PROTECTION OF UNACCOMPANIED AND SEPARATED MIGRANT CHILDREN UNDER INTERNATIONAL LAW

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ABSTRACT

PROTECTION OF UNACCOMPANIED AND SEPARATED MIGRANT CHILDREN UNDER INTERNATIONAL LAW

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The number of children migrating alone or becoming unaccompanied or separated during and after their perilous journey has dramatically increased in recent years. Several reasons such as the desire to access to better living conditions including education and employment and economic prosperity or to have protection from violence, exploitation, or abuse keep forcing children to leave often without their parents the country where they live and seek new living spaces. As aliens and children, who lack parental protection, unaccompanied and separated children (UASC) face many challenges and dangers and are frequently subject to various human rights violations. Due to their vulnerability, international law has recognised their need for special care and to this end adopted several protection measures.

In this regard, this thesis seeks to analyse whether international law and national practices provide adequate protection for UASC from violence, abuse, exploitation, and exclusion from fundamental rights. In this respect, it analyses several international legislative instruments related and applicable to UASC, primarily the 1951 Refugee Convention the United Nations (UN) Convention on the Rights of the Child (CRC),

which is the most widely ratified Convention in the world. It also addresses regional and soft law instruments on the issue.

Accordingly, it argues that the developments in international law have contributed to enhanced protection of UASC. On the other hand, numerous severe challenges and shortcomings in international legislation and states' practices continue to threaten and undermine protecting and promoting UASC's rights.

Keywords: Unaccompanied and separated children, international law, child protection, the UN Convention on the Rights of Child, best interests principle.

ÖZ

REFAKATSİZ VE AİLELERİNDEN AYRI DÜŞMÜŞ GÖÇMEN ÇOCUKLARIN ULUSLARARASI HUKUK KAPSAMINDA KORUNMASI

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Yalnız başına göç eden veya tehlikeli yolculukları sırasında veya sonrasında refakatsiz kalan ya da ailelerinden ayrı düşen çocukların sayısı, son yıllarda çarpıcı bir biçimde artmıştır. Daha iyi yaşam koşullarına, daha kaliteli bir eğitime ve iş olanakları ile ekonomik refaha erişim arzusu, şiddetten, sömürüden veya istismardan korunma isteği gibi çok çeşitli nedenler çocukları yanlarında ebeveynleri olmadan yaşadıkları ülkeyi terk etmeye ve yeni yaşam alanları aramaya zorlamaktadır. Hem yabancı hem de ebeveyn korumasından yoksun çocuklar olarak, refakatsiz ve ailelerinden ayrı düşmüş çocuklar pek çok zorluklarla ve tehlikelerle karşılaşmakta ve çok çeşitli insan hakları ihlallerine maruz kalmaktadırlar. Savunmasızlıkları nedeniyle, uluslararası hukuk onların özel bakıma ihtiyaçları olduğunu kabul etmiş ve bu amaçla çeşitli koruma önlemleri almıştır.

Bu bağlamda, bu tez, uluslararası hukukun refakatsiz çocuklar için şiddet, istismar, sömürü ve temel haklarından mahrum bırakılma konularında yeterli koruma sağlayıp

sağlamadığını uluslararası hukukun kapsamı ve uygulamadaki görünümleri üzerinden inceleme gayesindedir. Bu kapsamda, dünyada en geniş şekilde onaylanan sözleşme olan Birleşmiş Milletler (BM) Çocuk Hakları Sözleşmesi (ÇHS) başta olmak üzere refakatsiz ve ailelerinden ayrı düşmüş çocuklara ilişkin ve onlara uygulanabilir olan uluslararası hukuk belgelerini analiz etmektedir. Ayrıca, konuya ilişkin bölgesel ve bağlayıcı olmayan hukuk belgelerine de değinmektedir.

Buna göre, bu tez, uluslararası hukuktaki gelişmelerin refakatsiz ve ailelerinden ayrı düşmüş çocukların korunmasının iyileştirilmesine katkı sağlamış olduğunu savunmaktadır. Öte yandan, uluslararası mevzuattaki ve devletlerin uygulamalarındaki çok sayıda ciddi zorluklar ve eksiklikler, refakatsiz ve ailelerinden ayrı düşmüş çocukların haklarının korunmasını ve teşvik edilmesini tehdit etmeye ve zayıflatmaya devam etmektedir.

Anahtar Kelimeler: BM Çocuk Haklarına Dair Sözleşme, çocuk koruma, çocuğun üstün yararı ilkesi, refakatsiz ve ailelerinden ayrı düşmüş çocuklar, uluslararası hukuk.

To my beautiful family and all uprooted children

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After my graduation from the Faculty of Political Sciences, University of Ankara, I joined the Human Rights and Equality Institution of Turkey (TİHEK) and since then have spared to efforts to expand and deepen my knowledge in this area, which I believe, is critically important to ensure that all human beings can lead a life with dignity.

Following this ideal, I decided to pursue post-graduate studies in the Middle East Technical University (METU) at the Department of International Relations focusing on human rights with a particular attention on the rights of refugees and children. Looking back and considering how much I have learned and how wonderful professors and friends I have known at this University, which is one of the best in Turkey, today I think that I could not have made a better decision. Nowadays, building on what I have learned at the Institution where I work and my studies at METU, I continue my post-graduate studies in the same field at the London School of Economics, which is yet another privilege and unique opportunity better equipping me for the professional challenges ahead.

The broad literature review that I have carried out has shown me that many scholars and researchers have been devoting a lot of time and attention to the problems and challenges facing refugees, children and particularly UASC. They certainly represent some most vulnerable categories of refugees. I hope that my thesis will be a modest contribution to this vast literature.

Among the international entities, which have over the years been actively working to protect and promote the rights of refugees and children, including UASC, the efforts and contributions of the UN Committee on the Rights of the Child (UNCRC), UNHCR, UNICEF, UNESCO, EU, Save the Children and many others are praiseworthy.

I am thankful to all my professors in METU, from each of whom I have learned a lot. First and foremost, I wish to express my heartfelt thanks to my Thesis Advisor, Assoc. Prof. Dr. Zerrin Torun who did not hesitate to step in at a critical juncture in the process of my postgraduate studies, encouraged me to take the last important steps and efficiently led the process to a successful conclusion. Without her support, guidance and deep knowledge, it could not have been possible to achieve what I have accomplished. I also wholeheartedly thank Assoc. Prof. Dr. Başak Kale and Assist. Prof. Dr. Neva Övünç Öztürk for their time, attention and extremely useful contributions to the finalization of my thesis.

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LIST OF ABBREVIATIONS

BID	Best interests Determination
BIP	Best interests Procedure
CCCs	Core Commitments for Children in Humanitarian Action
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CJEU	Court of Justice of the European Union
CMW	International Convention on the Rights of All Migrant Workers and Members of Their Families
CoE	Council of Europe
CP AoR	Global Child Protection Working Group on Area of Responsibility
CRC	United Nations Convention on the Rights of the Child
CRRF	Comprehensive Refugee Response Framework
ECHR	European Convention on Human Rights
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
ESC	European Social Charter
EU	European Union
ExCom	UNHCR's Executive Committee
FRA	European Union Fundamental Rights Agency
FRONTEX	European Border and Coast Guard Agency,
GC	General Comment
GCM	Global Compact for Safe, Orderly, and Regular Migration
GCR	Global Compact on Refugees
IAWG	Inter-agency Working Group
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights

ICRC	International Committee of the Red Cross
ICSE	International Child Sexual Exploitation
IHRL	International Human Rights Law
INTERPOL	International Criminal Police Organization
IOM	International Organization for Migration
IRC	International Rescue Committee
NGOs	Non-governmental Organizations
OHCHR	Office of the United Nations High Commissioner for Human Rights
OPAC	Optional Protocol to the CRC on the Involvement of Children in Armed Conflict
OPIC	Optional Protocol to the CRC on a Communications Procedure
OPSC	Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography
UASC	Unaccompanied and Separated Children
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCRC	UN Committee on the Rights of the Child
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations International Children's Emergency Fund
USA	United States of America

CHAPTER 1

INTRODUCTION

Unaccompanied and separated children (UASC) are among the most vulnerable groups to violence, exploitation, and harm. Due to their vulnerability and particular needs, they are entitled to special protection safeguards. The main purpose of this thesis is to offer a comprehensive examination of the existing legislative framework and policy instruments as well as states' practices on the protection of UASC within the context of international law. In this regard, it seeks to analyse whether international law and national practices provide adequate protection for UASC from violence, abuse, exploitation, and exclusion from fundamental rights. Within this context, the thesis argues that although, considering the particular vulnerabilities and needs of UASC, the developments in international law have contributed to enhanced protection of UASC, numerous severe challenges and shortcomings in international legislation, primarily in international refugee law, and states' practices remain a threat to the protection and promotion of UASC's rights; and therefore there is a need for adopting and implementing a rights-based approach based on the principles of human rights, which are universally and legally recognized including equality and non-discrimination, human dignity, right to live in a secure and peaceful environment, self-determination and self-expression, to deal with those challenges.

Children comprise a substantial portion of the influx of international migration. A wide variety of reasons force children to leave the country where they live with or without their parents and seek new living spaces and international protection. Although the motivations and conditions behind the migration of each child are unique and a consequence of mixed factors, there are some common causes that lead children to make often irregular, unsafe and lonely journeys. The UNHCR's report on "Global Trends, Forced Displacement in 2019", for instance, confirms that crises and

displacement create the circumstances which lead to abuse and exploitation of children, especially UASC.[1] Due to the increasing number of international and internal conflicts, including sectarian violence in almost every part of the world, children's vulnerability to human rights violations has increased. In addition to killings, physical injuries and going missing, children also suffer the psychological trauma of witnessing war and losing their family members.[2] The UN Committee on the Rights of Child (UNCRC) defines "children in potentially vulnerable situations" as "groups of children which are likely exposed to violence", including migrant or refugee children, and displaced and/or trafficked children. It further states that children in emergencies are extremely vulnerable to violence as a result of armed conflicts or wars.[3] Apart from the violence emanated from them, armed conflicts also result in the children's massive displacement and an increased risk of separating from their parents or other responsible adults who can provide them with care and protection, going missing or being victims of human trafficking, as it is in the case of internal conflicts in Syria and Afghanistan and international conflict in Ukraine.

In addition to insecurity and violations of fundamental human rights stemming from armed conflicts in the country of origin, discriminative practices of state agents, lack of opportunities in education and employment, poverty and poor socio-economic conditions within the home country are also among the main reasons affecting children's decision to migrate.[4] As stated by the UNHCR, children, who have engaged

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[1] UNHCR, *"Global Trends, Forced Displacement in 2019"*, 18 June 2020, p. 9. Retrieved from https://www.unhcr.org/statistics/unhcrstats/5ee200e37/unhcr-global-trends-2019.html (Accessed 22 October 2020)

[2] Kirsten Sandberg, "The Convention on the Rights of the Child and the Vulnerability of Children", *Nordic Journal of International Law*, 84, 2015, p. 241.

[3] The Committee on the Rights of Child, General Comment No.13, CRC/C/GC/13, 2011, para. 72/g.

[4] Chona R. Echavez et al., *"Why do children undertake the unaccompanied journey? Motivations fordeparture to Europe and other industrialised countries from the perspective of children, families and residents of sending communities in Afghanistan"*, Afghanistan Research and Evaluation Unit & United Nations High Commissioner for Refugees Issue Paper, December 2014, p. 1. Retrieved from https://resourcecentre.savethechildren.net/library/why-do-children-undertake-unaccompanied-journey-motivations-departure-europe-and-other (Accessed on 25 October 2020)

in migration movements without their parents or family members, depart their homes in the hope of finding convenient living conditions, which would enable them to lead a better and safe life, away from war, conflict and poverty, have access to education opportunities and suitable employments helping them earn their living and if necessary, to support their families.[5]

Based on these purposes, Bhabha and Abel point out that children have engaged in various types of migration, such as gendered migration of girls as sex workers, the self-initiated migration for seeking opportunity, safe migration undertaken within the family unit, or unsafe migration including life-threatening forced migration and exploitative ones such as smuggling and human trafficking.[6] Due to a wide range of unique situations, therefore, difficulties in categorizing, in the literature, children in migration movements are often referred to as "children on the move."[7] As mentioned above, the motivations and reasons behind children's action to migrate may be directly related to the child's immigration status. In this regard, refugee children are children who have left their country due to a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" under Article 1 of the 1951 Convention.[8] Similarly, asylum seeker children are also outside their country of origin and seek international protection from persecution. However, unlike refugee children, they have not "yet been legally

[5] UNHCR, *"Trees Only Move in the Wind: A Study of Unaccompanied Afghan Children in Europe"*, PDES/2010/05, June 2010, p. 22. Retrieved from https://www.ecoi.net/en/document/1281598.html (Accessed on 02 November 2020)

[6] Jacqueline Bhabha and Guy Abel, "Children and Unsafe Migration", in *IOM World Migration Report 2020*, p. 233. Retrieved from tps://publications.iom.int/system/files/pdf/wmr_2020.pdf (Accessed on 12 January 2021)

[7] Ibid.

[8] UNGA, "The Convention relating to the Status of Refugees (1951 Refugee Convention)", General Assembly resolution 429 (V) of 14 December 1950, Adopted on 28 July 1951, Article 1/A/2. Retrieved from https://www.unhcr.org/1951-refugee-convention.html

recognized as a refugee and are waiting to receive a decision on their asylum claim."[9] In this thesis, the term migrant children has been used to refer to all children who cross the borders both voluntarily and involuntarily.

While some children on the move cross the borders with their parents, others leave their families behind or aim to reunite with their family members and begin a lonely and often challenging journey.[10] In this regard, the terms "unaccompanied" and "separated" children, both specific subgroups of children on the move, are used to refer to children who make these lonely, difficult journeys. As defined by UNHCR, unaccompanied children are less than 18 years old, lack the care of both parents and other family members and are not cared for by an adult whom law or customs assign the responsibility to act so.[11] Separated children, also lack the care of their both parents. Unlike unaccompanied children, separated children are accompanied and cared for by other family members or relatives.[12]

It must be noted that in international refugee law, particularly in the 1951 Convention, no distinction has been made for children in terms of definitions of international protection status.[13] Therefore, there is no definition of refugee or asylum seeker child in international refugee law, which is age-neutral and is generally shaped and interpreted within the scope of adult experiences. For the purpose of this thesis, as stated above, the term "migrant children" has been used as an umbrella term covering all children who have migrated both voluntarily and forcibly. If not explicitly stated

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[9] Amnesty International, "Refugee, Asylum Seeker and Migrants", Retrieved from https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/ (Accessed on 13 February 2022).

[10] Ibid., p. 244.

[11] UNHCR, *1997 Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (1997 Guidelines)*, February 1997, para. 3/1. Retrieved from https://reliefweb.int/report/world/guidelines-policies-and-procedures-dealing-unaccompanied-children-seeking-asylum (Accessed on 20 December 2020)

[12] Ibid., para. 3/2.

[13] Neva Öztürk et al., *Çocukların Adalete Erişim Hakkı Çerçevesinde Hukuki Yardim Hizmetlerine Dönük İhtiyaç Analizi,* Union of Turkish Bar Associations Publications, June 2019, p. 105.

otherwise, the term UASC has been used to refer to all unaccompanied and separated children irrespective of their immigration or asylum status as being a refugee, asylum seeker, or immigrant, in the light of the international documents adopted on the issue.

In recent years the number of children migrating alone or becoming unaccompanied or separated during and after their perilous journey has dramatically increased. Menjivar and Perreira reiterate the fact that today UASC constitute a high number of irregular migrants from the Global South.[14] For instance, Eurostat data shows that the number of UASC entering the European Union (EU) area doubled from 2013 (12,725) to 2014 (23,150) and quadrupled to 95,205 in 2015.[15] The main countries of origin of UASC who entered the EU area were Syria, Afghanistan, Iraq, Venezuela, Colombia and Eritrea.[16] As convincingly argued by Menjivar and Perreira, the figures on the UASC's countries of origin demonstrate that weak economic and security situations and unfavourable family environments threaten economic well-being and sense of security and safety at the microlevel, thus creating a strong drive for migration of UASC and perpetuates their search for a better life.[17]

According to the data available to UNHCR, in the period of 2010 and 2019, around 400,000 UASC sought asylum in 117 countries. Germany alone reported 87,000 (one fifth) of the 400,000 UASC asylum applications. Furthermore, in 2019, around 25,000 new asylum applications were lodged by UASC and additionally, 153,300 UASC were

[14] Cecilia Menjivar and Krista M. Perreira, "Undocumented and unaccompanied: children of migration in the European Union and the United States", *Journal of Ethnic and Migration Studies*, 45 (2), 2019, p. 1-2.

[15] Eurostat, "Asylum applicants considered to be unaccompanied minors by citizenship, age and sex - annual data", Retrieved from https://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do (Accessed on 20 November 2020)

[16] UNHCR, UNICEF and IOM, *"Refugee and Migrant Children in Europe Accompanied, Unaccompanied and Separated Overview of Trends January to June 2020"*. Retrieved from https://eea.iom.int/sites/eea/files/publication/document/UNHCR-UNICEF-IOM%20Factsheet%20on%20refugee%20and%20migrant%20children%20Jan-June%202020.pdf (Accessed on 15April 2021).

[17] Menjivar and Perreira, 2019, p. 2.

reported to be among the global refugee population at the end of 2019.18 In 2020, the number dropped to 21.000. As rightly stated by UNHCR, the number of UASC's asylum applications is still "disproportionately high", given that all asylum applications worldwide decreased by one million in 2020 due to the COVID-19 pandemic.[19]

Regarding the COVID-19 pandemic, UNICEF has submitted the worrisome impacts of the pandemic and the states' response to it on children, especially on UASC. In this context, UNICEF has reported that children have been rejected and pushed back at borders in violation of international law by states.[20] Furthermore, displaced children have been globally suffering from exclusion from "national response and recovery plans to the COVID-19 pandemic" and have faced "a significant reduction in access to essential services and care".[21]

Similarly, in December 2021, UNHCR shared some alarming observations and predictions regarding the impact of certain recent facts and developments on the daily lives of large numbers of people in many regions and countries, which bear the risk of forcing many people to migrate and get on the move in the hope of finding a better life elsewhere. In this regard, UNHCR underlines the effects of new and ongoing conflicts and the disastrous consequences of climate change in dramatically increasing the

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[18] UNHCR, "*Global Trends: Forced Displacement in 2018*", 19 June 2019, p. 60. Retrieved from https://www.unhcr.org/statistics/unhcrstats/5d08d7ee7/unhcr-global-trends-2018.html (Accessed on on 20 October 2020.

[19] UNHCR, *"Global Trends: Forced Displacement in 2020*", 18 June 2021, p. 8. Retrieved from https://www.unhcr.org/60b638e37/unhcr-global-trends-2020 (Accessed on 22 October 2021)

[20] UNICEF, *Pushback Practices and their Impact on the Human Rights of Migrants: UNICEF Submission to the Thematic Report of the United Nations Special Rapporteur on the Human Rights of Migrants*, February 2021, p. 1. Retrieved from: https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/pushback/UNICEFSubmission.pdf (Accessed on 14 March 2022)

[21] UNICEF, "COVID-19 has led to dramatic reduction in essential services and protection for migrant and displaced children in countries around the world", Press Release, 18 December 2020. Retrieved from https://www.unicef.org/press-releases/covid-19-has-led-dramatic-reduction-essential-services-and-protection-migrant-and (Accessed on 14 March 2022)

number of involuntarily displaced people in 2021. Thousands of people in vast geographies from Afghanistan to Ethiopia have been uprooted because of human rights violations, violence and persecution. UNHCR further emphasizes that many of these forcibly displaced people have had to overcome additional hardships originating from the COVID-19 pandemic, challenging weather conditions and increasingly restrictive immigration and border policies and practices and laws regulating asylum. Afghanistan represents a case in point in UNHCR's assessment. The abrupt withdrawal of international military presence in August 2021 left this country and its people confused and desperate in taking care of their daily lives and needs Afghanistan has found itself in a period of instability and unpredictability. There is a risk of worsening domestic military conflicts as the Taliban has taken over the political power and has run the country since the fall of Kabul in their hands. Given these circumstances, UNHCR estimates that some half a million people have been newly displaced even before the Taliban seized power in August 2021. In the absence of foreign aid and due to the inaccessibility of frozen government assets, Afghanistan has found itself in a worst economic crisis, which was also worsened by a prolonged period of drought. All these factors have caused scarcity of food and widespread hunger, as some nine million Afghans face the risk of famine.[22] All these factors and realities may trigger an increasing number of Afghans including children to migrate and seek better life opportunities in other countries. As far as Afghanistan is concerned, given the social realities and certain practices involving boys as well, it may be useful to pay particular attention to the circumstances facing children both girls and boys in Afghanistan. Indeed, there may be a linkage between the high number of unaccompanied and separated migrant children from this country and the allegations of sexual exploitation and abuse of children, including boys. This point is particularly important, because it may be considered as a well-founded fear during the reception procedures in the host country.

[22] UNHCR, "On the frontlines of the global displacement crisis, 2021: forced displacement in pictures", December 2021. Retrieved from https://www.unhcr.org/spotlight/2021/12/on-the-frontlines-of-the-global-displacement-crisis-in-2021/ (Accessed on 7 January 2022)

Currently, the ongoing war in Ukraine has created many tragedies. Since 24 February 2022, more than four million people have been forced to flee Ukraine.[23] While two million Ukrainian children, many of them UASC, have been forced to leave their homeland and immigrate to other countries primarily to the EU countries, the number of internally displaced children has been estimated as more than 2.5 million.[24] UASC constitute the majority of children forced to leave Ukraine, as such a great emergency and displacement have resulted in family separations. These children, who are deprived of family care, are at a heightened risk of being exposed to violence, exploitation, trafficking and disappearances.

It must also be emphasized that since a limited number of countries have collected and reported data regarding UASC, the actual figures are estimated to be much higher.[25] In addition, in many cases, the exact number of unaccompanied or separated girls cannot be reflected in the statistics. This is mainly because girls are more easily employed as domestic workers; used as sex workers by human traffickers; or forced into early marriage before they even reach the stage of identification and registration in the countries of destination. In that vein, the gender dimension of migration must be taken into consideration.

The issue of children in the displacement cycle is not important only because they constitute the vast majority of the global refugee population. In many ways, children mean more than numbers. As stated by Sandberg, children not only have "the universal vulnerability" of being human, but they also have the particular and further

[23] This data has been provided by the UNHCR, for the period of 24 February 2022- 4 April 2022. UNHCR Data Portal, "Ukraine Refugee Situation", 4 April 2022, Retrieved from: https://data2.unhcr.org/en/situations/ukraine (Accessed on 5 April 2022).

[24] UNICEF, "War in Ukraine: Support for children and families", Retrieved from: https://www.unicef.org/emergencies/war-ukraine-pose-immediate-threat-children (Accessed on 5 April 2022).

[25] "Upon the UNHCR's request governments to be reported on the number of unaccompanied and separated children in the refugee population, only 53 countries reported a total of 111.000 unaccompanied and separated child refugees and 27.600 unaccompanied and separated children sought asylum in 2018". UNHCR, *"Global Trends - Forced Displacement in 2018"*, 19 June 2019, p. 60.

vulnerability of being a child. She points out that since children "are not yet fully developed physically, mentally, emotionally and spiritually", they are to some extent dependent on the protection and decisions of adults.[26] Hart also defines children as the most vulnerable subgroup and future of humanity, as they are not capable of ensuring their own welfare and protecting themselves from maltreatment and exploitation.[27] When it comes to UASC, there is a consensus on the specific and further need for UASC to be protected from maltreatment and harm. As aliens and children who lack their parents' protection, UASC face many challenges and are subject to various human rights violations. In addition to challenges experienced by every migrating child, such as discrimination, marginalization and exclusion, UASC are the most at the risk of abuse, exploitation, and exclusion from fundamental rights, protective measures and access to social services. Besides the psychological challenges and traumas of leaving their homeland and being separated from their families, UASC are more often at risk of being subjected to sexual assault, recruitment, violence, human trafficking, forced labour, discrimination and stigmatization in transit and destination countries.[28]

Following 9/11, security-oriented approaches to migration and restrictive migration control policies have been adopted especially in Europe and North America. Accordingly, the restrictions on regular and safe pathways force UASC into irregular migration into the hands of human smugglers and traffickers. Therefore, the situation of UASC has become a significant concern within the context of the international protection system. Although this significant concern and particular vulnerabilities of UASC require a special international protection system based on a "child-sensitive" and "child rights-based approach", neither the 1951 Convention relating to the Status

[26] Sandberg, 2015, p. 221- 222.

[27] Stuart N. Hart, "From property to person status: Historical perspective on children's rights", *American Psychologist*, 46 (1), 1991, p. 53. Retrieved from https://doi.org/10.1037/0003-066X.46.1.53 (Accessed on 27 November 2020)

[28] UN General Assembly (UNGA), "*Assistance to Unaccompanied Refugee Minors Report of the Secretary-General"*, A/60/300, Sixtieth Session, 24 August 2005, p. 3.

of Refugees nor its 1967 Protocol includes any specific reference to children who are in need of and seeking international protection. As UNHCR states that since international refugee law, and the concept of international protection established therein, have traditionally been interpreted and implemented in accordance with adult experiences, and children are accepted dependent objects in the family unit, the international protection claims of children have often been "incorrectly" assessed or "overlooked".[29]

As a response to this approach, Schweiger argues that states should prioritize child refugees over adult refugees in cases where they cannot accept all as refugees. As reasons for such a differentiation, the author considers three factors: "a) vulnerability, b) efficiency, and c) life phase, and life span".[30] However, this argument put forward by Schweiger appears controversial and runs counter to international law. As correctly stated by UNHCR, a child-sensitive and rights-based approach to international protection based on the best interests of the child should not be misinterpreted to mean that every asylum-seeking child must be automatically granted refugee status.[31] It is because the recognition of asylum seekers as refugees is a legal process, as such, international law does not give states the flexibility to grant this status selectively and arbitrarily, and the situation of asylum seekers needs to be assessed in an objective manner by applying the relevant criteria under Article 1 of the 1951 Convention. Therefore, it may be argued that Schweiger's preferred way forward lacks legal ground, and perhaps should be seen as a morally grounded suggestion.

