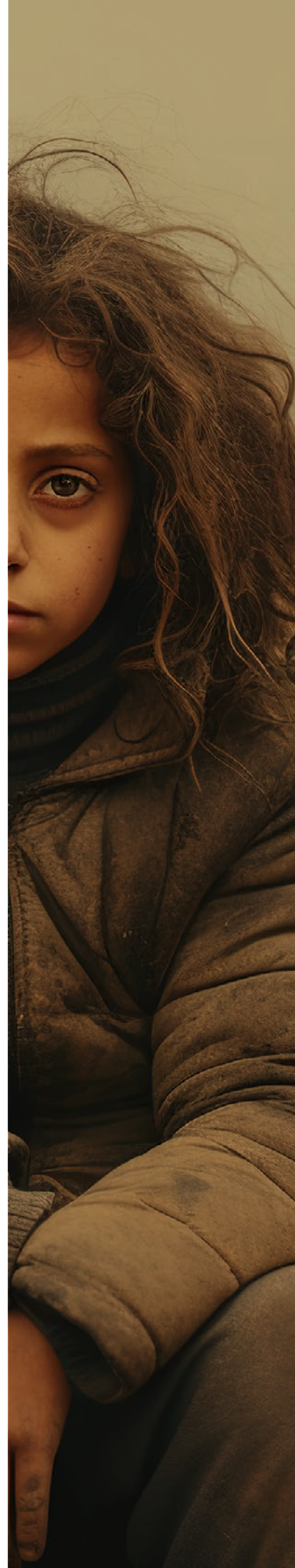


hosts it. The only tool that the Coronavirus must achieve this result is the random variations that occur in the RNA every time it reproduces. They have the function of adapting the parasite to the host, but arise by chance from the mistakes that the virus commits in reproducing. This is not for a gift from Mother Nature if these errors lead to the selection of more contagious but less lethal viral strains. Simply, according to probabilistic rules, the reproductive process selects the variants that in turn are more functional to reproduction.

At this point, it should be clear that a virus mutates and why it mutates, that the adaptation it pursues (without its knowledge) can even make it better, but we do not yet know what role man can play in this process. Because he has a role. The role of man in this emergency is mirrored to that of the virus: the latter can survive without the host for days and days, but only if it meets the ideal temperature and light conditions, since it prefers cold and dark, and can be transmitted and reproduced if, equally, it finds a favourable scenario. For this reason, viruses are normally classified as an obligate intracellular parasite.

Coronaviruses are often actors in zoonoses, which is the transmission of diseases from an infected animal, called a “reservoir”, to humans. A zoonosis is at the origin of the spread of Ebola, as of other pathogens less known to the public, including Nipah in India. In the case of COVID-19 it is said, but it is not scientifically ascertained, that the epidemic would have originated in the Wuhan fish market, where raw and cooked foods, such as bat soup, are sold and consumed. On December 30, 2019, the Wuhan Municipal Health Commission notified an “Urgent Notice on the Treatment of Pneumonia with Unknown Causes” and publicly acknowledged - for the first time - that other cases were related to the attendance of that wholesale market, where, as a tradition, wild animals are “served”, slaughtered on the spot, and where therefore a promiscuity is created between different species and man, which raises the risk of transmission through the blood, saliva, urine and faeces of infected animals.

On January 13, the new coronavirus attacked Thailand and Japan. The first outbreaks in Italy have been occurring since January 20, while in Wuhan the lockdown is triggered, and the world begins to close airports and borders. But only on March 11, when people everywhere die from COVID-19, the World Health Organization (WHO) declares a pandemic.



In the Biomedical Campus of Rome, through molecular evolutionary analysis, we not only traced the origin of the pandemic (this Coronavirus was similar to the SARS of bats), but even calculated the exact data of the jump of species, around November 25, 2019. This is the most likely date with a 95% confidence interval which are September 28 and December 2. In this way we and other researchers have found a lot of variants that distinguish them for one, two or more mutations mostly on the Spike protein, but not only structural proteins such as NP6 or NSP2, but also as the Polymerase enzyme changed.

In other words, evolution implies change. Change implies mutations, Mutations imply variants. Everything leads to adaptation, which means that the virus mute to adapt to the new host. Virus evolution, lead to be more contagious and less lethal. We have seen a lot of variants and others we will see over the time.

