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**Human Rights of Refugee Children
in light of the Multilevel System**

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Human Rights of Refugee Children in light of the Multilevel System

Thais Rivera Barreto*

Abstract

This paper analyses the human rights of unaccompanied refugee minors in the European Union current situation. The analysis regards especially how the unaccompanied minors have their best interest considered and enforced by the European multilevel system. Recently, the European Union is facing an unprecedented refugee crisis. In face of this crisis, the human rights of refugees are being undermined. Unaccompanied refugee children are enduring an even higher hardship due to their vulnerability. The EU and the Member States measures to deal with such human rights crisis have several gaps regarding its implementation and protection standards. Thus, in this context the European human rights multilevel system – the Member States, EU and Council of Europe – shall overcome these gaps and ensure that the best interest of the child and the human rights of unaccompanied minors are both enforced.

Keywords: unaccompanied minors; refugee crisis; multilevel system; European Union; best interest of the child; protection gaps; human rights; children rights; Council of Europe; Common European Asylum System.

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List of Abbreviations

AFSJ	Area of freedom, security and justice
CEAS	Common European Asylum System
CoE	Council of Europe
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
DAA	Draft Accession Agreement
ECtHR	European Court of Human Rights
EMN	European Migration Network
ESC	European Social Charter
EU	European Union
FRA	Fundamental Rights Agency
FRR	Fundamental Rights Report
IOM	International Organization for Migration
MS	Member State
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UASC	Unaccompanied and separated children
UK	United Kingdom

UN United Nations

UNICEF United Nations Children's Fund

UNCRC United Nations Convention on the Rights of the Children

UNHCR United Nations High Commissioner for Refugees

USA United States of America

1. Introduction

The unprecedented refugee crisis in Europe is a recurrent topic in the media nowadays. The scenes of refugees, and particularly children, dying while crossing the Mediterranean in 2015 shocked the world. The current crisis is not only a migration crisis, it also represents a humanitarian disaster for many reasons.

Some of these reasons are the violence, starvation and the Syrian war which the refugees fled from. Millions of people tried to escape from this violent civil war to find a safe shelter. First, they tried to flee to the neighbour countries, but the situation there offered them little or even no hope. So, these people looked for a safe shelter in Europe.¹ The Syrian displaced persons have joined the existing patterns of refugees making their way towards Europe from “other war-torn or famine-struck” places of the globe, as Afghanistan and Iraq.²

Another reason is the high number of deaths during the perilous traverse of the Mediterranean.³ The responses of some *European Union* (hereinafter EU) member states are also intensifying the refugees’ hardship and violate even more their rights.⁴

¹ Letter written by the First Vice-President *Frans Timmermans* sent to the PdVA.

² Court of Justice of the European Union (2017), Opinion of Advocate General *Sharpston*, para 7.

³ In 2015 an average of 3,770 people died or were reported missing in the Mediterranean Sea.

⁴ E.g. “In September 2015 Germany reinstated border controls with Austria after having received hundreds of thousands of people in a few days. On 15 September 2015 Hungary closed its border with Serbia. On 16 October 2015 Hungary erected a fence along its border with Croatia. On 11 November 2015 Slovenia started to erect a fence along its border with Croatia. In December 2015 Austria erected a fence at the main border crossing with Slovenia. Austria had meanwhile temporarily reintroduced controls at internal borders on 16 September 2015.” Court of Justice of the European Union (2017), Opinion of Advocate General *Sharpston*, paras 12-16. Moreover, “poor living conditions, a sudden spate of deaths and a “complete loss of hope” are exacerbating mental health issues and leading to suicide attempts and self-

These adversities are even more severe regarding children, due to their physical and psychological immaturity and their vulnerability. However, the number of children in migration who arrived in the *European Union* – many of whom are unaccompanied – has dramatically augmented. In 2015 and 2016, an average of “30% of asylum applicants in the *European Union* were children.”⁵

These children are particularly exposed to risks and are often “suffering from extreme forms of violence, exploitation, trafficking in human beings, physical, psychological and sexual abuse before and/or after their arrival on EU territory.”⁶

The European multilevel system needs to deal with the above-mentioned issues and shortcomings in order to effectively enshrine the refugees’ human rights and the specific needs and special protection of the more vulnerable persons, as the unaccompanied children.

In light of this dramatic humanitarian crisis, the purpose of this thesis is analysing if and how the unaccompanied minors have their best interest considered and enforced by the European multilevel protection. To achieve this objective, it is fundamental to underpin the current refugee crisis, the European multilevel system and the rights of the children, specially the right to have his or her best interest considered.

Therefore, at first, the present article will analyse the current situation of refugees in the EU and, particularly, the conjuncture of children refugee. The European legal spheres of asylum law

harm in the *Moria* refugee camp on the Greek island of Lesbos.” *The Middle East Eye*.

According to *the Independent* in January 2017 “Humanitarian organisations have condemned European governments for leaving refugees to “freeze to death” as the continent is gripped by a deadly cold snap.” *The Independent*.

⁵ European Commission, COM (2017) 211 final, p.2.

⁶ *Ibid.* p. 2

will also be discussed. Then, it is essential to examine the human rights' multilevel protection in Europe and the interplay between its three different levels – national, supranational and international. Thus, the human rights protection in the national, *European Union* and *European Convention on Human Rights* will be studied. However, only the European Union and Convention level will be emphasized.

Further, the rights of the children will be object of discussion, especially regarding the principle and rule of the best interest of the children, the right to family life and the right to development and survival. Afterwards, the guarantee of these rights in each level of protection will be underpinned.

Finally, a critical analysis of the protection of the unaccompanied minors under the European multilevel will be elaborated. For this reason, the relevant legislative framework and its enforcement and implementation reality will both be approached.

2. The Present Situation of Refugees in Europe

2.1 The Refugee Crisis

This section will address the current refugee crisis in Europe. First, statistic data regarding how many refugees and asylum seekers have come to the European Union between 2014 and 2016 will be provided.

Then, some terminological elucidations concerning what is a refugee, what is an asylum seeker and what is a person eligible for subsidiary protection in Europe, will be made. Finally, some legal instruments related to refugees' rights and policies in Europe will be approached, specially, regarding the *EU Asylum System*.

Since 2014, Europe is experiencing the highest mass movement of people after the Second World War.⁷ In 2014, two hundred eighty thousand persons arrived by land and by sea. Such number, naturally, does not include the people who were undetected.⁸

In 2015, according to the *International Organization for Migration* (hereinafter IOM) this number increased to more than 1,046,600 migrants. In this year, more than 3,770 persons were reported to have died while trying to cross the Mediterranean Sea.⁹

The IOM also reports that an estimated number of 204,311 migrants and refugees entered Europe by sea between 1st January and 29th May 2016. They have arrived in Italy, Greece, Cyprus and Spain.¹⁰ For this whole year, the *Eurostats* database has registered that the total number of first time asylum applications for the EU member states (plus Norway and Switzerland) was 1,233,340.¹¹ This number does not comprise the migrants that have not applied for asylum.

In the first quarter of 2017 164 500 persons required asylum for the first time in the EU. Most of these asylum seekers (22 500 persons) escaped from the war in Syria. The second nationality that leads the applications was Afghan (which consists in 12.500 applications), followed by 11.500 Nigerian asylum applications.¹²

2.1.1 Who qualifies to be a refugee?

⁷ European Commission (2016).

⁸ BBC.

⁹ *Ibid.*

¹⁰ International Migration Organization.

¹¹ British Refugee Council.

¹² Eurostat.

Asylum seekers are persons who seek international protection on the ground that they cannot return or be returned to their country of origin due to the fact that they have a well-founded fear of persecution or are at danger of being ill-treated or being subjected to other severe harm.¹³

The EU law defines asylum seekers as “applicants for international protection”. The Union’s law proscribes the refoulement of any asylum seeker until a decision on the asylum application is adopted. Thus, the presence of asylum seekers in the European Union MS is lawful, in light of article 9 (1) of the *Asylum Procedures Directive (2013/32/EU)*.¹⁴ This provision determines that asylum seekers are allowed to remain in the MS for the purpose of the procedure, until the responsible authority has taken a decision¹⁵, though some exceptions exist, remarkably “for subsequent applications¹⁶”.

The *EU Qualification Directive (2011/95/EU)* approaches the definition of refugee in its article 2 (d):

“‘refugee’ means a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12¹⁷ does not apply.”¹⁸

¹³ Fundamental Rights Agency/ Council of Europe (2014), p. 43.

¹⁴ *Ibid*, p. 43.

¹⁵ Asylum Procedures Directive (2013/32/EU), article 9 (1).

¹⁶ Fundamental Rights Agency/ Council of Europe (2014), p. 43.

¹⁷ Article 12 refers to the situations that excluded people from been refugees, such as committing a crime against peace, a war crime, or a crime against humanity and be “under protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees.”

This Directive is part of the Common European Asylum System (Hereinafter CEAS), which is based in the two cornerstones of the international legal framework on refugee's protection, the *Geneva Convention* of 1951 regarding to the status of refugees and its supplementary *New York Protocol* of 31st January 1967.

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2.1.2 Refugee Status

The Qualification Directive's article 2 also establishes other relevant concepts, as of the subsidiary protection and of the refugee status. Subsidiary protection covers in its scope persons from third-countries or stateless persons, who, albeit do not qualify as refugees, if return to their country of origin or former residence (in the case of stateless persons) would face a real danger of suffering a grave harm. The refugee status "means the recognition by a Member State of a third-country national or a stateless person as a refugee"²⁰

It is important to clarify that the recognition of a person as a refugee has a declaratory character. Thereby, a person is a refugee as soon as he or she fulfils the conditions contained in the legal definition. This happens prior to the moment he or she is formally recognized as a refugee by a MS (and has his or her refugee status declared). Such declaratory character is confirmed by the *Qualification Directive*.²¹

Furthermore, The EU Charter for Fundamental Rights guarantees the right to asylum in its article 18, people who "qualify for asylum have the right to have this status recognised". Articles 13 and 18 of the Qualification Directive give those people who have fulfilled the criteria for being

¹⁸ Article 2(d), Qualification Directive.

¹⁹ Qualification Directive, preamble paras 3 and 4.

²⁰ Qualification Directive, article 2.

²¹ *Boeles, Pieter/ den Heijer, Maarten/ Lodder, Gerrie den / Wouter, Kess*, p. 298.

refugees or being under subsidiary protection, respectively, an expressed right to be granted the status of refugee or subsidiary protection.²²

Under the *European Convention on Human Rights* (hereafter ECHR) there is no definition of what is a refugee or asylum seeker, neither is the right to asylum or to be granted the status of refugee guaranteed. The European Court on Human Rights (hereinafter ECtHR) can solely examine whether the removal of an alien would subject him or her to a real risk of treatment contrary to some²³ ECHR provisions.²⁴ Nevertheless, The Strasbourg Court (ECtHR) advance in the asylum protection through its jurisprudence.²⁵

2.2 Asylum law in Europe

This sub-section will succinctly address the asylum law in Europe. In the European Union jurisdiction, there are different legal spheres providing rules relating to asylum: there is the national legislation of the EU member states, the EU asylum law and the treaties concluded under the Council of Europe. Furthermore, there is the international universal framework – the treaties concluded within the UN framework – and bilateral and multilateral treaties concluded by the Union MS. These two last spheres will not be further discussed due to the limited scope of the present thesis²⁶

²² Fundamental Rights Agency/ Council of Europe (2014), p. 45.

²³ Especially article 3 ECHR, which prohibits torture and an “inhuman or degrading treatment or punishment.” Article 3, ECHR.

²⁴ Fundamental Rights Agency/ Council of Europe (2014), p. 45

²⁵ This Court had determined, through its law case, that in some circumstances the refolement of aliens would not be possible. In light of the Convention’s article 3, this Court established the prohibition of an extradition that would give rise to exposure to ill-treatment. Furthermore, the ECtHR, established in view of the rights to life, granted under article 2 ECHR, the protection against refolement. This Court has also determined the absolute nature of prohibition of return to torture in the *case Saadi v. Italy*, 2008. *Ibid*, p. 61.

²⁶ *Boeles, Pieter/ den Heijer, Maarten/ Lodder, Gerrie den / Wouter, Kess*, pp. 21 and 22

2.2.1 (Between) the EU and the Member States spheres

The asylum law is one particular aspect of the Migration Law²⁷. The migration law and policy are part of the EU competence to establish the Area of Freedom Security and Justice (hereinafter AFSJ). According article 4 (2) (j) of TFEU the Union shares a competence with the MS regarding AFSJ. However, differently to other areas in which the Union has a shared competence, the MS have a large discretion in the AFSJ framework.²⁸

The EU migration law is not completely harmonized, and, additionally, a considerable part of the measures adopted under EU level allows the MS to have discretion. This reflects in a non-homogeneous domestic migration – and consequently asylum – regime between the Member States.²⁹

2.2.1.1 The *Common European Asylum System*

Under the auspices of the *Treaty of Amsterdam* (1999) the EU started to develop what came to be the CEAS. The *Treaty of Nice* (2001) determined that the Council should adopt some minimum standards and criteria to determine which MS would be responsible for asylum applications. With the *Treaty of Lisbon*, the measures on asylum were changed into a common asylum policy.

This policy pursued the establishment of a common system containing uniform status and procedures, which includes a uniform status of asylum and subsidiary protection. It also

²⁷ Migration law provides a legal framework regarding voluntary migration and forced migration (e.g. asylum protection and protection of victims of human trafficking).

²⁸ *Azoulai, Loïc / Vries, Karin de*, p. 5.

²⁹ *Boeles, Pieter/ den Heijer, Maarten/ Lodder, Gerrie den / Wouter, Kess*, p. 29.

comprehends criteria and mechanisms for resolve which MS is in charged to considering an application.³⁰

The constitutional basis of the CEAS are articles 67(2)³¹ and 78 of the *Treaty of Functioning of The European Union* (hereinafter TFEU) and, the above mentioned, article 18 of the CFREU.³²

Article 78 determines the creation of the CEAS, which has to observe the MS obligations under the *Geneva Convention of 1951* and ensure the compliance with the principle of non-refoulement.³³ Furthermore, this asylum policy must respect other relevant international treaties, such as the European Convention on Human Rights and the United Nations Convention on the Rights of the Child (UNCRC).

Moreover, article 78 differentiates asylum protection and subsidiary protection. The former concept refers to the protection of refugees, the latter regards the “protection of persons under human rights treaties of general applicability.”³⁴

The personal scope of CEAS only covers nationals of third-countries³⁵ and stateless persons who apply for international protection, which in light of the *Qualification Directive*, includes refugee status and subsidiary protection status.³⁶

The pivotal legal acts adopted under the CEAS framework are: the above noted *Qualification Directive*, the *Reception Conditions Directive*,³⁷ the *Asylum Procedures Directive*³⁸. the

³⁰ European Parliament (2017).

³¹ According to article 67(2) TFEU: The Union “shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals.”

³² *Nuno Piçarra*

³³ Fundamental Rights Agency/ Council of Europe (2014), p. 35 and 64

³⁴ *Boeles, Pieter/ den Heijer, Maarten/ Lodder, Gerrie den / Wouter, Kess* p. 250

³⁵ Non-EU Member States.

³⁶ *Boeles, Pieter/ den Heijer, Maarten/ Lodder, Gerrie den / Wouter, Kess*, pp. 250 and 252

³⁷ Directive 2013/33/EU.

³⁸ Directive 2013/32/EU.

Dublin Regulation and the *EURODAC Regulation*.³⁹ These three directives set only minimum standards, thus the MS can provide a more extensive protection.⁴⁰

2.2.1.2 Notes on the CEAS' and its implementation

In this section, some notes regarding how the CEAS is being implemented and its consequences for the refugee's rights and protection will be formulated. Nevertheless, the analysis will be brief and prompt due to the limited scope of this thesis.

The framework for the European asylum policy was significantly reinforced after the recast of its main instruments (e.g. the recast of the *Dublin System* in 2013, the *Dublin III* and the recast *Reception Condition Directive*). However, the CEAS still has numerous protective gaps⁴¹ and the adoption of further legislation and further harmonization is still necessary. Fifteen years of CEAS harmonization have not been able to prevent enormous discrepancies in the asylum practices in the MS.⁴²

The CEAS certainly has its achievements, and its recast directives and regulation have brought some advances. As, e.g. the improvements regarding family unification and vulnerable groups protection under *Dublin III*⁴³, which will be further addressed in the section 5.1. Nevertheless, when it comes to the CEAS implementation (or lack of due implementation by some MS) there are some shortcomings, as it will be examined in section 5.

³⁹ Regulation (EU) No 603/2013.

⁴⁰ *Wollmer, Anna*.

⁴¹ For instance, one of the CEAS shortcomings is the different treatments between refugees and persons subjected to subsidiary protection. Albeit their need from international protection have different causations, both categories have the same needs regarding housing, health care and other basic human rights. *Pollet, Kriss* pp. 75 and 76.

⁴² *Ibid*, pp. 74 and 75.

⁴³ *Brandl, Ulrike*, p. 158.

The *Dublin III*, likewise the Dublin Regulation of 2003, has governed the responsibility allocation of asylum seekers among the MS.⁴⁴ Its foremost aim is to provide a clear method to determine which MS is responsible to analyse an asylum application, in order to prevent that the same asylum applicant makes multiple applications in different Member States.⁴⁵

The Dublin allocation follow 3 general principles, which are hierarchic. The first listed provision that matches the applicant situation determines which MS will be responsible. The first principle regards a special safeguard for unaccompanied minors and applicants who have family members already living in the EU. According to the second principle, the MS responsible is the one that has facilitated the legal entry into the Union (e.g. by issuing a residence document or a visa)⁴⁶. The third principle appoints that the MS responsible is the one in which the asylum seeker has unlawfully entered.⁴⁷ This third criterion imposes a significant higher burden for the MS that have an external border.⁴⁸

The *Dublin System* is claimed by some authors as the cornerstone of the CEAS. In contrast, other authors highlight the significant problems that have been documented in this system's operation, which includes the negative impact on the lives of many asylum-seekers and its "failure to further the objective of solidarity and fair sharing of responsibility for asylum within the EU the Treaties required."⁴⁹

⁴⁴ *Maiani, Francesco*, p. 103.

⁴⁵ *Garlick, Madeline*, p. 161.

⁴⁶ *Boeles, Pieter/ den Heijer, Maarten/ Lodder, Gerrie den / Wouter, Kess*, pp. 258 and 259.

⁴⁷ *Ibid*, p. 259.

⁴⁸ *Linos-Alexandre Sicilianos*, p. 5.

⁴⁹ *Garlick, Madeline*, p. 160.

“The *Dublin System* is considered one of the most controversial⁵⁰ aspects of the asylum law”, particularly by virtue of the different standards on reception in the different MS⁵¹. Due to the absence of any mechanism that monitors the inter-regional distribution of refugees, the Member States are engaged in a race to the bottom competition.⁵² So, if a benefit is reduced in one MS, the other MS tend to reduce it as well to avoid the burden of having more refugees. “This race to the bottom creates an additional hardship to the refugees, what could be prevented by a more coordinated system.”⁵³

Furthermore, certain MS apparently aim “to keep their contribution to asylum protection as low as possible.”⁵⁴ Additionally, the EU law standards are not effectively implemented by some MS⁵⁵. These two factors also impair the asylum seeker and refugee’s rights.

Part of the relevant literature⁵⁶ alludes that the recent years evidences⁵⁷ suggest that the *Dublin System* is failing to achieve its explicit aims and many issues are flowing from its effective implementation. It is not apparent that it provides MS with a

⁵⁰Di Filippo, Marcello.

⁵¹Boeles, Pieter/den Heijer, Maarten/Lodder, Gerrie den / Wouter, Kess, p. 257.

⁵²“The rising influx of people seeking international protection in Europe has led to efforts among some European states to reduce their attractiveness as countries of refuge. (...) In Austria, for example, the amendments of the Asylum Act that entered into force on 1 June 2016 bring along two major restrictions: refugees who apply for family reunification now generally must prove that they have adequate accommodation, sickness insurance and stable and regular resources (cf Article 7 Family Reunification Directive) unless the application is submitted within three months from the date of granting of refugee status.” Czech, Philip, p.1.

⁵³Altemeyer-Bartscher/ Holtemöller/Lindner/Schmalzbauer, Götz Zeddies, p. 220

⁵⁴Ibid, p. 220 and 221.

⁵⁵Garlick, Madeline, p. 160 and 161.

⁵⁶E.g. Garkick (2016) and Hruschka (2017).