On the other hand, it is evident that children in the need of protection require special attention and consideration of their best interests due to their vulnerability. Within the

[29] UNHCR, Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, HCR/GIP/09/08, 22 December 2009, p. 3. Retrieved from: https://www.refworld.org/docid/4b2f4f6d2.html (Accessed on 5 March 2022)

[30] Gottfried Schweiger, "Should states prioritize child refugees?", *Ethics & Global Politics*, 12 (2), 2019, p. 46. Retrieved from DOI: 10.1080/16544951.2019.1649958 (Accessed on 21 November 2020)

[31] UNHCR, 22 December 2009, p. 3.

scope of law, and international human rights law in particular, the term vulnerability is often used to differentiate the categories of people. Therefore, since these children experience difficulties in the enjoyment of their rights enshrined by international law due to their vulnerability, a legal outlook of the vulnerability requires special attention, care, "positive protective or restorative" measures and procedural safeguards adopted by states and other duty bearers within the context of their responsibility to protect and implement these children's rights.[32]

Accordingly, there are also several child-specific protection regulations under international law, including international human rights law, refugee law and humanitarian law. In this regard, the Convention on Rights of the Child, its Optional Protocols, the Committee established by the Convention and its General Comments have formed the fundamental protection mechanism for children, including UASC. As those children are also an essential part of migration and asylum movements, and mainly in need of international protection, they are also entitled to the rights and protection by the 1951 Refugee Convention and its 1967 Protocol. Furthermore, there have also been several regional and soft law instruments applicable for the protection of UASC such as the Council of Europe (CoE) 's and the EU's policy documents, the UNHCR's Guidelines on Protection and Care of Refugee Children and also Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum.

Over the years, particularly since 1990s, several developments and progress related to protecting UASC have occurred. First of all, as stated in the Report of the UN Secretary General, the efforts to address the issue have been increased, and several international and regional instruments and initiatives have been constituted, including the adaptation of new resolutions and guidelines. Furthermore, cooperation between all stakeholders, including UN agencies, national governmental institutions,

[32] Alexander H. E. Morawa, "Vulnerability as a Concept of International Human Rights Law", *Journal of International Relations and Development*, 6 (2), June 2003, p. 139.

international non-governmental organizations, and individuals, have been enhanced.[33] Moreover, the contribution of age and gender mainstreaming to protection programmes, increasing participation of children in the protection process, and capacity building and training activities for personnel dealing with UASC are among other positive steps taken.[34] The regulations and actions are taken to implement them focus on UASC's access to international protection[35], realizing their well-being and development, participation in decision-making process, the prevention of factors that will lead to separation of children from their families, and when it occurs, on identification, registration and documentation of those children, family tracing and reunification, if it is possible and in the best interests of the child, providing alternative care and protection considering the specific needs of children in each case.[36]

It is undoubtedly true that these developments have contributed to the enhanced protection of UASC. However, severe challenges and shortcomings both in legislative level and in practice remain a threat to protecting and promoting children's rights. In this regard, Jorge Bustamante, the former Special Rapporteur on the human rights of migrants, reports two primary gaps regarding the protection of migrant children and their rights: The first protection gap identifies that migration laws and policies neither have specific provisions for children nor a child rights-based approach.[37] As also stated by the UNHCR, these developments have not been totally integrated in international protection system and refugee status determination process.[38] Secondly, in many

[33] UNGA, A/60/300, 2005, p. 18

[34] Ibid.

[35] Öztürk et al., 2019, p. 110.

[36] UNGA, A/60/300, 2005, p. 3.

[37] Jorge Agustin Bustamente, "Statement by Professor Jorge Agustin Bustamente Special Rapporteur on the Human Rights of Migrants", *Human Rights Council*, 11th Session, Geneva, 2 June 2009.

[38] UNHCR, 22 December 2009, p. 3.

countries, child protection policies and mechanisms do not consider the conditions and particular needs of migrant and refugee children.[39]

International law has regulated several norms and standards related to the protection of all children and children's rights, often with a specific emphasis on the rights of UASC. Furthermore, almost every state is a party to the CRC except the United States of America (US). However, it is hard to argue that States Parties are entirely willing to implement the rights enshrined in the CRC and other documents. Protection of children's rights and immigration control policies of states often remain as conflicting interests. In many cases, as opposed to the obligations stemming from international law, states treat UASC as migrants or refugees first, and children second. Therefore, the protection of UASC maintains its importance as an issue that needs to be addressed under international human rights and refugee law.

In this context, as underlined by Bhabha, despite visible progress accompanied by well-established norms, well-organized advocacy initiatives, and new opportunities for high-quality alternative care, UASC lack consistent protection. Indeed, they still face forced return and removal. In addition, giving these children access to fundamental rights has been denied by states.[40] In particular, the lack of a properly designed and implemented best interests determination and identification and age assessment process, denial of access to territory, shortcomings in legal guardianship and family reunification procedures, detention of children as an ordinary procedure which must be a last resort under international law and insufficient living conditions in these centres are the main challenges faced by UASC.

Another issue to be noted is that the phenomenon of migration has traditionally been examined within the context of adult and mostly male movements. Due to the massive migration movements mainly caused by the Arab Uprisings and the Syrian Civil War

[39] Bustamente, 2 June 2009.

[40] Jacqueline Bhabha, "Moving Children: Lacunae in Contemporary Human Rights Protections for Migrant Children and Adolescents", *Revue européenne des migrations internationales*, 30 (1), 2014, p. 52. Retrieved from https://journals.openedition.org/remi/6747 (Accessed on 26 November 2020)

which started in 2011, the studies on migration in the international literature show a significant increase. Following the high number of children migrating and seeking asylum alone in the most developed continents and countries such as Europe and North America, there has been increasing attention and concern on the issue of unaccompanied children and their protection. Yet, research on unaccompanied children who migrate without their family members or legal guardians or who are left alone on their journey after migrating with their families has still been limited. This is due mainly to the neglect of the fact that children have an independent existence from their parents and family members during their immigration movements, even if they are identified as special rights holders by international law. Besides, the discourse on the children on the move, including UASC, refers to them as passive, vulnerable, and exploited agents of migration movements.

The main purpose of this thesis is to offer a comprehensive examination of the existing legislative framework and policy instruments on the protection of UASC within the context of international law. Based on this purpose, the primary concern of the thesis which it seeks to examine, is as follows: "What are the main legislative instruments under international law, namely under international humanitarian law, refugee law, and human rights law, regarding the protection of UASC? Do these instruments provide an adequate level of protection for UASC at the global level? What are the most significant challenges for UASC in practice?"

Following the Introduction, which deals with the motivations behind children's alone migration and figures on the issue, Chapter Two presents the conceptual framework for protecting UASC. In this regard, the concept of child protection is defined in its historical context with a particular reference to the CRC and in relation to the international protection regime. In this chapter, the definition of unaccompanied and separated children is also discussed, addressing the differences between these terms and the traditional term "orphan".

In Chapter Three, the legislative framework which is related to and applicable to UASC is examined. In this context, a wide range of legislative instruments related to and applicable to these children are discussed within the context of international humanitarian law, international refugee law and international human rights law. The 1951 Convention and CRC, as well as their functional and complementary interpretation, are given specific attention in this chapter. Furthermore, regional and soft law instruments such as the General Comments of the UNCRC and UNHCR's Guidelines are addressed.

Chapter Four seeks to address the main challenges faced by UASC in contradiction to international safeguards and states' commitments under international law analysing several issues of concern, including best interests determination (BID); identification and proper age assessment; the appointment of a legal guardian and representative; family tracing and reunification; and finally, detention of UASC.

The thesis concludes that although the developments in international law have contributed to enhanced protection of UASC, numerous severe challenges and shortcomings in international legislation, primarily in international refugee law, and states' practices remain a threat to the protection and promotion of UASC's rights. In this context, the thesis argues that a rights-based approach must be adopted to ensure the protection of UASC. Accordingly, international refugee law, the 1951 Convention and international protection procedures therein, in particular, should be interpreted in a functional, dynamic, children rights-based and in a complementary manner to the CRC to protect UASC.

CHAPTER 2

CONCEPTUAL FRAMEWORK ON PROTECTION OF UNACCOMPANIED AND SEPARATED CHILDREN

The CRC identifies a child as "(…) every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier."[41] Although the term "child" has been defined in primary international human rights law documents, there is no legally binding definition of migrant or refugee children or UASC, since the 1951 Convention and its 1967 Protocols are age-neutral documents and do not include any references to children. It stems from the fact that children are accepted as the integral and dependent agents of the family unit rather than independent individuals in the migration context. Likewise, as Goodwin-Gill states that the meaning of the term protection with respect to migration or asylum context is not fully clear, and this term is best defined considering the circumstances like time, space, environment and certain needs[42]

As stated above, the legal documents and instruments on migration and asylum, first and foremost 1951 Convention and its 1967 Protocol, have overlooked children and lacked specific integrated provisions and definitions regarding children. Thus, these children have been addressed by interchangeable names in different contexts, such as migrant children, refugee or asylum seeker children, children on the move, independent children, unaccompanied or separated children, and orphans.

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[41] The UN, *"Convention on the Rights of the Child (CRC)*", General Assembly Resolution 44/25, 1989, Art. 1.

[42] Guy S. Goodwin-Gill, "Unaccompanied Refugee Minors: The Role and Place of International Law in the Pursuit of Durable Solutions", *International Journal of Children's Rights*, Vol. 3, 1995, p. 406. (Accessed on 15 January 2021)

As noted by Uppard and Birnbaum, inaccurate identification of UASC may result in arbitrary family separations in the cases of children who are actually not unaccompanied or separated, or vice versa and may lead to unaccompanied and separated children being overlooked.[43] Since children, specifically UASC need different degrees of protection and care, and their status is rarely straightforward, it is vital to define and identify them so that they can receive proper protection and care.

Accordingly, in this Chapter, the conceptualization of child protection will be examined in a historical context and in its relation to international protection regime. In this regard, the meaning and transformation of the concept of child protection from the past to the present will be discussed with a particular reference to the CRC and its rights-based approach towards child protection. It will be also emphasized that since 1951 Convention does not include any references to and definitions of UASC, the terms of unaccompanied and separated children will be discussed within the framework of UNHCR and UNCRC Guidelines, addressing the differences between these terms and the traditional term orphan.

2.1. Child Protection

The term child protection means providing assurances for children against any kind of harm by considering their best interests. It includes children's physical integrity and safety as well as emotional and psychological well-being. The end goal of child protection is to construct a nurturing, safe and encouraging environments for all children so that they would not have to worry about any threat of maltreatment, exploitation, violence and neglect. In such an environment, children can lead a life in dignity and enjoy respect for their rights.

[43] Sarah Uppard and Lili Birnbaum, *"Field Handbook on Unaccompanied and Separated Children: Inter-Agency Working Group on Unaccompanied and Separated Children",* The Alliance for Child Protection in Humanitarian Action, 2016, p. 171. Retrieved from https://www.iom.int/sites/g/files/tmzbdl486/files/HANDBOOK-WEB-2017-0322.pdf (Accessed on 23 December 2020)

The UNICEF, charged with protecting and promoting all children's rights worldwide, defines "child protection" as a set of measures aiming to prevent and combat all sorts of violence against children including abuse and exploitation.[44] The terms of "abuse, exploitation and violence" cover all forms of physical, sexual, psychological and emotional maltreatment and neglect, including sexual and economic exploitation, trafficking of children, child labour, child marriage and female genital mutilation and cutting.[45] In this regard, child protection serves as a shield in preventing and combatting violation of children's human rights by addressing several forms of harmful activities and practices. Furthermore, as stated by Save the Children, which is one of the significant international non-governmental organizations (NGOs) active in the field of children rights and child protection, in addition to its role in preventing any kind of child abuse, child protection also provides a mechanism of response to how children are exposed to any type of harm to compensate for this harm and heal them. Therefore, child protection covers all measures to ensure children's access to essential services such as justice, education, health care, and housing. In the long term it also provides victims with assistance and support.[46]

Regarding the conceptualization of child protection, YangHee Lee, who is the former Chairperson of the UNCRC, mentions the transformation in three stages. Whilst in the first stage, a welfare perspective in child protection is dominant, children have transformed from objects to rights holders in the second stage. Finally, in the third stage, children have become relatively independent agents who can act on their behalf.[47]

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[44] UNICEF, *"Child Protection Information Sheets"*, p.1. Retrieved from https://reliefweb.int/sites/reliefweb.int/files/resources/2ECF960B200075A78525719A006E16C1-unicef-protection-may2006.pdf (Accessed on 01 February 2021)

[45] Save the Children, "*Save the Children and Child Protection",* 2007, p. 1 Retrieved from https://resourcecentre.savethechildren.net/node/7586/pdf/sc_child_protection_definition_20071.pdf (Accessed on 02 February 021)

[46] Save the Children, *"Protecting Children in Emergencies",* Policy Brief, 1 (1), Spring 2005, p. 3. (Accessed on 12 February 2021)

[47] Yanghee Lee, remarks at the plenary session of the International Society for the Prevention of Child Abuse and Neglect, Istanbul, Turkey, September 10, 2012. cited by Sid Gardner, *"The Future of the*

Similarly, from Hart's point of view, over time children's status has changed from "property to person status", in line with the development of human rights area.[48] He states that children have been accepted as "property" for centuries, in particular until the 19th century, since parents had almost unlimited power over them. In the 19th century defined as a "child saving era" by Hart, children emerged as a "special vulnerable class" with an emphasis on a welfare approach.[49]

Gradually, children became "potential persons" with the advancement in child protection in the first half of 1900s, when a child-oriented family life, reform on child labour, compulsory education, and a separated juvenile court system have emerged. As a result of progress in the human rights movement after the second half of the 20th century, children were valued as "persons" under law with limited freedoms and representation.[50] In 1924, Eglantyne Jebb and her sister Dorothy Buxton, founders of Save the Children in 1919, prepared a draft on declaration of the rights of the child and submitted it to the League of Nations for adoption.

In this regard, the Geneva Declaration of the Rights of the Child of the League of Nations was adopted in 1924. Then, UNICEF was established in 1946 aiming at providing food, clothing and health care to children in Europe affected by the war. It was followed by the adoption of the UN Declaration of the Rights of the Child in 1959. Despite these progressive movements, as argued by Crock and Martin, the status of the child as an object of protection did not change into "a subject with rights and

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Fifth Child: An Overview of Global Child Protection Programs and Policy",iUniverse Publication, Indiana, USA, 2016, p. 7. (Accessed on 15 February 2021)

[48] Stuart N. Hart et al. "A new age for child protection – General comment 13: Why it is important, how it was constructed, and what it intends?", *Child Abuse & Neglect,* 35 (12), December 2011, p. 972. (Accessed on 12 February 2021)

[49] Hart, 1991, p. 53.

[50] Ibid. p. 53-54.

voice".[51] Therefore, they remained to be considered dependent on adults to a large extent.

Finkelhor and Jones highlight the importance of changing norms and practices in the 1960s, as a result of women's movement and the civil rights movement.[52] However, these developments concurred with the understanding that children need special attention, protection and control due to their vulnerability. In this regard, a needs-based approach[53] focusing on providing physical well-being and meeting basic needs were dominant in the field of children's rights.

In the second half of the 20th century, the protective and needs-based approach began to transform into children's self-determination and self-expression rights to participate in decisions regarding their lives.[54] Van Bueren refers to the year of 1979, which was proclaimed as the International Year of the Child by UNESCO, as the beginning of the real change in children rights discourse, since the efforts in this year led to the conclusion of the CRC.[55] Peterson-Badali and Ruck also point out that the shift is based on the assumption that children are not the property of their families or the state, that they are legal persons with rights and freedoms, and found its clearest expression

[51] Mary Crock and Hannah Martin, "First things first: international law and the protection of migrant children" in Mary Crock and Lenni B. Benson (Eds.), *Protecting Migrant Children: In Search of Best Practice*, Edward Elgar Publishing, Cheltenham, & Northampton, MA, 2018, p. 79. Retrieved from https://www.e-elgar.com/shop/gbp/protecting-migrant-children-9781786430250.html (Accessed on 22 November 2020)

[52] David Finkelhor and Lisa Jones, "Why Have Child Maltreatment and Child Victimization Declined?", *Journal of Social Issues*, 62 (4), December 2006, p. 702-704. Retrieved from https://spssi.onlinelibrary.wiley.com/doi/10.1111/j.1540-4560.2006.00483.x (Accessed on 27 October 2020)

[53] For a comparison of charity-, needs-, and rights-based approaches to social issues, please see: Kosher et al., 2016, p. ix.

[54] Martin D. Ruck and Stacey S. Horn, "Charting the Landscape of Children's Rights", *Journal of Social Issues*, 64 (4,) 2008, p. 685. Retrieved from https://doi.org/10.1111/j.1540-4560.2008.00584.x (Accessed on 21 January 2021)

[55] Geraldine Van Bueren, "International Documents on Children", Save the Children, 1998, p. xv. cited in in Mary Crock and Lenni B. Benson (Eds.), *Protecting Migrant Children: In Search of Best Practice*, Edward Elgar Publishing, Cheltenham, & Northampton, MA, 2018, p. 80.

in the CRC.[56] Henceforth, the concept of child protection has started to evolve and children have taken their place in the international human rights agenda as rights holders.

As discussed in more detail under Chapter 3 related to UASC, the adoption of the CRC has become a milestone in the field of children's rights and child protection, since it reflects a revolutionary approach. The Convention has challenged the centuries-old status of children as dependent on adults by promoting respect for children's dignity and accepting and addressing them as "rights-holders".[57] Its date of adoption by the UN General Assembly is 20 November 1989 and almost a year later, on 2 September 1990 it entered into force.[58] It reflects explicitly the balance between children's need for nurturance and their right to participation and self-determination.[59] It contains both a child's right to protection from harm and violence and also his/her right to develop a personality through self-expression and participation in the decision-making and policy-making process.

One of the most essential features of the Convention is its emphasis on the notion of the child's autonomy and participation in decision-making on matters affecting them. In accordance with the Convention, children are recognized as the major and active subjects of child protection. The CRC, specifically through Article 12, has recognized a child as a unique individual who has the right to be heard, participate in matters affecting children, and respected by all other people, the state and its agencies and other entities, by challenging the idea that the child is insufficient and in need of

[56] Michele Peterson-Badali and Martin D. Ruck, "Studying Children's Perspectives on Self Determination and Nurturance Rights: Issues and Challenges", *Journal of Social Issues*, 64 (4), 2008, p. 750. Retrieved from https://spssi.onlinelibrary.wiley.com/journal/15404560 (Accessed on 15 December 2020)

[57] Ruck and Horn, 2008, p. 690

[58] The UN, "*The Convention on the Rights of the Child*", 1989.)

[59] Ruck and Horn, 2008, p. 690.

protection of adults.[60] In this respect, this approach of the CRC differs from the approach adopted by the "so-called child protection movement", which has a tendency to ignore all previous concerns about children's well-being and rights as the work of only those who are in charge of child protection.[61] Therefore, it represents the most essential stage in the conceptualization of children rights and child protection.

Regarding the conceptualization of child protection, Article 19 of the Convention represents an essential and the broadest provision by prioritizing prevention of all forms of harm and violence against children. It is also linked to a wide range of articles enshrined in the Convention in addition to those directly related to violence. The Convention contains an article on the right of the child to be free from all sorts of violence. Accordingly, the said article stipulates that when they are in the care of parents, legal guardian or any other authorized person, children should be protected from all kinds of violence, such as "physical or mental violence, abuse, neglect or negligent treatment, maltreatment or exploitation, sexual abuse". To that end, States Parties are required to put in place all suitable measures in the areas of legislative, administrative, social and educational fields. Furthermore, in accordance with the Article, such protective measures need to include effective procedures for the setting up of social programmes aiming to provide support for children and for those who are to care about them. Additionally, the article prescribes procedures for taking action to present the cases to consideration by judicial authorities in case of the need for preventative and investigative measures.[62]

As emphasized by Hart et al., the Article clearly shows the transformation in child

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[60] Lothar Krappmann, "The weight of the child's view (Article 12 of the Convention on the Rights of the Child)", *International Journal of Children's Rights,* 18, 2010, p. 502. Retrieved from DOI:10.1163/157181810X528021 (Accessed on 25 November 2020)

[61] Gertrud Lenzer, "Children's Studies and the Human Rights of Children: Toward a Unified Approach, in Kathleen Alaimo and Brian Klug (Eds.), *Children as equals: Exploring the rights of the child,* University Press of America, MD, USA, 2002, p. 208. Retrieved from http://www.brooklyn.edu/web/aca_centers_children/020901_BOOKS_ChildrenAsEquals.pdf (Accessed on 12 November 2020)

[62] UN, "*The Convention on the Rights of the Child",* 1989, Article 19.

protection from a need or charity-based approach toward a child rights-based approach also by showing the limits the authority of parents or guardians over children.[63] A rights-based approach is affiliated to a normative framework, and it is based on the principles of human rights, which are universally and legally recognized including equality and non-discrimination, human dignity, right to live in a secure and peaceful environment, self-determination and self-expression. Therefore, since it is supported by the internationally binding conventions, it has the potential to be more powerful than any other approach. This change of approach is clearly instituted in 2011 by the General Comment No. 13 (GC13)[64] of the UNCRC reformulating the priorities, policies, and practices in accordance with a child rights-based approach.[65]

The Committee strongly declares that "child protection must begin with proactive prevention of all forms of violence as well as explicitly prohibit all forms of violence."[66] The GC13 states that one of the main objectives of the General Comment is to replace previous isolated, fragmented and reactive initiatives in child protection systems with a holistic approach based on an integrated, cohesive, interdisciplinary, and coordinated child rights-based system.[67] In the GC13, the Committee, emphasizing the principle that: "No violence against children is justifiable; all violence

[63] Hart et al., 2011, p. 973.

[64] The Committee's General Comments aim to address the issues related to children rights which have challenges and normative gaps. They are often used "as reference in national judicial proceedings and as practical tools for policy development" (Christine Evans, "The Committee on the Rights of the Child", in Frédéric Mégret and Philip Alston (Eds.), *The United Nations and Human Rights: A Critical Appraisal*, Oxford Scholarly Authorities on International Law (OSAIL), 2020, p. 536-537). Although they are not "formally" legally binding documents, it can be argued that General Comments of the CRC bear a legal and moral nature and impact because they have a strong binding effect in terms of indicating how a provision should be considered and interpreted. Accordingly, they should be viewed as an important component of international human rights/child rights legislation.

[65] Ibid, p. 971.

[66] The UN Committee on the Rights of the Child (UNCRC), "*The General Comment No. 13 (GC13): The right of the child to freedom from all forms of violence*", CRC/C/GC/13, 2011, para. 46.

[67] Ibid., para. 11/c, 11/d and 39.

against children is preventable."[68], has adopted a rights-based approach with an official definition for the first time rather than a welfare approach to caregiving and protection of child. Through the GC13, the Committee also has objected to the perception, which identifies children as "victims" instead, by recognizing them as "rights-bearing individuals" and "a unique and valuable human being with an individual personality, distinct interest and privacy".[69] It has also highlighted that there is a need for a paradigm shift prioritizing human dignity and physical and psychological integrity and well-being of children[70].

One of the essential features of the rights-based approach is that it emphasizes the right to active participation in the decision-making process for all people, especially those affected by this process and decisions are taken. Therefore, this approach derives its strength from recognizing people as active rights holders rather than accepting them only as beneficiaries for charity and needs-based purposes.[71] Unlike needs, which might be met or satisfied, rights must be enjoyed by the right holders, respected by all others, and protected and fulfilled by duty bearers. Another revolutionary aspect of a rights-based approach is the emphasis given to the realization process of rights, including identifying root causes of violations, and strengthening rights holders to claim their rights by raising awareness about their rights with monitoring mechanisms and accountability procedures.[72]

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[68] The UN, "*Report of the independent expert for the United Nations study on violence against children",* A/61/299, para. 1. cited in the UNCRC, GC13, 2011, para. 3/a

[69] Ibid., para. 3/b and 3/c.

[70] Ibid., para. 59.

[71] Kosher et al, 2016, p. viii.

[72] Ibid.

Similarly, a child rights-based approach attaches great importance to the process of realization of the rights of children itself, in addition to the end result.[73] In the words of the Committee:

> This approach is based on the declaration of the child as a rights holder and not a beneficiary of benevolent activities of adults. It includes respecting and encouraging consultation and cooperation with, and the agency of, children in the design, implementation, monitoring and evaluation of the coordinating framework and specific measures therein, taking account of the age and evolving capacities of the child or children.[74]

A child rights approach prioritizes and guarantees "respect for the dignity, life, survival, wellbeing, health, development, participation and non-discrimination of the child as a rights holder." [75] It must be established and promoted as one of the exceptional objectives of states. In this context, a paradigm shift from child protection approaches perceiving and treating children as "objects" to a child protection system, which must be built upon the children's rights, has been needed.[76]

Thus, the reform process in the child protection services has focused on a holistic system approach.[77] Within the context of the CRC and GC13, the conceptualization of the holistic approach refers to all rights enshrined in the CRC must be respected both in individual and collective meaning. This approach emphasizes that the protection of one component at the present moment is not adequate. However, states and

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[73] UNCRC, the General Comment No. 21 on children in street situations, CRC/C/GC/21, 2017, p. 5, para. 10.

[74]UNCRC, GC13, 2011, para. 72/a

[75] UNCRC, GC21, 2017, p. 5, para. 10.

[76] Kirsten Sandberg, Children's Right to Protection Under the CRC, in Asgeir Falch-Eriksen and Elisabeth Backe-Hansen (Eds.) *Human Rights in Child Protection Implications for Professional Practice and Policy*, Palgrave Macmillan, 2018, p. 34.