What we have seen in the last 3 years was a sort of movie. We could say we are at the endemization period. The Omicron variants and sub variants are the expression of endemization because they contain all the mutations that have marked the evolution of the virus.

The Omicron family became dominant and remained so for an unprecedented period. Sub Variants have developed and, therefore, from Omicron 1 we have passed to Omicron 5, but since the appearance of this strain, we have seen the characteristics of an adaptation to the host: more contagiousness, less pathogenicity; because the virus does only two things, infects and reproduces endlessly. To continue to reproduce endlessly at a certain point it cannot kill the host, it must find a way of peaceful co-existence.

The vaccine chapter. The vaccine: it is true that it protects little or nothing from infection, but it is always a highly effective weapon against serious disease, despite the continuous mutations of the virus. How come? And what can we expect for the future? A vaccine no longer protects us from infection, but it does ensure that the infection does not lead to a serious illness — a COVID-19 that takes us to the hospital, if not to intensive care or sometimes to the cemetery. This does not seem to be a trivial matter, and it amply justifies the three or four vaccine doses. It is not unusual that many people do not have clear ideas about the distinction between infection and disease. Sometimes even experts do not have it or at least they often confuse the two.

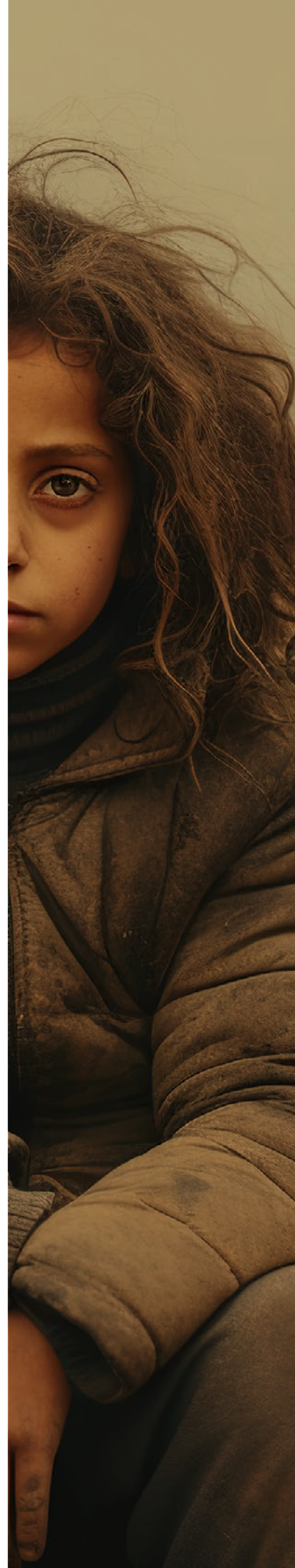


On the other hand, the best vaccine against an infectious and communicable disease is always the one that blocks the infection. That is, preventing the virus from entering our body, the disease blocks it upstream and prevents you from fighting the virus inside you. An important question could be, “Are vaccines a barrier?” Not all. In a way. It is almost automatic for people to think this is the way vaccines work — As a barrier that keeps the virus away from our bodies or expels it quickly when it gets in. And there are vaccines like that, a common example is measles vaccine which prevents infection and its transmission. Not that the anti-COVID vaccines we are using do not try to make antibodies that block the infection. They do block them in abundance, but alas too little. Only a few months, and the mutations of the virus do the rest.

So now, the latest variants of Omicron, heirs of Omicron BA.5, like Cerberus and XBB.1, in fact do not let themselves be neutralised by any antibody generated, whether by vaccination or by having overcome the disease.

To make a complete picture of antibody immune evasion, there is also the original sin, also called immuno-imprinting, that phenomenon is well-known to immunologists. It may be understood like this: if you get infected with Omicron, it is more likely that the virus will re-infect you if you are vaccinated than unvaccinated. The Omicron spike vaccine booster makes you make more neutralising antibodies against the Wuhan spike, the one of the first doses of the vaccine than the one against Omicron. Thus, the failure to block the infection allows the virus to continue to transmit in the population and to mutate under the selective pressure exerted also by vaccination.

Oral or nasal vaccines — we have a dire need for vaccines that block the entry of the virus on our mucous membranes. That is, mucosal vaccines, administered nasally or orally. If they are doing it, in pre-clinical models they work, but in humans we do not know yet, let us hope that at least some of the thirty in experimentation is safe and effective.



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