⁵⁷In this way, Constantin Hruschka adds that: “The Dublin system has been declared dead on numerous occasions over the past decade. It has proven to be highly dysfunctional from the beginning, as the allocation of responsibility did not have the intended effects (i.e. the prevention of “refugees in orbit” and of “asylum shopping”). Nevertheless, Dublin procedures and Dublin transfers are still taking place and the system is still operating. It will continue as the Commission proposal released on 4 May 2016 is a change in the continuity rather than the reform necessary for a more workable and efficient system.” Hruschka, Constantin, p. 1.

reliable and rapid responsibility allocation or asylum seekers “with timely access to a fair assessment of their claims in line with their interests and rights.”⁵⁸ There are also evidences indicating that Dublin’s enforcement in some areas is raising grave questions regarding the compatibility of the practice under this system and some European and international human rights standards.⁵⁹

Part of the literature⁶⁰ point at the inefficiency or even the failure of the Dublin system, stating that it does not work, not in normal periods, nor in times of crisis. Among other factors, one of this system shortcomings are the fact that the asylum seekers’ allocation preferences are not considered, so “their prospects for integration creates an evident trend against spontaneous compliance⁶¹ and towards secondary movements.”⁶²

This fact is one of the Asylum System’s main paradoxes. The Common System is built without foreseeing a road to allow those persons “to introduce their applications in order to benefit from it”.⁶³

This happens regardless the Refugee Convention provision, which the CEAS shall expressly respect. The Refugee Convention guarantees the asylum seeker the right to choose his or her residence place.⁶⁴ Nevertheless, under the CEAS the

⁵⁸ *Garkick, Madeline*, p. 194.

⁵⁹ *Ibid*, p. 160.

⁶⁰ E.g. *Maarten den Heijer, Marcello Di Filippo, Garlick and Constantin Hruschka*.

⁶¹ *Maarten den Heijer* adds that “the current Dublin system is highly ineffective because of a lack of consistent and correct implementation. This paradoxically results in a distribution among Member States that is far more equitable than the result would be if the Dublin regulation would be correctly applied in all cases: the over one million refugees and migrants that fled to Europe by sea in 2015 did not remain in the Member States responsible for handling their claims (Greece and Italy) but the large majority relocated themselves across Europe.” *Heijer, Maarten den*, p. 1.

⁶² *Di Filippo, Marcello*.

⁶³ *Bruycker, Philippe de/ Tsourdi, Evangelia*, p. 538.

⁶⁴ *Hathaway, James C.*

asylum seekers have not even the right to participate in this “choice”.

Consequently, asylum seekers have frequently absconded after they had been informed about their future transfer to other MS. Many MS have detained asylum seekers to try to reduce the risk of absconding. Notwithstanding the Dublin regulation⁶⁵, which specifies that the detention of persons who follow in its scope is just possible if there is a considerable risk of absconding and other conditions are met.⁶⁶ So, albeit those automatic and arbitrary detentions are not permitted under Dublin III, they are happening in violation of the refugee’s rights.

Moreover, the majority of the refugees are placed in refugee camps. They are not able to enjoy their right to freedom of movement to which they are entitled under the Refugee Convention. This increases their already high hardship.⁶⁷

2.2.2 Asylum law under the ECHR

The Strasbourg Court has reiterated that States have in principle freedom to control the entry, residence and expulsion of aliens as they see fit. Nevertheless, as the *Grand Chamber* has pronounced in the case *Georgia v. Russia*, “problems with managing migratory flows cannot justify a State’s having

⁶⁵ “Article 28 of the Dublin III Regulation on detention, which only expressly permits detention for the purpose of securing transfer procedures when there is a “significant risk of absconding” and subject to necessity, proportionality and insofar as less coercive alternative measures cannot be applied effectively. It also sketches out the applicable safeguards and conditions of detention under the Dublin III Regulation.” European Council on Refugees and Exiles, p. 1.

⁶⁶ *Boeles, Pieter/ den Heijer, Maarten/ Lodder, Gerrie den / Wouter, Kess*, p. 267.

⁶⁷ “This response is unlawful and counter-productive. Refugees become burdens on their hosts and the international community, and they are debilitated in ways that often make it difficult for them ever to return home, integrate locally or resettle. The risk of violence in refugee camps is also endemic—with women and children especially vulnerable to the anger that too often arises from being caged up.” *Hathaway, James C.*, p. 1.

recourse to practices which are not compatible” with its human rights obligations under the Convention.⁶⁸

As it was noted above, despite the absence of any specific provision regarding the right to refugee status – or any right related to international protection – under the Council of Europe System, the ECtHR has prohibited the return of aliens in some specific cases, through the interpretation of the Convention.

The article 3 ECHR forbids torture, inhuman and degrading treatment. Due to ECtHR jurisprudence⁶⁹, this article has become an actual non-refoulement principle, which binds the European Council’s members in a double manner. It prohibits the member countries to subject anyone “within their jurisdiction to a treatment contrary to Art. 3 ECHR,” and also binds them to do not return any person to a country if there are well-founded “grounds for believing that the person to be expelled or extradited would face a real risk of being subjected to treatment contrary to Art. 3 ECHR in the receiving country.”⁷⁰

The Strasbourg Court has also developed in its case law other rights⁷¹ related to refugee, especially regarding the right to family reunification, what will be further examined in section 4.

⁶⁸ According to the ECtHR judge *Sicilianos* this sentence sums up the Court’s approach. Based on the Convention’s general provisions, the ECtHR has progressively created some “standards which serve as a compass for the States parties, but also for the European Union.” This caselaw strengthens the 1951 Geneva Convention relating to the status of refugees and highlights the limits of the Dublin Regulation, while providing guidance for the migration policies of States on practices which are not compatible with its obligations under the Convention.” *Linos-Alexandre Sicilianos*, p. 4.

⁶⁹ E.g. The decisions of the ECHR in *MSS v Belgium and Greece* (2011) and *Hirsi Jamaa v Italy* (2012). *O’Nions, Helen*, p. 49.

⁷⁰ *Maurer-Kober, Bettina*.

⁷¹ As the right of refugees to have detention conditions which respect their human dignity, recognized by the ECtHR in the case *Khlaifia and Others v. Italy. Sicilianos, Linos-Alexandre*, p. 6.

2.3 Unaccompanied Minor Refugees

According to UNICEF children constitute half of the refugee population worldwide. In 2015, children consisted 31% of the refugees who arrived by sea in Europe. Moreover, in early 2016, 40% of the sea arrivals in Greece were children. One in four asylum applicants in the European Union in 2015 was a child. In this same year, 96 thousand unaccompanied children applied for asylum in the EU.⁷²

Additionally, UNICEF reports that in 2016 one hundred thousand children arrived in Greece, Italy, Bulgaria and Spain, of which more than 33,800 (34%) were unaccompanied and separated children (hereinafter UASC). Around 92% of all children who arrived through the Central Mediterranean Route in 2016 were UASC. The majority of these children come from Eritrea, the Gambia, Nigeria and Egypt⁷³. In 2015, Europol has declared that no less than ten thousand unaccompanied child refugees have gone disappeared after arriving in Europe.⁷⁴

Behind these alarming statistics, there are individual children who are living through a variety of experiences related to migration, many of them traumatic. Those children are in a state of actual vulnerability, due to their age, distance from home, and, frequently, separation from their parents or carers. Therefore, they need specific and appropriate protection.⁷⁵

⁷² European Commission, Children in Migration.

⁷³ UNHCR, UNICEF and IOM.

⁷⁴ European Parliament (2016), Vulnerability of unaccompanied and separated child migrants, p. 1.

⁷⁵ European Commission, COM (2017) 211 final, p. 2.

Unaccompanied minors are children (as it is defined in the UNCRC⁷⁶, article 1) “who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so”. In other hand, separated children “are children who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives.⁷⁷” This accompanying adult – who could also be unrelated – may be unable to, or unsuitable for take care of these children.⁷⁸

The EU, under the Qualification Directive, defines unaccompanied minor as a child “who arrives on the territory of an EU Member State unaccompanied by an adult responsible or who is left unaccompanied after he or she entered the territory of the Member States.”⁷⁹

Separated and unaccompanied children should be treated in a similar manner, despite they are normally involved in different circumstances, since “separated children are especially vulnerable as they may be accompanied by an adult who is abusive, a smuggler or a trafficker, or unable to effectively take care of them.⁸⁰

There are several reasons why children may be

⁷⁶ The UNCRC and the definition of what is a child will be further examined in section 4.

⁷⁷ European Parliament (2016), Vulnerability of unaccompanied and separated child migrants, p. 2.

⁷⁸ Fundamental Rights Agency (2016), Current migration situation in the EU: separated children.

⁷⁹ Qualification Directive, article 2 (1).

⁸⁰ Fundamental Rights Agency (2016), Current migration situation in the EU: separated children, p. 3.

unaccompanied or separated, such as “persecution of the child or the parents; international conflict and civil war;” accidental separation from the parents over the course of their journey; “human trafficking and smuggling, including sale by parents; and searching for better economic opportunities.”⁸¹

The UN Committee on the Rights of the Child has recognised plentiful protection gaps in the treatment of unaccompanied and separated children. The Committee has identified that UASC are subject to greater risks “of sexual exploitation and abuse, military recruitment, child labour (including for foster families) and detention”. Many countries recurrently deny that these children entry or detain them in the border. In other cases, these children have their entry admitted, but their access to asylum procedures is refused, or their asylum applications are treated with a lack of an “age and gender-sensitive manner”⁸².

Those children are often victims of discrimination and they are deprived of access to food, shelter⁸³, housing, education and health services. Unaccompanied and separated girls are at special danger of sexually based gender violence. In some situations, these children are having no access to appropriate identification, registration, documentation, age assessment, family tracing, guardianship systems or legal advice.⁸⁴

Regardless their status as refugees, migrants or any other

⁸¹ European Parliament (2016), Vulnerability of unaccompanied and separated child migrants, p. 1.

⁸² *Ibid*, p. 3.

⁸³ For instance, in Greece in the first quarter of 2016 there were only 641 of beds available in existing shelters and transit centres and “936 unaccompanied children registered in the waiting list for shelter.” UNHCR Mapping of unaccompanied children, as of 7.07. 2016. European Union (2017), p. 58.

⁸⁴ European Parliament (2016), Vulnerability of unaccompanied and separated child migrants, p. 3.

status, those children shall be primarily and always treated as children, who are in need and entitled to protection, support and have all their human rights respected. Nevertheless, currently and particularly due to the refugee crisis, children's rights are being repeatedly violated⁸⁵ in Europe.

This situation is even more serious regarding unaccompanied children, who are facing a triple harm due to: I) the fear or violence that grounded their refugee status; II) the deprivation of a normal and harmonious development at their homes, which is endured by all refugee children; III) the absence of their parents and families, what expose them to risks of even more violence and abuses.

3. The Multilevel Protection system and its interplay

3.1 The European Human Rights Multilevel Protection

Human rights are protected under the national level, through the Constitutions of each Member State (herein MS) of the European Union, in the supranational (EU) level and in the international level. There are these different levels of protection.

This phenomenon reflects the universal recognition of human rights⁸⁶. That recognition and the human rights promotion in almost all states' national constitutions and international treaties, is a consequence of the worldwide experience that human rights cannot be effective without a constitutional protection and safeguards that go across frontiers. As it was described by Kant⁸⁷ the Human Rights protection demands

⁸⁵ European Parliament (2016), p. 4.

⁸⁶ In this regard *Noberto Bobbio* affirms, through his study of the human rights historical evolution, that in the end of the XX century and beginning of the XXI century the Age of the Rights bloomed. *Bobbio, Noberto*.

⁸⁷ For additional information see *Immanuel Kant's Perpetual Peace: A Philosophical Sketch*.

national and international – and also a supranational – constitutionalism.⁸⁸

Furthermore, the system of protection mentioned above is a mirror of the constitutional features of the supranational and – even – the international tiers. In this regard, the multilevel constitutionalism “focuses in the assumption that the citizens are the basis and origin of the public power” regardless its national, supranational or international vests, leading to the understanding that these different levels of governance are the complementary faces of one system serving the citizens’ interests and rights.⁸⁹

According to the multilevel constitutionalism perspective there is no level hierarchy, but rather a functional relationship,⁹⁰ based upon a reciprocal recognition, consideration and cooperation. The EU and the national levels of protection are interconnected and interwoven.⁹¹ The international tier – Council of Europe⁹² – is also interconnected to this framework, due to the fact that all EU Member States are member of the Council of Europe. The Council’s link with the EU law was reinforced by the introduction of article 6 Treaty on European Union (herein TEU), which will be further analysed in a subsequent section.

In this way, *Freixes Sanjuan*⁹³ endorses that in the EU context there is an integral, but not completed, system of recognition and protection of fundamental rights, which includes the Union,

⁸⁸ *Petersmann, Ernst-Ulrich* (2001).

⁸⁹ *Pernice, Ingolf* (2008), p. 24.

⁹⁰ *Pernice, Ingolf*, (2012).

⁹¹ *Pernice, Ingolf* (2008), p. 29.

⁹² The focus of the present thesis regarding the international level of protection is exclusively the Council of Europe. The ICCPR and the Geneva Convention won’t be addressed, since the analyses here is limited to the regional (European) framework. Furthermore, regarding the protection of the children, object of this study, the ECHR and the CFREU are a mirror (and often rephrase) of the other relevant international frameworks.

⁹³ *Sanjuán, Teresa Freixes*.

the system derived of the constitutional traditions shared by the EU Member States and the Council of Europe frameworks. Furthermore, these three tiers have a good level of harmonization and are interconnected by article 6⁹⁴ TEU.

Additionally, the human rights judicial⁹⁵ protection by the European Community⁹⁶ and the Council of Europe levels was the driven force of their progressive transformation “into constitutional instruments protecting citizens’ rights and community interests across national frontiers by three different kinds of multilevel constitutionalism.”⁹⁷

In the subsequent items, the different levels of protection will be addressed and the relation between them will be analysed, specially, the interplay between the Court of Justice of the European Union (therein CJEU) and the Strasbourg Court.

⁹⁴ Article 6 TEU: “1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.” Treaty on European Union.

⁹⁵ By the CJEU and the ECHR respectively.

⁹⁶ And then the European Union.

⁹⁷ *Petersmann, Ernst-Ulrich*, 2008, p. 775.

3.1.1. The National Level

In this section, the aim is to discuss about the national level of human rights protection and its position in the multilevel system. The national level of fundamental rights protection provides constitutional guarantees and safeguards.

Despite the relevance of this national protection to ensure an effective protection of the Human Rights, a level of safeguard that can be enforced across frontiers is necessary. In the globalization context, in which the relations, rights and obligations often transcend national borders, the relevance of a transnational human rights protection increases.

Moreover, the multilevel protection does not prevent that each Member State provides a higher level of fundamental rights guarantee. Some human rights (e.g. personal freedom) have a national origin and were then 'imported' to the other tiers, some other rights (e.g. right to personal data protection) has a supranational origin but shortly was introduced in the national frameworks.⁹⁸ This plural development and transmigration of safeguards is one of the main benefits of the multilevel protection.

Furthermore, the common constitutional traditions shared by the Member States are a formal source of EU Fundamental Rights, in accordance with article 6 TEU, mentioned above. The common constitutional traditions are being used by the European Court of Justice as an interpretation source and as a ground for the Court's decisions. The ECHR aims to reflect the collective share commitments of its members⁹⁹. By this way the Convention reflects the minimum standards of fundamental rights protection – in other words common constitutional

⁹⁸ *Bilancia, Paola.*

⁹⁹ *Craig/de Búrca*, p. 388.

traditions – joint by the members states.

3.1.2 The Supranational Level

The entry into force of the Treaty of Lisbon increased considerably the human rights safeguards in the EU level. The Charter of Fundamental Rights of the European Union (herein CFREU) became a binding instrument.¹⁰⁰ Article 6 TEU also provides that the fundamental rights developed by CJEU jurisprudence, together with the MS's common constitutional traditions shall consist in EU law general principles. Moreover, pursuant article 6 (2) the European Union shall accede to the ECHR.

The Charter has acquired the same legal value of the Treaties, becoming the core of the EU constitutional law. Consequently, the CJEU competences increased, having as a baseline the Charter provisions. In the EU new framework, the fundamental rights are not only limits to the exercise of power, but rather objectives of the Union.¹⁰¹ Thereby, the new treaty-like status of the Charter gives a significant “impetus to further improvement of fundamental rights protection at the EU level.”¹⁰²

Since the Charter acquired binding force (in late 2009) the CJEU has enhanced its role as a Human Right adjudicator. In other words, the proclamation of the ECFR as a binding instrument had as a consequence a significant increasing in the incidence of Human Rights adjudication before the Court.¹⁰³

¹⁰⁰ Voßkuhle, *Andreas*, p. 3.

¹⁰¹ *Bilancia, Paola*.

¹⁰² *Kuhling, Jurgen*, p. 479.

¹⁰³ *Gráinne de Burca*, p. 1 The author notes that this growth is not only a function of the Charter's binding force, but it is also a consequence of the expansion of the EU law scope to other fields as policy, as such as immigration and asylum. *Burca, Gráinne de* (2013), p 2.

The Lisbon Treaty clearly establishes that the Union powers – regardless if exercised by the EU institutions or implemented by the member states – are limited to what is compatible to the Charter’s fundamental rights provisions.¹⁰⁴

In this regard, the MS must observe the Charter provisions solely when implementing the EU law. Nonetheless, according to *Ingolf Pernice*, the protection of the EU fundamental rights in national level may lead to the setting of standards for a high-level protection of human rights within the MS “also in matters which are not directly related to European actions”, since the national courts have to maintain a close dialogue with the CJEU according to article 267 TFEU.¹⁰⁵

Furthermore, by making a reference to the constitutional traditions of the MSs, article 6 establishes the necessary openness at the EU level for a continuous “trade-off between the national and the European standards of rights in the Union through the judicial dialogue between the two constitutional levels”.¹⁰⁶

3.1.3 The International Level

The European Convention on the Protection of Human Rights and Fundamental Freedoms is an International Treaty, which provides an international regional level of protection. The Convention has not a universal character. It is rather a pan-European Human Rights protection system¹⁰⁷, which includes among its 47 members nearly all the European states¹⁰⁸. By this means, the ECHR is different of other international

¹⁰⁴ *Pernice, Ingolf* (2008), p. 52.

¹⁰⁵ *Ibid*, p. 52.

¹⁰⁶ *Pernice, Ingolf* (2008). p. 52.

¹⁰⁷ The Council of Europe (2012), p. 5.

¹⁰⁸ except by Belorussia, Vatican City and other States which the recognition is limited (e.g. Kosovo).

instruments (e.g. the Geneva Convention), which applies in the universal international level.

The European Convention on the Protection of Human Rights was adopted in 1950 and it is the first instrument of this kind to provide binding guarantees. As a “Constitutional Court” which the speciality is human rights,¹⁰⁹ the European Court of Human Rights ensures that the State Parties of the European Convention comply with the human rights and safeguards present in the Convention.¹¹⁰

This Court is competent to interpret and find violations of the European Convention based upon States and individual applications, which alleges breaches in the civil and political rights protected by the Convention.¹¹¹ Although they are mostly based in individual complains, these finding usually goes beyond the individual cases, especially in the case of legislation violations.¹¹²

The main difference between the multilevel judicial governance of national courts and the ECtHR is that The ECtHR “asserts only subsidiary constitutional functions vis-à-vis national human rights guarantees, with due respect for the diverse democratic traditions in the 47 ECHR member countries.”¹¹³

Furthermore, differently of the supranational (EU) and the national levels, there is solely a judicial branch in the ECHR framework. Thereby, the ECtHR adjudication of human rights violations is always and only based on the control of the national public powers. In this regard, the ECtHR recognizes the essentiality of the Principle of Subsidiarity, which the Court

¹⁰⁹ *Voßkuhle, Andreas*, p. 2 .

¹¹⁰ *Seibert-Fohr/Villiger*, p. 13.

¹¹¹ Council of Europe, *The Court in Brief*, p. 2.

¹¹² Council of Europe, *The Court in Brief*.

¹¹³ *Petersmann, Ernst-Ulrich*, p. 775.

shall always respect when controlling the national public powers' acts.¹¹⁴

According to the Principle of Subsidiarity the ECtHR “only may deal with the matter after all domestic remedies have been exhausted.”¹¹⁵ Moreover, the ECtHR¹¹⁶ shall observe the margin of appreciation doctrine. In light of this doctrine the national authorities have a “space for manoeuvre (...) in fulfilling their obligations under the European Convention on Human Rights¹¹⁷”.

In almost fifty years the ECtHR has delivered more than 10,000 judgments. Which are binding on the countries concerned and have led governments to adjust their legislation and administrative practice in a broad range of areas.¹¹⁸ By this way, The Court's jurisprudence makes the Convention a relevant instrument to concretize the human rights in Europe. Only in 2016, “53,500 applications were allocated to a judicial formation,” this high number represents an increase of 32% compared with 2015 (40,550).¹¹⁹

In a law case regarding the right of residence and freedom of circulation,¹²⁰ the ECtHR successfully intervened concerning a

¹¹⁴ *Callejón, Francisco Balaguer.*

¹¹⁵ Article 35(1) of the European Convention.