[77] Eileen Munro and Andrew Turnell, "Re-designing Organizations to Facilitate Rights-Based Practice in Child Protection, in Asgeir Falch-Eriksen and Elisabeth Backe-Hansen (Eds.), *Human Rights in Child Protection Implications for Professional Practice and Policy*, Palgrave Macmillan, Cham, Switzerland, 2018, p. 107. Retrieved from https://link.springer.com/chapter/10.1007%2F978-3-319-94800-3_5 (Accessed on 15 November 2020)

international bodies must fulfil it in a sense of recognizing, respecting, and guaranteeing that component in the future.[78]

According to GC13 of the CRC, a child rights-based definition of child protection would include "strong support for proactive primary prevention, promotion of good childcare, and a commitment to secure the rights and well-being of all children". Accordingly, GC13 recommends the creation of a child rights-based comprehensive coordinating framework.[79] In this regard, GC13 also draws attention to the expertise and experience-sharing and cooperation between all stakeholders such as UN agencies, civil society organizations, community leaders, parents and children themselves, in addition to public institutions for effective implementation of the Article 19 of the Convention.[80] As stated by the Committee in the GC13, as a result of this human rights imperative, the programs of child rights-based protection should be an integral part and one of the main components in assisting sustainable development in countries supported and assisted both technically and financially by international donor institutions including the World Bank, UN agencies, and other regional organizations.[81]

While both the CRC and GC13 emphasize the autonomy of children as rights-holders with a rights-based approach, they do not ignore the vulnerabilities of children, especially some subgroups of children. In this regard, whilst the GC13 determines that it should be applied to all children under 18, besides it specifically addresses the children in vulnerable situations such as children without obvious primary or proxy caregivers including unaccompanied migrant children, children of migrating parents, and children in streets. While the UNCRC recognizes the extreme vulnerability of

[78] Kosher et al., 2016, p. xiv.

[79] Hart et al., 2011, p. 972.

[80] UNCRC, GC13, 2011, para. 6.

[81] Ibid., para. 74.

children on the move, including UASC[82], Sandberg also uses the term "the geography of vulnerability", which is regarded in reference to migrant or displaced children. As these children are far from their original and familiar environment, their vulnerability to breaches of rights is extremely high.[83]

Therefore, since these children experience difficulties in the enjoyment of their rights enshrined by international law due to their vulnerability, a legal outlook of the vulnerability requires special attention and states and other duty bearers' responsibility to protect and implement these children's rights. In this regard, Fineman's approach based on vulnerability, dependency and social institutions provides "a legal paradigm" and "analysis of state responsibility".[84] According to Fineman, "the vulnerable subject" should be the reference point of the law-making processes. Laws and programmes should position vulnerability as a regulatory principle so that society and institutions "mediate, compensate, and lessen" these vulnerabilities.[85] Fineman's vulnerability analysis necessitates a more "responsive state". She states that:

> A guarantee of equality is not enough for this legal subject. The responsive state must be one that recognizes relationships or positions of inevitable inequality, as well as universal vulnerability and dependency acting as an instrument of social justice in both its law-making and enforcement functions.[86]

Similar to Fineman's institutional and responsive state approach, UNCRC attaches particular importance to the concept of vulnerability and points out that states need to identify factors that create and increase the child's vulnerability and address these

[82] UNCRC, GC13, para. 72/g.

[83] Sandberg, 2015, p. 221.

[84] Martha Albertson Fineman, "Vulnerability and Inevitable Inequality", Oslo Law Review, 4 (4), 2017, p. 134.

[85] Martha A. Fineman, The Vulnerable Subject and the Responsive State", *Emory Law Journal*, 60 (2), 2010, p. 268.

[86] Fineman, 2017, p. 149.

factors "when developing laws, regulations, policies, programmes and services".[87] Furthermore, in the case of children without obvious primary or proxy caregivers, the GC13 also identifies the state as the de-facto caregiver. The special provision of GC13 stipulates that Article 19 is applicable to children who do not have a primary or proxy caregiver or another person in charge of their protection and well-being. In such cases, the State party is required to assume the responsibility like a caregiver and is under the obligation to provide the child with the necessary protection and care to support his/her well-being.[88] Furthermore, children who are deprived of their family environment temporarily or permanently are also required to be offered alternative care. By carefully considering potential risks of violence, which these children may have to face, different ways may be possible to safeguard the rights of these children, for instance in care arrangements similar to families.[89]

The GC13 provides a shield for these children in all settings composed of three types of settings, which are usual care settings such as family homes, schools, the other kind of education institutes, and religious institutions; medical, rehabilitative and care facilities which children are in the custody of professionals and state actors; and finally, neighbourhoods, communities and camps or settlements for refugees and children displaced by emergencies such as conflict and/or natural disasters.[90]

Despite all those measures described in relevant regulatory documents, through various forms of violence and abuse, children's right to protection is violated in a massive manner. These violations, which are often neglected or unrecorded, hinder the survival and development of children by creating the risk of short life, physical and

[87] UNCRC, G*eneral comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24),* CRC/C/GC/15, 17 April 2013, para. 11.Retrieved from: https://www.refworld.org/docid/51ef9e134.html (Accessed on 19 April 2021)

[88] Ibid., para. 35.

[89] Ibid., para. 35.

[90] Ibid., para. 34.

mental health problems, lack of education, inefficacy in parenting and social life in the later years, and the need to immigrate enforcedly.[91]

In fact, the CRC recognizes the link between the protection of children from all forms of violence and maltreatment and the other rights of children including the right to life, survival, and development, the right not to be separated from parents, the right to health, the right to social security, and the right to education and leisure.[92] All rights of children need to be construed in consideration of the ultimate aim of child protection, which is to achieve the well-being, health, and development of all children. Furthermore, as stated by the Committee, child development must be accepted as a broad and holistic concept comprising the physical, mental, psychological and social development of children.[93]

In this regard, child protection is a primary condition for the children in terms of enjoying their rights to survival, development and well-being enshrined especially in the CRC and other international documents, as well as national laws. On this critically important aspect of the matter, Hart argues that children continue to be exposed to physical and psychological violence and sexual mistreatment worldwide, and international attention to this matter has been increasing over the past years. Reminding a solid motivation to enhance child protection, Hart believes that a transformational change is needed to achieve lasting improvements. In Hart's view, only a child rights-based approach can yield meaningful worldwide reform of child protection policies, priorities and practices.[94] Furthermore, according to a statement made by Marta Santos Pais, the former Special Representative of the UN Secretary-General (SRSG) on Violence against Children, a child protection system should be composed of both legislative and institutional framework, based on a culture of respect

[91] UNICEF, 2004, p. 8.

[92] UNCRC, GC13, 2011, para. 7/b.

[93] Ibid., para. 18 and 62.

[94] Hart et al., 2011, p. 972.

for rights of children with child-friendly services and mechanisms which prioritize the participation of the child.[95]

On the other hand, while almost all children in the world may experience these forms of harm, children with specific vulnerabilities and in emergencies are more likely to be exposed to them.[96] In emergencies and humanitarian crisis, the concerns related to child protection, which have already existed, are intensified and get even worsened by the emergency. In addition, a wide variety of new concerns, which are specific to, and stemming from that situation, have arisen.[97] UNICEF reports that the common features of emergencies such as breakdown in legal and social systems, disorder and failure in providing the basic humanitarian and social services lead to several significant problems and instability in child protection.[98] For instance, armed conflicts make

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[95] Marta Santos Pais and Jacqueline Bhabha, "Interview: The CRC Drafting Process and the CRC Committee: Part 1", Retrieved from https://learning.edx.org/course/course-v1:HarvardX+FXB001+3T2021/block-v1:HarvardX+FXB001+3T2021+type@sequential+block@6d98b43c52654065bb8d406b7c66cb28/block-v1:HarvardX+FXB001+3T2021+type@vertical+block@cc587fb7c2984fbcaa7755b97579db8f

[96] "The Committee on the Rights of Child defines "children in potentially vulnerable situations" as "groups of children which are likely exposed to violence include, but are not limited to, children: not living with their biological parents, but in various forms of alternative care; not registered at birth; in street situations; in actual or perceived conflict with the law; with physical disabilities, sensory disabilities, learning disabilities, psychosocial disabilities and congenital, acquired and/or chronic illnesses or serious behavioural problems; who are indigenous and from other ethnic minorities; from minority religious or linguistic groups; who are lesbian, gay, transgender or transsexual; at risk of harmful traditional practices; in early marriage (especially girls, and especially but not exclusively forced marriage); in hazardous child labour, including the worst forms; who are on the move as migrants or refugees, or who are displaced and/or trafficked; who have already experienced violence; who experience and witness violence in the home and in communities; in low socio-economic urban environments, where guns, weapons, drugs and alcohol may be easily available; living in accident- or disaster-prone areas or in toxic environments; affected by HIV/AIDS or who are themselves HIV infected; who are malnourished; looked after by other children; who are themselves carers and heads of households; born to parents who are themselves still under 18; who are unwanted, born prematurely or part of a multiple birth; hospitalized with inadequate supervision or contact with caregivers; or exposed to ICTs without adequate safeguards, supervision or empowerment to protect themselves." Children in emergencies are extremely vulnerable to violence when, as a consequence of social and armed conflicts, natural disasters and other complex and chronic emergencies, social systems collapse, children become separated from their caregivers and caregiving and safe environments are damaged or even destroyed;" The Committee on the Rights of Child, General Comment No.13, CRC/C/GC/13, 2011, para. 72/g.

[97] Save the Children, 2007, p. 6.

[98] UNICEF, "*Child Protection. A Handbook for Parliamentarians"*, 2004, No. 7, p. 9. Retrieved from https://www.refworld.org/docid/4a54bc000.html (Accessed 19 November 2020)

children more vulnerable to several existing and new forms of violence and abuse such as serving as soldiers, sexual exploitation, forced labour, rape and even genocide.[99]

Although states are under the obligation of protecting children from violence, exploitation and other kinds of harm under Article 19 of the CRC and GC 13, in many cases, countries of origin are incapable or reluctant to provide "a reasonable level of protection against such harm" for children.[100] Accordingly, several factors such as emergencies, conflicts, poverty, disasters, discrimination practices and systemic human rights violations are compelled children to leave their country and pursue safe places. In that case, transit or destination countries are responsible for providing adequate protection for children in need of international protection.[101]

Goodwin-Gill et al. refer to the term "surrogacy" as "a useful introduction to the system of international protection", which includes the obligation of another state or international organization to protect the person when one's own state does not provide it.[102] The 1951 Convention and its 1967 Protocol are the main instruments of the international protection regime. These instruments have significant provisions regarding "the refugee definition", "rights and obligations of refugees in their country of asylum", and "states' obligations including to cooperate with UNHCR in the exercise of its functions and to facilitate its duty of supervising the application of the Convention".[103] They are also complemented by other conventions and declarations adopted at the regional level. However, UNHCR correctly states that international refugee law is not an isolated area and must be interpreted in the light of international

[99] UNICEF, Child Protection Information Sheets, p. 7.

[100] "R (Bagdanavicius) v Secretary of State for the Home Department [2005] 2 WLR 1359, [2005] UKHL 38, para. 30 (Lord Brown)" cited in Guy S. Goodwin-Gill et al., "The Refugee in International Law", in Guy S. Goodwin-Gill, Jane McAdam, *The Refugee in International Law*, 4th Edition, Oxford University Press, 2021, p. 9.

[101] UNHCR and Inter-Parliamentary Union, *A guide to international refugee protection and building state asylum systems: Handbook for Parliamentarians*, No. 27, 2017, p. 15.

[102] Guy S. Goodwin-Gill et al., 2021, p. 8.

[103] UNHCR and Inter-Parliamentary Union, 2017, p. 18.

human rights and humanitarian law.[104] In a similar vein, the Inter-American Court of Human Rights (IACHR) points out that although the concept of international protection is directly linked to refugee status in the first place, it also includes other kinds of the normative framework for protection in the context of several branches of international law, especially in the context of international refugee, human rights and humanitarian law.[105] In this regard, according to the IACHR, the broadened notion of international protection covers:

> (a) the protection received by asylum seekers and refugees on the basis of the international conventions or domestic law; (b) the protection received by asylum seekers and refugees on the basis of the broadened definition of the Cartagena Declaration; (c) the protection received by any foreign person based on international human rights obligations, and in particular the principle of non-refoulement, as well as complementary protection or other forms of humanitarian protection, and (d) the protection received by stateless persons in accordance with the relevant international instruments.[106]

As stated by the UNHCR, states are initially under the obligation to identify people who seek and need international protection. In this regard, setting up determination mechanisms for people in need of international protection, first and foremost refugees is vital for the enjoyment of "the right to seek and enjoy asylum".[107] As discussed in Chapter Three, the term "refugee" is defined under Article 1 of the 1951 Convention. According to this definition, a refugee is "someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political

[104] UNHCR and Inter-Parliamentary Union, 2017, p. 15.

[105] The Inter-American Court of Human Rights (IACHR), *"Advisory Opinion on Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection"*, OC-21/14, 19 August 2014, para. 37. Retrieved from https://www.refworld.org/cases,IACRTHR,54129c854.html (Accessed 20 December 2021)

[106] Ibid.

[107] UNHCR and Inter-Parliamentary Union, 2017, p. 125.

opinion."[108] The point that distinguishes refugees from other immigrants is that they leave their country for fear of persecution due to certain characteristics and cannot return to their country. Therefore, these people, deprived of the protection of their own country, "seek protection from a country of refuge, and from the international community".[109]

Furthermore, there may be other persons who do not legally comply with the definition of refugee but are likely to suffer serious harm in their country. Since they cannot benefit from the protection of their country of origin, they also need international protection. For these persons, states have envisaged some complementary and temporary forms of international protection in their domestic laws. The scope of this complementary and temporary protection differs from country to country.[110]

For children who are deprived of the protection of their country, the international protection regime is vital in order to realize their rights. However, the international protection regime, which was developed as an immediate response to the massive population movements after the Second World War and does not include any additional protection or reference to children, is not sufficient on its own to protect children who are already vulnerable. Children have experienced many challenges in each stage of the displacement cycle and the asylum-seeking process, in particular. Since it is the formal recognition of the child's demand for international protection, the refugee determination process is at the centre of the asylum process.[111] In Pobjoy's words:

> But while there is a vast and mature body of literature addressing issues faced by refugee children generally, often with an emphasis on unaccompanied and

[108] UNHCR, "What is a Refugee?", Retrieved from: https://www.unhcr.org/what-is-a-refugee.html (Accessed on 25 February 2022).

[109] UNHCR, *Persons in need of international protection*, June 2017, p. 1. Retrieved from: https://www.refworld.org/docid/596787734.html (Accessed on 25 February 2022)

[110] UNHCR and Inter-Parliamentary Union, 2017, p. 147.

[111] Jason M. Pobjoy, *The Child in International Refugee Law".* Cambridge Asylum and Migration Studies, Cambridge University Press, Cambridge, 2017, p. 2.

> separated children, there has been relatively limited engagement with the legal challenges that a child may face in qualifying for international protection.[112]

Undoubtedly, all children in need of international protection, including the UASC, who are recognized by the UNCRC as among the most vulnerable groups, must be able to enjoy an effective child protection system and exercise their rights. Accordingly, as argued by Öztürk et al., unlike other children, refugee or asylum-seeking children must initially access international protection procedures to access and enjoy their rights.[113] Therefore, as will be discussed in more detail in Chapter Three, the 1951 Convention, which forms the basis of the international protection system should be interpreted and implemented in a functional, dynamic, rights-based and complementary manner within the framework of the General Comments of the CRC and UNCRC.

While some argue that subcategorizing children such as refugee and migrant children in general or UASC in particular, will lead to their stigmatization and thus make them more vulnerable, the Committee's approach and interpretation aim to enable states to take more targeted and specific measures, taking into account the special situation of these children.[114] Gispen also underlines another function of the vulnerability approach. She argues that in addition to justifying recognition of child-specific rights in the CRC, vulnerability also serves a function in interpretation and ultimately government of the Convention.[115]

Vulnerability theory draws attention to the state's responsibility to protect vulnerable people including UASC and to the significant role of law and social institutions as the instruments of resilience against vulnerability. On the other hand, as Sandberg correctly argues, putting too much emphasis on children's vulnerabilities may prevent

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[112] Ibid.

[113] Öztürk et al., 2019, p. 110.

[114] Sandberg, 2015, p. 229.

[115] Marie Elske C. Gispen, "Vulnerability and the Best interests of the Child in Tobacco Control", *The International Journal of Children's Rights,* 29, 2021, p. 596.

them from being seen as right-holders and may cause misperceptions such as a return to paternalistic and charity-based approaches. In this regard, the vulnerability theory should be interpreted in a way that has the potential to strengthen and monitor the implementation of the Convention's provisions through social institutions and law, rather than in a way that leads to paternalism.[116] Therefore, to avoid this misperception, a rights-based and holistic approach is needed that considers the specific vulnerabilities of children, including UASC, while emphasizing their capacities as right-holders and their participation rights.

To sum up, considering GC 13 and Article 19, which underline the obligations of states, protection of children and prevention of violence against children are often listed among the measures that can reduce the number of children on the move. As refugee and migrant children without parental care have a greater risk of facing violence, abuse, and exploitation, they have a unique place in terms of child protection systems. In this regard, it can be argued that the consideration of Article 19 of the CRC and GC13, together with the 1951 Convention; on the one hand, points to the obligation of states regarding child protection systems, on the other hand, the failure to fulfil this obligation constitutes the justification for the child's access to international protection. In order to provide an effective response for these children, child protection systems, which are built upon a rights-based approach, must address and respond to their concerns and needs, which are both common for each child and unique to them.

2.2. Orphans

When unaccompanied or separated children are mentioned, it is often seen that there is a false notion, as these children are confused with orphans. Therefore, it is useful, firstly, to define the term orphan for the purposes of this thesis.

[116] Sandberg, 2015, p. 222.

The term orphan has been used for centuries to define a child whose parents are dead.[117] Inter-agency Guiding Principles on Unaccompanied and Separated Children define orphans as the children who have lost both parents. It also points out that in some states, a child whose one of the parents is dead is accepted as an orphan, as well.[118] Especially in armed conflicts or wars, there is a tendency to label every child who is alone or left behind as an orphan. However, not every child, specifically those travelling alone, is an orphan.

As stated by the UNHCR, a child becomes an orphan only if his/her both parents are dead. This clarification and identification are crucial, and if the child has not lost both parents, the term orphan should not be used.[119] In this regard, the terms of unaccompanied or separated children, which will be explained below, have a meaning different from the term orphan. Although, an unaccompanied child may become an orphan at the same time, in other cases, while children have travelled with their families, they may accidentally be separated from their families or left behind. Similarly, despite the existence of the possibility that they may have family reunification, they may be unable to return.[120]

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[117]Cambridge Dictionary, "orphan", Retrieved from https://dictionary.cambridge.org/tr/s%C3%B6zl%C3%BCk/ingilizce/orphan (Accessed on 20 December 2020).

[118] Inter-Agency Working Group (IAWG), *"Inter-agency Guiding Principles on Unaccompanied and Separated Children",* January 2004, p. 13. Retrieved from https://cms.emergency.unhcr.org/documents/11982/43375/Guiding+Principles+on+Unaccompanied+and+Separated+Children%2C+2004/ab0d3c80-5f96-4523-abf2-95701beb4341 (Accessed on 20 December 2020)

[119] UNHCR, *"Refugee Children: Guidelines on Protection and Care (1994 Guidelines)",* 1994, p. 122. Retrieved from https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/UNHCR_Refugee_Children_Guidelines_1994.pdf (Accessed on 22 December 2020)

[120] Jacqueline Bhabha, "Too much disappointing': the quest for protection by unaccompanied migrant children outside Europe", in Kanics et al. (Eds.), *Migrating Alone, Unaccompanied and Separated Children's Migration to Europe*, UNESCO Publications, France, 2010, p. 94. Retrieved from https://www.scribd.com/document/118234697/migrating-alone (Accessed on 11 November 2020)

Immediately labelling a child as an orphan may bear inclination to urge adoptions instead of focusing on family tracing, family reunification, or community support.[121] Therefore, in such situations identifying children as unaccompanied or separated and the meaning of these terms become crucial.

2.3. Unaccompanied Children

In the migration context, accepting children as an independent and a specific group, who needs to be addressed, is a new phenomenon. The situations and times when these children are accompanied or unaccompanied are even much more untouched. Therefore, the notion of unaccompanied child is a newly accepted concept, unlike the term orphan.

The 1951 Refugee Convention, which reflects the then conception of human rights and the notion of child as adult dependent objects, does not distinguish a refugee adult from a refugee child. Therefore, a child is considered a refugee within the scope of the Convention if she/he meets the conditions under the refugee definition set out in the Convention. Since there is no specific provision or definition regarding refugee children, thus, there is no distinction between any categories of refugee children including unaccompanied children.[122]

Similar to the 1951 Convention, the CRC does not contain a definition of unaccompanied children. However, unlike the 1951 Convention, the CRC distinguishes unaccompanied children from accompanied children and stipulates special protection for them through Article 22. Under Article 22, the CRC recognizes that both children accompanied by their parents and unaccompanied children are

[121] Ibid.

[122] Ilias Bantekas, **"**Unaccompanied Children and their Protection under International Refugee Law" in Satvinder S. Juss (ed.), *The Ashgate Research Companion to Migration Theory and Policy*, Ashgate Publications, Farnham, UK, 2013, p. 348. Retrieved from https://www.taylorfrancis.com/chapters/edit/10.4324/9781315613239-23/unaccompanied-children-protection-international-refugee-law (Accessed on 26 November 2021)

entitled to the right to "receive appropriate protection and humanitarian assistance" in order to enjoy all the rights recognized by the CRC and other international law instruments.[123]

The official definition of unaccompanied children has been enshrined in the UNHCR's 1997 Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (1997 Guidelines) for the first time. In paragraph 3/1 of the Guidelines, an unaccompanied child is defined as a person under the age of 18 years, unless majority is reached earlier under the applicable law. The definition also foresees that such a child is also separated from both parents and is deprived of the care by an adult whom law or custom assigns such a responsibility.[124]

This definition has been embraced by the latter documents of the UN and other international and supranational organisations such as the EU and national legislation and regulations. In harmony with the UNHCR's 1997 Guidelines, according to the General Comment No. 6 (GC6) of the UNCRC, on the Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, unaccompanied children as defined in Article 1 of the Convention, are those, who have been separated from both parents and other relatives and do not have the care of an adult whom law or custom assigns the responsibility to do so.[125]

In a similar but broader context, the EU Council Directive 2005/85/EC (1 December 2005) on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status defines an unaccompanied child as:

> (a) person below the age of 18 who arrives in the territory of the Member States unaccompanied by an adult responsible for him/her whether by law or by

[123] UNGA, CRC, 1989, Article 22.

[124] UNHCR, 1997 Guidelines, para. 3/1.

[125] UNCRC, *"General comment No. 6 (GC6) Treatment of Unaccompanied and Separated Children Outside their Country of Origin*", CRC/GC/2005/6, 1 September 2005, para. 7.

> custom, and for as long as he/she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he/she has entered the territory of the Member States.[126]

As seen the EU Directive covers not only children who are separated from their parents or other relatives on arrival in the territory of a member state, but also children who are left alone after the arrival. The Turkish legislation in this area is aligned with the EU Acquis.

In the light of the definitions above, it is obvious that children who are completely deprived of care of an adult are recognized as unaccompanied children. In addition, there are also numerous cases in which children are cared for by adults such as a neighbour, a staff in the institution, or a totally stranger person, or in some cases even a smuggler, who are not children's relatives or principal caregivers by law or custom.[127] Such children are also be accepted as unaccompanied children by international human rights instruments. For instance, a child who is in the care of an unrelated village member whose relationship with the child is questionable in terms of "quality and duration" must be identified as an unaccompanied child.[128]

Since an unaccompanied child is defined by the lack of a principal caregiver, it is important to identify what principal caregiver means. Bantekas points out that principal caregiver does not need to be the legal or biological parent of the child. In some cases, children may live with foster parents, or may about be adopted, or the relatives of the child may care for the child.[129] In order to determine whether an adult accompanying a child is the primary caregiver of the children, the criteria that must be

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[126] EU Council Directive 2005/85/EC (1 December 2005) on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, Art. 2 (h).

[127] IRC et al., *"ARC Resource Pack: Actions for the rights of the children, A capacity-building tool for child protection in and after emergencies"*, 2009, p. 14. Retrieved from https://resourcecentre-drupal.savethechildren.net/keyword/arc-action-rights-children-resource-pack (Accessed on 20 November 2020)

[128] Uppard and Birnbaum, 2016, p. 172.

[129] Bantekas, 2013, p. 353.

taken into consideration is “the quality and durability” of the relationship which the caregiver and the child have.[130] By the 1997 Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, UNHCR sets forth the guidelines on identifying unaccompanied children and children accompanied by adults who are not their parents. According to this document, a child is considered unaccompanied if his/her parents are not with him or her and if the relationship between the child and caregiver are dubious and not convincing to the interviewer.[131]

As seen, the official definition of unaccompanied child focuses solely on the absence of parents or other principal caregivers. Contrary to the UNHCR’s official definition, Bantekas points out that some national laws differentiate between unaccompanied children on the ground of their age or the degree of separation from their families, such as temporary, transitory or semi-permanent separation from the family.[132] For instance, in the USA, “a special immigrant juvenile status” is designated only for unaccompanied children who are “deemed eligible by that court for long-term foster care due to abuse, neglect, or abandonment”. Under the Regulation, to be eligible for long-term foster care, the family reunification of the child must be out of the question.[133] However, it is clear that under international human rights law, adequate protection must be provided to all unaccompanied children, regardless of their age, degree of separation from their families, or purposes of travel. Otherwise, as strongly argued by Bantekas, there would be a possibility that some states may use this difference as a justification tool for the expulsion of specific categories of children from their country.[134] As stated by the UNHCR, the purposes or causes of the unaccompanied children's travel, or their age, or their degree of separation are only

[130] UNHCR, 1997 Guidelines, Annex II, p. 19, para. 5.

[131] For all criteria on determining of principal caregivers, see UNHCR, 1997 Guidelines, Annex II.

[132] Bantekas, 2013, p. 350

[133] David B. Thronson, "Kids Will Be Kids - Reconsidering Conceptions of Children's Rights Underlying Immigration Law*”, Ohio State Law Journal.* Vol 63, 2002, p. 1006.

[134] Bantekas, 2013, p. 350.

necessary for differentiated care of those children, possibility of family reunion and durable solutions.[135] Therefore, these features cannot be used to discriminate against unaccompanied children by States. Regardless of their age (under the age of majority), separation status and motives behind their choice to migrate, all unaccompanied children must be identified and provided protection.

2.4. Separated Children

Separated children also lack the care of their both parents. Unlike unaccompanied children, separated children are accompanied and cared for by other family members or relatives.[136] According to the EU Reference Document on Unaccompanied Children, separated children are those who do not have the care from either of his/her parents or from a legal or customary caregiver. However, this definition does not exclude the possibility of care provided by any other relative or any other adult family member.[137]

Uppard and Birnbaum also draw attention to the fact that for a child to be defined as a separated child, separation from their parents must have an involuntary nature and the child must be away from a protective environment. In this regard, children who have been hosted and cared for by a legal or customary primary caregiver, or children who study in boarding schools should not be considered and treated as separated children. However, when these children lose their protective environment or contact with their parents or become separated from their customary caregivers, then they should be accepted as separated.[138] For instance, if a child was legally cared by his/her uncle as

[135] UNHCR, 1994 Guidelines, p. 122.

[136] Inter-Agency Working Group, 2004, p. 13.

[137] Rebecca O Donnell, Reference Document on Unaccompanied Children, EU Project on "Identifying good practices in, and improving, the connections between actors involved in reception, protection and integration of unaccompanied children in Europe", 2014. p. 9. Retrieved from www.connectproject.eu/PDF/CONNECT-EU_Reference.pdf (Accessed on 22 November 2020)

[138] Uppard and Birnbaum, 2016, p. 59.

a primary caregiver before the displacement and is still with that person after the displacement, then she/he must be accepted as not separated. On the other hand, if the child, who was previously in the care of the parents, is deprived of the care of his/her parents and is placed in the care of his uncle after displacement, then she must be identified as a separated child.[139]

In practice, it is common to encounter children who are separated from their parents to be accompanied by their adult siblings. Therefore, UNHCR specifically addresses children accompanied by their adult siblings in its guidelines on the treatment of unaccompanied children. According to the Annex II of the Guidelines, throughout the process of determining refugee status, a child should be processed together with his/her accompanying adult sibling provided that they are sharing a common past and the adult sibling is able to explain and defend the child's application to acquire refugee status.[140] If the available evidence indicates that these conditions are fulfilled, then the child should be identified as a separated child. On the contrary, if it is failed to meet these conditions, the child must be considered and treated as an unaccompanied child in the process of determination of his/her refugee status and considering the best interests of the child, a durable solution should be assessed.[141]

Although they have different meanings, in the literature on migration and children's rights, unaccompanied children or separated children are interchangeably used and there is rare differentiation between these two groups. Similarly, the international documents and guidelines on the protection of unaccompanied children cover separated children and provide protection and care for them. For instance, the UNCRC's General Comment No. 6 enshrines that "If not otherwise specified, the guidelines below apply equally to both unaccompanied and separated children."[142]

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[139] Ibid., p. 172.

[140] UNHCR, 1997 Guidelines, Annex II, p. 20, para. 1.

[141] Ibid., para. 2.

[142] UNCRC, GC6, 2005, para. 10.

This approach stems from the fact that children in both categories are exposed to similar risks. Furthermore, in some cases the situation and treatment of the children accompanied by their relatives rather than their parents may be even worse than unaccompanied children.[143] Therefore, their need for protection must also be given priority. To this end, in this thesis, the term of unaccompanied children has been used to include children who have been separated from their parents, but not necessarily other family members or relatives.

In conclusion, as unaccompanied or separated children lack family support and protection and are more vulnerable to risks, it is vital to identify whether these children are unaccompanied or not as soon as possible. In this way, it will be possible to monitor whether the needs of these children are met, and their families or other relatives can be traced immediately. Otherwise, as argued by Sandberg, these children who have particular vulnerabilities and, therefore, need special attention, care and protection, may have been easily overlooked.[144] Furthermore, Uppard and Birnbaum notes the significance of defining target groups properly for the programs which deal with unaccompanied and separated children. When applying these definitions and identifying children, the historical, economic, social and cultural context, like local traditions and practices should be taken into consideration in addition to formal definitions. It should not be overlooked that there may be differences and potential contradictions between traditional terms and formal terms.[145]

It should not be forgotten that even if the labels, legal and immigrant status of these children change with time and place, their need for protection and respect for their

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[143] Shahin Yaqup, *"Independent Child Migrants in Developing Countries: Unexplored Links in Migration and Development",* UNICEF Innocenti Research Centre, Florence, Italy, 2009, p. 10. Retrieved from https://www.unicef-irc.org/publications/559-independent-child-migrants-in-developing-countries-unexplored-links-in-migration.html (Accessed on 14 November 2020)

[144] Sandberg, 2015, p. 237.

[145] Uppard and Birnbaum, 2016, p. 171.

rights will continue. Therefore, the next chapter analyses the international legislations adopted to protect UASC.

CHAPTER 3

UNIVERSAL AND REGIONAL LEGISLATIVE FRAMEWORK AND SOFT-LAW INSTRUMENTS ON UNACCOMPANIED AND SEPARATED CHILDREN

Due to UASC's vulnerability to human rights violations and exploitation, international law has long recognized their need for special care and adopted several protection measures. There has been a wide range of legislative instruments related and applicable to UASC within the context of international humanitarian law, refugee law, and particularly international human rights law.[146] Furthermore, there have also been several regional and soft law instruments applicable for the protection of UASC.

International legal regulations on the protection of refugee children have first emerged after World War I. Considering the intensity and specificity of the problems experienced by children during and after the war, the League of Nations adopted the Geneva Declaration of the Rights of the Child in 1924, which is the first international human rights document related to the rights specific to children.[147] The Declaration set forth five principles regarding the needs and rights of children. Two articles of the Declaration are essential within the context of refugee children. These are the right to receive relief in times of distress and the right to protection against every form of exploitation.[148] Besides, there is a specific reference to orphans highlighting the

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[146] Jacqueline Bhabha, *"Independent Children, Inconsistent Adults: International Child Migration and the Legal Framework.*" UNICEF Innocenti Research Centre, Florence, Italy, May 2008, p.3. Retrieved from https://www.unicef-irc.org/publications/pdf/idp_2008_02.pdf (Accessed on 22 December 2020)

[147] Jason M. Pobjoy, "Art.22 Refugee Children", in John Tobin (ed.), *The UN Convention on the Rights of the Child: a commentary*, Oxford University Press, Oxford, 2019, p. 819. Retrieved from https://global.oup.com/academic/product/the-un-convention-on-the-rights-of-the-child-9780198262657?cc=tr&lang=en& (Accessed on 24 December 2020)

[148] Bhabha, 2008, p.i.

obligation to provide shelter and assistance.[149] However, the Declaration has not imposed any duties on states; it has just referred to "men and women of all nations" as the duty-bearers. It has also recognized children as the objects of protection rather than right holders.[150]

Following World War II, international law instruments initiated the efforts to formally recognize UASC as a part of the protection of refugees in a humanitarian context.[151] Within the framework of international humanitarian law, the Geneva Conventions of 1949, which is binding for all parties to both international and non-international conflicts, ensured specific protection measures for "children who are orphaned or are separated from their families as a result of the war" and also stipulated family unity and contact.[152] However, these initiatives are also based on a welfare approach instead of a rights-based approach.[153]

International refugee law and protection measures therein are also applicable to UASC holding refugee status or seeking asylum. Although the 1951 Convention Related the Status of Refugees and its 1967 Protocol are the core documents within refugees' migration process and rights, it is an age-neutral convention. It does not specifically address the case of refugee children, including UASC. Through the activities of the UNHCR, which "serves as the 'guardian' of the 1951 Convention and its 1967

[149] League of Nations, *"Geneva Declaration of the Rights of the Child",* Adopted 26 September 1924, Art. 2. Retrieved from https://www.humanium.org/en/geneva-declaration/ (Accessed on 25 December 2020)

[150] Office of the United Nations High Commissioner for Human Rights (OHCHR), *"Legislative History of the Convention on the Rights of the Child Volume 1",* United Nations, New York and Geneva, 2007, p. 3. Retrieved from https://www.ohchr.org/Documents/Publications/LegislativeHistorycrc1en.pdf (Accessed on 26 December 2020)

[151] Crock and Martin. 2018, p. 77.

[152] Uppard and Birnbaum. 2016, p. 33.

[153] Crock and Martin, 2018, p. 77.

Protocol"[154], however, UASC have been recognized as a specific target group of international refugee law.

The most comprehensive legislation on the rights of migrant and refugee children, including UASC, has been developed under international human rights law, including the International Bill of Rights (the UDHR, the ICCPR, and the ICESCR), and first and foremost the CRC and its Optional Protocols. The CRC, the most essential international legally binding document relating to children's rights, also represents a cornerstone for the protection of UASC. In its Preamble, the CRC recognizes the existence of children "living in exceptionally difficult conditions" and their need for special consideration. It is undoubtedly clear that UASC are at the highest risk of living in difficult conditions. UASC are under the protection of the CRC since the rights enumerated therein apply to all children in the jurisdiction of a State Party regardless of race, colour, religion, national, ethnic or social origin or migration status of the child, their parents or legal guardians. They have also additional protection under Article 20 related to the protection of children deprived of the family environment and Article 22, which is the only legally binding international provision addressing the situation of refugee or asylum-seeking children, including unaccompanied children and guaranteeing their right to "receive appropriate protection and humanitarian assistance" to enjoy their rights outlined in international law.[155]

In addition to international law instruments, several protection measures are adopted by the regional human rights mechanisms in Africa, America and Europe. Furthermore, several soft law instruments directly addressing UASC, including the guidelines and general comments of the UNCRC and UNHCR, have complemented the international legislative framework.

[154] UNGA, "The Convention relating to the Status of Refugees (1951 Refugee Convention)", General Assembly resolution 429 (V) of 14 December 1950, Adopted on 28 July 1951. Retrieved from https://www.unhcr.org/1951-refugee-convention.html

[155] Pobjoy, 2019, p. 821-822.

In this regard, this Chapter of the thesis deals with the international legislative framework, which is related and applicable to UASC in detail. It analyses the related provisions of international humanitarian law, international refugee law and international human rights law, also addresses the shortcomings of these instruments. It also addresses the regional and soft law instruments.

3.1. International Humanitarian Law

International humanitarian law, de Waal argues, is the oldest tradition of all human rights concepts, whilst it, in a modern way, complements to human rights law as a distinct field with a different philosophy.[156] Based on the Geneva Conventions of 12 August 1949 and their Additional Protocols of 1977, it is the primary legislation which is applicable in both international and non-international hostilities. As the international treaties, they are legally binding for the States Parties and each party to a conflict, even for non-state actors.[157]

Children are entitled to protections guaranteed by international humanitarian law in situations of armed conflict. Twenty-five articles under the Geneva Conventions and two additional protocols provide specific provisions related to children. The protection of children, including UASC, under international humanitarian law has two dimensions. Firstly, these children enjoy the general protection provided by the Geneva Conventions as civilians. Secondly, they benefit from several protection provisions which are specific to children. International humanitarian law has particularly referred to children "who are orphaned or separated from their families as a result of the war" as a vulnerable group who needs additional care and protection.[158]

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[156] Alex de Waal, "Human Rights, Institutional Wrongs", Dennis Dijkzeul and Yves Beigbeder , (Eds.) *Rethinking international organizations: Pathology and promise,* Berghahn Books, New York, 2003, p. 238.

[157] Uppard and Birnbaum, 2016, p. 37.

[158] ICRC, *"ICRC Statement to the UNHCR Global Consultations on International Protection",* fourth meeting, Geneva, 22-24 May 2002, Retrieved from https://www.icrc.org/en/doc/resources/documents/statement/5as9pp.htm (Accessed on 17 April 2021)

In terms of general protection, children are under the protection of the Fourth Geneva Convention related to the protection of civilian persons in time of war. Article 38/5 of the Convention envisages that children under fifteen years are treated as protected persons. Thus, they "benefit by any preferential treatment to the same extent as the nationals of the State concerned." namely humane treatment including respect of life and physical and moral integrity, the prohibitions on coercion, corporal punishment, torture, collective punishment and reprisals as well as receiving individual or collective relief, medical attention and hospital treatment, practising their religion and authority to move from the war zone.[159] Chetail points out that although refugees have also been identified as protected persons under Article 73 of the Additional Protocol I, their protected persons status depend on two cumulative conditions. Firstly, they must have legal refugee status. Secondly, and more restrictively, they must obtain this status "before the beginning of hostilities" which constitutes one of the most crucial and criticized shortcomings of international humanitarian law.[160] Therefore, on a normative level, UASC children have more comprehensive and advanced protection than other refugees under international humanitarian law due to their child status.

In the framework of special protection of children, the Fourth Geneva Convention and the Additional Protocols safeguard evacuation, assistance and care, identification, family unity and prevention of separation, education and cultural environment,

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[159] Denise Plattner, "Protection of Children in International Humanitarian Law", *International Review of the Red Cross*, Vol. 240, 1984, p. 141. Retrieved from: https://www.icrc.org/en/doc/resources/documents/article/other/57jmat.htm (Accessed on 17 April 2021)

ICRC Advisory Service on International Humanitarian Law, "Legal Protection of Children in Armed Conflict: Legal Factsheet", 28 February 2003, p. 1. Retrieved from https://www.icrc.org/en/download/file/1033/children-legal-protection-factsheet.pdf (Accessed on 17 April 2021)

[160] Vincent Chetail, "Armed Conflict and Forced Migration: A Systematic Approach to International Humanitarian Law, Refugee Law, And International Human Rights Law", in Andrew Clapham and Paola Gaeta (Eds.) *The Oxford Handbook of International Law in Armed Conflict*, Oxford University Press, Oxford, 2014, p. 707.

additional protection in case of children's detention, exemption from the death penalty, and protection of children from exploitation.[161] Article 24 states that:

> The Parties to the conflict shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances. Their education shall, as far as possible, be entrusted to persons of a similar cultural tradition.
> The Parties to the conflict shall facilitate the reception of such children in a neutral country for the duration of the conflict (…).[162]

The Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts (Protocol I) has a specific provision under Article 77 on the protection of children from "any form of indecent assault".[163] It also imposes an obligation on states to take all measures for preventing direct participation of children under the age of fifteen in hostilities. Furthermore, it expands the context of child protection applying to the non-international hostilities.[164]

Moreover, the Protocol II relating to the Protection of Victims of Non-International Armed Conflicts has also envisaged fundamental guarantees and special care measures for children, including UASC such as receiving education, including religious and moral education, taking appropriate steps to facilitate the reunion of families temporarily separated, and non-recruitment and non-participation of children under the age of fifteen in hostilities. Besides, it stipulates that:

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[161] ICRC Advisory Service on International Humanitarian Law, 2003, p. 1.

[162] UNGA, "*The Forth Geneva Convention Relative to the Protection of Civilian Persons in Time of War"*, 12 August 1949, Art. 24. Retrieved from https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.33_GC-IV-EN.pdf (Accessed on 16 May 2021).

[163] UNGA, "*The Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts (Protocol I)"*, 8 June 1977, Art. 77. Retrieved from https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.34_AP-I-EN.pdf (Accessed on 16 May 2021).

[164] Crock and Martin, 2018, p. 78.

> (e) Measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.[165]

One of the most significant issues for UASC safeguarded by international humanitarian law is the maintenance of family unity and, in this regard, ensuring contact between family members, identifying missing members and children, family tracing and reunification.[166] This issue is crucial especially during the evacuation process. As stated by the Inter-Agency Working Group on Unaccompanied and Separated Children, in evacuation operations during armed conflicts, children should not be separated from their adult family members. Evacuation of children without their parents or other family members must only be a last resort and temporary.[167] As per Article 78 of Protocol I, evacuation of children without their family members is limited to strict conditions, including the necessity of the parents' or other legal caregivers' consent and tracking of evacuated children. It also offers guidance on facilitating the return to their families and country of children evacuated.[168]

As can be seen, on a normative level, there are some safeguards for children, including UASC provided by international humanitarian law. On the other hand, as stated by the ICRC, these rights and protection measures have not become a reality in practice. UASC affected by conflicts have still faced several problems that could have been avoided through respect for international humanitarian law. Significantly, the provisions and safeguards related to the prevention of family separation and

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[165] UNGA, "*The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)"*, 8 June 1977, Art. 4/3/e. Retrieved from https://www.refworld.org/docid/3ae6b37f40.html (Accessed on 16 May 2021)

[166] Uppard and Birnbaum, 2016, p. 38.

[167] IAWG, 2004, p. 24

[168] UNGA, *"The Protocol I Additional to the Geneva Conventions",* 1977, Art. 78.

prohibition of the recruitment or participation in hostilities of children under the age of fifteen are not implemented in many cases.[169] A significant number of children either actively participate in conflicts or become "innocent victims" of wars and conflicts.[170] As another shortcoming, it must be emphasized that the protection of children under international humanitarian law has been based on a welfare approach instead of a rights-based one. This approach finds its expression under the title of Article 24 of the Fourth Geneva Convention, which is "measures relating to child welfare".[171] Therefore, there is a need for a holistic and rights-based approach complemented by international human rights law, by the CRC in particular, towards these challenges and better and more effective implementation of international humanitarian law in practice.

3.2. International Refugee Law

UNICEF stated that although children constitute only %30 of the world population, they made up %50 of world refugees in 2019.[172] Besides, %37 of children who arrived in Europe only between January and June 2020 were UASC.[173] In this context, international refugee law and protection measures therein are also applicable to UASC in the need of international protection. 1951 Convention Relating to the Status of

[169] ICRC Statement to the UNHCR Global Consultations on International Protection, 2002.

[170] ICRC Advisory Service on International Humanitarian Law, 2003, p. 2.

[171] UNGA, *"The Forth Geneva Convention",* 1949, Art. 24.

[172] UNICEF, *"Child Displacement*", September 2021. Retrieved from https://data.unicef.org/topic/child-migration-and-displacement/displacement/ (Accessed on 22 December 2021)

[173] UNICEF, "Latest statistics and graphics on refugee and migrant children: Latest information on children arriving in Europe". Retrieved from https://www.unicef.org/eca/emergencies/latest-statistics-and-graphics-refugee-and-migrant-children (Accessed on 22 January 2021)

Refugees[174] and the 1967 Protocol[175], which set forth the rights of refugees and the obligations of states as contracting parties, are the main legal documents and milestone of international refugee law. Currently, 146 States are the party to the Convention, while there are 147 states parties to the Protocol. In total, 149 States are party to either or both.[176]

Since the 1951 Convention and 1967 Protocol are the fundamental legislative instruments of international law in terms of migration movements, as Pobjoy argued, it represents "the appropriate platform" to address the needs and challenges of refugee children including UASC.[177] However, despite the high proportion of children in the refugee population and the consensus that they have special vulnerabilities and need special protection, neither the 1951 Convention nor the 1967 Protocol contains any specific reference to children.[178] The one and only reference to the protection of refugee children, in particular unaccompanied children, is in the Final Act of the Conference that adopted the 1951 Convention. At the recommendation submitted by the Holy See within the context of the family unity, the Final Act addresses the protection of family unity and "the protection of refugees who are minors, in particular

[174] "The Convention relating to the Status of Refugees was adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950 and entered into force on 22 April 1954, in accordance with article 43". Retrieved from https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.23_convention%20 refugees.pdf (Accessed on 22 April 2021)

[175] "The Protocol relating to the Status of Refugees, which removes the geographical and time limits in the Convention, entered into force on 4 October 1967, in accordance with article 8". Retrieved from https://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolStatusOfRefugees.aspx (Accessed on 22 April 2021)

[176] UNHCR, *"States parties, reservations and declarations",* September 2019, Retrieved from: https://www.unhcr.org/1951-refugee-convention.html (Accessed on 20 January 2021)

[177] Jason M. Pobjoy, "*The Child in International Refugee Law, Cambridge Asylum and Migration Studies*", Cambridge University Press, Cambridge, 2017, p. 16. Retrieved from ttps://www.cambridge.org/core/books/abs/child-in-international-refugee-law/introduction/40E1DE5D249EAEEF6BBB2EE0876BC783 (Accessed on 24 April 2021)

[178] Ibid., p. 97.

unaccompanied children and girls, with special reference to guardianship and adoption."[179]

The Refugee Convention and its Protocol is age-neutral, which means that it is applicable to all individuals who have been recognized as refugees under the Convention regardless of their age. According to the Convention, a refugee is a person with

> a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[180]

The definition of a refugee under Article 1 has not made a reference to specific situation of children. Therefore, since children are treated the same as adults, they must meet each criterion in the definition to be recognized as a refugee in the context of the Convention.[181] Within this framework, if the child is at the genuine risk of the "being persecuted" on the five Convention grounds, then he/she meets the refugee definition. Thus, as pointed out by Pobjoy, being a child or indeed an unaccompanied child makes no difference in terms of protection.[182] In this regard, it must also be noted that child-specific forms of persecution have been ignored by the Convention.

The Convention sets forth a comprehensive group of rights to which all refugees are entitled. These rights include non-discrimination, freedom to practise their religion and freedom as regards the religious education of their children, right to assembly, access

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[179] UNHCR, *"The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis",* 1990, p. 269 and 272. Retrieved from https://www.refworld.org/docid/53e1dd114.html (Accessed on 21 May 2021)

[180] UNGA, "*The Convention relating to the Status of Refugees*", 1951, Art. 1/A/2.

[181] Crock and Yule, 2018, p. 100.

[182] Pobjoy, 2017, p. 3.; Bantekas, 2013, p. 849.

to courts, right to access to housing, public education and public relief, social security and freedom of movement. As stated by Hathaway, most of the rights are recognised for those who are "lawfully or habitually in, lawfully staying, or durably residing in an asylum country", such as the "right to be protected against expulsion", "internal freedom of movement", "right to self-employment". However, under the Convention, some core and fundamental rights are provided for everyone who enters within an asylum country's jurisdiction or begins to be physically present on the territory of the country, even if they are not formally granted refugee status, such as the right of access to the courts, property rights, right to access to elementary education, as well as principles of non-discrimination and non-refoulement. Therefore, the Convention has a declaratory character in terms of those rights.[183]

One of the most child-related rights enumerated in the Convention is the right to public education. According to Article 22, the state parties have the obligation to "accord to refugees the same treatment as is accorded to nationals with respect to elementary education."[184] Besides, refugees must receive a treatment at least as favourable as that provided to other aliens regarding secondary education.[185] This treatment includes the acceptance of "foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships."[186] Even though there is no direct reference to children under this article, its relevance to children is obvious, with respect to primary education in particular. At this point, it may be useful to draw attention to the declaratory character of the Convention, in that the right to education under Article 22 is not only provided for "refugees lawfully 'present' or 'staying' in a state party". In

[183] James C. Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press, Cambridge, Second Edition, 2021, p. 174-194.

[184] UNGA, "*The Convention relating to the Status of Refugees*", 1951, Art. 22.

[185] Guy S. Goodwin-Gill, "*The Refugee in International Law*", Clarendon Press, Oxford, 1998, p. 257 cited in IOM, *International Migration Law No.15 - Human Rights of Migrant Children*, IOM Publications, 2008, p. 68. Retrieved from https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/abs/refugee-in-international-law-by-guy-s-goodwingill-oxford-clarendon-press-1983-xxvi-318-pp-25/A8B0235C23DF758311B43F9461761D97 (Accessed on 22 March 2021)

[186] UNGA, "*The Convention relating to the Status of Refugees*", 1951, Art. 22.

this regard, as stated above, even if people, including children are not yet granted refugee status, the receiving states bear the obligation to offer them the right to education as they are already within the jurisdiction of the state.[187] Accordingly, in some countries such as Greece and Croatia, Article 22 has been violated, as children detained in reception and identification centres or transit zones are denied the right to education on the grounds that they do not have refugee status. Similarly, in Turkey, the practice in which Syrian children are not enrolled in schools and not provided education on the grounds that they do not yet have identity cards is not in line with Turkey's obligations under Article 22.[188]

Most importantly, the principle of non-refoulement is at the core of the Convention and international refugee law. This principle under Article 33 of the Convention prohibits to expel or return a refugee to a place where his/her life would be threatened on the five enumerated grounds.[189] Therefore, if state agencies fail to identify and expel the individuals who must be under the protection, this constitutes a violation of non-refoulement obligation. Similar to the right to education, the principle of non-refoulement also applies to everyone who enters the asylum country's jurisdiction irrespective of their legal or immigration status. However, it must be reiterated that Article 33 does not include any differentiated safeguards for children.

When the provisions of the 1951 Convention are examined, it is seen that although children comprise almost half of the refugee population in the world, international refugee law and the 1951 Convention neglect their experiences. While many girls and boys have suffered from age and gender-related forms of persecution such as female genital mutilation or forcible recruitment, as stated above, age is not one of the grounds

[187] Hathaway, 2021, p. 747.

[188] Ibid.

[189] Ibid., Art. 33.

for a well-founded fear of persecution under the Convention.[190] As it does not include any reference to age as a ground for a well-founded fear of persecution, asylum-seeking children, including UASC, need to establish "a well-founded fear of persecution based on one or more of the Convention grounds".[191]

One of the most significant shortcomings of the Convention and the definition of refugee therein is the ignorance of the fact that children may not be in the position to express their refugee status claims similar to adults and their need for additional support to do so.[192] Furthermore, the "well-founded fear" criteria, which must be met to obtain refugee status, may be more challenging for UASC. Due to their age and, accordingly, their mental development and maturity, UASC may lack the comprehension of harm, even though they may be at risk in the future. Furthermore, the past experiences of children, such as trauma, exploitation, lack of education, as well as feeling of insecurity and fear towards state officials, may lead them to fail in articulating their level of fear. Therefore, procedures designed for adult asylum-seekers may not be applicable to children.[193]

As properly stated by Goodwin, the 1951 Convention is unable to go beyond recommending measures for family unity and offering access (at least) to primary education in terms of the rights of refugee children, including UASC.[194] As a result of the absence of provisions referring to the situation of refugee children, it is argued that the Convention is based on the needs of adult refugees. The Convention neither includes any reference to child-specific persecution forms nor prohibits discrimination

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[190] Alice Edwards, "Age and gender dimensions in international refugee law", Erika Feller et al. (Eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, Cambridge, 2003, p. 57-58.

[191] Annemarie Middelburg and Alina Balta, "Female genital mutilation/cutting as a ground for asylum in Europe". *International Journal of Refugee Law*, *28*(3), 2016, p. 421.

[192] Ibid.

[193] Crock and Yule, 2018, p.101.