¹¹⁶ “The European Convention on Human Rights provides protection exceeding that ensured by national law, a protection that is based on certain common, shared, and therefore uniform principles (as is the case with European Union law). This uniformity is balanced with respect for national identities, through the requirement of the prior exhaustion of national remedies (under Article 35(1) of the Convention, “[t]he Court can only deal with the matter after all domestic remedies have been exhausted...”) and the doctrine of the margin of appreciation (leaving a certain degree of discretion to national governments, “a mild form of immunity”).” *Cassese, Sabino*, p. 2.

¹¹⁷ Council of Europe (2008), p.1. The doctrine of the margin of appreciation won't be further addressed, due to this thesis limited scope.

¹¹⁸ Council of Europe. The Court in Brief.

¹¹⁹ European Court of Human Rights (2017).

¹²⁰ Judgement in *Aristimuño Mendizabal v. France* (application no. 51431/99). ECtHR Decision of January 17th, 2006. “the Court noted that the applicant, as a Community national, had been directly entitled under Community law to reside in

right that is protected by the 3 different levels (Convention, Union and French levels). In this case the ECtHR has provide an integrated interpretation of the Convention in view of the national and the EU law.¹²¹

3.2 The European Union and the European Convention on Human Rights

The present section will address the relationship between the EU and the European Convention on Human Rights. Firstly, their relationship before the Lisbon Treaty milestone will be object of analysis. Then, the after-Lisbon relationship will be addressed, regarding specially article 6 TEU and its provision concerning the accession of the EU to the ECHR. The CJEU decision about this accession will also be studied. Finally, the current relationship between the EU and the ECHR, specifically regarding their courts' interplay, will be discussed.

3.2.1 Pre-Lisbon context

As it was noted above, while the Strasbourg Court has always had one only mandate, to guarantee that contracting parties respect human rights as protected in the Convention, “the CJEU's role as a human rights adjudicator has been relatively modest.”¹²²

Nonetheless, CJEU's role regarding the human rights sphere has advanced expressively, in the extension of the progressive expansion of the EU law scope, which start to include areas

France and be issued with a “residence permit for a national of an EEC Member State”, valid for five years. The Court therefore interpreted Article 8 of the Convention in the light of Community law and in particular of Member States' obligations regarding the rights of entry and residence of Community nationals.” Council of Europe (2006), press release.

¹²¹ *Bilancia, Paola.*

¹²² *Imamović, Šejla*, p. 58.

closely related to the human rights perspective, such as asylum and immigration law.¹²³

Before the Lisbon *momentous*, the CJEU often¹²⁴ used the Convention and the jurisprudence of the ECtHR as grounds of its extensive interpretation and creative action.¹²⁵ It is noteworthy that the CJEU besides follow the Convention jurisprudence, has reconsidered its own case-law in light of subsequent developments of the Strasbourg's Court.¹²⁶ Even though the Convention as an instrument of international law did not directly bind the EC.¹²⁷

This influence has been mutual and both Courts developed a vehement dialogue through their case law. This dialogue and their references to each other's jurisprudence reflect a very real and reciprocal impact.¹²⁸ Moreover, these Courts "have been instrumental to strengthening each other's legal system. For instance, in the Hornsby case of 1997, the ECtHR "indirectly condemned the non-execution of the CJEU judgment as

¹²³ *Ibid*, p. 58.

¹²⁴ Moreover, the ECHR and the Strasbourg Court jurisprudence have always been a relevant source of inspiration for the CJEU as from the days it started to develop its case law on fundamental rights protection. (...) "Yet, in practice the approach of the Luxembourg Court has come quite close to that by way of increasing its acceptance and reference to the Strasbourg case law. This influence has been reciprocated." *Timmermans, Christiaan*, p. 9.

¹²⁵ *Sanjuán, Teresa Freixes*.

¹²⁶ "That was the case concerning the applicability of Article 8 of the Convention to searches of business premises by public authorities. Initially, in *Hoechst* the Court of Justice was against such a proposition. However, the European Court of Human Rights held in a series of rulings, in particular *Chappell v. United Kingdom* (1989) and *Niemietz v. Germany* (1992), finally in *Société Colas Est v. France* (2002), that the notion of "home" in Article 8 could be extended to professional premises. The Court of Justice subsequently accepted that development in *Roquette Frères* (2002), finding that it had to take into account the Strasbourg case-law subsequent to *Hoechst*." *Costa, Jean-Paul* (2008), pp. 2 and 3.

¹²⁷ *Timmermans, Christiaan*, p. 9

¹²⁸ *Timmermans, Christiaan*, p. 9

contrary to Article 6 of the Convention.”

Furthermore, in the iconic *Bosphorus* case¹²⁹ the ECtHR abdicated its judicial control task in the situations in which the MS actions are required by the EU law.¹³⁰ “The most important contribution of *Bosphorus*¹³¹ was the development of the doctrine of equivalent protection”.¹³² Since, the ECtHR found that the protection of fundamental rights by the European Community law could be presumed “equivalent to that of the Convention System.”¹³³

In this regard, *Dean Spielmann*, the president of the of the European Court of Human Rights, asseverated that the level of protection accomplished within the EC by the mid-1990s was already high enough as to permit the ECtHR, in the *Bosphorus* judgment, “to consider it equivalent to the Convention system”. “Giving rise to a presumption of compliance where a State acts strictly in line with its obligations as a member of the EU.”¹³⁴

Nevertheless, the *Bosphorus* presumption is not conclusive, it is rather a rebuttable presumption and can be proved otherwise.¹³⁵

¹²⁹ Judgement in *Bosphorus*, C-84/95, EU:C:1996:312.

¹³⁰ *Besselink, Leonard F.M* (2008), p. 2

¹³¹“The case arose from the impounding by the Irish authorities of an aircraft leased by the applicant company from Yugoslav Airlines. The authorities were acting in pursuance of an EC Council Regulation which, in turn, had implemented the UN sanctions regime against the Federal Republic of Yugoslavia. In the domestic proceedings, the applicant company unsuccessfully argued that the aircraft was not covered by the Regulation. The result of those proceedings was determined by a preliminary ruling from the Court of Justice which had found that the Regulation had been applicable to the *Bosphorus* Company and that the impoundment compatible with Community law. In Strasbourg, the applicant company alleged a breach of Article 1 of Protocol 1 to the Convention. In a sense, it was a kind of “appeal” against the ruling given by the European Court of Justice.” *Costa, Jean-Paul* (2008), p.6.

¹³²*Costa, Jean-Paul* (2008), p. 6.

¹³³ Council of Europe (2005), Press release.

¹³⁴ *Spielmann, Dean* (2013), p. 2.

¹³⁵ In this regard *Emmanuelle Bribosia* adds that the *Bosphorus* principle “entails a presumption of equivalent protection that can be rebutted if in the circumstances of a particular case, it can be demonstrated that the protection of Convention rights is manifestly deficient.” *Bribosia, Emmanuelle*, p. 33.

Moreover, this presumption does not apply in the case in which the Member States have a “certain margin of appreciation in the performance of their EU obligation.”¹³⁶

The *Bosphorus* judgment has since then been continually confirmed by the ECtHR.¹³⁷ However, the EU accession to the Convention could alter this scenario. Since this accession would normally implicate in the fact that the ECtHR would have the final say in all cases regarding alleged violation of Human Rights, even in those situations where the MS acts in the implementation of EU Law.¹³⁸

3.2.2 The EU accession to the European Convention on Human Rights

With the advent of the Lisbon treaty the multilevel Human Rights protection was improved, as it was noticed above. “Ever-closer links have been established between the ECHR and the CJEU, and their respective jurisprudence”. Moreover, article 6 TEU gave binding force to the ECHR and established in its third paragraph that the EU shall accede to the Convention.¹³⁹

As it was noted above, the accession would have as a consequence the subjection of the EU acts (as it happens to all the Convention High Contracting Parties) to the control exercised by the Strasbourg Court in view of the Conventions provisions.¹⁴⁰

A result of Strasbourg competence to review cases in which the EU is party would lead to a decreasing of the perceived human

¹³⁶ *Bribosia, Emmanuelle*, p. 33.

¹³⁷ *Timmermans, Christiaan*, p. 11.

¹³⁸ *Gragl. Paul* (2014).

¹³⁹ *Timmermans, Christiaan*, p. 9.

¹⁴⁰ *Costa/ Skouris*. Joint communication from Presidents *Costa* and *Skouris*.

rights gap. By this way, the ECtHR decisions would clearly bind all EU institutions, including the Court of Justice of the European Union.¹⁴¹

After long negotiations, in 2013 the EU and the Council of Europe presented a draft accession agreement (hereinafter DAA) on how the EU could be integrated within the Convention system¹⁴² for the protection of European human rights. In that agreement, there was a provision allowing the involvement of the EU institutions in the cases in which a complain to the ECtHR alleges that a provision of EU law is incompatible with the Strasbourg System.¹⁴³

Additionally, the DAA established some sort of “preliminary reference downward” from the ECtHR to the CJEU, in applications from individuals complaining of an incompatibility between EU law and the ECHR. “So as to allow the CJEU to exercise an “internal review” on the issue before the European Court of Human Rights exercises its “external review” under the Convention.”¹⁴⁴

Lately in 2013, the Commission requested a CJEU opinion on whether the draft Accession Agreement was compatible with the EU law. Then, in December 2014, the CJEU delivered the Opinion 2/13, which states the incompatibility between the draft agreement and the EU law.

The negative answer was based on two main themes, the exclusive jurisdiction of the CJEU and the autonomy of the EU law¹⁴⁵. Furthermore, the Opinion was strongly based on article

¹⁴¹ *O’Neill, Aidan QC.*

¹⁴² European Parliament (2016), *The EU Accession to the ECHR after Opinion 2/13: Reflections, Solutions and the Way Forward*, p. 8.

¹⁴³ *O’Neill, Aidan QC.*

¹⁴⁴ *Ibid.*

¹⁴⁵ *Lock, Tobias.*

3 of EU Protocol 8.¹⁴⁶ This article emphasizes that EU's obligation, under article 6(2) TEU, to accede to the ECHR is not unconditional, due to the fact that the accession must not affect article 344 TFEU.¹⁴⁷

The CJEU main¹⁴⁸ objection was that the Agreement violates the CJEU judicial monopoly concerning the interpretation of the EU law. Since, in accordance with article 344 TFEU, the European Union MSs are prevented from submitting any dispute regarding the interpretation of EU law to any method of dispute settlement other than the ones provided in the EU Treaties.¹⁴⁹

The CJEU has held that an international agreement cannot affect the autonomy of the EU legal system, that principle is preserved by article 344. The obligation under article 344, specially, regarding the respect to the CJEU exclusive jurisdiction constitutes an essential feature of the EU law.¹⁵⁰

According to the CJEU the accession would alter this feature and impair the autonomy of the EU law. Thereby, the

¹⁴⁶ Protocol No. 8 to the Treaty on European Union, article 3: "Nothing in the agreement referred to in Article 1 shall affect Article 344 of the Treaty on the Functioning of the European Union." This Protocol relates to article 6(2) TEU and is an integrant part of the EU primary law. TEU, Protocol No. 8.

¹⁴⁷ *Johansen, Stian Øby*, p 170.

¹⁴⁸ Other arguments that the CJEU used to justify the incompatibility in regard were: a) "the draft agreement failed to have regard to the specific characteristics of EU law with regard to the judicial review of acts in the area of the CFSP;" and b) due to the accession "the principle of mutual trust under EU law, highly relevant in the context of the EU's Area of Freedom, Security, and Justice, could be undermined". *Douglas-Scott, Sionaidh*, pp. 1 and 2.

The other arguments will not be further developed due to the extension and objection of the present study.

¹⁴⁹ *Odermatt, Jed*, pp. 5 and 7.

¹⁵⁰ "Furthermore, the obligation of Member States to have recourse to the procedures for settling disputes established by EU law" (...) "must be understood as a specific expression of Member States' more general duty of loyalty resulting from Article 4(3) TEU (see, to that effect, judgment in *Commission v Ireland*, EU:C:2006:345, paragraph 169), it being understood that, under that provision, the obligation is equally applicable to relations between Member States and the EU." Court of Justice of the European Union (2014), Opinion 2/13 of the Court, para 202.

integration of the EU law, in the DAA terms, to the ECHR is prevented by the EU Treaties. Indeed, article 3 of Protocol No 8 safeguard is based in this consideration.¹⁵¹

Therefore, due to the CJEU Opinion the European Union did not accede to the Convention system. The main consequence of it, regarding the Human Rights multilevel protection, is the loss of opportunity to increase the Strasbourg and Luxembourg Courts dialogue and to intensify their cooperation in order to provide a better human rights protection and enforcement in Europe.

3.2.3 The post-Opinion 2/13 conjuncture

Many scholars¹⁵² still defend the desirability, necessity and feasibility of the accession, in light of the improvement of the Human Rights protection in Europe. The accession is desirable to improve the legal protection offered to the EU citizens.

In this regard, is important to emphasize that if the EU accede to the Convention system, the European level of protection would also apply to the EU institutions and to the MS when implementing the EU law, notwithstanding the *Bosphorus* doctrine.¹⁵³ Therefore, the accession would guarantee a third level of Human Rights control and protection in the situations mentioned above.

The accession is also still necessary in order to provide coherence of the European system of protection. Since the accession would reduce the risk of divergent Court interpretations regarding Human Right standards. These discrepancies occasionally occur, but their frequency may

¹⁵¹ *Ibid*, paras 201-203.

¹⁵² In instance: *Leonard F.M. Besselink* (2014); *Andrew Duff* (2015); *Šejla Imamović* (2016); *Martin Kuijer* (2016) and *Johan Callewaert* (2016).

¹⁵³ *Kuijer, Martin*, p. 50.

increase. Particularly, if the CJEU take the Strasbourg Court case-law in consideration less often¹⁵⁴, due to the fact that the EU currently has its own binding human rights instrument.¹⁵⁵

Furthermore, as the Commission had stressed, the accession is still a Treaty obligation.¹⁵⁶ Also, the attainment of the accession purpose is still relevant. Since the accession will allow the EU “to develop superior rights jurisprudence of a constitutional type. Closing the circle between the Convention and Charter systems should allow the EU to achieve the best global standard in rights protection and remedial action.”¹⁵⁷

The integration of the EU law within the ECHR system is still feasible and can happen in three different ways: a) By ignoring the Court’s opinion b) By the opening of further

¹⁵⁴ And there is evidence to believe that this is a very real possibility. This perception is strengthened if one looks at the recent case-law of the CJEU: the *Åkerberg* case-law promotes a very broad application of the Charter, and the *Melloni* case-law foresees a level of human rights protection dictated by EU law.

Šejla Imamović further strength this argument: “According to *de Búrca*, who conducted a study on the number of references to the Charter of Fundamental Rights by the Court of Justice since it became legally binding in late 2009 until the end of 2012, there has been a remarkable lack of reference on the part of the Court to other relevant sources of human rights law and jurisprudence in that period, most notably to the ECHR and the ECtHR case law. She determined that out of 122 cases in which the Charter was mentioned, the CJEU referred to a Convention provision in only 20, with only 10 judgments involving some mention or discussion of the ECtHR case law. Moreover, any references to other international human rights treaties and to the common constitutional traditions of the member states have been basically absent from the CJEU’s case law. This is quite remarkable considering that a study on the number of references by the CJEU to the ECHR before the Charter became legally binding (from 1998 to 2005)¹⁴⁴ revealed that the references to the ECHR have been increasing constantly throughout those years, and that the ECHR had in fact become the main rights instrument in in the CJEU’s jurisprudence.”

Imamović, Šejla, p. 59

¹⁵⁵ *Kuijer, Martin*. P. 51.

¹⁵⁶ *Ibid.* P. 52.

¹⁵⁷ *Duff, Andrew*.

negotiation c) by the amendment of the EU Treaties.

The first approach is not politically practicable and it is irreconcilable with EU law¹⁵⁸. Regarding the second approach, some voiced that the re-opening of negotiations is possible.¹⁵⁹

Other authors argue that further negotiations are improbable in the current juncture, since “there is little political prospect that non-EU states parties to the ECHR will be willing to reopen the negotiations on accession”, and waive “all the compromises that in the end they were willing to strike”. This apply, particularly to Switzerland, Turkey and the Russian¹⁶⁰ Federation.¹⁶¹

Due to the unlikelihood of the negotiations, the Treaties amendment would be the most viable solution. The prospect of treaty change is not unrealistic, since a change for another motive, the fiscal Union implementation, is foreseen. This alteration might lower the numerous requirements that have hindered the accession, including the “horizontal articles of the Charter and Protocol no 8” modification.¹⁶²

3.2.4 The current relationship between the EU and the CoE

While the accession does not succeed or even in the case that the accession is unachievable, the EU and the European levels of protection shall improve their current dialogue – particularly regarding the Luxemburg and Strasbourg Courts – and

¹⁵⁸ *Kuijer, Martin*, p. 52

¹⁵⁹ *Morano, Foadi, Andreadakis and Lock, Tobias*.

¹⁶⁰ Specially regarding “the declaration of Russia at the re-opening of the negotiations after a few EU Member States rejected the earlier version of the Accession Agreement, stands as an omen.” *Besselink, Leonard F.M.* (2014), p. 1.

¹⁶¹ *Ibid*

¹⁶² *Duff, Andrew*, p. 3. Furthermore, “the resolution of the issues raised in Opinion 2/13 should be used to strengthen the case for an early revision of the Treaties.” *Duff, Andrew*, p. 4.

enhance their coherence and cooperation to provide an efficient and complete multilevel protection.

The above noted fact that the CJEU references to the Convention system are declining may hinder the multilevel protection. This decreasing is contradictory, for the reason that these two Human Rights instruments “can hardly be seen in isolation.”¹⁶³ Since the Charter in its article 52(3) establishes a close connection between the two catalogues. According to this provision, the CFREU rights which correspond to rights protected by the ECHR should be given equal meaning and scope as the relevant Convention rights.¹⁶⁴

That provision, as a matter of EU law, makes the ECHR part of the EU law framework – as an interpretation source. Indeed, whereas the Strasbourg Court determines the Convention’s meaning and scope, it could be argued that the Luxembourg Court is in effect under a Treaty obligation to consider the ECtHR jurisprudence.¹⁶⁵

Moreover, article 53 lays down that the Charter cannot restrict or impair rights “as recognised, in their respective fields of application, by Union law and international law”, which includes the MS constitutions and, remarkably, the ECHR.¹⁶⁶

Coincidentally, article 53 of the Convention Human Rights’ Catalogue also deals with its relationship with the other protection levels. This provision, by setting a minimum standard of protection, permits the ECHR signatories to offer a more extensive protection than the Convention.¹⁶⁷ That includes the extensive protection under their national legislation and through

¹⁶³ *Imamović, Šejla*, p. 59

¹⁶⁴ *Ibid*, p. 59

¹⁶⁵ *Ibid*, p. 59

¹⁶⁶ EU, Charter of Fundamental Rights of the European Union.

¹⁶⁷ *Duff, Andrew*.

the establishment of other levels of protection, as the EU system one.

Therefore, both provisions establish an openness in the respective Human Rights instruments which allows dialogue and interplay among the Multilevel different layers. The coherence between the two systems and their frequent dialogue is the best way to prevent a – dangerous¹⁶⁸ – division in the European Human Rights system after the shocking impact of Opinion 2/13.

It is important that both Courts act to prevent this division while the accession does not take place. Alternatively, if the accession does not happen¹⁶⁹, the Courts shall seek a progressive convergence between their protection standards, in view to achieve consistency, normative clarity and to finally develop a necessary cooperation system. Since the above noted coherence is fundamental in order to enhance the Human Rights guarantees and close any protection gaps (which will be studied in a subsequent section).

In the meantime, the CJEU has pointed out that it will continue to build its case law based, mainly, on the EU Charter. Regarding the Strasbourg Court, it is not clear whether this Court will reconsider or not¹⁷⁰ the *Bosphorus* presumption of equivalent protection.¹⁷¹

President *Spielmann* has signaled the role of the ECtHR in the post-Opinion 2/13 juncture, which is to guarantee that there

¹⁶⁸ *Callewaert, Johan*.

¹⁶⁹ Or in order to prepare the European protection landscape for the accession.

¹⁷⁰ In this regard Šejla Imamović adds that: “the ECtHR may be less inclined to apply the Bosphorus presumption of equivalent protection in future cases. It would not be surprising if the ECtHR would decide to reconsider its lenient attitude towards EU member state measures implementing their EU law obligations.” *Imamović, Šejla*, p. 64.