[194] Guy S. Goodwin-Gill and Jane McAdam, "*The refugee in international law*", Oxford University Press, Oxford- New York, 2007, p. 475.

based on age under Article 3 of the Convention, which is about the principle of non-discrimination. In many cases, UASC in need of international protection face discrimination in transit or destination countries. Considering that some feminist scholars characterize the Convention as gender-blind[195], it can be argued that such blindness also applies to children. As Beyani underlines, even the management of refugee camps has been shaped by male-adults experiences and women and children have not been included in the decision-making process.[196] Therefore, it is evident that international refugee law, the 1951 Convention, in particular, is not adequate to address the asylum claims of UASC, who are in need of international protection.

Similarly, Nykanen, critically assessing the Refugee Convention, argues that it is inadequate to meet the protective needs of refugee children because it is based on an adult male norm, not paying enough attention to other cases, including those of children.[197] In its 2009 Guidelines regarding child asylum claims, the UNHCR also stated that "It *(the definition of a refugee)* has traditionally been interpreted in light of adult experiences. This has meant that many refugee claims made by children have been assessed incorrectly or overlooked altogether."[198] In line with the assessment of the UNHCR, Pobjoy addresses two challenges faced by children during the refugee status determination process, which are invisibility and incorrect assessment. He argues that both challenges may result in the risk of the child being returned to the country of origin, where he/she will be tortured or persecuted, and this means the violation of the non-refoulement principle.[199] In this regard, UNHCR also highlights that although the application cases of UASC for refugee status tend to be examined

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[195] Efrat Arbel, "Intoduction: Gender in refugee law: From the margins to the centre" in E. Arbel et al. (Eds.), *Gender in refugee law: From the margins to the centre*, Routledge Publications, New York, 2014, p. 9.

[196] Chaloka Beyani, "The Needs of Refugee Women: A Human-Rights Perspective". *Gender and Development*, 3(2), 1995, p. 30.

[197] Eeeva Nykanen, "Protecting Children? The European Convention on Human Rights and Child Asylum Seekers", *European Journal of Migration and Law*, Vol. 3, 2001, p. 316.

[198] UNHCR, *Guidelines on International Protection No. 8*, December 2009, p. 3, para. 1.

[199] Pobjoy, 2017, p. 3.

more independently compared to those for accompanied children, the persecution forms specific to unaccompanied children are not always considered by national authorities.[200]

The 1951 Convention, which was adopted in 1951 in the context of the Cold War, emerged mainly as an immediate response to the massive displacement movements after the Second World War. In Edwards' words, it reflects an "inherent bias in the legal formulation" and "inequalities in society at the time of drafting the 1951 Convention".[201] It is also a product of an understanding which accepts children as adult-dependent objects instead of legal subjects as right holders. It does not cover many significant issues related to today's complex migration movements, such as burden sharing, and gender and age-based persecution. For example, in this context, Baroness Hale claims that the Convention is incompatible with "the most modern constitutions and human rights instruments" and "subsequent developments" in the field since gender is not included as a ground of persecution in the Convention.[202] Undoubtedly, the same criticism applies to the case of children as the Convention does not include age-specific forms of persecution. While the Convention remains the most comprehensive and fundamental legal document on refugee law, since children's particular vulnerabilities require "an age-sensitive and rights-based approach", it needs to be revised and adapted to current conditions and humanitarian challenges.

It must be noted that international human rights law is a "living" and "dynamic" area. Therefore, it has an evolutionary character that must be interpreted in the light of the "present-day conditions" in addition to the objective and purpose of the human rights treaties. According to Article 31 of the Vienna Convention on the Law of Treaties,

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[200] UNHCR, *"Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*", HCR/1P/4/ENG/REV. 4, April 2019, p. 146, para. 2. Retrieved from https://www.refworld.org/docid/5cb474b27.html (Accessed on 24 May 2021)

[201] Edwards, 2003, p. 80.

[202] UK - House of Lords, Fornah v. Secretary of State for the Home Department (linked with Secretary of State for the Home Department v. K), UKHL 46, 18 October 2006, para. 84.

when interpreting a treaty, which must be in good faith, its context and object and purpose must be considered.[203] This also applies to the 1951 Convention, as the Convention is a significant part and instrument of human rights area. Zimmerman and Wennholz state that the Convention needs to be interpreted dynamically in harmony with international human rights norms and standards to ensure systematic consistency among human rights instruments. Otherwise, the interpretation of the Convention "in an isolated manner" would be contrary to the "object and purpose" of the Convention.[204]

UNHCR also confirms the 1951 Convention's character as "a living and dynamic instrument". Therefore, it should be interpreted in "a purposive or teleological manner" and applied in line with evolving norms of other international human rights instruments, including the UN and regional conventions, UNHCR's and other agencies' guidelines, "UNHCR Executive Committee conclusions, academic literature and judicial decisions at national, regional and international levels"[205]. As McAdam points out; this dynamic approach contributes to adapting the Convention to new circumstances and thereby maintaining its "effet utile".[206]

In this regard, as argued by Pobjoy, the CRC, based on a rights-based approach, is relevant to the 1951 Convention and the child's refugee status in (at least) three significant ways. Accordingly, the CRC provides procedural safeguards, which are not addressed by international refugee law for children. It may also serve as "an interpretative aid to inform the interpretation of the Refugee Convention". Finally, it

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[203] United Nations, Vienna Convention on the Law of Treaties, United Nations, Treaty Series, Vol. 1155, 23 May 1969, Art. 31/1. Retrieved from https://www.refworld.org/docid/3ae6b3a10.html Accessed on 4 March 2022)

[204] Andreas Zimmerman and Philipp Wennholz, "Article 1F 1951 Convention", in Andreas Zimmerman et al. (Eds.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary*, OUP, 2011, p. 609.

[205] UNHCR, 4 April 2019, p. 9,

[206] Jane McAdam, "Interpretation of the 1951 Convention", in Andreas Zimmerman et al. (Eds.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary*, OUP, 2011, p. 103.

has also potential to be used as "an independent source of status outside the international refugee protection regime".[207]

As discussed in more detail in the following section, in the cases that children do not satisfy the refugee definition of the 1951 Convention, the CRC, in particular Articles 3 and 22, operates as a complementary mechanism and extends the context of the Refugee Convention for children. Article 3 of the CRC, which stipulates that "in all actions concerning children (…) the best interests of the child shall be a primary consideration."[208] is significantly connected with the expulsion or refoulment of UASC. The best interests principle offers an extra guarantee for children within the context of migration movement and refugee law. Even if it is concluded that children are not entitled to specific protection as regards to non-refoulement principle under the Refugee Convention, they still may have protection if the removal or expulsion is contrary to their best interests. This stems from the fact that the scope of the principle of the best interests of the child is very wide and its assessment goes far beyond the risk of a child being tortured or ill-treated upon return.[209] Therefore, as argued by Justice Blake, former President of the Upper Tribunal of England and Wales, it creates "a new category of protected persons whose claims will need to be assessed and evaluated by domestic decision makers."[210]

The interpretative effect of the child's best interests is significant in decisions regarding the access of UASC to international protection. In this regard, Bhabha and Young underline the interpretative function of the best interests principle enshrined under Article 3 of the CRC, which serves as a tool for international refugee law in terms of

[207] Pobjoy, 2017, p. 27.

[208] UNGA, CRC, Art. 3.

[209] Crock and Martin, 2018, p. 85.

[210] "Justice Blake, "Current Problems in Asylum and Protection Law: The UK Judicial Perspective" (Paper presented at *the Ninth World Conference of the International Association of Refugee Law Judges*, Slovenia, 7 September 2011, p. 10," cited in Pobjoy, 2019, p. 834. Retrieved from https://www.iarmj.org/publications/world-conference-papers/56-world-conferences/9th-world-conference/337-bled-papers (Accessed on 22 March 2021)

broadening and deepening the scope of protection, both in terms of substantive law and procedural mechanisms".[211] McAdam also draws attention to the importance of the principle stating that it imposes "an additional layer" for interpretation and application of the refugee definition under Article 1/A/2 of the 1951 Convention. She further argues that the principle "constitute a complementary ground of protection in its own right" for children outside their country of origin due to generalized violence.[212]

Accordingly, Pobjoy accepts the best interests principle as "an independent and complementary source of protection".[213] He argues that the best interests principle is directly related to UASC's international protection claims in two significant ways. On the one hand, it is an appropriate tool to interpret the protection obligations "or, indeed, the wider non-refoulement obligations under international human rights law" of states stemming from the 1951 Convention in an age-sensitive and inclusive manner.[214] On the other hand, it also serves as an "independent basis for protection outside the traditional refugee protection regime" and "traditional non-refoulement obligations".[215] In a similar vein, Sizer points out that the interpretation of and evaluation of age-neutral provisions of the 1951 Convention and the 1967 protocol in a child-focused manner reflects the interpretative effect of the child's best interests.[216] For instance, the interpretative effect of the child's best interests regarding removal decisions appears in two ways: First, the UNCRC transforms traditional non-refoulement protection into a child-specific form with its approach. The second is to

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[211] Jacqueline Bhabha and Wendy Young, "Not Adults in Miniature: Child Asylum Seekers and the New US Guidelines", *International Journal of Refugee Law*, 1(1), 1999, p. 98.

[212] Jane McAdam, *Complementary Protection in International Refugee Law*, Oxford University Press, 2011, p. 173-174.

[213] Jason. M. Pobjoy, "The best interests of the child principle as an independent source of protection", *International Comparative Law Quarterly*, 64(2), 2015, pp. 1-43.

[214] Ibid., p. 6-7

[215] Ibid, p. 8.

[216]Merve Sizer, *Yabancıların Ülkeden Uzaklaştırılmasına İlişkin Kararlarda Çocuğun Yüksek Menfaati İlkesinin Rolü,* Master's Thesis, Ankara University, Social Sciences Institute, Ankara, 2020, p. 36.

carry out the risk assessment in a child-focused way, considering the risks of harm specific to the child and the child's vulnerable position.[217]

As convincingly argued by Sizer, the CRC is generally not taken into account as a resource for enforcing the principle of non-refoulement since the non-refoulement is shaped by adult experiences and is generally not associated with children.[218] However, despite the absence of any specific reference to children in the 1951 Convention, the Convention and the refugee definition therein must be age-sensitively interpreted to consider children's unique situation, including their vulnerabilities and needs Therefore, the non-refoulement obligation of a state must be constructed by considering "child-specific forms and manifestations of persecution", including trafficking of children for prostitution, sexual exploitation or subjection to female genital cutting, and forced marriage.[219] It must be considered that the UNCRC, the official interpretative body of the CRC, has clearly defined a principle of non-refoulement in the case of children. It obliges the host country not to send the child back to a country where he/she would face a serious risk of "irreparable harm"[220], a criterion which is absent in the standard definition of the non-refoulement principle under the 1951 Convention. In this regard, Sizer points out that applying the traditional definition of the non-refoulement principle is not in the child's best interests and therefore constitutes a violation of CRC.[221]

In addition to the best interests principle under Article 3, CRC Article 20 and 22 also has the potential to guarantee further protection and support for refugee children if it is read and interpreted in light of Article 1 of the 1951 Refugee Convention in a comprehensive manner. Even though they do not fall within refugee definition of

[217] Ibid.

[218] Ibid., p. 37.

[219] Pobjoy, 2019, p. 834. See also, UNCRC, GC6, 2005, p. 21.

[220] UNCRC, GC 6, para. 26.

[221] Sizer, 2020, p. 37.

Article 1 of the 1951 Convention, UASC are entitled to other forms of complementary forms of protection, and they benefit from all human rights guaranteed for children, notably by the CRC, "in the territory or subject to the jurisdiction of the State, including those rights which require a lawful stay in the territory."[222] As stated by the Committee on the Rights of Child:

> In line with the generally applicable principles and, in particular, those relating to the responsibilities of States with regard to unaccompanied or separated children finding themselves in their territory, children who are neither granted refugee status nor benefiting from complementary forms of protection, will still enjoy protection under all norms of the Convention as long as they remain de facto within the States' territories and/or subject to its jurisdiction.[223]

Accordingly, children, including UASC, have a special status and further advanced protection under international refugee law. Children cannot be expelled or returned to their country of origin if the return is contrary to the child's best interests, only due to the decision on their refugee application.[224] In contrary to the case of adult asylum seekers whose refugee applications are rejected, where receiving states do not have the obligation to provide temporary residence, in the case of children, receiving states are under the obligation to take all appropriate measures for child protection. This generally means providing "residence and care on the basis of so-called humanitarian grounds."[225]

To conclude, the 1951 Convention should be interpreted in a teleological, dynamic and functional manner, in light of other human rights conventions and the CRC in particular, to increase its impact, especially in the context of UASC. To overcome the shortcomings and fragmentation in international law, international legislative documents should be functionally interpreted in a way that is evolving and

[222] UNCRC, GC6, 2005, para. 77.

[223] Ibid., para. 78.

[224] Bantekas, 2013, p. 352.

[225] Ibid, p. 351.

complementary to each other, bearing in mind the best interests principle. In this regard, the following section of the thesis deals with these international human rights law instruments.

3.3. International Human Rights Law (IHRL)

3.3.1. Bill of Rights and Other Instruments of IHRL

The most comprehensive legislation on children's rights on the move, including UASC, has been developed within international human rights law. Firstly, Universal Declaration of Human Rights (UDHR)[226], International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) constitute International Bill of Rights, which are the fundamental instruments setting out the primary and general human rights which apply to all human beings, including UASC. One of the significant provisions of the Bill of Rights is the prohibition of discrimination regarding children's rights. The non-discrimination principle is regulated as an absolute right in Article 2 of the Covenants. In ICCPR, discrimination is prohibited in terms of the rights and freedoms recognised in the Covenant and, through Article 26, in the enjoyment of all legally recognised rights and freedoms. In addition, Article 10/3 of the ICESCR specifically addresses protecting children from economic and social exploitation. The Article stipulates that without any discrimination as to parental care or other circumstances, for all children and young persons, special measures of protection and assistance shall be taken. It further foresees that economic and social exploitation of children and young persons

[226] It may be useful to recall that, even though the Declaration does not create legal obligations for its states parties, because over the past decades it has born profound effect on the development of international human rights law, it is considered to have become a part of the customary international law and thus, gained a binding nature. (Australian Human Rights Commission, "Is the Universal Declaration legally binding?" Retrieved from https://humanrights.gov.au/our-work/what-universal-declaration-human-rights (Accessed on 15 March 2022).

shall be prevented.[227] Thus, UASC's civil, political, economic, social and cultural rights are protected regardless of their race, ethnicity, religion, age or migration status.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its Optional Protocol protect all women and girls. Under Article 1 of the Convention, discrimination against women is "any distinction, exclusion or restriction", which exists based on gender in any field of life including political, economic, social and cultural sphere. CEDAW also underlines the negative impact of cultural and traditional norms, customs and stereotypes, which are the motivations behind girls' decision to migrate, in most cases, on women's and girls' life.[228] In complementary to the CRC, CEDAW urges states to adopt a child and gender-sensitive migration legislation and policies.[229]

The International Convention on the Rights of All Migrant Workers and Members of Their Families (CMW) includes protection for migrant child workers and children of migrants. It provides specific measures for migrant workers' children, including the right to birth registration and nationality and the right to education on an equal basis with the citizens of the destination country.[230] On the other hand, the Convention lacks a direct reference for protecting UASC.

Among the relevant international law instruments, the Palermo Protocol (Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000) also deserves a reference, because it places a strong emphasis on

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[227] UNGA, *"International Covenant on Economic, Social and Cultural Rights (ICECCR)*", General Assembly resolution 2200A (XXI) of 16 December 1966, Article 10/3. Retrieved from https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx (Accessed on 20 January 2021)

[228] UNGA, Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979, Introduction. Retrieved from https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx (Accessed on 20 January 2021)

[229] IOM, 2008, p. 12.

[230] Ibid.

trafficking in persons including children. The Protocol makes consistent references to the situation of (women and) children and under Article 6, emphasizes the obligation of each state party to consider the special needs of children such as proper housing, education and care.[231]

3.3.2. The UN Convention on the Rights of the Child (CRC)

The fundamental human rights conventions, including specific conventions addressing the rights of the members of certain groups, apply to UASC even if they do not have a direct reference to them.[232] However, as Bhabha states, all rights related to children have been codified and consolidated under the CRC.[233] The CRC, the most essential international legally binding document relating to children's rights, also represents a cornerstone for protecting UASC. In this context, Fass sees the CRC as a reaffirmation of international commitments to human rights after World War II.[234] The Convention has a unique and significant place in the history of human rights and the realisation of respect for child and children rights in many specific ways.

Firstly, it is the most widely and swiftly ratified international human rights convention. All UN member states, except for the USA (as of July 2021, 196 States), are party to the Convention.

Secondly, it is the first legally binding human rights instrument to address children's rights explicitly. Bhabha, describing CRC as "a watershed" in terms of recognising

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[231] Office of the UN High Commissioner on Human Rights. "Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children". Retrieved from https://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx (Accessed on 15 March 2022)

[232] Bhabha, 2008, p. 3.

[233] Ibid.

[234] Paula S. Fass, "A Historical Context for the United Nations Convention on the Rights of the Child", *ANNALS, AAPSS*, 633, January 2011, p. 17. Retrieved from DOI: 10.1177/0002716210382388. 2011 (Accessed on 12 February 2021)

children rights, states that it shows the central role of children in the broader concerns of the human rights movement. She reiterates that it underscores the obligations of States parties to take more into account the human rights of children in general, particularly their best interests.[235]

Furthermore, the CRC has codified the previous international provisions in international humanitarian, refugee, and human rights law under children's rights.[236] In this context, it elaborates the rights laid out in previous non-binding documents and includes new principles and rights such as the child's best interests and the right to participation.[237] Besides, the CRC has brought a great variety of issues regarding children's rights together under one unifying theme: respect for the child's dignity.

Another essential feature of the CRC is that it identifies children as right-holders, which means children are active participants in the realisation of their rights and can make claims that hold duty-bearers accountable. Besides, in the CRC, states and their agents (as primary duty-bearer), as well as parents, guardians, caregivers and other community members (as secondary duty-bearers), are recognised as duty-bearers which are actors having legal obligations to respect, protect and fulfil of children rights.[238] Furthermore, the CRC is also significant as it does not allow the State parties to derogate from the Convention. States must apply all rights in every situation, including emergencies.

The CRC with its revolutionary approach recognising children as the right-holders, offers the most comprehensive protection. It points out a child's right to protection from harm and violence. Also, it highlights the child's right to develop a personality

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[235] Bhabha, 2008, p.5.

[236] Crock and Martin, 2018, p. 82.

[237] UNICEF, 2004, p. 10.

[238] The EU, European Commission, *"Child Rights Mainstreaming in Programme and Project Cycle Management"*. Retrieved from https://europa.eu/capacity4dev/sites/default/files/learning/Child-rights/2.8.html (Accessed on 22 March 2021)

through self-expression and participation. In this context, the Convention includes civil, cultural, economic, political and social rights set forth through survival, protection, development and participation rights.[239]

The principal rights protected by the CRC are the right to nationality and name; family reunification; prevention of separation; prevention of illicit transfer and non-return of children abroad; freedom of expression and association; right to privacy and family life; right to be protected from all forms of violation and exploitation including sexual exploitation or abuse; right to healthcare and education; prohibition of abduction of the sale or traffic in children; prohibition of torture and ill-treatment and detention of a child as only last resort.

In this regard, although each provision of the CRC applies to UASC, this thesis examines the CRC's core principles and the most related provisions to unaccompanied and separated children.

3.3.2.1. The Core Principles of the CRC

While implementing the rights outlined in the Convention, the four overarching principles guide the Party States, which are non-discrimination (Article 2), the child's best interests (Article 3), the right to life, survival, and development (article 6), and the right to participation (Article 12).[240] The UNCRC highlights that the core principles of the CRC must be integrated into legislation related to children and must

[239] The CRC consists of three parts and 54 articles. Forty-one articles of those enshrined in Part I are directly related to the child's rights. In Part II and Part III, 13 articles specifically deal with 13 procedural and administrative issues, including establishing the UN Committee on the Rights of the Child to monitor the implementation of the Convention and its working procedure. Its context has also been expanded and strengthened through three Optional Protocols related to "the involvement of children in armed conflict", "the sale of children, child prostitution and child pornography," and the latest "communications procedure".

[240] UNCRC), *"2012 Day of General Discussion: The Rights of All Children in the Context of International Migration Background Paper*", August 2012, p. 9. Retrieved from https://www2.ohchr.org/english/bodies/crc/docs/discussion2012/2012DGDBackgroundPaper.pdf (Accessed on 10 December 2020)

be implemented in all administrative, political and judicial processes.[241] These principles are especially important for protecting children migrating alone and must be considered in every stage of the displacement cycle.

The first core principle outlined in the Convention is the principle of non-discrimination. Article 2 prohibits any kind of discrimination based on "the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status", while they are enjoying the rights outlined in the Convention. It also obliges States to take proper measures to protect children against discrimination. Therefore, as stated by the UNCRC, all children within the State's jurisdiction, not only the citizens of a State Party, enjoys the rights envisaged in the CRC. In this regard, unless it is explicitly foreseen otherwise, all rights apply to all children on the move, including those trying to enter the territory of a state party, regardless of their "nationality, immigration status or statelessness".[242] The Committee's interpretation is also crucial for UASC detained at the entry point or transit zones.[243] In this regard, UASC, who cross the borders irregularly, have the same protection as other children.

The Committee also underlines that this provision does not exclude "differentiation on the basis of various protection needs such as those deriving from age and/or gender".[244] Thus, State parties should take appropriate proactive measures to ensure the enjoyment of the rights of those children who have special needs, such as UASC. Gornik points out that the Convention, through Article 2, facilitates the stay of UASC in destination

[241] IOM, 2008. p. 26

[242] UNCRC, GC6, 2005, p. 7, para. 12.

[243] Daniel Senovilla Hernández, "Some Key Aspects on the Interpretation of the CRC Contents and Its Application to the Situation of Unaccompanied Children Outside Their Country of Origin, in Daniel Senovilla Hernandez and Philippe Lagrange (Eds.), *The Legal Status of Unaccompanied Children Within International, European and National Frameworks Protective Standards vs. Restrictive Implementation*, PUCAFREU Project, 2011, p. 8. Retrieved from https://calenda.org/217903?file=1 (Accessed on 12 December 2020)

[244] UNCRC, GC6, 2005, p. 8, para. 18.

countries by offering them specific protection, which adult migrants do not have.[245] Furthermore, it enables significant safeguards like the appointment of guardians, who can facilitate their access to the asylum procedures and promote the child's best interests.[246]

Another critical aspect of the non-discrimination principle is the obligation for states to take adequate measures to prevent stigmatisation and segregation of UASC. IOM states that the significant problems experienced by migrant children in their destination countries are derived from misperceptions towards aliens. These misperceptions often result in exclusion from education and denial of access to essential services like healthcare and accommodation.[247] Therefore, the principle of non-discrimination becomes even more critical in terms of UASC.

The second and most important principle enshrined in the CRC is the child's best interests principle, which serves as the fundamental guiding standard for national and international bodies regarding policies, actions, and decisions related to children.[248] According to Article 3/1 of the Convention, the principle of best interests of the child is to be considered as a primary point of reference ("primary consideration") in all procedures, which will be taken by social support institutions, judicial and administrative authorities, legislative organs.[249]

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[245] Barbara Gornik, "At the Crossroads of Power Relations the Convention on the Rights of the Child and Unaccompanied Minor Migrants Child" in Mateja Sedmak, et al. (Eds.), *Unaccompanied children in European migration and asylum practices: in whose best interests*, Routledge, London, New York, 2018, p. 21. Retrieved from https://www.taylorfrancis.com/chapters/edit/10.4324/9781315639888-2/crossroads-power-relations-barbara-gornik (Accessed on 28 November 2020)

[246] Jyothi Kanics, "The best interests of unaccompanied and separated children: A normative framework based on the Convention on the Rights of the Child in Mateja Sedmak, et al. (Eds.), *Unaccompanied children in European migration and asylum practices: in whose best interests*, Routledge, London, New York, 2018, p. 39. Retrieved from https://www.taylorfrancis.com/chapters/edit/10.4324/9781315639888-3/best-interests-unaccompanied-separated-children-jyothi-kanics (Accessed on 22 November 2020)

[247] IOM, 2008. P. 16.

[248] Uppard and Birnbaum, 2016, p. 15.

[249] UNGA, CRC, Article 3/1.

The term “primary consideration” means that the best interests of the child “may not be considered at the same level as all other considerations” but are in a stronger position. This position is directly linked to the special status and vulnerabilities of children in terms of “dependency, maturity, legal status and, often, voicelessness”[250]. Therefore, it is the primary consideration that must be implemented at each stage of the displacement cycle, including the refugee status determination and reunification processes. It must be noted that regarding family unity under article 9[251] and “adoption” under article 21, the best interests of the child must be “the paramount consideration”. Accordingly, the best interests of the child are regulated as the determining factor when making decisions on adoption and family unity, and as a matter to be the primary consideration on other matters.[252] The terms "paramount consideration" and "primary consideration" in the Convention are not randomly or unconsciously chosen terms but indicate a significant semantic and legal difference. In this context, the fact that the child's best interests are the "paramount consideration" in matters related to adoption within the scope of Article 21 means that under no circumstances will other factors be taken into consideration more dominantly than the best interests of the child. On the other hand, other factors are also considered in all cases where the child's best interests are a "primary consideration". Hence, there may be a balance between other factors and the child's best interests when deciding for the child, and in some cases, other factors may outweigh the child's best interests.

[250] UNCRC “*General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)**”, CRC/C/GC/14, 29 May 2013, para. 37. Retrieved from https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf (Accessed on 15 March 2022)

[251] Although Article 9 does not explicitly mention the best interests principle as “the paramount consideration, it reads: “States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.” UNGA, CRC, 1989, Article 9/1.

[252]UNCRC, GC14, 2013, para. 38.

The Convention does not include a formal definition of the best interests principle. According to the UNCRC, however, it is necessary to have a clear and extensive assessment of the child's identity, nationality, the way he or she has been raised, ethnic and cultural background, special needs for protection in view of his/her vulnerabilities. As another precondition for such an assessment process to be undertaken, the child should be allowed to enter the territory of the country of destination.[253] UNCRC General Comment 14 (GC14) focuses on and extensively addresses the concept of the best interests of the child by considering it "a right, a principle and a rule of procedure." GC14 is built upon Article 3 of the Convention and promotes the "best interests of the child" as the primary consideration in all decisions concerning him or her but is not necessarily presented as the only consideration.[254] In this regard, the provision regarding the primary consideration of the child's best interests principle has multi-faceted content. It includes the child-centred perspective on risk assessment and the emergence of a child-specific non-refoulement standard (as an interpretive principle). It also requires child-specific procedural safeguards in decision-making (as a procedural rule). Finally, in the absence of such a determination process, as a self-executing norm, it provides the right of access to the courts (as a substantive right).[255]

In addition to Article 3/1, the second paragraph obliges states to provide protection and care necessary for the child's well-being. While doing so, it also underlines the importance of respecting parents and legal guardians' rights and duties on children.[256] The third paragraph of Article 3/1 also emphasises the need for complying with the

[253] UNCRC, 2012, p. 10.

[254] UNCRC, GC14, 2013.

[255] Sizer, 2020, p. 160.

[256] Kristina Touzenis and Ruth Farrugia, "The international protection of unaccompanied and separated migrant and asylum-seeking children in Europe" in Kanics et al. (Eds.), *Migrating Alone, Unaccompanied and Separated Children's Migration to Europe*, UNESCO Publications, France, 2010, p. 24. Retrieved from https://unesdoc.unesco.org/ark:/48223/pf0000190796 (Accessed on 25 January 2021)

standards of competence in services and facilities related to the children's care and protection.[257]

The best interests principle is vital since it constitutes the basis for the protection and well-being of children. Furthermore, it is a direct reference point addressing States' general and specific commitments under the Convention and as discussed above, is also an interpretative and complementary source for international refugee law to protect the rights of children in the need of international protection.[258] In this regard, the interpretation of the principle is crucial. As Touzenis and Farraguia are surely right to point out “interpretations of the best interests of children cannot trump or override any of the other rights guaranteed by other articles in the Convention".[259] For instance, no child may be denied access to education and health services or detained in the same facilities as adults because it is in the child's best interests.

The right to life, survival and development enshrined by Article 6 is the third core principle recognised by the CRC. Numerous rights outlined in the Convention, such as the freedom of expression and association, the right to privacy and family life, protection from violence and the right to healthcare and education, are directly related to the child's survival and development. The CRC adopts a holistic approach towards the children's development by embracing all rights in the Convention.[260] Therefore, Article 6 must be interpreted "to the maximum extent possible" by going far beyond physical integrity and survival.[261] In this framework, like all children, unaccompanied and separated children have the right to live and grow in a healthy environment, allowing them to achieve "their maximum human potential".[262]

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[257] UNGA, CRC, Art. 3/3.

[258] IOM, 2008. p. 21

[259] Touzenis and Farrugia, 2010, p. 24.

[260] IOM, 2008. P. 23

[261] UNCRC, 2012, p. 11.

[262] Uppard and Birnbaum, 2016, p. 15.

Regarding the protection of UASC, the Committee addresses the importance of Article 6 in the adoption and implementation of migration procedures. For instance, the decision to deport children to their country of origin or residence in the destination country may critically influence their development.[263] Furthermore, detention of unaccompanied children or poor care conditions are directly related to the child's right to survival and growth. While determining the child's best interests and durable solutions, it is crucial to assess their developmental opportunities in both countries of origin and destination.[264] Children migrating alone constantly face severe threats that harm their lives, survival, and development, such as trafficking, physical and sexual exploitation, and emotional abuse. Therefore, states are obligated to adopt appropriate measures and provide adequate care for the protection of children against those threats.

The last general guiding principle of the CRC is the child's participation and right to be heard in all administrative or judicial proceedings. Article 12 of the CRC assures that all children have the right to hold and express their own opinions and the right to be heard in all judicial and administrative issues and decisions that impact their lives. The Article obliges all duty-bearers to give due weight to the children's views considering "the age and maturity of the child".[265]

Due to its importance, UNCRC adopted a General Comment on principle in 2009, intending to guide its interpretation further. In General Comment 12 on the child's right to be heard, the Committee reiterates that as other core principles of the Convention, this principle should be interpreted broadly and implemented to enjoy all other rights in the CRC.[266] Article 12 also includes the right to be informed about the issues,

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[263] UNCRC, 2012, p. 11.

[264] Hernández, 2011, p. 10.

[265] UNGA, CRC, 1989, Article 12.

[266] UNCRC, "*General comment No. 12 (GC12) The right of the child to be heard"*, CRC/C/GC/12, 20 July 2009, p. 5, para. 2. Retrieved from https://www.refworld.org/docid/4ae562c52.html (Accessed on 18 December 2020)

problems or solutions affecting the child through a representative, like legal guardians in the case of unaccompanied children.[267] Furthermore, this right is especially vital for and interlinked with assessing the child's best interests. In this regard, the Committee points out that "there can be no correct application of article 3 if the components of article 12 are not respected."[268]

The principle becomes even more critical in the case of UASC since they primarily lack parents who can represent them. The Committee has the view that children arriving in a country following their parents and looking for work or as refugees may particularly face vulnerable situations. Therefore, in the opinion of the Committee, children should have the right to explain their views about the process determining their refugee or migrant status and, in this regard, children's expectations about education opportunities and health conditions should be known to integrate them into available social services. The Committee further recommends that in addition, children should have the possibility to explain their reasons for forcing them to seek asylum in another country.[269]

For all children, the principle implicitly declares that children are independent right holders and have an existence beyond their relations with adults. However, as Crock and Martin convincingly argue, it should not be interpreted as meaning that children should be left alone in all their decisions. The duty-bearers must ensure that UASC are given the necessary tools to make the right decisions.[270] These tools and information must be "in a manner that is appropriate to their age and level of maturity" since it has a significant role, especially in refugee status and best interests determination process with other durable solutions.[271]

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[267] UNCRC, 2012, p. 11.

[268] UNCRC, GC12, 2009, p. 15, para. 74.

[269] Ibid. p. 27, para. 23.

[270] Crock and Martin, 2018, p 91.

[271] Pobjoy, 2019, p. 841.

Although it is more likely that the views of UASC will be given more weight than accompanied children's opinions, it is difficult to say that this principle is fully applied even to them. As Bhabha clearly shows, since their vulnerability and protection need are the only considerations when adopting policies, these children often do not go beyond being "passive victims of exploitation".[272] Therefore, in practice, UASC are not considered to have their own opinions and the ability to make decisions about their own life. Consequently, they are often excluded from policy-making and decision-making processes.

3.3.2.2. The CRC and Unaccompanied and Separated Children

UASC are entitled to protection under the CRC since the rights enumerated therein apply to all children in the jurisdiction of a State Party regardless of the child's, their parent's or legal guardian's race, colour, religion, national, ethnic or social origin or migration status. All core principles of the CRC apply to UASC. In addition to general provisions for all children, there are additional safeguards specific to UASC in the CRC.

To begin with, in its Preamble, the CRC recognises the existence of children "living in exceptionally difficult conditions" and their need for special consideration. Undoubtedly, UASC face the biggest risk of living in difficult conditions.

The first right to which UASC are entitled is to be cared for and not separated from their parents as outlined in Articles 7 and 9. According to Article 9, States Parties are obligated to guarantee children not to be separated from their parents unless it is for their best interests. In the case of UASC, in which the separation has already existed, the Article has significant importance for the processes of identification, family tracing

[272] Bhabha, 2008, p.2.

and reunification.[273] Regarding the obligation under Article 9/1, Article 10 urges the States to deal with the family reunification process "in a positive, humane and expeditious manner". [274]

In addition, Article 20 constitutes one of the most related provisions and special protection for UASC, as these children are "temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment".[275] Therefore, they are the beneficiaries of the special protection and alternative care, including "inter alia, foster placement, kafala of Islamic law, adoption or if necessary placement in suitable institutions for the care of children" offered by Article 20.[276] In this respect, the Article does not distinguish between citizen children who lack parental care and unaccompanied children, and equal protection has been provided to all.[277]

Unaccompanied children also have additional and specific protection under Article 22, the only legally binding international provision that ensures safety for refugee or asylum-seeking children, either accompanied or unaccompanied children. Pobjoy, one of the significant scholars analysing refugee and asylum-seeking children's rights, states that Article 22 presents the international community's long-standing affirmative approach based on recognising refugee children's need for special protection and "a rights-plus framework".[278] Through this provision, states are obligated to provide the same protection as other children and an appropriate level of humanitarian assistance for refugee children or children seeking refugee status.[279] The most important

[273] Uppard and Birnbaum, p. 35.

[274] UNGA, CRC, Article 10.

[275] Ibid., Article 20.

[276] Pobjoy, 2019, p. 845-846.

[277] Kanics, 2018, p. 40.

[278] Pobjoy, 2019, p. 837.

[279] Touzenis and Farrugia, 2010, p. 28.

contribution of the Article to children's rights is its direct reference to all applicable rights in the Convention and international humanitarian and refugee law.[280] At this point, it must be recalled that, as stated above, human rights law is considered as a living and dynamic area. Due to its evolutionary character, it requires to be interpreted in the light of the Convention's objective and purpose, as well as by taking into consideration "the present-day conditions" and the contributions of other international human rights law instruments. Therefore, in addition to Article 3, Article 22 provides the legal basis for guaranteeing further protection and support for refugee children if it is read and interpreted in light of Article 1 of the 1951 Refugee Convention in a comprehensive manner.

The first paragraph of the Article establishes the general framework. It guarantees refugee and asylum-seeking children's right to "receive appropriate protection and humanitarian assistance" to enjoy their rights outlined in international law.[281] It does not define the meaning and scope of the "appropriate measures", since the content and scope of appropriate measures may vary from case to case. However, considering the relevant rights enshrined in the CRC and the particular vulnerabilities and needs of UASC, these include prevention of family separation, the identification and registration, family tracing and reunification, avoiding detention of children, the appointment of a legal representative or guardian, proper age assessment and refugee status assessment, and adequate care arrangements such as keeping siblings in the same institutions, enabling separated children to live with their relatives in the destination country, as well as guaranteeing these children's access to education and healthcare services.[282] It must also be noted that the Article ensures equal treatment both for refugee children and asylum-seeking children. Therefore, holding a refugee status is not the pre-condition for enjoying rights and additional protections outlined in the CRC. In fact, as mentioned in the section of international refugee law, the 1951

[280] Crock and Martin, 2018, p. 83.

[281] Ibid., p. 821-822.

[282] UNCRC, GC 6, 2005, p. 13-14, para. 40; Hernandez, 2011, p. 12; IOM, 2011, p. 52.

Convention, as per its declarative nature, foresees the rights, even if not all of them, but most of them as enshrined therein, should be granted before the refugee status is formally confirmed. Consequently, when granting these rights, they should be interpreted together with the CRC, as per the relevant rules of interpretation, which are referred to above.

Unlike to general character of the first paragraph, Article 22's second paragraph sets out some specific provisions. Firstly, it urges States Parties to cooperate with the UN agencies and other inter-governmental and non-governmental organisations to facilitate the family tracing and reunification process for UASC. As argued by Po'boy, this obligation is a distinctive feature of Article 22 and is evident of the importance attached to the work and contributions of these organisations.[283] Furthermore, by granting the same protection status, it reiterates that UASC benefit from the alternative care mechanisms in the host country in the same way as citizens of that country. Thus, Article 20 is further strengthened by reaffirming Article 22.

Although unaccompanied children are explicitly mentioned only by Article 22, there are some other rights which are directly linked to them, such as the right to "full access to education"[284], "an adequate standard of living"[285], and "right to enjoy the highest attainable standard of health and facilities for the treatment of illness and rehabilitation of health"[286]. For instance, Article 37 of the CRC protects against torture, capital punishment, and unlawful and arbitrary deprivation of liberty. This provision is critical for the decision to return an unaccompanied or separated child to his country of origin. When Article 37 is read in complying with Articles 3, 6 and 22 of the CRC, it is evident that it implicitly includes the non-refoulement principle.[287] In this respect, even if the

[283] Pobjoy, 2019, p. 850

[284] UNCRC, GC 6, Arts. 28, 29 (1) (c), 30 and 32.

[285] Ibid., Art. 27.

[286] Ibid., Arts. 23, 24 and 39.

[287] Andreas Schloenhardt and Joseph Lelliott, "Migrant children and the United Nations Protocols against smuggling of migrants and trafficking in persons UN Protocols against smuggling of migrants

refugee status cannot be granted to the child, the Committee promotes the view that the host country bears the responsibility not to send the child back to a country where he/she would face a serious risk of irreparable harm.[288] This provision also prohibits unlawful and arbitrary detention of children and guarantees the USAe of detention as a measure of last resort. Furthermore, in this context and within the framework of international human rights law, it may be useful to recall that in the application of the principle of non-refoulement, the risk of irreparable harm is to be taken into account, especially when considering the cases of children.

In addition to Article 19, which deals with the protection of children from any forms of violence and abuse in general and is elaborately examined in Chapter Two[289,] the CRC also has additional safeguards specific to the "prevention of trafficking and sexual and other forms of exploitation, abuse and violence"[290], as well as "prevention of military recruitment and protection against effects of war".[291]

3.3.2.3. The Optional Protocols to the CRC and UASC

Since its adoption in 1989, the context of CRC has also been enhanced by three Optional Protocols, which all include significant safeguards for the rights of UASC. The first is the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (OPSC), which entered into force in January 2002. It is a significant instrument for the protection of UASC, since these children are at the heightened risk and the most vulnerable to these crimes. The OPCS obliges states to prohibit "the sale

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and trafficking in Persons", in Mary Crock and Lenni B. Benson (Eds.), *Protecting Migrant Children: In Search of Best Practice*, Edward Elgar Publishing, Cheltenham, & Northampton, MA, 2018, p. 132. Retrieved from https://www.unicef.org/eca/emergencies/latest-statistics-and-graphics-refugee-and-migrant-children (Accessed on 22 November 2020)

[288] UNCRC, GC 6, para. 26.

[289] Supra, p. 17.

[290]UNGA, CRC, Arts. 34, 35, 36.

[291] UNGA, CRC, Arts. 38 and 39.

of children, child prostitution and child pornography" and criminalises "a) sexual exploitation of the child; b) transfer of organs of the child for profit; c) engagement of the child in forced labour".[292] The State Parties are also committed to taking proper measures to protect the child victims of these harmful practices.[293]

The Second Optional Protocol on the Involvement of Children in Armed Conflict (OPAC), entered into force in February 2002, also protects UASC. On the one hand, it provides safeguards for the prevention and criminalisation of the recruitment and use of children under 18 in hostilities.[294] Furthermore, it stipulates that in the cases children are contradictorily recruited or used in armed conflicts, States must provide "appropriate assistance for their physical and psychological recovery and their social reintegration".[295]

These provisions become significant given that UASC, especially girls, are more vulnerable to human trafficking, sexual and economic exploitation, trading of organs and other forms of harm. Furthermore, many unaccompanied children are separated from their families due to armed conflicts and have a history of previous recruitment and use in these conflicts.

Finally, the latest Optional Protocol to the CRC on a Communications Procedure (OPIC) entered into force in 2014. While 52 States has signed the OPIC, it has been ratified by 48 States as of December 2021. As stated by Kanics, the OPIC provides the opportunity for UASC, like all other children, to apply to the UNCRC for alleged

[292] OPSC, Article 3/1/a/i.

[293] UNGA, "Assistance to unaccompanied refugee minors: Report of the Secretary-General", A/58/299, Fifty-eighth session, 20 August 2003., p. 4 Retrieved from tps://www.iom.int/sites/g/files/tmzbdl486/files/jahia/webdav/shared/shared/mainsite/policy_and_research/un/58/A_58_299_en.pdf (Accessed on 22 December 2020)

[294] OPAC, Article 4.

[295] OPAC, Article, 6.

violations of their rights. The Committee has the power to adopt interim measures[296] and launch inquiries for "grave or systematic violations by a State Party" of children's rights.[297] The OPIC also includes inter-state communications. Therefore, a state may apply to the Committee with the allegation that another state's treatment of unaccompanied children violates the Convention on the Rights of the Child or its Optional Protocols.[298]

The CRC, primarily through Article 3 and 22, constitutes the most significant step in protecting UASC. It also functions as a complementary mechanism to international humanitarian and refugee law. Pobjoy is undoubtedly correct to point out, given both the international community's perception that refugee children have various vulnerabilities and needs and that more than half of refugees worldwide are children, it is not surprising that an article particularly related to refugee children's rights has been included. [299] However, relatively little attention is paid to the exact content of the Article.[300] Pobjoy argues that this provision is often misrepresented as it does not go beyond being a "window dressing", because the provision does not provide additional safeguards for unaccompanied children as the first paragraph of Article 22 is too general and does not define the meaning and scope of the appropriate measures.[301] It should be emphasized here that, as the situation and vulnerability of each child may vary from case to case, appropriate measures assessment should be made on a case-by-case basis. Regarding the appropriate measures, it may be helpful and explanatory to note that some provisions of the international conventions may not be "self-executing", and as such, they may need to be further legislated and adapted to the situation in the country by relevant national laws. Therefore, defining "appropriate

[296] OPIC, Article 6.

[297] OPIC, Article 13.

[298] Kanics, 2018, p. 41.

[299] Pobjoy, p. 819.

[300] Ibid.

[301] Ibid.

measures" with clear boundaries can have negative consequences and reduce the scope of protection provided to children. Both the assessment of the child's best interests under Article 3 and the taking of appropriate measures under Article 22 have been identified by the Convention as an obvious obligation for states. Therefore, the concept of "appropriate measures" must be interpreted in such a way that would bear the responsibility for the national lawmakers to introduce clear measures to this effect. Therefore, Article 22 should be interpreted comprehensively that expands the context of international humanitarian and refugee law.

It is evident that the CRC in general, and Article 22 in particular, provides the most comprehensive protection for UASC. However, it has been criticised since it lacks unique mechanisms directly for children on the move. While Article 22 is still the only legally binding provision addressing the rights of refugee and asylum-seeking children, including unaccompanied children explicitly, it neither provides any guidance for the refugee assessment process nor refers to child-specific persecution. In this regard, the CRC, similar to other international law instruments, is not adequate to address and meet the particular needs of migrant children, including UASC. Therefore, it is necessary to establish specific instruments and mechanisms which will pay special attention to this group of children and demonstrate their needs[302] In addition to the gaps in the text of the CRC, there are also some limitations related to the implementation of the Convention as discussed in Chapter 4. It is also noteworthy that the State Parties are allowed to make reservations to the provisions of the Convention.[303] In fact, as Pobjoy points out, “The tension between immigration control and the protection of children was evident throughout the drafting of the CRC”. Many states have made general reservations, especially related to Article 2 of the Convention, to limit the rights in the Convention for non-citizen children.[304] On this

[302] Ibid., p. 34.

[303] Ibid., p. 35.

[304] Pobjoy, 2017, p. 14-15.

basis, it may be argued that the prevalent reservation practices enable States to evade obligations, therefore, undermine the Convention's efficiency.

To overcome the shortcomings of the Conventions under international humanitarian, refugee and human rights law and complement them, several regional and soft law human rights instruments have been adopted by international organisations. The following section of the thesis will examine these instruments.

3.4. Regional and Soft Law Instruments

3.4.1. Regional Instruments on the Protection of UASC

International human rights conventions at the regional level also provide a basis for States Parties in protecting the rights of UASC. In addition, the judicial mechanisms established by these Conventions, such as the European Court of Human Rights (ECtHR) and Inter-American Courts of Human Rights (IACHR), also assist State Parties. Through their case law, they reveal human rights violations suffered by UASC. Furthermore, the legislative instruments adopted by the EU, which is a supranational organisation, bear legal consequences for the member states. Therefore, they serve as the effective tools for UASC in the territory of the EU member states. In this regard, this section firstly analyses the regional legislative and soft law instruments with an international character, particularly adopted by the Council of Europe (CoE), the Organisation of American States, and the African Union. Then, it examines the instruments under the European Union law regarding the protection of UASC.

The African Charter on the Rights and Welfare of the Child adopted by the African Union explicitly refers to the special protection and assistance for refugee children and children deprived of the family environment, including UASC.[305] The first two paragraphs of Article 23 of the African Charter on the Rights and Welfare of the Child

[305] Uppard and Birnbaum, 2016, p. 39.

contain similar provisions to Article 22 of the CRC.[306] In the third paragraph of the Article 23, the Member States of the African Union ensure that UASC enjoy the same protection as other children, including nationals who lack family care.[307] Finally, Article 25 guarantees special protection and assistance to children separated from their parents due to armed conflicts, emphasising several crucial issues such as alternative care, tracing and reunification of family members. The Article also highlights that "the child's ethnic, religious or linguistic background" must be taken into consideration by authorities during alternative care arrangements and the best interests determination process.[308]

The American Convention on Human Rights adopted by the Organisation of American States includes a general provision regarding children's rights and protection. According to Article 19 of the Convention, considering his/her circumstances created by family, social environment and formal authorities, minor children are entitled to protection.[309] In this sense, it does not refer to the specific needs of UASC. Indeed, the context of the protection for children set forth by the Convention is also rather vague. It does not specify what circumstances and to what extent children are entitled to protection.

On the other hand, the IACHR intends to fill this gap through its advisory opinions and case law related to the rights of refugees and migrant children, including UASC. For example, upon the request of Argentine, Brazil, Paraguay and Uruguay governments in 2014, the Court issued an advisory opinion (OC-21/14) concerning the

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[306] The African Union, *"The African Charter on the Rights and Welfare of the Child",* Date entry into force: November 29, 1999, Art, 23. Retrieved from https://au.int/en/treaties/african-charter-rights-and-welfare-child (Accessed on 24 January 2021)

[307] Ibid., Art. 23.

[308] Ibid., Art. 25.

[309] Organisation of American States, *"The American Convention on Human Rights- The Pact of San José"*, adopted on 22 November 1969, Article 19. Retrieved from https://www.cartercenter.org/resources/pdfs/peace/democracy/des/amer_conv_human_rights.pdf (Accessed on 24 January 2021)

rights and guarantees of children within the framework of migration and considering the need for international protection.[310] Through the Advisory Opinion, the Court draws attention to increasing and a remarkable number of unaccompanied children. Accordingly, it recalls the obligations of the Member States stemming from international law, especially on the issues of identification, age assessment, best interests determination, the appointment of a legal guardian, detention only as a last resort, and family unity. In the case of UASC, it recommends that a durable solution must be provided. The Inter-American Court expresses again that States are under the obligation to take appropriate measures mainly designed for the unique situation of UASC on a case-by-case basis. In this regard, it underlines that migration management procedures must comply with international law and promote and protect children's human rights. [311]

In addition, the human rights system established by the CoE significantly protects and promotes human rights throughout the continent. All Member States of the CoE are parties to the ECHR which entered into force in 1953. Even though the Convention does not include any provision directly addressing children, Article 3 (prohibition of torture and ill-treatment), Article 5 (right to liberty and security), Article 8 (right to respect for private and family life), Article 13 (right to an effective remedy), and Article 14 (prohibition of discrimination) are especially applicable to the cases of UASC. In addition, the case law of the ECtHR contains comments about and references to the rights of children and because the case law to be seen as direct interpretations of the Convention, they should be considered as binding for the states parties. Furthermore, the Revised European Social Charter (ESC), adopted by the CoE to safeguard "social and economic rights as a counterpart to the ECHR",[312] contains specific guarantees directly for children. In this regard, Article 17 of the ESC explicitly

[310] IACHR, OC-21/14, 19 August 2014.

[311] Ibid.

[312] The Council of Europe, "*The European Social Charter: The Charter at a Glance*". Retrieved from: https://www.coe.int/en/web/european-social-charter (Accessed on 25 January 2021)

recognises children's and young persons' "right to appropriate social, legal and economic protection". This provision applies to all children irrespective of their legal or migration status. Accordingly, the European Committee of Social Rights (ECSR) also states that the protection afforded under the Charter covers all children within the jurisdiction of the Member States, including children who are illegally present on the country's territory. In the ECSR's words, "any other solution would run counter to the respect for their human dignity and would not take due account of the particularly vulnerable situation of children." [313] In this respect, the ECSR adopts the same rights-based and holistic approach as the UNCRC by emphasising the children as the rights holders and their dignity.

In addition, the Committee of Ministers and the Parliamentary Assembly of the CoE has adopted several policy documents to emphasise the needs of and provide appropriate protection to UASC with a child-rights sensitive approach. Accordingly, as stated by Danisi and Crock, the Parliamentary Assembly and the Committee of Ministers address the specific issues related to UASC such as living and detention conditions, the appointment of a legal guardian and access to legal and administrative procedures, as well as durable solutions for them including integration into the host country and return to the country of origin.[314] In this respect, "the Recommendation CM/Rec(2007)9 of the Committee of Ministers on Life Projects for Unaccompanied Migrant Minors" states that migration policies should contain more than border controls and repressing the migration movements. They should consider the challenges and risks experienced by UASC and aim to reduce them. The Recommendation also lays stress on the "diversity and heterogeneity" of the conditions of UASC in each case stemming from their ethnic, cultural, personal background or legal status. Therefore,

[313] The European Committee of Social Rights (ECSR), "Defence for Children International (DCI) v. the Netherlands", Complaint No. 47/2008, 20 October 2009, para. 64. Retrieved from: https://hudoc.esc.coe.int/eng#{%22sort%22:[%22ESCPublicationDate%20Descending%22],%22ESCDcIdentifier%22:[%22cc-47-2008-dmerits-en%22]} (Accessed on 19 July 2021)

[314] Carmelo Danisi (with Mary Crock), "Immigration control and the best interests of the child in Europe", in Mary Crock and Lenni B. Benson (Eds.), *Protecting Migrant Children: In Search of Best Practice*, Edward Elgar Publishing, Cheltenham, & Northampton, MA, 2018, p. 139.

the States Parties should adopt an "individualised, multidisciplinary and participatory approach".[315] It also underlines the importance of coordination between policy and practice, setting up national agencies, and awareness-raising activities regarding the risks faced by UASC.[316] Therefore, the Recommendation offers "practical advice" to CoE's Member States in dealing with UASC.[317]

On the other hand, due to minimal progress in the protection of UASC, including the adoption of harmonised national acts regarding legal guardianship and ensuring adequate protection systems, the Parliamentary Assembly of the CoE readdressed the issue by adopting Resolution 1810(2011) on 15 April 2011.[318] Through this Resolution, the Assembly emphasises the protection gaps in the EU law and calls the EU Member States to adopt new legislation and fully implement their commitments stemming from international and EU law.[319]

The CoE has also adopted the Strategy for the Rights of the Child in 2016 to set up priority areas on children's rights. In addition to consultations with the Member States, international organisations and agencies, NGOs, and national human rights

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[315] The Council of Europe, *"The Committee of Ministers, Recommendation CM/Rec(2007)9 of the Committee of Ministers to member states on life projects for unaccompanied migrant minors",* 12 July 2007, p. 2. Retrieved from https://emnbelgium.be/publication/recommandation-cmrec20079-committee-ministers-member-state-life-projects-unaccompanied (Accessed on 24 November 2021)

[316] The concept of "life projects" for UASC was introduced by the Recommendation. By this innovative concept, it has been aimed to strengthen the abilities of these children to participate in social life as independent and responsible members by supporting their social integration, personal development and cultural awareness and ensuring their access to vital services. Ibid., para. 10-14.