¹⁷¹ *Kuijer, Martin*, p. 55.

is no legal vacuum in the protection of Human Rights in Europe. The president also emphasized the relevance of the coherence and no hierarchy¹⁷² of the Multilevel system.¹⁷³

If both Courts do not promote a more extensive cooperation and dialogue, the development of a divergent European human rights scenery where these two complex systems grow “further alongside each other” with their courts “potentially adopting different approaches and interpretative tools” is inevitable. Moreover, these dissimilar approaches probably will lead to conflicts.¹⁷⁴

The divergences may include the non-application of the *Bosphoros* doctrine, which could have legal and political negative impacts for national authorities.¹⁷⁵ Thereby the national Courts would find themselves trapped between conflicting supranational and international obligations.¹⁷⁶

In this regard, the CJEU behaviour concerning the adoption of a separate and self-sufficient approach can be problematic as it generates a false impression that the different multilevel layers (EU and the Convention system) are separated from each other. This also can create an unproductive competition¹⁷⁷ between the Courts, further strengthening the conflict menace.

Currently, the dangerous prospect of the shadow of opinion

¹⁷² Which is an immanent characteristic of the Multilevel theory, examined above.

¹⁷³ “(...) the important thing is to ensure that there is no legal vacuum in human rights protection on the Convention’s territory, whether the violation can be imputed to a State or to a supranational institution. Our Court will thus continue to assess whether State acts, whatever their origin, are compliant with the Convention, while the States are and will remain responsible for fulfilling their Convention obligations. The essential thing, in the end, is not to have a hierarchical conception of systems that would be in conflict with each other. No, the key is to ensure that the guarantee of fundamental rights is coherent throughout Europe.” *Spielmann, Dean* (2015), p 5.

¹⁷⁴ *Imamović, Šejla*, p. 63 and 64.

¹⁷⁵ *Ibid*, p. 64.

¹⁷⁶ *Claes, Monica*, p. 87.

¹⁷⁷ *Imamović, Šejla*, p. 64.

2/13 may result in an additional fission between the two Human Rights system, instead of achieving the accession's intended further coherence and cooperation between the Strasbourg and the Luxembourg Courts. This would hinder the Human Rights protection in the region.

The above-mentioned conflicts and competition represent the treachery and downside of the multilevel system which can result in incertitude and undermine the Human Rights' protection.¹⁷⁸ For this reason, the coherence between the multilevel tiers is fundamental. Since, such coherence enables the raise of the benefits¹⁷⁹ in the plural system of protection.

A sufficient level of coherence between the Courts – notably the CJEU and the ECtHR – is necessary in order to guarantee an efficient working of the European Multilevel system. The different layers should adopt a cooperative approach instead of a conflictual and competitive behaviour. In this regard, in view to promote legal certainty and a complete and complementary protection, the EU shall accede to the Convention system. If the accession is not possible due to the current political juncture, the Courts shall develop a better dialogue and enhance their meeting frequency. This dialogue would ideally outcome in the development of a cooperation which would guarantee the improvement of the human rights protection in Europe, especially regarding the protection of vulnerable groups –

¹⁷⁸ Voßkuhle, *Andreas*, p. 4

¹⁷⁹ Andreas Voßkuhle notes some examples of benefits: “The benefits of a plural system of human rights protection result both from the variety of regulatory frameworks as well as from the different jurisdictions. (...) Furthermore, new catalogues of human rights can prevent gaps occurring in legal protection that may arise from the increasing complexity of societal life. Accordingly, the Charter of Rights stresses the need to take societal and social progress into. (...) Moreover, this procedure serves to contour and reinforce common European standards of human rights, an aspect that cannot be emphasised enough. The European constitutional tradition thus becomes the motor of learning processes, dynamic adaptability, and progressive developments within the framework of an emergent European legal order. *Ibid*, p. 3 and 4.

notably the children rights.

4. The Principle of the Best Interest of the Child in light of the Multilevel Protection

4.1 Rights of the Child

Before analysing the children's rights framework, it is essential to clarify the concept of the term child. Secondly, the history of the children's rights development will be briefly addressed. Then, some considerations regarding the relevant rights will be made.

Under international universal law, the *United Nations Convention on the Rights of the Children* (hereinafter the UNCRC) establishes that "a child means every human being below the age of eighteen years". This legal parameter is currently used to define what is a child in Europe¹⁸⁰.

Under the *Council of Europe* law, most of the instruments related to children adopt the UNCRC concept above mentioned.¹⁸¹ Regarding the EU law, the Treaties, secondary law and CJEU case law do not provide a sole formal definition of below which age the individual is a "child". That concept can differ significantly under the Union's law, depending on the regulatory framework¹⁸², which can vary between 15 to 21 years.¹⁸³

¹⁸⁰ Fundamental Rights Agency/ Council of Europe (2015), p. 17

¹⁸¹ Examples include Article 4 (d) of the Council of Europe Convention on Action against Trafficking in Human Beings⁴ or Article 3 (a) of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention). *Ibid*, p. 18.

¹⁸² "For example, EU law governing the free movement rights of EU citizens and their family members defines 'children' as "direct descendants who are under the age of 21 or are dependent", essentially endorsing a biological and economic notion as opposed to one based on minority. Some EU laws ascribe different rights to children according to their age. Directive 94/33/EC on the protection of young

The children's right is a novelty of the twentieth century. In the nineteenth century children had few or no rights worldwide. This conjuncture gradually changed through the adoption of some international instruments, as the Declaration of the Rights of the Child (1924), followed by the United Nations General Assembly's adoption of a nonbinding declaration on children's rights (1959) among other¹⁸⁴ instruments¹⁸⁵.

Finally, in 1989 the milestone UN Convention on the Rights of the Children was adopted. This tendency to protect the rights of the children was widely reproduced by national constitutions.¹⁸⁶ The EU also has adopted provisions to promote a supranational protection of children's rights, what will be further examined in the section 4.2.

Children are not only subjects of protection, but rather holders of rights. They are holders of all human rights and beneficiaries of some special regulations, which are a function of their specific characteristics.¹⁸⁷

In this regard, *Janusz Korczak* affirms that: "Children are not the people of tomorrow, but are people of today. They have a right to be taken seriously, and to be treated with tenderness

people at work (Young Workers Directive), for example, which regulates children's access to and conditions of formal employment across the EU Member States, distinguishes between 'young people' (a blanket term for all persons under the age of 18 years), 'adolescents' (any young person of at least 15 years of age, but less than 18 years of age – who is no longer subject to compulsory full time schooling) and 'children' (defined as those under the age of 15 – who are largely prohibited from undertaking formal employment). Other areas of EU law, particularly those areas in which EU action complements that of Member States (such as social security, immigration and education), defer to national law to determine who is a child. In these contexts, the CRC definition is generally adopted." *Ibid*, p. 18.

¹⁸³ *Ibid*, p. 18.

¹⁸⁴ In 1966 the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were adopted by the UN. *Nussbaum/ Dixon*, p. 550.

¹⁸⁵ *Ibid*, p. 550.

¹⁸⁶ *Nussbaum/ Dixon*, p. 550 and 551.

¹⁸⁷ Fundamental Rights Agency/Council of Europe (2015), p. 19.

and respect.” Children shall “be allowed to grow into whoever they were meant to be.”¹⁸⁸

In the section 4.1 the concepts, scope and development of some rights of the child will be analysed. Nevertheless, only those rights related to the thesis’ scope will be underlined herein: the children’s right (and principle) to have their best interest taken as a primary consideration, the right to development and survival and the right to family life.

4.1.1 The Principle of the Best Interest of the Child

In this section, the history and origin under international universal law of the Principle of the Best Interest of the Child will be underlined. Additionally, its definition, scope and relevance under the UNCRC¹⁸⁹ will be examined. The importance of this principle regarding the European context will be studied in section 4.2.

The principle in enquiry was not introduced by the UNCRC¹⁹⁰, but the Convention on the Rights of the Children had the merit of extending the best interest principle’s scope¹⁹¹. Its reach was expanded “to an obligation on States to ensure that children’s interests are placed at the heart of government and of all decision-making which impacts on children.”¹⁹²

¹⁸⁸ *Janusz Korczak in Hammarberg, Thomas* (2008), p. 10.

¹⁸⁹ As it was emphasized in the section 3, this thesis will not analyse the role of the international universal layer in the multilevel system. Nevertheless, the examination of the principle of the Best Interest of the Child in the UNCRC context is fundamental to fully understand this principle and its origin and definition, since the UNCRC is the principal set of children rights standards that exists.

¹⁹⁰ This principle “was included in a number of other international human rights instruments, most notably the 1959 Declaration on the Rights of the Child and the 1979 Convention on the Elimination of All Forms of Discrimination Against Women.” *Logan, Emily*, p. 2.

¹⁹¹ Article 3 (1) UNCRC establishes: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”. UN Convention on the Rights of the Children.

¹⁹² *Logan, Emily*, p. 2.

This principle is one of the four key principles of the UNCRC, which are: non-discrimination, the best interests of the child as a primary consideration, right to life and development, and participation rights. These four principles are fundamental to provide children's protection.¹⁹³

Therefore, the principle of the best interest of the child is in the core of the most widely-accepted international human rights treaty in the world – the UNCRC¹⁹⁴. That reflects the universal acceptance of this principle.¹⁹⁵

The definition of the best interest of the child is not obvious.¹⁹⁶ This principle has “an indeterminate but not discretionary legal concept.”¹⁹⁷ Since its definition is flexible and embraces a variety of continually evolving questions, such as the child specific context and the progress of the knowledge regarding children development.¹⁹⁸

Hence, this concept is child specific¹⁹⁹ and shall be determined in a casuistic basis²⁰⁰. However, it has to be clear and objective to do not leave a room for an arbitrary approach. It should not consist in what someone finds the best for the child, but rather

¹⁹³ Nyman, Johanna, p. 93.

¹⁹⁴ The UNCRC was ratified by all UN members, except the USA and Somalia.

Kilkelly, Ursula, p. 246.

¹⁹⁵ Costa, Jean-Paul (2011), p. 2.

¹⁹⁶ Hammarberg, Thomas, p. 4

¹⁹⁷ Llorens, Jorge Cardona. p. 12.

¹⁹⁸ *Ibid*, p. 12.

¹⁹⁹ Khazova, Olga, p. 28. This author also adds that: “Therefore, as stated in General Comment No. 14, its content “must be determined on a case-by-case basis”. What is in the best interests of one child may not be in the best interests of another child in a similar situation.”

²⁰⁰ In this regard, Costa adds that: This leads me to remark that while the prominence of the best interest principle is well established, what it requires in a given set of circumstances must be ascertained case by case, with all Convention-protected rights and interests being brought into the balancing exercise. Costa, Jean-Paul (2011), p. 5

in what, objectively, secures the child overall development and the full realization of his or her human rights.²⁰¹

The UNCRC, in its progressive approach, considers the best interest a general principle and an umbrella provision for the whole convention. This principle is a guide to interpret the other UNCRC provisions and it is also grounded in that Convention's substantive provisions.²⁰² A preliminary outline of such principle definition would consist in the sum of the UNCRC norms.²⁰³

That definition has the benefit of providing a universal interpretation of what is the child best interests. Anyway, variances will inevitably arise during the actual practice process, requiring an accurate "balancing of competing interests or the child's interests over time".²⁰⁴

The best interest of the child is not only a right and a principle, but also a procedural rule.²⁰⁵ Thus, the best interest of the child shall be taken as a paramount consideration regarding government implementation measures and administrative and judicial decisions concerning children. It also shall bind the private sector and persons who work with children.²⁰⁶

The best interest is a "unique provision in a human rights treaty,

²⁰¹ *Llorens, Jorge Cardona*. pp. 12 and 13.

²⁰² *Hammarberg, Thomas*, pp. 3-6

²⁰³ "Though necessarily general and incomplete, a reasonable first building block towards the definition of what is in the best interests of the child is the sum total of the norms in the Convention. This means, for example, that it is in the best interests of the child to: receive education (Art. 28); have family relations (Art. 8); know and be cared for by his or her parents (Art. 7); be heard in matters concerning him or her (Art. 12), and to be respected and seen as an individual person (Art. 16). In the same way, the Convention states what is not in the best interests of the child: for instance, to be exposed to any form of violence (Art. 19); to be wrongly separated from his or her parents (Art. 9); to be subjected to any traditional practices prejudicial to the child's health (Art. 24); to perform any work that is hazardous or harmful (Art. 32), or to be otherwise exploited or abused (Arts. 33-36)" *Hammarberg, Thomas*, p. 5.

²⁰⁴ *Hammarberg, Thomas*, p. 5.

²⁰⁵ *Llorens, Jorge Cardona*, p. 16.

²⁰⁶ United Nations Committee on the Rights of the Child (2013), General comment No. 14, p. 5.

establishing a principle to guide decisions and actions affecting the lives of children both individually and collectively.”²⁰⁷ This principle acknowledges that children are subjects of human rights just like adults. Nonetheless, unlike adults, children do not have a presumptive autonomy and the possibility to make independent decisions relating to their own lives.²⁰⁸

So, this principle provides boundaries and guidelines for the adults empowered to make decisions on behalf of children, ensuring that these decisions will lead to the overall well-being of the child. Nevertheless, due to its flexibility, if misunderstood, this principle can be used to justify any actions that adults with power over children opt for making.²⁰⁹

Therefore, the assessment of the best interest of the child is complex and varies on a case-by-case basis. It must consider each child’s specific circumstances and, especially, the child own voice regarding the decisions that will affect his or her life.

4.1.1.1 The child Participation in the Assessment of his or her Best Interest

Another inherent aspect of this principle is the empowerment of children as right holders and not only mere subjects of protection. That is reflected in the children participation²¹⁰ in the assessment of what is his or her best interest.

²⁰⁷ Lansdown, Gerison, p. 31.

²⁰⁸ *Ibid*, p. 31.

²⁰⁹ Gerison Lansdown address some examples of the misappropriation of this principle: “History is littered with examples of adult policies and actions, promoted at the time as being in the best interests of children, but subsequently discredited – for example, the evacuation of children during the Second World War, the refusal to allow mothers contact with children in hospital, corporal punishment, the institutionalisation of children or the application of shock treatments to “cure” children with disabilities. In other words, adults are far from omniscient in respect of their capacities to determine children’s best interests.”*Ibid*, p. 31.

²¹⁰ The right of participation is also established by Article 12 UNCRC, which states that: “A child capable of forming a view on his or her best interests must be able to give it freely and it must be taken into account.”

The participation right²¹¹ means that the child has the right to have a voice in decisions affecting him or her. The children's views should be considered and given weight in the decision making. As the *United Nations Committee on the Rights of the Child* underpins, listening to the child is an essential feature of his or her best interest assessment. Thus, the best interest cannot be determined without listening the child concerned.²¹²

The children empowerment through the right of participation is fundamental, especially in light of the necessity to move forward from the traditional and paternalistic mindset. Such mindset perceives adults as the ones who supposed to frame all the children rights and have the final²¹³ (and only) say in determining the best interest of children.

According to the welfare approach children's necessities are determined by "adults on their behalf and sometimes those needs are not given" the importance they deserve. Since "there is no conceptual barrier to having them subsumed into the needs of other individuals or groups. They are not always a full part of the equation."²¹⁴

Nonetheless, it is necessary to overcome this view and move to a perspective that considers children as subjects who have an inherent value and can participate in the determination of their own rights, this is fundamental in order to eliminate those barriers.²¹⁵

²¹¹ The participation right is together with the best interest of the child one of the UNCRC general principles. In this regard, *Johanna Nyman* adds that: "participation rights enshrined in Article 12 of the UNCRC are one of the unique features of the convention." *Nyman, Johanna*, p. 94.

²¹² *Ibid*, p. 93 and 94.

²¹³ *Ibid*, p. 94.

²¹⁴ *Logan, Emily*, p. 3.

²¹⁵ *Ibid*, pp. 3 and 4.

The child participation shall be a function of his or her age and maturity, the increasing of these factors must determine an equal raising of his or her ability to influence the decision.²¹⁶

4.1.1.2 The Principle of the Best interest of the Child as a Primary Consideration

According to the *United Nations Convention on the Rights of the Child* such principle shall be a primary consideration. “That means that the best interest of the child may not be considered on the same level as all other considerations.”²¹⁷

This position is justified by the children’s peculiar characteristics, concerning their dependency, legal status, maturity and, frequently, lack of say. Unlike adults, children have a low possibility to make a strong case for defending their own interest and the adults involved in the decision-making must be aware of the children’s interests. If those interests are not emphasized, they will be ignored and forgotten.²¹⁸

In the case of collision between the child’s best interest and other interests, the decision-maker must cautiously balance the interests of all parties in view to finding an appropriate compromise. In those cases, in which harmonization is not possible, the authorities need to weigh all rights involved in light of the perspective that the child has the right to have his or her best interest treated as a primary consideration. So, the child’s interests shall be ranked “high in priority and are not one consideration among others”²¹⁹.

Nevertheless, the primary consideration provision does not state that the children’s interest shall always come first. The

²¹⁶ *Hammarberg, Thomas*, p. 5.

²¹⁷ *Llorens, Jorge Cardona*, p. 16.

²¹⁸ *Llorens, Jorge Cardona*, p. 16.

²¹⁹ *Ibid*, p. 16

objective of this rule is not to trespass other persons' rights, but to ease the examination of the interest of the children as a vulnerable group.²²⁰

4.1.2 The Right of the Child to Survival and Development

According to the *Declaration of the rights of the Child*: “The Child should enjoy special protection and facilities (...) to enable him” or her “to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in condition of freedom and dignity.”²²¹

This Declaration was one of the first documents²²² to ensure the right to development in a holistic way, also addressing the importance of education, family life and protection against violence and cruelty to achieve a harmonious development.²²³

The UNCRC has also guaranteed this right, together with the right to survival, in its article 6(2).²²⁴ The provision encompasses various aspects of development. These both rights provide children with an intrinsic right to life, and establish the positive obligation of the state (and also the supranational and international levels of protection) to assure the child's rights to life, protection and development.²²⁵

The right to development is also related to the right of participation, since the right of the child to have a voice and

²²⁰ Logan, Emily, p. 3

²²¹ Declaration of the Rights of the Child (1959), principle 2.

²²² The Convention of Geneva has also regard this right. But due to the inter-complementarity between the UN documents, just the Convention of 1959 will be addressed in this section.

²²³ Mahgoub, Khadeija Elsheikh, p. 13 and 14.

²²⁴ Both rights are closely related. “Since the right to survival is a dynamic concept and incorporate all steps that” must be taken to ensure children healthy development. Kaime, Thoko, p. 113

²²⁵ Kaime, Thoko, p. 111.

have agency is a significant element of his or her development.²²⁶

Unlike the right to development, the right to survival was a novelty of the UNCRC. The relevance of this right relates to the fact that survival is a crucial prerequisite for the enjoyment of all the other human rights. Such a right includes the right of life in the civil, political, social, economic and cultural aspect. Furthermore, a life of human dignity shall be guaranteed, what includes the access to adequate life standards, housing, nutrition and health²²⁷.

The right of the child to survival and development is one of the general principles of the UNCRC, as it was mentioned above. This principle is also an objective of the complete substantive part of the Convention. Additionally, the respect of the rights to survival and development implies in: I) the protection of the child against torture and other cruel treatment; II) the safety of the child; III) the right to participation;²²⁸ IV) the right to enjoy the family environment.²²⁹

Moreover, the child's right to a physical, mental, spiritual, moral, social and psychologic development shall be implemented in light of the Principle of Human Dignity²³⁰, since this principle provides a quality factor to those rights.²³¹

²²⁶ Peleg, Noam (2013), p. 529-530 and 533.

²²⁷ Kaime, Thoko, pp. 111 and 112.

²²⁸ Which is a factor of the child social development. Mahgoub, Khadeija Elsheikh, p. 136.

²²⁹ *Ibid*, pp. 135-137.

²³⁰ In this regard, the Committee on the Rights of the Child affirms that dignity is the core value of the Convention." *Ibid*, p. 156

²³¹ *Ibid*, p. 141 and 157.

4.1.3 The Right to Family Life

According to the UNCRC, every child has the right to remain with the family unless it contradicts his or her best interest.²³²

The family is also considered as the best environment to assure the child's appropriate development.²³³

The ECtHR²³⁴ adopts a progressive concept of family which does not include solely the legal ties, but also considers the effective existence of a personal and affective relationship resultant of a life in common.²³⁵

The Committee of the United Nations Convention on the Rights of the Child underlines the relevance of the family life for the child. It denotes family²³⁶ as “the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children”.²³⁷

The right to family life between a child and a parent shall be protected by the national law – and also the supranational and international levels of protection. The common enjoyment of each other's company is an aspect of this right. So, where a family tie is established, the development of this tie shall be

²³² Article 9 UNCRC.

²³³ *Mahgoub, Khadeija Elsheikh*, p. 15 and 16.

²³⁴ On the other hand, the CJEU established a narrower definition of family considering the traditional conceptualization of family, in light of the directives 2004/38/EC and 2003/86/EC. Nonetheless the EU political institutions are in favour of a more progressive approach. *Buttigieg, Eugene*, p. 106.

²³⁵ *Guerra, Luis Lopez*, p. 11.