[317] Juan Manuel López Ulla and Marie Françoise Valette, "The Council of Europe and the Migration of Unaccompanied Children: Jurisprudence of the European Court of Human Rights and recommendations of the Committee of Ministers and the Parliamentary Assembly" in Daniel Senovilla and Philippe Lagrange (ed.), "*The Legal Status of Unaccompanied Children within International, European and National Frameworks Protective Standards Vs. Restrictive Implementation",* PUCAFREU Project, 2011, p. 35. Retrieved from https://calenda.org/217903?file=1 (Accessed on 22 November 2020)

[318] The Council of Europe, Parliamentary Assembly, *"Unaccompanied children in Europe: issues of arrival, stay and return",* Resolution 1810(2011), 15 April 2011. Retrieved from ssembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17991&lang=en (Accessed on 22 November 2021)

[319] Ibid.

institutions, the Strategy also includes children's views.[320] Similar to other documents adopted by the CoE, it guides the Member States to adopt and implement comprehensive child protection policies. On the other hand, the distinctive feature of the Strategy is its emphasis on the impact of the digital world on children.

In addition, in 2017, as the complement of the Strategy for the Rights of the Child, the CoE released the Action Plan on Protecting Refugee and Migrant Children in Europe for 2017-2019. The Action Plan aims at aiding and supporting States in dealing with migration flows through building capacities and strategies and improving the effectiveness of CoE's activities by compiling all of them within a single document. It puts a specific emphasis on the plight of UASC. It chalks out the concrete actions that the Member States should take to ensure that refugees and migrant children effectively enjoy their rights. In this respect, as three major objectives, it promotes child-friendly procedures including easy access to their rights, ensuring protection and contributing to better integration of children, in case they stay in the European country of destination.[321]

Furthermore, as briefly referred to above, the ECtHR sets up a normative framework through its case law. It concretises the meaning of the individual rights and freedoms enshrined in the Convention.[322] As stated by Letsas, as it applies to all other human rights instruments, ECtHR also accepts the concept of a "living instrument", which means that the Convention and the meaning of the rights should be interpreted in the light of "present-day conditions" as one of the main characteristics of its case law.[323]

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[320] The Council of Europe, *"Strategy for the Rights of the Child (2016-2021)*", March 2016, p. 5. Retrieved from https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168066cff8 (Accessed 17 October 2021)

[321] The Council of Europe, *"The Action Plan on Protecting Refugee and Migrant Children in Europe (2017-2019)*", May 2017, p. 6. Retrieved from https://edoc.coe.int/en/children-s-rights/7362-council-of-europe-action-plan-on-protecting-refugee-and-migrant-children-in-europe-2017-2019.html (Accessed on 17 October 2021)

[322] UNCRC, 2012, p. 13.

[323] George Letsas, "The ECHR as a Living Instrument: Its Meaning and Legitimacy', in Follesdal, Peters and Ulfstein (Eds.), *Constituting Europe: The European Court of Human Rights in a National,*

In this respect, Nykanen argues that the ECHR has gained increased importance for protecting asylum seekers in Europe over the past ten years. As an example, she refers to the judgements of the ECtHR which has interpreted Article 3 of the ECHR in favour of refugees and promoted the view that persons, who are likely to face torture or inhuman or degrading treatment or punishment in the country of origin, should not be deported. Nykanen considers the scope of the principle of non-refoulement under the ECHR in some respects broader than the principle's scope as recognised in Article 33 of the Refugee Convention. To be precise, she believes that, unlike the Refugee Convention, the ECHR does not bind the non-refoulement principle to a person's civil or political status or behaviour. In other words, the ECtHR's competence has reinforced the principle of non-refoulement in the European context and generated binding judgments regarding the conduct of states party to the ECHR.[324]

In the case of UASC, the Court has concluded important cases, mostly related to Article 3, Article 5 and Article 8 of ECHR, as discussed in Chapter Four .[325] The Court has also released a factsheet on "unaccompanied migrant minors in detention".[326] For instance, in the Judgment of Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, the Court draws attention to "the child's extreme vulnerability" as a "decisive factor" regarding the determination of migration status.[327] Furthermore, the Court reiterates the obligations of States Parties stemming from the CRC and points out that:

European and Global Context, Cambridge University Press, Cambridge, 2013, p.2. Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2021836 (Accessed on 12 December 2021)

[324] Nykanen, 2001, p. 317.

[325] UNCRC, 2012, p. 13.

[326] ECtHR, *"Factsheet on Unaccompanied Migrant Minors in Detention",* Press Unit, June 2020. Retrieved from https://www.echr.coe.int/Documents/FS_Unaccompanied_migrant_minors_detention_ENG.pdf (Accessed on 22 February 2021)

[327] ECtHR, *"The Case of Mubilanzila Mayeka and Kaniki Mitunga v. Belgium",* Application no. 13178/03, 12 October 2006, para. 55. Retrieved from https://www.asylumlawdatabase.eu/en/case-law/ecthr-mubilanzila-mayeka-and-kaniki-mitunga-v-belgium-application-no-1317803 (Accessed on 28 November 2020)

> Children have specific needs that are related in particular to their age and lack of independence, but also to their asylum-seeker status. The [European] Court [of Human Rights] has also observed that the Convention on the Rights of the Child encourages States to take appropriate measures to ensure that a child who is seeking to obtain refugee status enjoys the protection and humanitarian assistance, whether the child is alone or accompanied by his or her parents (...).[328]

One of the essential cases ruled by the ECtHR is the case of Rahimi v. Greece, which is related to an unaccompanied Afghan child deprived of his liberty for two days by the Greek authorities. Through this judgment, for the first time, the Court held that an unaccompanied child's detention and release without providing any alternative care constitutes a breach of Article 3 of the ECHR.[329] The case is significant since it reflects the most prevalent challenges experienced by unaccompanied children.

In addition to the CoE's protection, UASC are also entitled to protection under the EU law. First and foremost, the EU Charter of Fundamental Rights contains a specific provision titled "the rights of the child".[330] Article 24 of the Charter ensures the child's right to protection and care, right to express the views, right to maintain a relationship with their parents, and the principle of child's best interests.[331] Also, Article 7 (respect for private and family life), Article 18 (right to asylum), Article 19 (protection in the event of removal, expulsion or extradition – principle of non-refoulement) and Article 32 (prohibition of child labour and protection of young people at work) are among other rights which children are entitled.[332]

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[328] ECtHR, "The Case of Abdullahi Elmi and Aweys Abubakar v. Malta", Applications nos. 25794/13 and 28151/13, 22 November 2016, para. 103. Retrieved from https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/CASE%20OF%20ABDULLAHI%20ELMI%20AND%20AWEYS%20ABUBAKAR%20v.%20MALTA.pdf. (Accessed on 22 November 2020). See also López Ulla and Valette, 2011, p. 29.

[329] López Ulla and Valette, 2011, p. 29.

[330] The EU, *"The EU Charter of Fundamental Rights",* OJ C 326, 26 October 2012, Art. 24. Retrieved from https://eur-lex.europa.eu/eli/treaty/char_2012/oj (Accessed on 12 January 2021)

[331] Ibid.

[332] Ibid., Arts. 7, 18, 19 and 32.

Apart from the treaties, which are the primary instrument of the EU law, there are also secondary law instruments under four categories: "regulations, directives, decisions, recommendations and opinions". In this regard, primarily through Directives, the EU has also regulated the rules and safeguards for UASC. According to Article 24/3 of the Reception Conditions Directive (Recast), within this framework, Member States must trace the family of UASC. In addition, Article 31 (5) of the Qualifications Directive (Recast) stipulates that the start or continuation of the tracing process should not prevent the granting of international protection to the child.[333]

The (Recast) Qualification Directive numbered 2011/95/EU requires "appropriate care and custodial arrangements" for unaccompanied children when their asylum applications are considered. The Directive includes one of the most comprehensive provisions directly related to unaccompanied children. Under Article 31 titled "unaccompanied minors", the Directive obliges the EU Member States to guarantee the legal representation of an unaccompanied child, meeting their protection needs, providing alternative care arrangements, the participation of children in asylum procedures, considering the best interests principle as the primary element, tracing and reunifying with family members, and training of officials who are dealing with unaccompanied children.[334] Besides, the EU Family Reunification Directive requires the Member States to permit the entry and residence of the unaccompanied child's parents even if they are third-country nationals when joining their parents in another country would not serve the best interests of the child. [335]

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[333] The EU Fundamental Rights Agency (FRA) and CoE, "*Handbook on European law relating to the rights of the child"*, Publications Office of the European Union, Luxembourg, 2015, p. 169. Retrieved from https://fra.europa.eu/en/publication/2015/handbook-european-law-relating-rights-child (Accessed on 12 January 2021)

[334] The EU, European Parliament and the Council, *"Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted",* 13 December 2011, para. 27 and Articles 2/l, 20/3, and 31.

[335] The EU, European Council, "*Directive 2003/86/EC on the right to family reunification*", 22 September 2003, Art. 10/3.

Furthermore, the EU Regulation No 1168/2011 has amended the FRONTEX Regulation, which now includes rules applicable to FRONTEX operations and foresees a set of specific obligations regarding human rights and accountability.[336] In this regard, the Regulation stipulates that FRONTEX will perform its tasks and responsibilities in full conformity with the applicable Union legislation, including the Charter, and the relevant international law, including the Geneva Convention. In this context, the Regulation foresees that "no person shall be disembarked in, or otherwise handed over to the authorities of, a country in contravention of the principle of non-refoulement and that the special needs of children and other vulnerable persons shall be addressed in accordance with Union and international law".[337] Also, Mitsilegas argues that the Lisbon Treaty, together with the 2011 Directive on Trafficking in Human Beings, has addressed the issue of balance between the key aspects of the EU trafficking legislation, namely the enforcement and protection. The Directive includes provisions, inter alia, on assistance, support and protection for unaccompanied child victims of trafficking in human beings.[338] Similarly, the Return Directive recognizes UASC as vulnerable persons and contains safeguards on return and removal of UASC as well as their detention only as a last resort by focusing on the best interests and family unity principles and the existence of appropriate care arrangements in the State of return.[339]

3.4.2. International Soft Law Instruments at Universal Level

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[336] The EU, European Parliament and the Council, *"Regulation (EU) No 1168/2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union",* 25 October 2011.

[337] Ibid., Art. 1/3/b.

[338] Valsamis Mitsilegas, "*The Criminalisation of Migration in Europe Challenges for Human Rights and the Rule of Law"*, Springer, Switzerland, 2015, p. 50.

[339] The EU, European Parliament and the Council, "*Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals",* 16 December 2008, Arts. 3/9, 10 and 17.

In international law, there exist two important law instruments, which are soft law and hard law instruments. Generally, hard law is used to refer to international law documents, which bear legal obligations for the parties concerned and therefore, can be brought before the relevant courts. Human rights convention adopted by the UN and other regional mechanisms may be considered an example of hard law instruments.[340] On the other hand, soft law refers to international legal instruments, which are not legally binding for the parties involved. The resolutions of the UN General Assembly are good examples of this kind of law.[341] Although they are not legally binding, soft law instruments have a degree of impact in international law in terms of influencing and guiding state behaviour and therefore providing a mechanism to establish basic rules for resolving ongoing or recurring problems.[342] They can also serve for the purpose of clarifying existing binding rules that might be vague as to scope.[343]

3.4.2.1. The Resolutions of the United Nations General Assembly (UNGA)

In its Resolution numbered 55/79, adopted on 22 February 2001, the UN General Assembly (UNGA) noted "its deep concern" regarding the increasing number of UASC worldwide. It remarks on the vulnerability of those children to risks stemming from armed conflicts "such as being forcibly recruited or subjected to sexual violence, abuse or exploitation." It calls on all duty bearers and stakeholders to protect the rights of all migrant and refugee children in general and unaccompanied children in particular. In this regard, it requires ensuring their best interests as the primary

[340] European Center for Constitutional and Human Rights (ECCHR). “Hard law/soft law”. Retrieved from https://www.ecchr.eu/en/glossary/hard-law-soft-law/ (Accessed on 16 March 2022)

[341] Ibid.

[342] Emily Crawford, *Non-Binding Norms in International Humanitarian Law*, Oxford University Press, Oxford, 2021, p. 23.

[343] Ibid., p. 25.

consideration, prioritising family tracing and reunification processes, and monitoring alternative care conditions in host countries.[344]

On 19 December 2001, the UNGA issued another resolution directly on "assistance to unaccompanied refugee minors". In Resolution 56/136, the UNGA expresses its deep concern on the plight of UACS and reiterates that UASC are among the most vulnerable group of refugees and migrants as they face the risk of violence, sexual abuse and use as child soldiers. Therefore, it reaffirms the urgent need for special assistance and care and the need for early identification and accurate data on UASC.[345] It references explicitly international humanitarian law and urges states to respect and implement the 1949 Geneva Conventions' provisions. Accordingly, while appreciating the efforts of the UNHCR and UNICEF and other organisations aiming to protect and assist UASC, it calls upon the relevant UN Agencies and other international human rights organisations to further mobilise appropriate and sufficient support for UASC, especially in education, health, and mental rehabilitation services.[346]

In addition, the Secretary-General's Report on the Assistance to Unaccompanied Refugee Minors numbered 58/299 was issued on 20 August 2003 at the request of the General Assembly.[347] The report provides information regarding the UN Agencies' actions related to concerns raised in Resolution 56/136. In his report, the Secretary-General emphasises the disadvantageousness and vulnerability of unaccompanied and separated girls. It points out the importance of adopting a right-based approach towards the issue. The report deals with the "global priority issues relating to refugee children": family tracing and reunification, military recruitment, sexual exploitation, abuse and

[344] UNGA, Resolution 55/79, A/RES/55/79, 22 February 2001, p. 8-9, para. 7,8, and 11.

[345] UNGA, "*Assistance to unaccompanied refugee minors, Report of the Secretary-General*", A/56/136, Fifty-eighth session, 15 February 2002.

[346] Ibid.

[347] UNGA, "*The Secretary-General's Report on the Assistance to Unaccompanied Refugee Minors*", A/58/299, 20 August 2003.

violence, and education. It also addresses the special protection needs of refugee girls, internally displaced children, registration and detention, and other and challenges.[348]

The UNGA has recapitulated the same concerns and recommendations through several following resolutions.[349] For instance, in its Resolution 58/190 on the protection of migrants of 22 December 2003, the General Assembly reiterates the need for "a focused and consistent approach towards migrants as a specific vulnerable group, in particular, migrant women and children".[350] While its emphasis on assistance and protection irrespective of the migrant's legal status is significant, the Resolution addresses women and children as a single group.[351] This perception has the potential to ignore and undermine the different challenges faced by these two groups and, therefore, their different needs

On 19 September 2016, the UNGA organised "The High-Level Summit on Refugees and Migrants" to address large movements of persons between States and to promote rights-based response to those movements. As the outcome of the Summit, all UN Member States adopted the New York Declaration for Refugees and Migrants (Resolution No. 71/1) unanimously. UNHCR describes the New York Declaration as "a milestone for global solidarity and refugee protection at this time of unprecedented displacement."[352] Through the Declaration, all Member States has reconfirmed their commitments to respect and ensure the refugees and migrants' rights. There has also been a consensus on improving support and possibilities for refugees and migrants, emphasising adopting durable solutions.

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[348] Ibid.

[349] UNGA, Resolution 57/190 of February 2003; Resolution 58/190 on Protection of migrants of 22 December 2003; Resolution 59/261 of December 2004; Resolution 60/231 of December 2005 and Resolution 61/146 of December 2006.

[350] UNGA, Resolution 58/190 on Protection of migrants of 22 December 2003.

[351] UNCRC, 2012, p. 59.

[352] UNHCR, *"The New York Declaration for Refugees and Migrants: Answers to Frequently Asked Questions*", February 2018, p. 2.

Whilst the New York Declaration applies to all refugees and migrants, there are some specific provisions, which directly refer to the situation of refugee and migrant children, and UASC in particular. In this respect, the Member States reiterate their commitments stemming from international law regarding the specific needs of UASC, including providing birth registration, nutrition and primary healthcare and education services.[353] They also reconfirm to ensure the child's best interests as the primary consideration in their policies irrespective of their legal status.[354] Finally, all Member States remark their intentions to develop additional guidelines on the protection of UASC.[355]

The New York Declaration presents one of the latest developments on protecting the rights of refugees and migrants. It is significant since it reflects the consensus of all UN Member States without any reservation or objection. Furthermore, in Annex I, the Declaration includes "a comprehensive refugee response framework (CRRF)". Unlike the previous Resolutions, the CRRF aims to respond to displacement in a more systematic, sustainable and inclusive way rather than solely on the basis of a humanitarian-based approach.[356] In this regard, Bhabha points out that through the New York Declaration, the urgent need to protect refugee children has been mainstreamed in "the political and diplomatic" arena, "after years on the side-lines".[357]

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[353] UNGA, "*The New York Declaration for Refugees and Migrants*", A/RES/71/1, 3 October 2016, p. 5, para. 23 and 59. Retrieved from: https://www.refworld.org/docid/57ceb74a4.html (Accessed on 28 December 2020)

[354] Ibid, para. 32 and 59.

[355] Ibid. p. 10, para. 52.

[356] UNHCR, *"The New York Declaration for Refugees and Migrants*", February 2018, p. 4.

[357] Jacqueline Bhabha, "Children on the Move in the Twenty-First Century: Developing a Rights-Based Plan of Action." in Marcelo Suarez-Orozco (ed.) *Humanitarianism and Mass Migration: Confronting the World Crisis*, University of California Press, 2019, p. 90. Retrieved from https://www.jstor.org/stable/j.ctv9zchv9 (Accessed on 16 February 2021)

Besides the CRRF, the New York Declaration also has announced the adoption of two "global compacts on refugees and safe, orderly and regular migration" in 2018 by inviting the UNHCR to submit a proposal for such a global compact.[358] Accordingly, the UNGA adopted Resolution No. 73/151 on Global Compact on Refugees (GCR) on 17 December 2018.

The primary function of the GCR is to serve "a basis for predictable and equitable burden and responsibility-sharing" among all stakeholders, including the UN Member States, international and regional organisations including the financial, national and local institutions, academia, civil society, media and private sector, as well as members of the host community and refugees.[359] The main objectives of the GCR are to "i) ease pressures on host countries, ii) enhance refugee self-reliance, iii)expand access to third-country solutions, and iv) support conditions in countries of origin for return in safety and dignity." [360] It also has provisions regarding UASC. Within this framework, it addresses the specific needs of UASC and the need for proper identification, registration, best interests determination, age assessment procedures, and care arrangements and accommodation services.

Finally, as a separate document, the UNGA adopted the Global Compact for Safe, Orderly and Regular Migration (GCM), Resolution No. 73/195, on 19 December 2018. The Global Compact is of great importance as it is the first international agreement to include all aspects of international migration.[361] It reflects a "child-sensitive" approach by promoting children's rights stemming from international law and considering the child's best interests as the primary principle in all stages of displacement of

[358] UNGA, "*The New York Declaration",* 2016, p. 21, para. 19. (Accessed on 22 December 2021)

[359] Ibid., p. 2.

[360] Ibid. p. 4.

[361] OHCHR, "*Global Compact for Safe, Orderly, and Regular Migration (GCM)*". Retrieved from https://ohchr.org/EN/Issues/Migration/Pages/GlobalCompactforMigration.aspx (Accessed on 16 January 2021).

children.[362] UNICEF states that GCM is "a landmark agreement", as it firstly puts children in the centre of the migration management.[363] Like the GCR, the GCM also points out the specific situation and needs of UASC. The GCM also highlights the risk of UASC going missing and requires the effects of migration laws, policies and practices to be reviewed to prevent this risk. Furthermore, it emphasises the necessity for family contacts, tracing, and reunification; best interests determination; identification; and appointment of a legal guardian, particularly in cases of UASC. Lastly, as an innovative step, it proposes developing and conducting "intra- and cross-regional specialised human rights and trauma-informed training for first responders" and public officials.[364]

The New York Declaration and Global Compacts adopted have been accepted as "the most significant development" in the last decades regarding refugee and migrant protection.[365] It is also argued that they constitute "a major political step towards structuring States' responses more coherently and international cooperation on these issues. [366] However, these instruments also lack the capability to provide appropriate and complete protection for children in need of international protection, including UASC. In this regard, Hathaway argues that these instruments are a "decidedly thin" and "partial" response to the international protection regime, which is "risky, chaotic, and debilitating, with resources grossly misallocated relative to needs and which does

[362] UNGA, *"The Global Compact for Safe, Orderly and Regular Migration",* A/RES/73/195, 11 January 2019, p. 6. Retrieved from https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_73_195.pdf (Accessed on 22 November 2020)

[363] UNICEF, *"Migrant and Displaced Children: Children on the move are children first"*, Retrieved from. https://www.unicef.org/migrant-refugee-internally-displaced-children (Accessed on 18 December 2020)

[364] Ibid., p. 21, para. 28/b.

[365] Adrienne Anderson and Michelle Foster, "A Feminist Appraisal of International Refugee Law", in Cathryn Costello et al. (Eds.), *The Oxford Handbook of International Refugee Law,* Oxford University Press, Oxford, 2021, p. 74.

[366] İdil Atak and François Crépeau, "Refugees as Migrants", in Cathryn Costello et al. (Eds.), *The Oxford Handbook of International Refugee Law,* Oxford University Press, Oxford, 2021, p. 137.

not provide durable solutions for most refugees".[367] He further states that "The Compact, in other words, is all about process – a bureaucrat's dream perhaps, but nothing that comes even close to dependably addressing the operational deficits of the refugee regime."[368] In a similar vein, Aleinikoff identifies two major gaps in the Compacts, which are the absence of "a global responsibility-sharing strategy and structure", and a lack of provisions regarding the revision of the definition of a refugee under Article 1 of the 1951 Convention, which includes the forced migrants who do not qualify as refugees. [369] Therefore, despite their important role to demonstrate the global attention and political will on the displacement issues, these instruments also are not perfect and adequate to fill the gap in international refugee law.

3.4.2.2. The General Comments of the UNCRC

The high number of UN Resolutions on the subject shows how serious the situation of unaccompanied children is and the need to reinforce international and national protection provided to these children is recognized and attached to high importance. The General Comments of the UNCRC also has complemented the Resolutions.

Since it directly and solely addresses unaccompanied children's specific situations and needs, the UNCRC's policy documents are the essential soft law instruments. The UNCRC significantly contributes to the implementation of the Convention through its General Comments, Concluding Observations and Recommendations, which contain detailed interpretations of the provisions of the CRC and advises for the States Parties on general and thematic fields.[370]

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[367] James C. Hathaway, "The Global Cop-Out on Refugees", *International Journal of Refugee Law*, 30 (4), 2018, p. 593.

[368] Ibid. P. 594.

[369] Alexander Aleinikoff, "The Unfinished Work of the Global Compact on Refugees", *International Journal of Refugee Law*, 30 (4), 2018, p. 612.

[370] Kanics, 2018, p. 41-43.

Indeed, ensuring proper representation of UASC in the relevant administrative and legal processes is considered vitally important by the UNCRC. In this regard, to provide "clear guidance to States on the obligations deriving from the CRC with regard to this particularly vulnerable group of children", it has adopted its "General Comment 6 (GC6) on the Treatment of Unaccompanied and Separated Children Outside Their Country of Origin". The GC6 aims to call attention to the plight of UASC and address the challenges faced by the states and other stakeholders in providing the full enjoyment of rights for these children. In the GC6, the Committee points out the gaps in the protection of UASC by adopting a holistic approach. In this respect, GC6 recalls the obligation of states to form an efficient legal framework and put in place the necessary arrangements to ensure meaningful representation of UASC's best interests. It outlines a detailed analysis of core principles and relevant rights outlined in the CRC and "response to general and specific protection needs". In line with the CRC's provisions, it sets up initial assessment measures, such as early identification and proper registration of UASC, family tracing and reunification attempts. It recommends that as soon as the UASC is identified, the host states should appoint a guardian/ legal adviser and keep these arrangements until the child reaches the age of 18 or permanently leaves the jurisdiction of the host state.[371]

The GC6 is also noteworthy for providing a comprehensive interpretation of Article 22 and UASC's access to asylum procedures. It draws attention to child-specific forms of persecution such as recruitment of children in armed conflicts, trafficking for prostitution and sexual exploitation of female genital cutting or mutilation.[372] Furthermore, States should prioritise UASC's refugee status applications in a prompt and fair manner. Considering the fact that GC6 does not confine refugee children's rights to the rights enshrined in the 1951 Convention, even if a child does not meet the refugee definition in Article 1/A/2 of the 1951 Convention, they still "shall benefit

[371] Ravi KS. Kohli, "Protecting Asylum Seeking Children on the Move*", Revue européenne des migrations internationales*, 30 (1), 2014, p. 83. Retrieved from http://journals.openedition.org/remi/6768, DOI: 10.4000/remi.6768 (Accessed on 16 October 2020)

[372] UNCRC, GC6, p. 21, para. 74.

from available forms of complementary protection to the extent determined by their protection needs"[373] This interpretation paves the way for complementation and enhanced implementation of the 1951 Convention, which lack gender and age sensitivity. Last but not least, the Committee urges States parties to withdraw their reservations to the Convention provisions, which limit the protection of unaccompanied and separated children in a systematic way.[374]

In addition to GC6, the Committee's "General Comment No 13 (GC13) on the Right of the Child to Freedom from All Forms of Violence" is crucial in the case of UASC. While the GC13 determines that it should be applied to all children under 18, it addresses children explicitly without prominent primary or proxy caregivers, including unaccompanied children, children of migrating parents, and children in street situations. It also identifies the State as the de-facto caregiver. The special provision of GC13 regarding those children points out that.[375] Through the GC13, the Committee also draws attention to special protection of children affected by cross-border issues either accompanied or unaccompanied by highlighting the need for regional and international cross-border cooperation and specific legislation, policies, programmes and partnerships.[376]

There are also other several general comments of the UNCRC. Even if they have a general nature, all of them can apply to UASC.[377] Finally, the Committee adopted a

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[373] Ibid., para. 77. See also: Pobjoy, 2017.