²³⁶ For the Committee, the concept of family is broad and functional, which reinforces its role as the safe harbour which guarantees the children well-being. For the Committee family definition “includes to a variety of arrangements that can provide for young children's care, nurturance and development, including the nuclear family, the extended family, and other traditional and modern community-based arrangements, provided these are consistent with children's rights and best interests.” *United Nations Committee on the Rights of the Child* (2006), p. 7.

²³⁷ *Ibid*, p. 7.

protected and measures to enable that parents and child are reunited have to be undertaken.²³⁸

According to the UNCRC Committee growing up without a family can bring severe risks to the child development. Ergo, in such cases the state shall ensure the healthy and normal development of the child and also create an adequate environment to allow this full development.²³⁹

In this regard, as a complement of the child's right to family life, article 20 of the UNCRC guarantees that the public authorities shall assure special protection and assistance for those children permanently or provisionally deprived of their family environments.²⁴⁰

The family is the primary locus of development and socialisation of the child, thereby the family life shall be an essential guarantee in view to ensure the child's best interest. Moreover, if the child cannot have access to the family environment, he or she is entitled to a special assistance and protection in order to continuing his or her harmonious and healthy development.

4.2 The rights of the Children in light of the Multilevel Protection

The rights of the child will be here examined in view of the national, supranational and international layers of protection. In the national level of protection, the principle of the best interest of the child will be emphasized.

In the two other levels, at first, the general framework on children's rights will be analysed, then the principle of the best interest of the child will be approached. Regarding the EU level,

²³⁸ Choudhry, Shazia, p. 350.

²³⁹ Peleg, Noam (2012), p. 380.

²⁴⁰ Hearst, Alice, p. 336.

the EU competence to legislate and take action on children's rights will be also discussed.

4.2.1 The Rights of the Child under the National Level of Protection

Due to the extent and aim of this thesis the rights of the children under the MS national law will be shortly addressed. For this reason, this section will solely underpin the principle of the best interest of the child.

Most of the MS' jurisdictions include the principle of the best interest of the child in their legal framework. In some Member States, this principle is stipulated by their constitutional outline and has a guiding force in decision making²⁴¹. In some other MS²⁴², such principle is present in their relevant legislations. In three MS' national legislations²⁴³ this principle is not guaranteed at all.²⁴⁴

Nevertheless, some national legislations only state that the best interest of the child shall be considered, without asseverate that this principle should be a primary paramount consideration.²⁴⁵

A general analysis of the MS legal framework provides the conclusion that judicial measures which pursue the effective implementation of the best interest of the child are more strongly developed in some areas. The development is higher in ambits such as family and placement into care than in other

²⁴¹ E.g. Belgium, Hungary, Slovenia and Spain.

²⁴² In instance Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Greece, France, Italy, Lithuania, Luxembourg, Malta, Slovenia, Slovakia, Spain, Sweden and the United Kingdom.

²⁴³ In Cyprus, Estonia, Ireland this principle is not enshrined in the national legislations. *Tuite, Margaret*, p. 88.

²⁴⁴ *Ibid*, p. 88.

²⁴⁵ *Ibid*, p. 89.

law areas – as the asylum and immigration law. This lack of effectiveness regarding the principle is extremely problematic, due to the fact that the best interest principle shall be the primary consideration in all cases relating to children’s rights.²⁴⁶

Therefore, in general lines this principle is insufficiently protected under the national level of the Member States. To mitigate this issue and its dangerous consequences for the children’s rights protection, the Commission will examine how it can contribute to guarantee that “the determination of the best interests is properly and objectively” done to further enshrine the human rights of children, according to the European Commission Coordinator for the rights of the child, *Mrs. Margaret Tuite*.²⁴⁷

4.2.2 The children’s Rights under the Supranational Level of Protection

Historically, the children’s rights in the EU were truly fragmented and addressed only some “specific children-related aspects of broader economic and politically driven initiatives”. Such as features regarding children in the fields of free movement of persons and consumer protection.²⁴⁸

Only in the 2000s, the EU start to address the children’s rights in a more broader way. Its children’s law more coordinated framework is based in three landmarks: I) the introduction of CFREU; II) the adoption of the Treaty of Lisbon; III) the “adoption of the European Commission Communication on a special place for children in EU external action”, and “the

²⁴⁶ *Tuite, Margaret*, p. 89

²⁴⁷ *Ibid*, p. 89.

²⁴⁸ *Fundamental Rights Agency/ Council of Europe* (2015), p. 20

Council EU Guidelines for the promotion and protection of the rights of the child.”²⁴⁹

The Treaty of Lisbon expressly recognize the protection of the child as one of the EU’s main objectives, which is reflected in its internal agenda and its external relations. According to article 3 TEU, the EU shall promote the protection of the children’s rights. Furthermore, it adds that in “its relations with the wider world” the EU must collaborate to the protection of the human rights, specially, regarding children.²⁵⁰

Moreover, article 2 TEU establishes that the respect for fundamental rights is one of the EU core values. The Treaty of Lisbon has further collaborated to enhance EU’s capability to enshrine the rights of children, by giving binding force to the Charter of Fundamental Rights.²⁵¹

The CFREU improved the visibility of the children’s rights in the EU framework.²⁵² Particularly in its article 24²⁵³, which provides the children’s rights to: protection, participation and contact with both parents. This article also ensures the best interest of the child as a primary consideration to guide all actions regarding children.²⁵⁴

The EU must guarantee the right to such safeguards and care as is required for the children’s well-being. Principally in those situations in which children need protection against negligence,

²⁴⁹ *Ibid*, p. 20

²⁵⁰ *Fundamental Rights Agency/ Council of Europe* (2015), p. 18.

²⁵¹ *Ibid*, pp. 18 and 19.

²⁵² The European Parliament also adds that: “The Charter establishes specific rights relevant to children, such as Article 14 establishing a right to education and Article 32 prohibiting child labour and providing guarantees for the protection of young people at work.” European Parliament (2012), p. 19.

²⁵³ This article reflects international standards on children’s protection, such as the UNCRC. *Ibid*, p. 23.

²⁵⁴ European Parliament (2012), p. 19.

abuse and violation of their rights, and against conditions that compromise their wellbeing.²⁵⁵

4.2.2.1 EU Competence Regarding Children Protection

The Charter and the Treaty of Lisbon established legal grounds for the EU action in the area of children protection. Even though, none of these documents confers a competence to the EU as a general policy area, these provisions establish an obligation for the EU to take measures oriented to the accomplishment of children's rights.²⁵⁶

Notwithstanding, the absence of a categorical competence to legislate on the rights of children, EU actions linked to those rights have an immediate impact on the policies and law related to children in the Member States.²⁵⁷

Additionally, several particular competences under the Treaties enable the EU to take specific positive actions to enshrine and promote the rights of the children. Various instruments and methods can be adopted, such as soft law, legislative action, political dialogue and financial assistance. But, any act undertaken by the EU must respect the principles of subsidiarity and proportionality and cannot trespass the competences of the MS.²⁵⁸

The *Commissioner for Justice, Fundamental Rights and Citizenship* holds the responsibility for policies concerning children. However, other EU institutions can likewise take

²⁵⁵ *Ibid*, p. 19.

²⁵⁶ European Parliament (2012), p. 20.

²⁵⁷ *Ibid*, p. 20.

²⁵⁸ European Commission (2016), p. 3.

specific actions targeting the “fulfilment of children’s rights within their area of competence.”²⁵⁹

The Commission has taken part in advancing the children’s rights in the European Union “through its Communication ‘*An EU Agenda for the Rights of the Child*’”. This “Agenda aims at stepping up efforts in protecting and promoting the rights of children in all relevant EU policies and actions”. Further, it intends to ensure the respect to the rights of the children encompassed in the Treaties provisions, CFREU and the United Nations CRC. The Commission is also entrusted to monitor the respect to fundamental rights in the EU, which includes the children’s rights.²⁶⁰

4.2.2.2 The Principle of the Best Interest of the Child under the EU law

As it was noted above, the *principle of the Best Interest of the Child* is expressly mentioned in article 24²⁶¹ of the CFREU. The EU is then binding to consider the best interest of the child when adopting a decision that affects children.

Furthermore, the principle of the best interests of the child as a primary consideration is solidly entrenched in numerous pieces of EU legislation, in instance the *2003 Brussels II a Regulation*, *Directive 2011/36/EU* on trafficking in human beings, *Directive 2011/93/EU* combating the sexual abuse and sexual exploitation of children and child pornography, and the *Dublin III Regulation 604/2013*.²⁶²

4.2.3 The Rights of the Child under the International Level

²⁵⁹ European Parliament (2012), p, 20.

²⁶⁰ *Ibid*, p. 21.

²⁶¹ With regard to the best interest of the child article’s 24 “formulation is almost identical word for word to the wording of Article 3.1 of the UNCRC”. *Tuite, Margaret*, p. 86.

²⁶² *Ibid.*, p. 86.

of Protection

Although the ECHR does not comprehend a definition of what is a child,²⁶³ its Article 1 establishes that all State Parties have to ensure the Convention rights to everyone within their jurisdiction. Moreover, article 14 of the ECHR assures the enjoyment of the rights set in its instrument “without discrimination on any ground”, which includes grounds of age. The ECtHR has been accepting applications by and on behalf of children regardless their age.²⁶⁴

4.2.3.1 The Protection of Family Life under the ECHR

The ECHR contains only two express references to children, so its potential to safeguard children’s rights cannot be instantly implied by its text. Nevertheless, its provision regarding the protection of private and family life (present in article 8 ECHR) has a singular importance for children.²⁶⁵

For this reason, the ECtHR has developed its case law regarding children rights through plentiful interpretative approaches, which comprises the highlight of the effective rights protection. The Court has also relied in children’s rights instruments – remarkably the UNCRC – to assure that its jurisprudence echoes the current standard on children’s rights.²⁶⁶

One of the foremost contributions of the ECtHR to children’s right was its recognition of family ties²⁶⁷. This Court promoted a

²⁶³ Nonetheless, as it was noted above – in light of the ECtHR jurisprudence – the Convention system adopts the UNCRC definition of child, persons bellow 18 years old. *Fundamental Rights Agency/ Council of Europe* (2015), p. 18.

²⁶⁴ *Ibid*, p. 18.

²⁶⁵ *Kilkelly, Ursula*, p. 245.

²⁶⁶ *Ibid*, p. 245.

²⁶⁷ This jurisprudence was developed through the case *Belgium v. Marckx*, in 1979. The Marckx case was referred to the ECtHR by Ms. Paula Marckx (an unmarried mother), acting on behalf of herself and of her infant daughter. The Belgium law required the mother to take some steps in order to have her tie with her daughter

child-centred approach relating to the recognition of family relationship and emphasized the positive obligation to respect the right to family life. The ECtHR determine that the right to family life shall enable the child integration with his or her family from the moment of the birth.²⁶⁸

Through its further case-law²⁶⁹ the Court continued to develop a child-focused concept of family, underpinning the state obligation to provide a positive protection of the right to family life. In its jurisprudence²⁷⁰ this Court also emphasised the importance of the reunion between parent and child, based on its comprehension that the passage of time can have irreversible consequences in the relationship of child and parent that are separated of each other.²⁷¹

Additionally, the Council of Europe has developed other documents to protect children's social and economic rights. The European Social Charter encompasses specific provisions regarding children, as article 7 on the right of children (and young persons) to protection and article 17 on the right of the children to social, legal and economic protection. Other provisions of this Charter have a particular relevance for children, as the right of the family to social, legal and economic protection, the right of migrant workers and their families to

legally recognized. "The applicants complain of the Civil Code provisions on the manner of establishing the maternal affiliation of an "illegitimate" child and on the effects of establishing such affiliation as regards both the extent of the child's family relationships and the patrimonial rights of the child and of his (or her) mother. The applicants also put in issue the necessity for the mother to adopt the child if she wishes to increase the child's rights." ECtHR Judgment in *Marckx v. Belgium*, application No. 6833/74, 1979, para 1 and 13.

²⁶⁸ *Kilkelly, Ursula*, p. 248 and 249.

²⁶⁹ For instance, in the ECtHR judgements: *Johnston v Ireland* (application number 9697/82, 1986) and *Kroon v Netherlands* (application number 18535/91, 1995).

²⁷⁰ E.g. In the ECtHR judgement *Ignaccolo-Zenide v Romania*, application number 31679/96, 2000.

²⁷¹ *Kilkelly, Ursula*, pp. 251-253 and 256 and 257.

protection and assistance, the right to education, and the right to protection of health.²⁷²

The Council has, also, draft or supported other binding documents²⁷³ related to children's rights, such as the *European Convention on the Repatriation of Minors* and the *European Convention on the Exercise of Children's Rights*. The latter contains "provisions aimed at protecting the best interests of children and promoting their rights."²⁷⁴

4.2.3.2 The Principle of the Best Interest of the Child under the Convention System

The principle of the best interest of the child has gradually moved to the front of legislation and case law in Europe and other places. In the ECtHR jurisprudence, this principle has been sturdily established, the Court has applied such principle over the years, starting with the re-uniting of children and parents.²⁷⁵

The principle of the best interest has added a significant value to the Council of Europe work. The Council is working in various ways in order to endorse this principle and guide its State Parties to provide a balanced application of the principle of the best interest of the child²⁷⁶.

Nonetheless, the principle has an abstract character and allows different applications depending on the situation. On one hand,

²⁷² European Parliament (2012), p. 11.

²⁷³ Furthermore, the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (...) and various conventions regarding family life, in particular on the adoption and custody of children, have been adopted under the Council of Europe's leadership to promote and protect children's well-being. Finally, the Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice, seeks to enhance children's access to and treatment in justice. European Parliament (2012), p. 11 And 12.

²⁷⁴ *Ibid*, p. 11.

²⁷⁵ *Costa, Jean-Paul Costa* (2011), p.2.

²⁷⁶ *Jensdóttir, Regína*, p. 85.

this flexibility shall be conserved and is not recommended to set a clear definition of what this principle comprehends. On the other hand, there is a need for an “agreed determination procedure”²⁷⁷, in order to avoid arbitrariness.

In light of this situation, the Council’s essential role is to establish sufficiently clear legal standards for legislators and practitioners apply this principle. Guaranteeing, therefore, that the best interest of the child has been considered at all pertinent levels.²⁷⁸

Nonetheless, currently, the best interest of several “children in Europe are not determined as they should”²⁷⁹ – this statement applies, even more in the case of refugee children. This reality must be shifted and the children’s human rights shall be ensured. The child’s best interest has to be taken as a primary consideration, specially, when it conflicts with the rights of other – non-vulnerable – groups.

4.3 In particular: The rights of Refugee Children

This section will deal with the rights of refugee children and their best interest. At First, the hazardous situation to which these minors are exposed will be underlined. Then, some rights of these children will be addressed, especially regarding the European Multilevel System.

Further, the best interest of the children refugee will be studied, and some specificities of the assessment of the best interest of such vulnerable children will be underpinned.

4.3.1 Refugee minor’s rights

Typically, more than 50% of any refugee population are

²⁷⁷ *Ibid*, p. 85

²⁷⁸ *Ibid*, p. 85.

²⁷⁹ *Ibid*, p. 85.

children. “Refugee children are children first and foremost, and as children, they need special attention.” Children are vulnerable, dependent and they are developing²⁸⁰. They are much more susceptible to malnutrition, illnesses and physical injury than adults. Further, they need the support and rearing of adults, for physical survival – in the early years – and also to have a social and psychological welfare²⁸¹.

Nevertheless, refugee children face far higher risks to their safety and well-being than any average child. The abrupt and violent onset of emergencies, the disturbance of their families and community structures and the critical shortage of resources to which most refugees are subject, deeply impact the “physical and psychological wellbeing of refugee children”.²⁸²

Additionally, “infants and young children are often the earliest and most frequent victims of violence, disease and malnutrition which accompany population displacement and refugee outflows”²⁸³ and due to the chaos of the emergency situation or the unsafe routes to Europe a lot of children are affected by the separation of their families.

The refugee children are daily facing a lot of adversities, what affect their normal development. So, they need a special protection from the host state in order to be able to fully enjoy all their human rights and have a healthy development.

In light of this need, the UNCRC article 22 (1) provides that the states shall ensure that an asylum seeker or refugee child receive the suitable protection and humanitarian support to be

²⁸⁰“Children are developing. They grow in developmental sequences, like a tower of bricks, each layer depending on the one below it. Serious delays interrupting these sequences can severely disrupt development.” UN High Commissioner for Refugees (1994), p. 7.

²⁸¹*Ibid.*, p. 6.

²⁸²*Ibid.*, p. 6.

²⁸³*Ibid.*, p. 6.

able to enjoy his or her human rights guaranteed by the Convention and other human rights instruments²⁸⁴ – like the CFREU and ECHR.

As it was pointed, there is no provision regarding refugees' rights under the European Council System. Nevertheless, the right to respect for family life in the ECHR's article 8 is often applied in cases involving refugee children rights, especially, in situations related to the child separation from family members. Interpreting this provision, the Strasbourg Court has found that such separation is likely to have a severe negative impact on the child's social and emotional stability, education and identity.²⁸⁵

Differently, the EU law contains special provisions comprising the rights of refugee children in accordance with the UNCRC's standards. Furthermore, due to above mentioned EU competence regarding asylum, the CFREU applies when a MS is implementing EU law on the Asylum Policy field (the CEAS framework).

Consonant to the international protection procedures, children are vulnerable persons and the MS are required to consider their specific situation when implementing EU law. This entails the MS to identify and accommodate the special needs that asylum-seeking children may have when they enter the host state.²⁸⁶

The above alluded "article 24 of the *EU Charter of Fundamental Rights* applies to the entry and residence requirements of the EU asylum acquis as it relates to children." Thus, it is required that in all actions concerning children the Member States

²⁸⁴ UNCRC, article 22.

²⁸⁵ *Fundamental Rights Agency/ Council of Europe* (2015), p. 166.

²⁸⁶ *Fundamental Rights Agency/ Council of Europe* (2015), p. 165.

ensure that the best interest of the children is a primary consideration.²⁸⁷

This core principle is also underpinned by the implementation of the Directive²⁸⁸ on common procedures for granting and withdrawing international protection and the *Dublin Regulation* as they relate to children²⁸⁹.

Furthermore, the EU provide a 10 principles framework for the protection of children in migration, what includes: children participation; non-discrimination, support to the family; adequate and well-trained professionals in the child protection system; and a cross-board and transnational system of protection.²⁹⁰

In the EU framework, there are also specific provisions related to unaccompanied minors and their particular rights. Among these instruments there are binding and non-binding provisions, which will be further addressed in the section 5.

4.3.2 Refugee Children's Best Interests

As it was mentioned, the *Principle of the Best Interest of the Child* is very flexible and its implementation varies according to each child specific situation. Thus, the assessment of the best interest of any refugee child shall consider his or her specific situation as a refugee, the family structure and any trauma or harm that the child has suffered.

The host country should do a careful assessment of each child refugee best interest, in light of article 24 of the *EU Charter on Fundamental Rights*. This assessment shall contemplate the child's identity and idiosyncrasies and in his or her family and

²⁸⁷ *Ibid*, p. 165.

²⁸⁸ Directive 2013/32/EU.

²⁸⁹ *Fundamental Rights Agency/ Council of Europe* (2015), p. 165.

²⁹⁰ European Commission, 10 Principles for integrated child protection systems.

social context (regarding also the home country and the displacement historical).

Thus, after any refugee child arrives in a MS, his or her best interest shall be determined by an assessment. Before making any decision, the public authorities are obliged (according to the decision-making migration procedure) to obtain all the necessary information about the recently arrived (or unknown) child and interpret this information in view of the principle of the best interest of the child.²⁹¹

This assessment shall also consider the vulnerability of the child towards determining the necessary quality of the rearing environment. Since more vulnerable children need a higher qualification of the family (or foster family) and the social surroundings in order to have their safe and good development assured.²⁹²

The decision about a refugee or asylum-seeking child needs shall be based on his or her right to development. So, if a child is in risk in the host country, the public authorities must intervene to ensure the safety and development of this child. Particularly regarding recently arrived children is relevant to appraise whether their development was damaged before they fled and if “the perspectives on improvement of these conditions

²⁹¹ In this regard, this author also adds that: “Research on newly arrived refugee children has shown that it is important to know which and how many stressful life events a child has experienced before arrival in the host country as well as the duration and severity of these events. Relevant experiences that should be taken into account in this process are exposure to violence, separation and loss of close relatives, feelings of being in danger prior to and during the flight, family situational changes, physical maltreatment, extreme poverty and the circumstances of life in a refugee camp outside the home country. The most common mental health problems children face upon arrival are post-traumatic stress disorder, depression and several anxiety disorders”. *Os, Carla van*, p. 71 and 72

²⁹² *Ibid*, p. 72.

for development” are safeguarded in case these children return²⁹³ (if their applications for asylum are denied).

The assessment of the child’s best interest shall be made in an even more cautious manner when related to unaccompanied minors, due to their additional hardship of being deprived of their primary caregivers and families.

5. The Enforcement of Unaccompanied Minors’ Best Interest in light of the Multilevel Protection

5.1 The European Multilevel Provisions and Policies on Unaccompanied Minor’s Protection

Besides the right of any refugee child to protection and humanitarian assistance, the above alluded article 22 UNCRC establishes additional safeguards to unaccompanied minors.

According to this article the states parties shall provide the appropriated cooperation to protect and assist the unaccompanied children. Those states shall also trace these minors’ parents or relatives in order to obtain the necessary information to promote the family reunification.²⁹⁴

In the case in which no family member can be found, the unaccompanied child is entitled to the same level of “protection as any other child permanently or temporarily deprived of his or her family environment.” That protection is addressed by article 20 of the Convention, which establishes that a child who endures such deprivation shall be granted state’s special protection and assistance.²⁹⁵

²⁹³ *Os, Carla van*, p. 73

²⁹⁴ UNCRC, article 22.

²⁹⁵ UNCRC, article 20.

As it was already mentioned, the UNCRC is a guide for the application of EU²⁹⁶ law in the matters concerning children and it is an interpretative tool for the Strasbourg Court²⁹⁷. Furthermore, all EU member states are parties of the UNCRC, so any unaccompanied minor shall be accorded such protection and assistance also under the national law framework.

Thus, the UNCRC and its core principle – the best interest of the child – have a high relevance under the 3 studied levels of protection. The EU law level comprehends a specific framework regarding unaccompanied minors, what will be analysed in this section. The focus will be the protection of these vulnerable migrant children under the *Dublin-III Regulation* and the *Action Plan on Unaccompanied Minors (2010-2014)*.

The ECHR has also an important role in the enforcement of vulnerable groups rights among its jurisprudence. Recently, it has supported the refugee children's right, especially of the UASC, to family reunification.

Furthermore, the Council of Europe has laid down some non-binding instruments related to the protection of unaccompanied minors, such as the *Strategy for the Rights of the Child* and the *Council of Ministers Recommendation n° 9*, which will be

²⁹⁶ Although, the EU is not a party of the UNCRC, “the European Commission recently stated that the ‘standards and principles of the UNCRC must continue to guide EU policies and actions that have an impact on the rights of the child. In addition, the Court of Justice of the European Union (CJEU) has expressly recognised the need to respect children’s rights and requires EU law to take due account of the UNCRC.” European Parliament (2012), p. 9.

²⁹⁷ “The obligations that the ECHR lays on its States Parties in the field of children’s rights more specifically must be interpreted in light of the CRC. The ECSR has also explicitly referred to the CRC in its decisions. Moreover, the standard-setting and treaty-making activities of the CoE are influenced by CRC principles and provisions.” Fundamental Rights Agency/ Council of Europe (2015), p. 28.

subject to further study later in this section.

Together with the *Fundamental Rights Agency* (hereinafter FRA), the Council of Europe has also elaborated a handbook²⁹⁸ – another non-binding instrument – to improve the awareness of children’s rights in Europe, which included the rights of unaccompanied minors.

5.1.1 European Union

There are several provisions regarding unaccompanied migrant minors under the EU level, and especially under the CEAS. Nevertheless, this section will focus on the above-mentioned *Dublin III Regulation*, which is the core of the CEAS, and establishes many requirements related to unaccompanied children. Furthermore, this section will address the *Commission Action Plan on unaccompanied minors* (2010-2014), which highlights numerous matters regarding the protection of these children.

5.1.1.1 Protection of unaccompanied minors under Dublin III

As it was mentioned in section 2, the *Dublin III Regulation* has achieved some progress regarding the protection of unaccompanied minors and family reunification.

Along those lines, the *Dublin III-Regulation’s* preamble explicitly refers to the aims of respecting family life, the best interest of the child²⁹⁹ – in accordance with the UNCRC – and to provide special guarantees for unaccompanied children. Furthermore, in light of those objectives (which are endorsed by the article 8 of this regulation) when an unaccompanied child applies for international protection, the presence of a family member or

²⁹⁸ Handbook on European law relating to the rights of the child.

²⁹⁹ Brandl, Ulrike, p. 150.

relative in another MS is a binding criterion for the allocation of responsibility.

This regulation has also made the definition of family wide, particularly regarding unaccompanied minors.³⁰⁰ For this vulnerable group, the clause of allocation of responsibility also enables the unification with the child's relatives³⁰¹, in case no family member is present.

These special responsibility rules regarding unaccompanied minors reflect the CJEU jurisprudence, "since it had already been de facto" established by the CJEU before the recast of Dublin III Regulation³⁰².

Another achievement of this regulation towards the children protection was the setting of criteria for the children's best interest assessment, e.g. the view of the child in accordance with his or her age and maturity level, family reunification possibilities, the child's safety and security and his or her wellbeing and development.³⁰³

Regarding the unaccompanied minors, *Dublin III* stipulates that the MS shall assure that these children are duly represented or assisted with respect to the procedures established in this Regulation. The *Dublin III*, likewise the *Reception Condition Regulation*, comprehends provisions on the tracing of these minors' family members.³⁰⁴

These provisions are essential since an evaluation results demonstrated that MS frequently did not sufficiently investigate

³⁰⁰ Brandl, Ulrike, p. 151.

³⁰¹ According to article 8 (2) of *Dublin Directive III*: for the family reunification take place the MS shall establish, based on an individual examination, that the relative can take care of the unaccompanied minor.

³⁰² Mouzourakis, Minos, p. 27.

³⁰³ Tuite, Margaret, p. 86.

³⁰⁴ Brandl, Ulrike p. 155.

if applicants have family members in other MS. Moreover, in view of the child's best interest³⁰⁵ the tracing procedure shall start as soon as the minor's application for international protection is made.³⁰⁶

Furthermore, any MS shall be able to derogate from the responsibility criteria, especially due to humanitarian and compassionate grounds. In view to reunite family members, relatives and other family relations³⁰⁷ and to guarantee a high level of protection of children, particularly the unaccompanied ones. The best interest of these vulnerable children shall prevail over the interest of the State.

5.1.1.2 The Action Plan on Unaccompanied Minors (2010-2014)

As it was stated, the Commission has a relevant role on monitoring the observation of the fundamental rights among the EU. Thus, to fulfil such role regarding a vulnerable group as the unaccompanied children, this institution has elaborated the *Action Plan on Unaccompanied Minors 2010-14*.

This plan was a response to the high number of unaccompanied minors in Europe, which affected all the MS. In 2009, the Commission announced an *Action Plan on Unaccompanied Minors*. Later in that year, the *Stockholm Programme*, endorsed by the European Council on December 2009, "welcomed the Commission's intention to develop an Action Plan, to be adopted by the Council, combining measures on prevention, protection and assisted return". The European Parliament, in its *Resolution on the Stockholm Programme*,

³⁰⁵ Brandl, Ulrike, pp. 155 and 156.

³⁰⁶ As it was confirmed by the CJEU in the case *Cimade/Gisti* (C-179/11). *Ibid*, p. 156.

³⁰⁷ United Nations High Commissioner for Refugees (2016).

insisted that such Action Plan should also approach issues as protection, durable solutions in the best interests of the child and cooperation with third countries.³⁰⁸

The action plan emphasises the need to respect the children's rights "as set out in the Charter of Fundamental Rights and the UNCRC, in particular the principle of 'the best interests of the child". Furthermore, it is essential to assure that any child who needs protection receives it, regardless his or her immigration status, and "that all children are treated as children first and foremost."³⁰⁹

The *European Migration Network* (hereinafter EMN) and the FRA have consulted the MS and civil society organizations and have identified numerous problems and solutions. These outcomes were presented in the action plan. The first problem found was the lack of sufficient data on unaccompanied minors.³¹⁰

Additionally, the plan established some main features for action, which are: "prevention, regional protection programmes, reception and identification of durable solutions". Protection and the "principle of the best interest of the child have been mainstreamed throughout all actions."³¹¹

This plan comprises housing these minors in adequate accommodations "and treating them 'in a manner that is completely compatible with their best interests". Thus, detention is justified uniquely as an exception and "should be 'used only as a measure of last resort, for the shortest appropriate period

³⁰⁸ European Commission, COM (2010)213 final, p. 2.

³⁰⁹ *Ibid.* p. 3 and 4.

³¹⁰ *Ibid.* p. 3.

³¹¹ *Ibid.* p.3.

of time and taking into account the best interests of the child as a primary consideration.”³¹²

A *Staff Working Document* was issued in 2017, to outline the development of the *Action Plan* between mid-2012 and the end of 2014 and also the progress of the plan’s main features in 2015 and 2016. According to this document, the migratory crisis has aggravated the “challenges posed by the arrival to the EU of vulnerable migrants” (and in particular unaccompanied children) due to the overall increase in the number of refugees fleeing to the EU. “The *European Agenda on Migration* and the Communication of February 2016 on the state of play in its implementation indicate that the protection of migrant minors”, and particularly of the unaccompanied children, “is a priority for the EU.”³¹³

The EMN elaborated a comparative study of MS policies and practices of how to protect unaccompanied minors in the period from their interception on the MS territory until the moment they were accorded a durable solution. Such analysis found good practices in the MS, but also highlighted some gaps and challenges that still need to be dealt with to guarantee that all unaccompanied children, irrespective “whether or not they are seeking asylum in the EU, benefit from the same level of protection.”³¹⁴

The outcomes of the *Action Plan* underlined by the *Staff Working Document* will be further developed in the section 5.2, regarding each specific practice that is necessary to guarantee the unaccompanied minors protection, as data collection and guardianship.

³¹² European Commission, COM (2010)213 final, p. 9.

³¹³ European Commission, SWD (2017) 129, p. 3.

³¹⁴ *Ibid*, p. 4.

5.1.2 Council of Europe

In 2007, The *Council of Europe's Council of Ministers* in its *Recommendation n° 9* created the *Life Projects*, which is a tool for unaccompanied children integration and also a durable solution for these minors. This project is child specific and considers each minor's juncture and personal profile³¹⁵ in light of the best interest principle.

It aims to develop the capabilities of minors, enabling them to acquire and improve the skills necessary to become independent, responsible and active in society. In view to achieve this, *Life Projects* pursues aims "relating to the social integration of minors, personal development, cultural development, housing, health, education and vocational training, and employment."³¹⁶

Additionally, under its *Strategy for the Rights of the Child (2016-2021)* the *Council of Europe* acknowledges the unaccompanied children precarious current situation besides the frequent human rights violations and privations that an average refugee child suffers. Furthermore, the strategy states that the principle of the best interests is habitually "neglected in asylum and immigration procedures".³¹⁷

Moreover, common practices like the "use of detention instead of child welfare protection", failures in assigning effective guardianship, "family separation and demeaning age assessment procedures are emblematic" of the variety of manners in which "migrant children fall through loopholes in

³¹⁵ Council of Europe (2007), p. 3.

³¹⁶ *Ibid*, p. 2.

³¹⁷ Council of Europe (2016), p. 9.

child protection frameworks”. These children also face a high risk of exploitation and traffic³¹⁸, specially the unaccompanied ones.

The strategy asserts that the rights of the refugee children will be protected and promoted by many Council's bodies, as the *Council of Europe Commissioner for Human Rights*. The state parties “will be supported in upholding their human rights obligations in line with the case-law of the ECtHR”, “the conclusions of the *European Committee on Social Rights*”, the Committee for the Prevention of Torture, the *Group of Experts on Action against Trafficking in Human Beings* and the *European Commission against Racism and Intolerance*.³¹⁹

The Council of Europe will also guide its state parties in taking a co-ordinated child rights based approach, considering also the Recommendations on *Life Projects* for unaccompanied migration minors. In this vein, special attention shall be given to the situation of unaccompanied children and to the connection between migration and trafficking of children.³²⁰

5.2 How the protection implementation stands currently

Notwithstanding that the *Dublin III Regulation* underpinned protective provisions and its legal basis under the *EU Charter of Fundamental Rights* and the ECHR Recommendation and Strategy, the rights of the unaccompanied minors are not being sufficiently and effectively implemented.

These vulnerable children are facing an even heavier hardship due to the Member States' shortcomings, negligence and frequent violations. As *the Council of Europe* has stated, the treatment carried out by the MS frequently ignores the principle

³¹⁸Council of Europe (2016), p. 9.

³¹⁹*Ibid*, p. 11.

³²⁰*Ibid*, p. 11.

of the best interest of the children.

This treatment further disregards the very peculiarity of children's situation, treating these unaccompanied minors – primarily or only – as migrants and not as children, ignoring also their special condition of vulnerable minors deprived of their family and normal development.

This section will deal with the multilevel protection implementation – emphasizing its shortcomings and gaps – in the relevant matters related to unaccompanied minors' protection, such as data collection, reception, missing children, family tracing and reunification. These inadequacies are currently undermining the human rights of unaccompanied migrant children.

The examination of these relevant matters will be made, specially, in light of the findings provided by the FRA 2016 and 2017 reports and the Commission's evaluation of the 2010-2014 Action Plan. Furthermore, the present analysis will highlight the importance of the principle of the best interest of the child in all issues involving unaccompanied minors and in different steps of the asylum procedure related to these children.

5.2.1 Data Collection

Data on asylum and migration compiled by the Member States and international organisations are not always comparable and do not effectively reflect the current situation of migrant children – accompanied or not³²¹. Thus, the identification and

³²¹ The FRA affirms in its 2017 Fundamental Rights Report that: "Research on the issue is generally sporadic. In Sweden, the County Administrative Board of Stockholm published a report on unaccompanied children. It contains some information on children who did not seek asylum but did visit transit accommodation for rest and food. According to interviews with the children, they place very little trust in the authorities and are aware that their chances of remaining

registration of vulnerable persons is still a challenge across MS.³²²

Despite the purpose of the *Action Plan of 2010-2014* to change this scenario, this situation persists. Additionally, the MS often just acknowledge the number of unaccompanied minors who applied for asylum. Furthermore, besides the minors who do not complete an application, there are the ones who are missing or are victims of human traffic. Without a sufficient data is difficult to plan and to implement any policy to address the needs and the best interest of such children.³²³

In the EU level, the Eurostat requires MS to provide data on migrants. But the data communicated is still very fragmented and the exact numbers of unaccompanied minors who go missing from reception and care facilities are not known. Furthermore, some EU Agencies, international organisations and networks (as the EMN) are also working to improve the availability of data concerning those children.³²⁴

The 2015 *European Migration Network Study* concluded that more systematic data collection by the MS, using common definitions on unaccompanied children, is necessary for informing policies directed to this especially vulnerable group.³²⁵

The common definition issue is preposterous, since the EU framework defines what is an unaccompanied child, as it was noted above.

5.2.2 Reception

in Sweden are slim. Meanwhile, UNHCR reported that, between January and September 2016, close to 20,000 unaccompanied children arrived in Italy, but the Italian authorities identified and registered only 14,225 unaccompanied children.” Fundamental Rights Agency (2017), Fundamental Rights Report 2017, pp. 181-182.

³²² *Ibid*, p. 181

³²³ European Commission (2017), SWD.

³²⁴ *Ibid*, pp. 6 and 7.

³²⁵ European Commission (2017), SWD, p. 12.

In the same vein of the *UN Committee on the Rights of the Child's General Comment No. 6* standards promoting family based care options, the *EU Reception Conditions Directive* requires that unaccompanied minors shall be placed according to this priority order: with adult relatives, with a foster family, in accommodation centres with special provisions for children or in other accommodation suitable for children.³²⁶

The directive also requires MS to take measures to prevent assault and gender-based violence, including sexual assault and harassment in the accommodation centres. Nevertheless, there are severe weaknesses in the reception system for unaccompanied minors. Due to the lack of sufficient “specialised facilities for unaccompanied children, despite Member States’ efforts, children are often accommodated in crowded first reception and transit facilities.”³²⁷

Moreover, “conditions at first reception facilities were reported to be inadequate in almost all Member States covered by FRA’s monthly overviews on the asylum and migration situation in 14 Member States.”³²⁸ According to the above mentioned action plan evaluation, in some cases minors have been “accommodated in closed facilities” in virtue of a “shortage of suitable alternative reception facilities”.³²⁹ This type of accommodation infringes the children’s rights to freedom, to a special protection and also impair their integration into society and development.

The FRA also noticed a disjunction between child protection systems and asylum or migration systems. Since, some accommodation options, care and child protection measures

³²⁶ Fundamental Rights Agency (2017), *Fundamental Rights Report 2017*, p. 183.

³²⁷ *Ibid*, p. 183.

³²⁸ *Ibid*, p. 183.

³²⁹ European Commission (2017), *SWD (2017) 129 final*, p. 68.

are only offered to minors without parental care who are nationals of the MS. These are not similarly³³⁰ provided to foreign unaccompanied children.³³¹

In some MS³³² there is an incessant lack of clear guidance and qualified staff to identify children at risk at registration and first reception. Furthermore, age assessment procedures have commonly not been applied at first reception facilities (specially in transit countries), nor have they been satisfactorily explained to the children.³³³

The absence of a clear identification and registration procedures is a particular shortcoming in the MS reception systems. This issue results in minors' disappearance, which leads to many risks, as abuse, sexual exploitation and trafficking. Children are also more likely to abscond from transit and temporary first reception facilities that do not comply with child protection standards.³³⁴

5.2.3 Missing Children

There is insufficient research to enable an overview of how many unaccompanied children went missing. On the one hand, several unaccompanied minors could be missing but not

³³⁰ E.g. in Italy, a new law regulates the minimum standards for first reception centres that provide care for unaccompanied children (...) The new law includes the possibility of creating temporary facilities with up to 50 places. Civil society organisations have criticised this, among other aspects of the new law, for contravening national frameworks on reception facilities, which promote communities of family-type care or small-scale facilities. They argue that the law could lead to the depersonalisation of relations, preventing the creation of a family-type atmosphere." Furthermore, "the CRC Monitoring Committee stated that the governments of France and the United Kingdom fell seriously short of their obligations under the CRC in relation to the Calais camp, where "hundreds of children have been subjected to inhumane living conditions, left without adequate shelter, food, medical services and psychosocial support, and in some cases exposed to smugglers and traffickers". Fundamental Rights Agency (2017), Fundamental Rights Report 2017, p. 183.

³³¹ *Ibid.*, P. 183.

³³² For instance, Italy. Fundamental Rights Agency (2016), Key migration issues

³³³ *Ibid.*

³³⁴ Fundamental Rights Agency (2017), Fundamental Rights Report 2017, p.183.

reported to the police, on the other hand, the lack of a central registry may lead to double registrations. Nonetheless, Europol asseverates that more than 10,000 unaccompanied children went missing³³⁵ in 2015³³⁶.

The missing children phenomenon gives rise to grave concerns, and the information on these children is incomplete and fragmented. A 2013 Study on missing children revealed that responses to this issue are often different across MS, “and suggested a provisional set of common EU-wide indicators on missing children that could be used for comparative analysis³³⁷”.

Under the EU level of protection, the Union has funded numerous projects on missing unaccompanied children which assessed this phenomenon and made several recommendations, as the *Italian SIS SIRENE project - Vigila et Protégé*³³⁸ and the *the SUMMIT project*³³⁹.eu. One of the SIS

³³⁵ FRA also brings some data relative to 2016: by September 2016, 427 unaccompanied children had gone missing in Denmark, in Finland and 6,357 in Italy. In February 2016, about 90–95 % of unaccompanied children in Hungarian reception centres went missing, as did 80 % of those in Slovenia. In January 2016, 4,749 unaccompanied child and adolescent refugees in Germany were considered to be missing. In May 2016, 1,829 unaccompanied minors seeking asylum were registered as missing with the Swedish Migration Agency. In Slovakia, “[a]lmost all the children placed in foster homes in the past five years have disappeared and no specific effort has been made to find them”, the Committee on the Rights of the Child stated in its concluding observations.” *Fundamental Rights Agency* (2017), *Fundamental Rights Report 2017*, p. 183.

In its August 2017’s monthly report FRA stated that: “In Hungary, unaccompanied children below the age of 14 continued to be transferred to the children’s home in Fót, from where they typically go missing”. *Fundamental Rights Agency* (2017), *Monthly data collection on the migration situation in the EU August 2017*, p. 12.

³³⁶ *Fundamental Rights Agency* (2017), *Fundamental Rights Report 2017*, p. 183.

³³⁷ *European Commission* (2017), SWD, p. 40.

³³⁸ This project aims “to search for and protect unaccompanied minors– fight against invisibility. The project has tried to identify solutions as necessary, for changes to the SIRENE Manual and to the catalogue of best practices both of Schengen Information System (SIS)/SIRENE and Police Cooperation and by creating technical solutions to facilitate and ensure completeness of the information transferred in case of a hit about an unaccompanied minor”. *European Commission* (2017), SWD, p. 40

³³⁹ What includes “The project Safeguarding Unaccompanied Migrant Minors from going Missing by Identifying Best Practices and Training Actors on Interagency

project outcomes was the conclusions that fingerprint identification of all unaccompanied children upon their entry into the EU shall be the primary tool to assure their subsequent identification and protection³⁴⁰.

Furthermore, since 2007 there is a hotline number on missing children among the EU, launched by the Commission.³⁴¹ In May 2016, the European Parliament has adopted a declaration on improving emergency cooperation in recovering endangered missing children and improving child-alert mechanisms in the MS³⁴². Under the ECHR system, “the enforced disappearance of children has been addressed under article 8 of the Convention”.³⁴³

The *Commission* has stated that missing migrant children have an equal right to protection as missing national one.³⁴⁴ But a Commission Study on Missing Children in 2013 illustrates that responses to missing migrant unaccompanied children are frequently different from responses to missing national minors.³⁴⁵

Fighting the missing children issue entails setting up strong prevention mechanisms and responses. Concerning the prevention, missing minors found anywhere in the European Union must be rapidly identified, “registered and referred to the child protection authorities”.³⁴⁶

In spite of the frightful data on missing children mentioned

Cooperation co-funded by the EU under the Pilot Project “Analysis of reception, protection and integration policies for unaccompanied minors in the EU, was launched in October 2014.” *Ibid*, p. 41.

³⁴⁰ European Commission (2017), SWD, p. 40 and 41.

³⁴¹ Fundamental Rights Agency/ Council of Europe (2015), 134.

³⁴² Fundamental Rights Agency (2017), Fundamental Rights Report 2017, p. 2.

³⁴³ Fundamental Rights Agency/ Council of Europe (2015), p. 134.

³⁴⁴ European Commission, COM (2017) 211 final, p. 7.

³⁴⁵ European Commission, SWD (2017), p. 11.

³⁴⁶ European Commission, COM (2017) 211 final, p. 7.

above, the 2015 *EMN Study* on some Member States' responses to the missing child phenomenon has identified numerous examples of good practices. Such as the smooth functioning of the reception system for unaccompanied minors in the Netherlands, which reveals how integrated reception and guardianship procedures may help preventing that minors go missing.³⁴⁷

5.2.4 Guardianship

As it was mentioned children deprived of parental care are notably vulnerable to abuse and exploitation. Thus, these children are entitled to special protection. Effective guardianship systems are crucial “to preventing abuse, neglect and exploitation and they protect child victims of trafficking”³⁴⁸.

The unaccompanied children need to be immediately supported in all legal and other matters. The guardianship should be installed as rapidly as possible in view to assist the child throughout the asylum procedures and all other important issues (e.g. legal, medical, and schooling ones). In some Member States, a minor “who is not properly represented by a guardian (or similar legal representative) cannot apply for asylum or validly act during asylum proceedings”³⁴⁹.

The CEAS is less restrictive, and stipulates that “a guardian has to be appointed but that can be done once the application is lodged”³⁵⁰. This provision criticized, in virtue of the fact that the

³⁴⁷ Commission, SWD (2017), p. 43.

³⁴⁸ Fundamental Rights Agency (2015), Guardianship systems for children deprived of parental care in the European Union, p. 3.

³⁴⁹ *Ibid.*

³⁵⁰ In light of the recast proposal of the *Asylum Procedures Directive* “the responsible authorities shall, as soon as possible and not later than five working days from the moment when an unaccompanied minor makes an application, appoint a person or an organisation as a guardian”. The current *Asylum Procedure Directive* (directive 2013/32/EU) article 25 is “less detailed.” Directorate General for Internal Policies, p. 39.

designation of a guardian should be the first measure to be taken when the national authority is aware that a child is unaccompanied. Hence, a guardian shall be assigned as soon as possible and before the asylum application is made.³⁵¹

The ECHR system has a more limited scope in this regard. It just provides the guardianship of those unaccompanied minors' who were victims of human traffic. This system guarantees under the Convention on Action against Trafficking in Human Beings that the unaccompanied child, as soon as he or she is identified as a victim of traffic, shall have a legal guardian who should represent him or her and act in his or her best interest.³⁵²

Theoretically, "constitutional or other domestic law provisions of all Member States recognise that all children" in their territory shall benefit from equal protection, notwithstanding his or her nationality or status. Nevertheless, "in practice, in many occasions the child's migration and residence status determines the type of protection granted and, more specifically, the specific guardianship and representation arrangements."³⁵³

The FRA 2016 Report has found numerous violations of the guardianship guarantee among the MS. There is a persistent delay in the appointment of guardians in several MS. In Germany and Italy, for instance, this delay sometimes is extended to several months. This delay has as a consequence the postponement of those children's access to protection, proper reception and family reunification.³⁵⁴

To deal with these delays in designating guardians, some MS

³⁵¹ *Ibid*, p. 39.

³⁵² Fundamental Rights Agency (2015), p. 16.

³⁵³ *Ibid*, p. 32.

³⁵⁴ Fundamental Rights Agency (2016), Key migration issues.

entrust these functions to reception staff (e.g. Bulgaria and Italy). This assignment may compromise the independence and impartiality required from guardians. Furthermore, these minors continue to face legal and practical obstacles to access asylum procedures. As it was stated, some MS, as Bulgaria, Italy and Greece – have started to initiate asylum procedures without a guardian being present.³⁵⁵

Furthermore, the FRA report of 2017 indicates that the guardianship for unaccompanied children remains inadequate. Besides the continuous delay³⁵⁶, this agency has noted the high number of children allocated per guardian in some MS. This can prevent the functioning of the service and result in insufficient care being provided to the children. In Sweden, for instance, a person may be a guardian for up to 30 children. In Bulgaria, this number is even higher: “at the end of October 2016, about 600 unaccompanied children were assigned to the six directors of the six reception centres.”³⁵⁷

Migrant children without a lawful residence are habitually supported only by a representative who does not have the full mandate of a guardian. Only four MS³⁵⁸ “have set up a separate guardianship system for unaccompanied children who only have a temporary right to stay in the Member State or have no

³⁵⁵ *Ibid.*

³⁵⁶ These delays were reported in several Member States in 2016. “In some countries, the guardian is appointed immediately and no time elapses between identification of the child and appointment of the guardian – such as in the Czech Republic and Ireland. In other countries it takes longer, (...) in Italy, unaccompanied children live in emergency shelters for up to six months without having a guardian appointed or receiving any kind of specific assistance.” In Germany, the Federal Association for Unaccompanied Minor Refugees published an evaluation which “shows that the appointments of guardians in many cases exceeded the legal time limits provided for by law.” Fundamental Rights Agency (2017), Fundamental Rights Report 2017, p. 186.

³⁵⁷ *Ibid.*, p. 186.

³⁵⁸ Belgium, Denmark, Finland, and the Netherlands.

right to stay at all”, what typically comprises children who are undocumented or seek asylum³⁵⁹. But regardless their status, these children also need protection, and more specifically, depend on the assistance and representation of a guardian.

5.2.5 Establishment of Durable Solutions

Identifying the most appropriate durable solution for an unaccompanied child, has an essential and lasting impact on his or her future. Thereby, it requires a cautious balancing of many factors, may involve different agencies and authorities, and should take account of the child’s views³⁶⁰, and reflect the child’s best interest. To do so it is fundamental to previously undertaken a deep assessment of this best interest.

As it was alluded in section 4, the assessment of the best interest of these vulnerable children is really complex and shall be made by the reception authorities as soon as the unaccompanied situation of the child is acknowledged, in order to determine which actions shall be adopted regarding the child.

“Work has been carried out in the MS and at EU” levels on all elements identified in the 2010-2014 Action Plan as viable durable solutions: return and reintegration in the country of origin; solutions for facilitating integration in the MS of residence; and resettlement. Nonetheless, the 2015 EMN Study³⁶¹ informs that in most MS a durable solution for those minors is not defined in legislation.³⁶²

³⁵⁹ Fundamental Rights Agency (2015), p. 32.

³⁶⁰ European Commission, SWD (2017) 129 final, p. 61

³⁶¹ Furthermore, it has found that MS seek to identify durable solutions for them, including return and reintegration (e.g. Belgium, Germany, Ireland, Slovenia, Spain, Sweden and the UK) “where such action is deemed to be in the best interests of the child”. This Study also highlights efforts regarding integration in some MS, as Belgium, Czech Republic and France and Germany (where family reunification is not possible), Malta, Poland, Spain (where return is not possible). European Commission, SWD (2017) 129 final, p. 61.

³⁶²*Ibid*, p. 61.

The return decision shall envisage the best interest of the child as a primary consideration, instead of the interest of the MS. Additionally, this principle grounds a range of protective measures to shield the child from a forced or damaging return. The best interest of the child shall still be monitored once the return takes place, to make sure that the child's rights continue to be safeguarded. In this vein, the Commission has undertaken a project³⁶³ to follow up return decisions regarding minors, aiming to ensure a safer and more sustainable system for the return of children, in view of their best interest.³⁶⁴

5.2.6 Family Tracing and Family Reunion

As it was mentioned, the *Dublin III* considers the family reunification possibility in the assessment of the child's best interest. Family reunification is also a right protected under the UNCRC³⁶⁵ which recognizes that the family life is also highly relevant for the development of the child.

Under EU law, besides the above noted conditions under the Dublin Regulation, the *Family Reunification Directive* requires MS to authorise the entry and residence of the unaccompanied minor's parents, in the case it is not in the child's best interest to join the parents abroad instead. In the absence of a parent, MS "have the discretion to authorise the entry and residence of the child's legal guardian or any other family member³⁶⁶".

The definition and rights attached to family are wider in the context of unaccompanied minors than for most other categories of child migrants. The Reception Conditions Directive also establishes that MS must start tracing the

³⁶³ For more information see: <http://hitfoundation.eu/projects/monitoring-of-returned-minors/>

³⁶⁴ *Beeck, Hanne Op de*, pp. 75 and 76.

³⁶⁵ *Geens, Koen*, p. 140.

³⁶⁶ *Fundamental Rights Agency/ Council of Europe* (2015), p. 168.

unaccompanied child's family members, where necessary. This is to be undertaken with the support of international or other relevant organisations as promptly as possible after the application for international protection is made, if it is in light of the child's best interests.³⁶⁷

Under the CoE framework, "article 8 of the ECHR does not allow migrant parents and their children an absolute right to choose where they want to live" and "national authorities can legitimately deport or refuse entry to family members provided" there are no insuperable hindrances to establishing family life elsewhere. The ECtHR, as in the case *Şen v. Netherlands*, balances between the rights of the child and the family and wider public policy interests. To do so, this Court considers three factors: the children's age; "their situation in the country of origin; and the degree to which they actually depend on their parents"³⁶⁸.

Nevertheless, the Commission reports that cross-border family tracing and reunification processes - including in countries of origin and transit - are frequently not performed, protracted or started too late. These procedures should be smoother and faster for all minors who are applying for asylum.³⁶⁹

5.2.7 Miscellaneous Protection Matters

According to the Commission, the MS should do everything possible to assure the availability of alternatives to administrative detention of unaccompanied children. Nevertheless, around half of the MS undertake detention

³⁶⁷ Fundamental Rights Agency/ Council of Europe (2015), p. 168 and 169.

³⁶⁸ *Ibid*, p. 169 and 170.

³⁶⁹ European Commission, COM (2017) 211 final, p. 7

measures for unaccompanied children whilst they are awaiting return.³⁷⁰ Some other MS national legislation³⁷¹ prohibits the detention of those children, but it still occurs in practice³⁷².

Furthermore, under Dublin III this detention is only lawful if compatible with the best interest of the child.³⁷³ So, according to the EU framework the detention of unaccompanied children only shall be used as an ultima ratio.

The UNCRC also requires that detention shall only be adopted as a last resort and shall take the shortest period possible. Administrative detention of those children and conditions of deprivation of liberty represents a grave challenge to the realisation of their rights.³⁷⁴

Detention can be extremely traumatic for children, especially due to the circumstances from which they have fled away. It is also less probable to afford an effective protection than effective supervision in an open childcare facility. Nonetheless and regardless the EU and the UNCRC framework, detention is habitually used merely for administrative convenience rather than as a measure of last resort.³⁷⁵

Detention is distressing and instead of protecting these vulnerable children's rights – and provide them a safe environment where they can develop and integrate with the community – it prevents them to benefit from their human rights. Thus, detention hardly would be compatible with their

³⁷⁰ European Commission, SWD (2017) 129 final, p. 68.

³⁷¹ Although their legislation prohibits the detention of unaccompanied children “Bulgaria and Hungary have detained unaccompanied children in practice. Greece holds unaccompanied children in detention to prevent absconding until they are placed in specialised facilities. Sweden also occasionally detains unaccompanied children.” In Austria and Germany, for instance, the detention of older children is legally allowed. FRA, Fundamental Rights report 2017.

³⁷² Fundamental Rights Agency, Key migration issues, 2016.

³⁷³ European Council on Refugees and Exiles, p. 5.

³⁷⁴ Council of Europe (2016), p. 8.

³⁷⁵ Ruxton, p. 73.

best interest. Furthermore, administrative detention and accommodation in conditions that deprive children of their freedom shall not be allowed in light of their best interest and right to a healthy development.

Moreover, according to FRA “the ageing out of children turning 18 during the procedure and prior to accessing asylum is a persistent concern in all Member States³⁷⁶.” This shows that the interest of the MS overcame the best interest of the children (and the aspiration to protect these minors) once more.

François Crépeau, the UN Special Rapporteur on the Human Rights of Migrants, has declared that in his visit to the MS he has observed a general absence of the assessment of the children’s best interest. He highlighted the visible lack of best interest determination procedure in practices such as the returns of migrant children, in the push-back of Afghani minors by “Italian authorities by maintaining them on the ferries returning to Greece”; and also in the recurrent detention of “children or of families when detention can never be in the best interest of a child”³⁷⁷. In those cases, besides the lack of a determination procedure, the best interest of the children was apparently not even considered.

6. Improvements of the Protection System in light of the Best Interest of the Child

There are many gaps and failures regarding the assessment and observation of the best interest of the child in the EU, as it was analysed in the last sub-section. These shortcomings have two general grounds: the inobservance of some EU protection

³⁷⁶ Fundamental Rights Agency (2016), Key migration issues.

³⁷⁷ *Crépeau, François*, p. 5.

standards and the lack of a strong protection framework.

It is important to underpin that such inadequacies are affecting the human rights of a very vulnerable group. These unaccompanied children supposed to have their special safeguard guaranteed and their best interest as a primary consideration. Nevertheless, sometimes, their best interest was not even considered.

Furthermore, if one of their rights is not properly guaranteed, as the right to an appropriate best interest assessment, it can undermine their other rights. The lack of an adequate best interest assessment impairs the MS authorities to know how they can act to provide the necessary and suitable protection to each child. The absence of an appropriate and prompt reception can also impair the child's access to protection, since the child can go missing and get exposed to several dangers.

Nevertheless, there are some projects and proposes which aim to solve some of these shortcomings. There are also some good practices related to the realization of unaccompanied minors' rights. Some of this proposes and practices will be analysed in the section 6.1.1. This section will also focus on the latest Commission Communication³⁷⁸ on Unaccompanied Children proposes and recommendations.

6.1 How to Face the Protection Gaps in light of the Commission Communication

The Commission 2017 Communication sets out many actions which need to be either taken or better implemented now by the MS. Hence, this Communication aims to provide several coordinated and effective actions to the persistent protection gaps and needs that children are tacking in Europe, ranging

³⁷⁸ The European Commission Communication COM (2017) 211 final.

from their identification, reception and the establishment of durable solutions³⁷⁹.

6.1.1 Registration, the Missing Children Phenomenon and Reception

After arriving in the EU, migrant children shall always be promptly identified and registered as children by means of a uniform data set across the EU. Moreover, children shall have priority in all border-related procedures and receive suitable support from specialised staff in the process of identification and registration. The staff should apply child-friendly and gender-sensitive approaches when collecting fingerprints and biometric data.³⁸⁰

The Communication proposes to lower the age for taking fingerprints and facial images from 14 to 6 years. Nevertheless, the biometric identification is fundamental to trace missing children³⁸¹, so it should be applied for all unaccompanied children, regardless their age. This practice would be adequate to achieve the legitimate aim of improving the tracing procedure and avoid the harms and violence which missing children often face, as human traffic. There are not equally efficient and less intrusive means to improve missing minors tracing. The intrusion in their privacy of collecting finger prints would be proportional in comparison with the aim to prevent the harm mentioned above, which is compatible with their general best interest.

The Commission points that protocols and procedures need to be in place to systematically report and respond to cases of unaccompanied children going missing. Reception centre

³⁷⁹ European Commission, COM (2017) 211 final, p. 3.

³⁸⁰ *Ibid*, p. 6.

³⁸¹ *Ibid*, p. 7.

managers and anyone involved in the care of the child must report all cases of children going missing to the police. The above mentioned missing children hotlines and national child alert mechanisms must be also used, where appropriate³⁸².

The police should also “enter an alert on the missing child in the Schengen Information System” (hereinafter SIS) “and liaise with the national SIRENE bureau”. MS should request a corresponding Interpol notice on missing persons to be issued, when necessary. The Communication also highlights the newly proposed reform of SIS, which comprises a proposal to add a classification to the missing child alert in the system, indicating (where known) the circumstances of the disappearance. “Work is underway on an automated fingerprint identification system in SIS”. This will enable SIS searching by fingerprints and establish a more reliable identification of minors in need of protection³⁸³.

A harmonized action on missing children tracing among the MS could be more efficient to face this phenomenon. The missing children problem is a cross-border issue, so it demands a cross-border action. A regulation on tracing of missing children in the EU level could be a very effective way to address this issue. Thus, the MS could be bound to enter a SIS alert in all cases of missing children. This regulation could set uniform procedures concerning the obligation of reporting the missing cases to the police and also stipulating to the MS a duty to engage in other local actions in order to improve the tracing process.

Furthermore, the best interest of each unaccompanied minor shall be determined following the child’s registration, which shall be prompt and consider the child’s personality, background and social aspects, as it was above noted. This assessment shall

³⁸²European Commission, COM (2017) 211 final, p. 7.

³⁸³*Ibid*, p. 7.

orient all action undertaken regarding to that child and his or her specific needs and characteristics.

The Commission points that the establishment of effective monitoring systems at the MS level should also contribute to the good functioning of reception centres. To support MS, “EASO will in 2017 develop specific guidance on operational standards and indicators on material reception conditions for unaccompanied children.”³⁸⁴

The Commission encourages the MS to ensure unaccompanied children access to health care, education and psychological assistance. The MS are also encouraged to: I) assure a series of alternative care options for these children, including foster/family-based care; II) “integrate child protection policies in all reception facilities hosting children, including by appointing a person responsible for child protection”; III) establish a monitor system regarding these minors’ reception and “monitor the availability and accessibility of a viable range of alternatives to the administrative detention of children in migration”.³⁸⁵

The appointment of persons responsible for children assistance, and even of volunteers, would help to integrate these children to the host country society. The administrative detention of unaccompanied minors shall not be a last resort, it should not be adopted at all. As it was above addressed, even a detention based on criminal grounds is hardly consonant with the best interest of a child. The administrative detention is a manner to impose these children a further hardship and prevent them to benefit from their rights (e.g. freedom and community life which are essential for their healthy development) and integrate society. Moreover, this measure is even more

³⁸⁴ European Commission, COM (2017) 211 final p. 9.

³⁸⁵ *Ibid*, p. 9.

traumatic for a child that needed to flee from a war or deprivation juncture.

In this vein, the Council of Europe Parliamentary Assembly is continuing supporting “the Campaign to End Immigration Detention of Children.”³⁸⁶

According to the Commission, the use of family-based care/foster care for unaccompanied minors has been expanded currently and proven successful and cost-effective, but it is still under-utilised³⁸⁷. The MS shall promote and incentive foster and family based care, since the family environment is the most adequate one to provide the child a good development, and it is consonant with the *Dublin III* hierarchical criteria.

6.1.2 Guardianship, Family Tracing and Relocation

The Commission adds that it and the EU agencies will establish: I) “a European guardianship network to develop and exchange good practices and guidance on guardianship in cooperation with the European Network of Guardianship Institutions”; II) reinforce the guardianship institution to assure that guardians for all unaccompanied children are rapidly assigned; III) guarantee prompt and “effective family tracing, within or outside the EU by making full use of existing cross-border cooperation channels”; IV) give priority to asylum applications of children according to the urgency principle; prioritize the relocation of unaccompanied minors from Italy and Greece.³⁸⁸

The exchange on good practices should not be limited to the guardianship network, it shall be implemented in all matters regarding unaccompanied minors, as family tracing, reception

³⁸⁶ Council of Europe (2016), p. 11.

³⁸⁷ European Commission, COM (2017) 211 final, p. 8.

³⁸⁸ European Commission, COM (2017) 211 final, p. 11.

and identification. Good practices shall be disseminated and replicated among the MS, in light, of course, of their different junctures. Furthermore, as it was already stated, the guardianship shall be established before the asylum application, differently than what is stated in *Dublin III*. The proposed *Dublin IV* recast shall ensure that the guardianship is established as soon as possible and preferentially before the application is lodged. Thus, the guardian can assist the child and seek his or her best interest in all steps of the application and international protection procedure.

This regulation change is fundamental due to the importance of a swiftly established guardianship to ensure the child's protection, rehabilitations and assists in cutting eventual links with traffickers. It also reduces the risk of the minor going missing,³⁸⁹ what is more common in the early reception process, as it was already outlined.

The family tracing shall also be based on the SIS and on cooperation with third states. According to *the Directorate-General for Internal Policies of the Union*, the EU shall identify third countries with which cooperation related to migrant unaccompanied children is necessary and feasible. It shall also incentive these countries to join the *1996 Hague Convention*³⁹⁰, and give them assistance, if necessary, to implement such Convention³⁹¹. In view of tracing the families of unaccompanied minors or providing their return and reintegration in their home country without discontinuing guaranteeing these children rights.

³⁸⁹Fundamental Rights Agency (2015), p. 26.

³⁹⁰ Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

³⁹¹ DG for Internal Policies of the Union, p. 26.

Give priority to these vulnerable children is compatible with the principle of undertaking their best interest as a primary consideration. This priority shall be factually enforced, especially regarding the transfer of these children from Greece and Italy.

The unaccompanied children shall be also better resettled and better allocated among the MS and inside the MS national territory. This would entail a lower number of children to be assisted in each reception centre and by each responsible authority. It will enable the authorities to afford a better and more individualised protection to each child and the MS to avoid an overcrowding of accommodations and reception centres, which is currently an obstacle to children protection.

The proposed recast Dublin IV could provide a new allocation and resettlement system to unaccompanied minors, a system that would indeed take these vulnerable children's best interest as the primary consideration. This would consist in their priority relocation among and inside the MS. Furthermore, the best interest of the child would be the allocation and the transfer criteria, which should involve the children's participation in the determination of the MS allocation.

The child would not freely choose a MS, but his or her view would be heard and considered, what would likely avoid second movements of children migrants (achieving one of the *Dublin System's* main aims and decreasing the number of minors going missing through absconding a MS in the direction to another state). Even if the children cannot be allocated to the MS where they want to go, the fact that they had the

opportunity to have a voice, be considered and empowered is very positive for the children development³⁹² and would increase their trust in the administrative authorities of the MS.

6.1.3 Return and Inclusion

The Commission encourages the MS to ensure that: I) appropriate family tracing and reintegration measures are put in place to meet the needs of children who will be returned to their country of origin; II) guarantee equal access to inclusive, formal education, including early childhood education and care; III) access to healthcare as well as to other essential public services for all children; IV) provide support to enable children in the transition to adulthood to “access necessary education and training”; V) foster social inclusion in “all integration-related policies, such as prioritising mixed, non-segregated housing and inclusive education”; VI) intensify resettlement to Europe for children in need of international protection.³⁹³

As it was examined above durable solutions can occur in 3 different manners: 1) the return and reintegration in the home country; 2) integration in the host country; 3) resettlement. The family reunification can also be a lasting solution measure, when it is possible and compatible with the best interest of the child. The adoption of such solutions is fundamental to provide the child a lasting stability and normality³⁹⁴, which are relevant for his or her salutary development.

As it was stated in section 5, the MS shall continue to monitor the best interest of the children once they return to their home country and ensure that these children are reunited with their

³⁹² In this vein Noam Peleg adds that participation is a substantial element of development. Noam Peleg (2013), p 530.

³⁹³ European Commission, COM (2017) 211 final, p. 14

³⁹⁴ European Commission, COM (2017) 211 final, p. 11

families, reintegrated and are benefiting of their human rights. Thereby, successful monitoring programs, as the HIT supported by the Commission and addressed in section 5.2.5, shall be extended and replicated by the MS and EU agencies.

Furthermore, the return decision shall be taken in light of the best interest of the child. By applying such principle in this context, the MS fulfil their duty under the EU law (in the extent of EU's competence under the CEAS and the *Return Directive*³⁹⁵) and under the ECHR system, regarding the provision on protection of family life and the ECHR expressly recognition of the best interest principle³⁹⁶.

A manner to endorse the children's development and transition to adulthood is by the adoption of the CoE's life project propose, addressed in section 5, which promotes the child independence, integration and education. The MS shall be encouraged to adopt such a project, what is beneficial for the state itself and enhances the best interest of the child.

The Commission also communicated that it will "promote the integration of children through available funding and exchange of good practices addressing non-discriminatory access to public services and targeted programmes."³⁹⁷

As it was already pointed, the MS still adopts a discriminatory approach when dealing with unaccompanied minors. In some matters, they treat national children and migrant ones in an

³⁹⁵ The para 22 of the Return Directive preamble establishes that: In line with the 1989 United Nations Convention on the Rights of the Child, the 'best interests of the child' should be a primary consideration of Member States when implementing this Directive. In line with the European Convention for the Protection of Human Rights and Fundamental Freedoms, respect for family life should be a primary consideration of Member States when implementing this Directive." Article 5 of such Directive further reinforce this provision. Directive 2008/115/EC.

³⁹⁶ As it was underpinned in section 4, though the *Convention* do not adopt any specific provision regarding children, it has included the best interest of the child principle in various of its legal instruments.

³⁹⁷ European Commission, COM (2017) 211 final, p. 14.

unequal manner. So, it is important that the MS, the Commission and the EU agencies promote non-discrimination, guaranteeing to these children a non-discriminatory access to education, housing, health-care and etc.

Additionally, the MS and the EU level shall promote their integration, as a durable solution and as a manner to enable these children to have a healthy development and contact with the community, and the eventual foster family, after the adversities that they have faced. It is also important to provide their smooth and cultural-sensitive adaptation to the host country society.

6.1.4 Data Collection, Best Interest Assessment and Staff Training

The Commission added that it and the EU agencies will: I) afford additional training, guidance and tools on best-interests-of-the-child assessments; III) launch consultations on improvements to current EU-level data collection concerning “children in migration including based on the Migration Statistics Regulation and the 2011 Guidelines”, and the Commission’s Knowledge Centre on Migration and Demography will compile a data repository on children in migration”; IV) request that organisations in direct contact with minors “have in place internal child protection policies in order to be granted EU funding”. The MS shall ensure that this internal policy is adopted.³⁹⁸”

The Commission stimulates the MS to ensure that: I) “all children are provided with pertinent information on their rights and on procedures, in a child-friendly and age- and context-appropriate manner”; II) ensure that those working with children

³⁹⁸ European Commission, COM (2017) 211 final, p. 16.

in migration – from arrival at EU borders to the adoption of a durable solution– are properly “trained and child protection professionals are involved where relevant; III) augment collection of more disaggregated data and statistics on children in migration.³⁹⁹

As it was analysed, the best interest assessment shall be the first measure undertaken after the authorities detect the child. A well-trained staff is fundamental in order to efficiently determine the child’s best interest, since this assessment involves a range of complex aspects. A quality assessment of the children’s best interest is necessary to provide them the adequate care and avoid that they go missing.

Additionally, the determination of unaccompanied children’s best interest is even more challenging and demands highly trained staff and a delicate and child-friendly approach. In virtue of the fact that unaccompanied children have faced more adversities and traumas than the average refugee minor.

The data consistency is crucial for the MS and the EU to be able to deal effectively with unaccompanied children needs and have a better notion concerning the number of missing unaccompanied minors. Besides the action that the Commission has described, the MS shall supply the Eurostat more consistent and less fragmented statistics on migrant children. To do so, the MS shall have a more centralized data collection system which may count on the support of private initiative and volunteers.

Besides requesting the organizations in immediate contact with children to adopt an internal child protection policy, the Commission or the EU agencies should monitor the

³⁹⁹ *Ibid*, p. 16.

implementation and functioning of these policies.

Informing the children about their rights and the migration process is a fundamental step to enhance their participation and boost their independence and development, what is also consonant with children's best interest. Furthermore, all communication and treatment provided to children shall be child-friendly. The children shall be treated always (from the moment they are intercepted at the border until the moment of their return or integration) first and foremost as children, regardless any status (e.g. as refugee, migrant, nationality, etc).

6.2 The EU and ECHR levels interface (towards providing a complete and integrate protection to unaccompanied minors)

As it was examined in section 5.2 there are many persistent gaps on unaccompanied children protection in Europe. Some EU and ECHR standards of protections are not being adequately implemented by the MS. There is also a lack of legally binding instruments, especially in some areas of protection such as dealing with missing children. Furthermore, there are no sufficient and efficient policies to guarantee the unaccompanied minors proper protection. This situation was underpinned by the migration crisis current context.

Although the *Treaty of Lisbon* and the now binding *EU Charter on Fundamental Rights* were a great advancement on the protection of the human rights – and the children rights – in the EU framework, the EU human right outline shall be further developed to promote an integral safeguard of children's best interest.

Notwithstanding the progressive development towards the implementation of the UNCRC, the legal provisions in the EU law “fall short of reflecting all the international standards” compressed in the UNCRC and other international and regional instruments regarding children protection.⁴⁰⁰

The acts of the EU institutions and the MS acts on implementing the EU law, are not binding by any international standards of protection of the child. Moreover, due to the *Bosphorus* doctrine presumption, the MS actions while implementing EU law are not a priori subject to ECtHR revision. Both of these realities create a gap on the protection of children rights, what endangers the right of the more vulnerable groups, as the unaccompanied migrant children.

In order to overcome the gap between EU law and the international legal standards for the protection of children, the EU should accede to the UNCRC and the ECRH. But the UNCRC does not allow the non-State entities accession to its framework. Thus the viable mean to enforce the UNCRC standards on the EU framework would be by the EU adoption of a Protocol declaring its commitment to the UNCRC and its principles. As a further consequence of this commitment, “the EU would be required to comply with the UNCRC Committee reporting process allowing for a periodic review of EU compliance with the Convention and an assessment of EU efforts in this area.”⁴⁰¹

Furthermore, the EU is progressing in its venture to protect human rights. However, the EU – and specifically the CJEU – has not a long tradition in human rights protection⁴⁰², as it was

⁴⁰⁰ Directorate General for Internal Policies, p. 26

⁴⁰¹ Directorate General for Internal Policies, p. 27.

⁴⁰² Since the two cornerstones on human rights protection in the EU framework, the Lisbon Treaty and the CFREU, were adopted in 2000 and 2009, respectively. The

already mentioned. Thus, the accession to UNCRC and the ECHR would reinforce the EU's role as a human rights actor and the CJEU as a Human Rights Court.

The accession of the EU to the ECHR is still feasible, as it was mentioned above, and it would add further legal strength to EU human rights policies and initiatives, including the ones related to minors⁴⁰³. Thus, it could guarantee a completed and integrated children rights protection in the European Union. Since the ECHR has strong human rights protection standards⁴⁰⁴ and the Strasbourg Court's jurisprudence is continuously guaranteeing the best interest of the child, including refugee minors.

The ECtHR, differently to the CJEU, is exclusively a Human Rights Court, so its focus is guaranteeing human rights, especially of the most vulnerable groups⁴⁰⁵, as the unaccompanied migrant children.

These both accessions would provide the unaccompanied migrant children the highest standard of protection under the national, supranational and international (regional) level. The EU accession to the ECHR would provide these vulnerable children an extra layer of protection and their representatives could apply to the ECtHR in order to guarantee their rights.

Currently, the ECtHR has no jurisdiction over the CEAS or over any actions of the EU institutions. Further, in light of the *Bosphorus Doctrine*, the Strasbourg Court is not controlling the acts of the MS on implementation of the CEAS or other EU

CFREU, has just become a binding instrument after the entry into force of the Treaty of Lisbon.

⁴⁰³ Directorate General for Internal Policies, p. 27.

⁴⁰⁴ *Ibid*, p. 27

⁴⁰⁵ As Dean Spielmann underlines: "(...) the duty which the Court constantly endeavours to fulfil, namely to protect the weakest and most vulnerable." Spielmann, Dean (2015), p. 4.

laws. However, after the accession the ECtHR could enforce the human rights of children – and particularly their best interest – in face of the continuous shortcomings of the CEAS implementation.

While the accession of the EU to the ECHR System does not occur, or if this accession never takes place, the EU and the CoE shall collaborate to protect the vulnerable person's rights. This cooperation shall occur in the human rights standard ambit and in the policy sphere.

In the present context of crisis, the Strasbourg and the Luxembourg Court could seek to establish - through their interpretative jurisprudence – additional human rights standards for unaccompanied children, in view to provide the effective monitoring and realization of their best interest in all decisions, policies and legislation regarding these children.

These two level should also engage in the protection of unaccompanied children by adopting joint recommendations and outlining common solutions and policies.

This cooperation could improve the implementation of unaccompanied minors' rights and provide an advanced and complete standard of protection in light of the principle of the best interest of the child.

7. Conclusions

1. Since 2014 Europe is facing a migration crisis with no precedent. Around 3 million of persons fled from war,

conflict and starvation and sought a safe shelter in Europe⁴⁰⁶. A considerable percentage of these persons were children and many of them were unaccompanied. These children have come to Europe without any caregiver, family member or they have been left unaccompanied after arrived in Europe.⁴⁰⁷

2. The Lisbon Treaty and the proclamation of the CFREU as a binding instrument have reinforced the human rights protection in the EU level, especially regarding the rights of children. The EU Charter of Fundamental Rights expressly recognizes the rights of the children and, particularly, the child's best interest as a primary consideration.
3. Although the European Convention rarely mentions children, the ECtHR developed children's rights law through its jurisprudence. This Court has remarkably contributed to a child-focused (and progressive) concept of family and to the establishment of positive obligations in order to guarantee the child's right to family life.⁴⁰⁸
4. The principle of the best interest of the child is guaranteed by the EU, adopted by the ECtHR jurisprudence and by many legal instruments of the *Council of Europe*. Additionally, almost all MS guarantee this principle to some extent⁴⁰⁹. However, the overall guarantee in the MS is insufficient and shall be improved. Such principle must be applied to all children,

⁴⁰⁶ See page 4.

⁴⁰⁷ See pages 16 and 17.

⁴⁰⁸ See page 55.

⁴⁰⁹ See page 50 and 51.

regardless of any status (as a MS's national, refugee, migrant).

5. The best interest of the child shall be a primary consideration. So, it shall normally prevail when conflicting with the rights or interests of other groups⁴¹⁰. This grounds the fact that children shall be prioritized among other migrant groups in the asylum application and other matters related to the international protection procedure. Unaccompanied minors are even more vulnerable and have faced even more adversities than the average refugee child. Therefore, those children shall be subject to a more extensive protection and special safeguard by the host MS.

6. A complete and quality best-interest assessment is the first measure that shall be undertaken in order to guarantee unaccompanied minors, and all migrant children, adequate care and protection. To achieve it, it is essential to guarantee the child participation in the assessment process, have a well-trained staff, use a child-friendly approach and also a gender and cultural-sensitive manner. The best interest determination of unaccompanied minors shall also take into account the hardship and traumas that these children have experienced.⁴¹¹

7. In many situations, the unaccompanied minors' interest is not regarded as a primary consideration. Sometimes, for the outcomes (and shortcomings) of the migration law

⁴¹⁰ See pages 45 and 46.

⁴¹¹ See pages 60-62.

and policy implementation it is apparent that the best interest of these children is not even envisaged⁴¹².

8. One of these shortcomings is the lack of consistent data on the number of unaccompanied children in Europe. Such issue hampers the MS and the EU institutions to even plan the necessary protection policies and actions and provide these minors the required infrastructure and care. It also hinders the tracing of missing children.⁴¹³
9. Unaccompanied minors frequently have their right to family life impaired by the delay and absence of family tracing by the MS⁴¹⁴. The family life is fundamental and the family environment, normally, consists in the preferential atmosphere for the child's proper development. For these reasons, in the situation which the child's relatives cannot be traced, he or she shall be preferable placed in a foster family or have access to a family based care.⁴¹⁵
10. Unaccompanied children are often victims of discrimination and deprivation. They are also in risk of abuse, violence and human trafficking.⁴¹⁶ Therefore, they demand a special protection of the state,⁴¹⁷ which shall provide them conditions to have a healthy and harmonic physical, mental, social and emotional development⁴¹⁸. An adequate reception and an efficient system of guardianship are relevant mechanisms to provide these

⁴¹² See pages 81 and 82.

⁴¹³ See page 71.

⁴¹⁴ See page 81.

⁴¹⁵ See pages 72 and 86-87.

⁴¹⁶ See page 18.

⁴¹⁷ See page 62.

⁴¹⁸ See page 46-48.

children protection and care. These two factors are also crucial to avoid that these minors go missing.⁴¹⁹ The human rights and the best interest of the children shall be realised during all the asylum procedure, since the child is identified until a durable solution is adopted, and even after it. The monitoring of the child's best interest shall be continued after this solution is implemented.⁴²⁰

11. The post-*Opinion 2/13* scenario has shaded a menace of conflicts and competition between the Strasbourg and the Luxemburg Courts. Such competition would endanger the human rights protection in the region. Thus, the CoE and the EU shall collaborate in several ways to enhance human rights standards and guarantee their implementation. This is to be applied especially regarding the relationship between the CJEU and the ECtHR, which shall establish a frequent dialogue and seek a progressive coherence and convergence on human rights standards. This would, ideally, outcome in a cooperation system. Such a cooperation and, the consequential, integrated human rights protection between the multilevel different tiers, is an important tool to close protection standard gaps. Furthermore, an active cooperation of the Coe and the EU in the policy sphere (e.g. by adopting common recommendations) could also resolve implementation shortcomings.⁴²¹

12. The cooperation between the Coe and the EU is even more relevant in the current time of crises in which the

⁴¹⁹ See pages 71-72 and page 88.

⁴²⁰ See pages 79 and 90.

⁴²¹ See page 38.

Human rights are being frequently not respected in Europe.⁴²² In such times, the human rights courts have a fundamental role not to permit that the MS put economic or political interests⁴²³ ahead of human rights protection, particularly concerning to vulnerable children's rights.

13. The accession of the EU to the ECHR would naturally increase such cooperation and provide an integrated – and most extensive possible – human rights protection in Europe. Thus, all the CEAS implementation issues would be subjectable to a triple control, by national level, the CJEU and the ECtHR. So, the unaccompanied children's rights – and specially their best interest – could be enforced in these three levels.

14. The EU accession to the UNCRC would provide a higher standard for children's rights in the acts of the EU institutions. It would also re-emphasize the relevance of children protection in the national level, while or not the MS are acting in the implementation of EU law. It would also reinforce the EU's role as a human rights protection actor.⁴²⁴

15. The CEAS has several shortcomings, which are undermining the human rights of refugees and infringing an even higher adversity to the most vulnerable refugees, as the unaccompanied minors. Moreover, this asylum system lacks coordination and a further harmonization that could diminish the implementations discrepancies between the MS⁴²⁵. The CEAS also lacks

⁴²² See pages 72, 73 and 77.

⁴²³ See pages 73 to 80.

⁴²⁴ See pages 94 and 95.

⁴²⁵ See page 12.

some provisions, e.g. regarding missing children tracing procedure and data compilation, especially of unaccompanied minors.

16. Some MS are not observing the CEAS rules (e.g. concerning guardianship, family tracing and administrative detention). Moreover, some Member States are also not contributing to the European Common Asylum Policy, disregarding their solidarity duties⁴²⁶. Furthermore, the Dublin criteria do not provide a fair share among the MS⁴²⁷, resulting that some countries are receiving a high number of refugees without having the necessary infrastructure to provide them basic human rights standards (e.g. concerning accommodation). Consequently, such MS cannot provide the necessary protection, reception and care to unaccompanied minors.⁴²⁸ So, currently there are two gaps on the protection of unaccompanied children, a gap on protection standards and a gap on implementation.

17. Some MS are dealing with the refugees as a burden,⁴²⁹ focusing on state's interests without regarding the best interest of the refugee children as a primary consideration.

18. In light of this principle's primary consideration feature, the Dublin System shall set the best interest of the unaccompanied children as a special allocation criterion

⁴²⁶ See pages 11 and 12 and note 31.

⁴²⁷ See page 12.

⁴²⁸ See note 83.

⁴²⁹ See page 82.

to determine the allocation of these minors. Such minors shall also have priority on transfers and resettlement.⁴³⁰

These children shall have the opportunity to participate in their allocation and transfer determination and their views shall be considered in this process.⁴³¹

19. The Council of Europe *Life project* proposes a positive way of integration of unaccompanied minors to the host state's society, it also focuses in each minor's idiosyncrasies and best interest. The MS shall follow this recommendation to enhance these children's rights and enable them to become independent and integrated individuals.⁴³²

20. The Member States, EU and Council of Europe successful projects and good practices⁴³³ on the protection of unaccompanied minors shall be shared between all the multilevel tiers and replicated, in order to achieve improvements and expand the integration between the levels in this matter.

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⁴³⁰ See page 89.

⁴³¹ See pages 44 and 45.

⁴³² See pages 63 and 69.

⁴³³ Specially regarding the MS and EU level.

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