[374] UNCRC, GC, p. 8, para. 17.

[375] UNCRC, *"The General Comment No. 13 (GC13) The right of the child to freedom from all forms of violence"*, CRC/C/GC/13, 2011, 18 April 2011, para. 35. Retrieved from https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.13_en.pdf (Accessed on 08 December 2020)

[376] Ibid., 2011, para. 76.

[377] These general comments include, but are not limited to, "General comment No. 1 on the aims of education (2001); General Comment No. 2 on the role of independent national human rights institutions in the promotion and protection of the rights of the child (2002); General Comment No. 5 on the general measures of implementation of the Convention on the Rights of the Child (2003), General Comment No. 8 on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (2006), General Comment No. 12. On the right to be heard, General Comment

joint general comment with the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families in 2017. The Joint General Comment No. 4 is related to "State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination, and return". Whilst its context is similar to GC6, the Committees also raise their concerns regarding migrant children, especially between 15 and 18 years. They pay particular attention to "ambiguous migration status" and "lower levels of protection" provided for them. In this regard, it recommends that States parties adequately prepare children for living independently and adopt appropriate measures to protect and assist them during their adulthood stage.[378]

Besides its General Comments, the Committee also holds decisions regarding allegations on the violation of unaccompanied children's rights within the framework of its authority to examine individual and State communications under the OPIC. For instance, the Committee has adopted fourteen violations decisions regarding the applications filed by unaccompanied children on age assessment procedure in Spain.

3.4.2.3. The Conclusions, Guidelines and Handbooks of the UNHCR, UNICEF, and ICRC

International governmental and non-governmental organisations and agencies play a significant role in protecting UASC. As mentioned above, both the CRC and the UNCRC have repeatedly emphasised the role of these organisations in the protection of children's rights and the importance of cooperating with them. Therefore, as Uppard and Birnbaum state, they have essential mandates stemming from international,

No.14 on the best interests of the child (2013), General Comment No. 15 on the right to health (2013), and General Comment No. 21 on children in street situations (2017)".

[378] UNCRC and Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), "*Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration*", CMW/C/GC/3-CRC/C/GC/22, 16 November 2017. Retrieved from https://www.refworld.org/docid/5a1293a24.html (Accessed 22 December 2021)

humanitarian, refugee, and human rights law.[379] On the one hand, the organisations such as UNICEF, UNHCR, and the International Committee of the Red Cross (ICRC) provide practical and technical support and assistance to those children, especially in the family tracing and reunification process. On the other hand, they guide States and other duty-bearers away from protection measures and safeguards by adopting guidelines on the issue.

UNHCR's Guidelines and Handbooks on international protection, as well as the Conclusions of the Executive Committee of the High Commissioner's Program (ExCom), the executive body of the UNHCR, play important roles in the coherent interpretation and application of the 1951 Convention. They have been accepted as "representing collective international expertise on refugee matters including legal expertise" and considered as significant tools by domestic and regional courts.[380] For instance, in the UK judicial system, the authoritative character of the UNHCR Guidelines has been recognized, and the view that they should be attached "considerable weight" has been expressed during a judicial proceeding.[381] In a similar vein, the USA Supreme Court has considered that "the UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status" "provides significant guidance" in interpreting the 1951 Convention.[382] Through the UNHCR's activities, UASC have been recognised as a specific target group of international refugee law. In addition to the 1951 Convention, the UNHCR also promotes the CRC by accepting the CRC as the basic framework for its activities and policies regarding refugee children.[383] To this end, UNHCR aims to and works to prevent family separation,

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[379] Uppard and Birnbaum, 2016, p. 33.

[380] Hathaway, 2021, p. 57.

[381] Walter Kälin, "Supervising the 1951 Convention on the Status of Refugees: Article 35 and Beyond", UNHCR Note, 2001, p.9. Retrieved from https://www.unhcr.org/3b3357a69.pdf#page=11&zoom=100,0,0 (Accessed on 16 March 2022)

[382] "Immigration and Naturalization Service v. Cardoza Fonseca, (1987) 480 US 421 (US SC, Mar. 9, 1987), at 439, n. 22." Cited in Hathaway, 2021, p. 60.

[383] Pobjoy, 2019, p. 823.

identify UASC, ensure adequate care and protection for them, and family reunification.[384] In this regard, the UNHCR's ExCom raised their concerns about violations against refugee children and other specific challenges faced by these children in 1987. Accordingly, it incorporated in refugee children its activities to protect and support. In 1988, it adopted its first guidelines on protecting refugee children.[385] This Guideline was revised in 1994, after the adoption of CRC in 1989. The revised "1994 Guidelines on Refugee Children's Protection and Care" present one of the most comprehensive and detailed publications of UNHCR related to refugee children's rights. It firstly refers to standards set forth by the CRC as "a normative frame of reference for UNHCR's action"[386]. Afterwards, the Revised Guideline addresses UNHCR's approach towards protection and assistance of refugee children, which is "three-pronged: direct services to the child; helping the child through services to the family, and assisting the child and the family through services to the community."[387] It also points out the importance of culture in children's identity and continuity, psychological well-being of children, health and nutrition, education, personal liberty and security, the legal status of refugee children, durable solutions, and operational framework.

Although the Revised Guideline 1994 is a general policy document related to all refugee children, it has a specific chapter directly addressing the situation of unaccompanied children. Like the other documents, the Guideline emphasises the unaccompanied children's particular vulnerability and protection needs and states that the services for unaccompanied children should start with preventing separation and identification.[388] In situations where children have already separated from their families, there is a need for family tracing and reunification to restore normalcy for

[384] Uppard and Birnbaum, 2016, p. 46.

[385] Goodwin, 2007, p. 476-477.

[386] UNHCR, 1994 Guidelines, p. 5.

[387] Ibid, p. 14.

[388] Ibid. p. 53.

these children.[389] It also highlights that the refugee status determination process is more challenging for UASC and demands a special consideration, which many states do not normally consider.[390] In this regard, the Guideline recommends that while determining the refugee status of unaccompanied children, States should adopt "a liberal application of the principle of the benefit of the doubt" by lifting the burden of proof for the child.[391]

The increasing risks and challenges faced by UASC over the years have required detailed guidelines specifically on their protection. In this respect, the UNHCR has issued "the Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum" in February 1997 as a complementary tool to the 1994 Guidelines.[392] This Guideline contains similar remarks and recommendations to the 1994 Guidelines, emphasising durable solutions for UASC. With the Guidelines of 1997, UNHCR reiterates the specific position of UASC and advises states not to refuse the UASC's access to their territories and provide the best care arrangements and durable solutions for them.

In addition to the 1994 and 1997 Guidelines, UNHCR also adopted several policy documents, which have essential safeguards for UASC. In 2007, ExCom issued the Conclusion on Children at Risk No. 107 (LVIII), which offers guiding principles for all duty-bearers and stakeholders regarding protecting children at risk who are hit the highest by displacement and statelessness.[393] As other crucial operational guidance documents, the UNHCR adopted the 2008 Guidelines for Determining the Best interests of the Child and the 2011 Field Handbook to implement UNHCR BID

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[389] Ibid., p. 15.

[390] Ibid. p. 43.

[391] Ibid.

[392] UNHCR, 1997 Guidelines, p. 4., para. 1.3.

[393] UNHCR-Executive Committee of the High Commissioner's Programme, *"Conclusion on Children at Risk*", No. 107 (LVIII), 5 October 2007. Retrieved from https://www.refworld.org/docid/471897232.html (Accessed 26 December 2021)

Guidelines. Currently, in May 2021, both the 2008 Guidelines and 2011 Field Handbook have been replaced by adopting the 2021 UNHCR Best interests Procedure (BIP) Guidelines: Assessing and Determining the Best interests of the Child. Through the new BIP Guidelines ExCom targets improving the capacity of UNHCR and other partners in refugee children protection.[394]

UNICEF, the principal UN agency responsible for protecting and advocating children's human rights, also works to protect and promote UASC's rights. On the one hand, it adopts several policy documents to guide the States and international and national organisations in child protection. It publishes significant reports on the situation of UASC. On the other hand, UNICEF provides humanitarian assistance and supplies to establish child-friendly refugee camps and safe places in practice. It also assists the national and local authorities in implementing and adopting appropriate child protection systems and services that answer the particular needs of UASC.[395]

Concerning humanitarian action, the Core Commitments for Children in Humanitarian Action (CCCs), which were made public in 1998 and revised in 2010, serve as the main policy tools for UNICEF. They also serve as a guiding light for other stakeholders, including states' institutions, international governmental and non-governmental organisations, and local civil society organisations. In terms of protecting UASC, the Core Commitments firstly remark the prevention of family separation and promoting family-based care as the child's best interests.[396] They also stipulate that all UASC should be provided with "a suitable, safe, alternative care

[394] UNHCR, "*2021 UNHCR Best interests Procedure Guidelines: Assessing and Determining the Best interests of the Child",* May 2021. Retrieved from https://www.refworld.org/docid/5c18d7254.html (Accessed 28 December 2021)

[395] UNICEF, "*Migrant and Displaced Children: Children on the move are children first".* Retrieved from: https://www.unicef.org/migrant-refugee-internally-displaced-children) (Accessed on 18 December 2020)

[396] UNICEF, *"The Core Commitments for Children in Humanitarian Action (CCCs)"*, October 2020, p. 53. Retrieved from https://www.unicef.org/emergencies/core-commitments-children (Accessed on 08 March 2021)

arrangement; and are provided with an individual case management/care plan".[397] Registration, family tracing and reunification, emergency care and protection, access to services including healthcare, education and legal aid are other critical considerations emphasised in the CCCs.

Furthermore, UNICEF co-leads the Alliance for Child Protection in Humanitarian Action (the Alliance), an international interagency group with more than 100 organisations. The Alliance also set standards and offers technical assistance to keep children safe from violence and other kinds of harm.[398] Regarding UASC, the Alliance has released essential documents such as Field Handbook on Unaccompanied and Separated Children published in 2016 and the Toolkit on Unaccompanied and Separated Children in 2017.

In addition, UNICEF implements the Global Child Protection Working Group on Area of Responsibility (CPAoR), which considerably improves coordination on child protection and capacity in the field aiming not only to protect the UASC, but also reunite them with their families in emergency situations as efficiently as possible. The Inter-agency Working Group on Unaccompanied and Separated Children (IAWG-UASC) operates under the umbrella of the CP AoR, further strengthening policy, practice and tools related to UASC as well as coordination.

Finally, the International Committee of the Red Cross (ICRC), which was mandated by the Geneva Conventions of 1949 to provide humanitarian assistance to the victims of conflicts, has undertaken essential functions regarding the protection of UASC.[399] In this respect, ICRC conducts several activities under the theme of "Restoring Family

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[397] Ibid.

[398] The Alliance for Child Protection in Humanitarian Action, *"About Us."* Retrieved from: https://www.alliancecpha.org/en/stepping-up-child-protection-in-humanitarian-action/how-we-work-2 (Accessed on 22 February 2021)

[399] ICRC, *"Our mandate & mission".* Retrieved From: https://www.icrc.org/en/who-we-are (Accessed on 20 February 2021)

Links" to avoid family separation and to restore family contacts when separation occurs due to emergencies, including wars, conflicts and other types of violence, as well as natural disasters and massive migration movements.[400] In addition to providing technical assistance, the ICRC also works together with the key organisations, including UNHCR, UNICEF and Save the Children and publishes guidelines and reports regarding UASC.[401] Within this framework, Inter-Agency Guiding Principles on Unaccompanied and Separated Children, published in 2004 by Inter-agency Working Group on Unaccompanied and Separated Children,[402] is one of the most significant contributions of the ICRC to the field. By adopting a comprehensive approach, they cover the most critical issues on the protection of UASC, including maintaining family unity, tracing and family reunification, care arrangements and durable solutions. They also address the specific matters on refugee children, such as refugee status determination, rejected asylum-seekers, and advocacy and capacity building.[403]

It is clear that almost all states, in particular the USA and the Member States of the CoE and EU, are significantly affected by massive migration movements both in a direct and indirect way. They face several challenges as countries of origin, transit or destination.[404] In this regard, judgements of the regional courts specify the deficiencies in legislation and practice and lead States to take necessary steps. Furthermore, the soft law documents adopted by regional human rights mechanisms are instrumental

[400] Uppard and Birnbaum, 2016, p. 42.

[401] Ibid. p. 43.

[402] "Inter-agency Working Group on Unaccompanied and Separated Children was established in 1995. It consists of the key organizations with field experience of issues concerning separated children including ICRC, International Rescue Committee, Save the Children UK, UNICEF, UNHCR and World Vision International. The primary objectives of the Working are "to promote and support preparedness, coordination and good practice based on lessons learnt. Inter-Agency Working Group, Inter-agency Guiding Principles on Unaccompanied and Separated Children", January 2004, p. 2. Retrieved from https://www.iom.int/sites/g/files/tmzbdl486/files/documents/InterAgency-Guiding-Principles-on-Unaccompanied-and-Separated-Children.pdf (Accessed on 20 October 2020)

[403] Ibid.

[404] Mitsilegas, 2015, p. 5.

and valuable resources for States. Together with the UNCRC, UNHCR, UNICEF, and ICRC serve as the lodestar in protecting UASC by providing the most comprehensive guidelines and international standards to put theory into practice. They offer safeguards for UASC and offer assistance and a roadmap for states to fulfil their commitments stemming from international humanitarian, refugee, and human rights law. On the other hand, these documents function as soft law instruments. Thus, they are not binding on states. The recommendations or guidelines have not been transformed into legal norms under binding Conventions within the regional human rights system yet. The states that do not even fulfil their obligations arising from the international conventions are usually reluctant to put the principles in these general comments and guidelines into practice. As López Ulla and Valette surely point out, although many policy documents are adopted and "good intentions are repeated year after year", the progress in the protection of UASC is minimal.[405] Therefore, as will be discussed in Chapter 4, it does not seem possible to claim that these instruments are capable of filling the gap in international legislation, particularly in international refugee law, and UASC can fully benefit from the protection provided through the application of these documents. In a similar vein, the judgements of the regional courts are often ignored by national governments, and similar cases with violation of UASC's rights continue to be brought before the courts. Therefore, most of the actions and promises are still unfulfilled and UASC continue to face the challenges of being a child, alien and alone at the same time. As Gornik correctly observed, "the relationship between unaccompanied minor migrants and the international children's rights regime is deeply demarcated by the citizenship status of the minors in question and the fact that they are foreigners in a particular country."[406] This unlawful approach is reflected in the most crucial issues for protecting UASC, such as children's best interests determination, identification, age assessment, family tracing and reunification, and detention as a last resort. In this respect, the following chapter will focus on the

[405] López Ulla and Valette, 2011, p. 36.

[406] Gornik, 2018, p. 16.

shortcomings in the legislation and challenges in practice faced by UASC related to these critical concepts.

CHAPTER 4

CHALLENGES ON PROTECTION OF UNACCOMPANIED AND SEPARATED CHILDREN

Because of the fragmentation of international law and the absence of a unified and codified international legislation, as well as the practices of states contrary to their international obligations, UASC experience many challenges in their search for the protection and special care they need and are entitled to.

As discussed in the third Chapter, UNCRC, UNHCR, and other international bodies find it essential to process the reception of the children in a well-organised, positive and humane way and recommend that UASC should be given access to all social services and legal protection available to children in the host country. Intending to ensure that UASC receive at least the minimum care given to national children, the situation of UASC needs to be monitored by national or local child welfare services.

The CoE's Strategy for the Rights of the Child in 2016 underlines the especially hazardous situation of UASC and addresses the most common challenges these children face. In this regard, it reflects neglection of the best interests principle, use of detention as a standard procedure, mishandling of guardian appointment and age determination procedures, and risk of trafficking as the significant challenges. It determines five priorities to deal with these challenges and ensure the implementation of children rights, as follows: "equal opportunities for all children; participation *(in decision-making process)* of all children; a life free from violence for all children; child-friendly justice for all children; rights of the child in the digital environment."[407]

[407] The Council of Europe, 2016, p. 4.

In a complementary study, Kanics and Hernandez undertake a comparative analysis of different legal arrangements and policy frameworks in some European countries regarding the reception and regularisation of UASC. As a result, they share a critical finding that some states attach priority to child protection only because they recognise and treat them as the most vulnerable human beings. In contrast, migrant children are denied fundamental human rights in some others. They argue that especially UASC need a timely decision in line with their best interests about their immigration and asylum status as it would eliminate at least some uncertainties regarding their future and, to this end, suggest consideration of "durable solutions" based on models of good practice for reception and care of UASC.[408]

Furthermore, several factors cause UASC to face a higher risk of getting exploited and trafficked. These factors are listed as commonly observed practices like the "use of detention instead of child welfare protection, failures in assigning effective guardianship, family separation and ineffective age assessment procedures". Barreto's research describes these deficiencies as "loopholes of child protection framework" into which migrant and refugee children, particularly UASC, fall.[409]

Along these lines, UNICEF emphasises the principle that regardless of their migration status, all children should be accorded the same protections. However, many other states need to make a lot of progress as they subject migrant and refugee children to differentiated and inconsistent treatment based on their migration and asylum status.[410] Looking into how the issue has been perceived throughout history enriches the debate.

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[408] Jyothi Kanics and Daniel Senovilla Hernandez, "Protected or merely tolerated? Models of reception and regularization of unaccompanied and separated children in Europe" in in Kanics et al. (Eds.), *Migrating Alone, Unaccompanied and Separated Children's Migration to Europe*, UNESCO Publications, France, 2010, p. 5.

[409] Thais Rivera Barreto, "Human Rights of Refugee Children in light of the Multilevel System", *Europa Kolleg Hamburg, Institute for European Integration*, Study Paper No 02/18, 2018, p. 72-73.

Retrieved from https://europa-kolleg-hamburg.de/wp-content/uploads/2018/03/SP-02-18_Thais-Rivera_MR.pdf (Accessed on 19 October 2021)

[410] UNICEF, *"Uprooted. The Growing Crisis for Migrant Refugee Children",* UNICEF Publications, 2016, p. 44.

In this context, Weissbrodt and Divine consider the human rights of non-nationals in a historical perspective and see a gradually broadening yet still patchy and incomplete international legal framework in this field. They emphasise that migrants and refugees are human beings too, and as such, they should be treated with respect; however, they also note the reality that in many states, migrants and refugees are not welcome, on the contrary, often face exploitation, discrimination, arbitrary expulsion, restriction of their movement and freedom of expression, denial of the access to fundamental rights.[411]

The treatment of UASC in the EU, like the other regions of the world, appears to suffer from several inconsistencies and poor practices that run counter to international obligations of the EU member states. Regarding the practices applied to UASC in the EU countries, Gaines underlines the observation that many EU countries are not acknowledging UASC rights, and the shortcomings in many EU member states have attracted international attention. Gaines sees the main difficulty in these EU member states as follows: they do not regard UASC as children but see UASC as illegal migrants and their legislation and policies vary significantly. These inconsistent practices then, Gaines argues, cause UASC to be subjected to substandard living circumstances, abandoned, refused and excluded from care services and ultimately, be deprived of protection.[412]

This chapter dwells on a set of key concepts which play a crucial role in carrying out meaningful research on UASC. Within this framework, the most alarming and challenging issues in protecting UASC will be examined in this chapter's sub-sections by highlighting the various examples from several states. In this respect, the challenges concerning the concepts like best interests determination, access to territory,

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[411] David Weissbrodt and Michael Divine, "International human rights of migrants", in Brian Opeskin and Richard Perruchoud (Eds.) Foundations of International Migration Law, Cambridge University Press, Cambridge, 2012, p. 152.

[412] Kyla Gaines, "Assessment of International Efforts to Protect the Rights of Unaccompanied Minors", *Independent Study Project (ISP) Collection*, Fall 2011, p. 2-4. Retrieved from https://digitalcollections.sit.edu/isp_collection/114 (Accessed on 25 November 2021)

identification, proper age assessment, legal guardianship, family tracing and reunification and detention of UASC as a last resort will be discussed in this chapter. As appropriate, references will be made to some ECtHR cases.

Some of these concepts mentioned above such as best interests determination, shall be focused on in this thesis. In the opinion of this thesis' author, adhering to the concept of the child's best interests bears crucial importance and, therefore, needs to be given corresponding attention, because it serves as a starting point in tackling all other reception challenges in an efficient and most humanitarian manner.

4.1. Best interests Determination

As the most frequently repeated concept in this thesis, the principle of the child's best interests based on the child's well-being, and its determination and due application lie at the heart of all processes concerning the rights and future of UASC. As stated by Gispen, it is "the legal basis" and "the cornerstone" in terms of addressing children's universal and particular vulnerabilities.[413] As stated in Chapter Three of the thesis, the principle has a significant potential to overcome shortcomings in the international refugee law and human rights law and provide additional safeguards for children in the international protection process when functionally interpreted as a complementary norm to refugee law. In this regard, as Gispen correctly states, it provides a legal and logical basis for a "responsive state to achieve substantive equality" in relation to the concept of vulnerability, which may be difficult to address within the "traditional human rights framework".[414] Accordingly, Echavez places a strong emphasis on the principle of the child's best interests and suggests that it should be a priority consideration applicable to all actions affecting UASC throughout their journey in line with the Article 3 of the CRC.[415] In a similar vein, Gornik et al. consider the principle

[413] Gispen, 2021, p. 591.

[414] Ibid.

[415] Echavez et al., 2014, p. 2.

of the best interests a most vital concept and criterion for decisions made about UASC and draw attention to the discrepancy between states' obligations to take this fundamental principle into account for UASC and the lack thereof in practice.[416] Therefore, all duty-bearers, first and foremost states, must put the best interests of the child at the centre of all law-making and migration management processes. As stated in Chapter Three, the principle has three dimensions. It serves as a substantive right, a procedural rule, and an interpretative norm.[417] As a substantial right, in the Committee's words, it "creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court".[418] Furthermore, its function as a procedural rule and an interpretative norm is vital for addressing the "innate and specific" vulnerabilities of the child and, consequently, requiring a protection and state response.[419]

UNCRC urges that the child's best interests shall be considered as a primary point of reference by all concerned. Accordingly, social welfare institutions, regardless of their public or private nature, judicial courts, legislative organs and administrative authorities are expected to act in line with this requirement.[420] In most cases, a child's interest differs from the interests of adults. In fact, not every child's best interests are the same. A decision or solution that works for one child may not be suitable for another child. Therefore, as stated by the Committee, when determining the child's best interests, authorities should make "a clear and comprehensive assessment" for each case, considering the child's views, identity, past experiences, specific vulnerabilities, and needs[421]

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[416] Gornik et al., 2018, p. 4.

[417] UNCRC, GC14, 2013, para. 6.

[418] Ibid.

[419] Gispen, 2021, p. 597.

[420] UNCRC, 2012, p. 10.

[421] UNCRC, GC 6, 2005, para. 20.

UNCRC, GC14, 2013, para. 52-80.

Even though they are referred to as the “best interests” of children in vulnerable situations, the Committee also recognizes the fact that their best interests may differentiate depending on their personal situations. In this respect, it is important that the relevant authorities show awareness of various sorts and degrees of vulnerabilities by dealing with them through a case-by-case approach. In other words, in approaching and assessing the vulnerabilities of these children “one-size-fits-all” approach does not seem to be the best way forward. [422]

The UNCRC further states that the best interests assessment and determination processes require procedural guarantees.[423] According to the Committee:

> Assessment and determination of the child’s best interests are two steps to be followed when required to make a decision. The “best-interests assessment” consists in evaluating and balancing all the elements necessary to make a decision in a specific situation for a specific individual child or group of children. It is carried out by the decision-maker and his or her staff – if possible, a multidisciplinary team –, and requires the participation of the child. The “best-interests determination” describes the formal process with strict procedural safeguards designed to determine the child's best interests on the basis of the best-interests assessment.[424]

Furthermore, as mentioned in Chapter Three, the UNHCR's BID Guidelines provide "a formal mechanism to determine the best interests of the child" and operational guidance on applying the best interests principle in practice. It addresses three situations in the BID process, which are: "the identification of the most appropriate durable solution for unaccompanied and separated refugee children, temporary care

[422] UNCRC, GC14, 2013, para. 76.

[423] Ibid., para. 6.

[424] Ibid,, para. 47.

decisions for UASC in certain exceptional circumstances, and decisions that may involve the separation of a child from parents against their will.[425]

Pobjoy draws attention to three basic elements that must be considered in determining the child's best interests. These elements are the views of children; the particular situation of the child, including their age, maturity level, specific vulnerabilities and needs; and finally, the rights outlined in the CRC.[426] Furthermore, Kaya et al. suggest employing a three-stage approach in determining the child's best interests, which would be assessing the risks and needs; considering possible solutions; and deciding the best option given the child's best interests.[427] Therefore, for UASC, the BID process starts with the appointment of a legal guardian to guarantee the child's best interests, and the primary consideration is to adopt the most suitable durable solution for the child.

UNCRC recognises the BID as "the most important method" in guaranteeing migrant, refugee or asylum-seeking children's rights and recommends implementing it when formulating migration and asylum legislation, policies and programmes.[428] However, there are several problems stemming from international, regional or national legislation and application of the principle in practice.

Firstly, Crock and Martin highlight the deficiency in the CRC regarding the principle of the child's best interests. Although the Convention is the primary safeguard of children's rights and submits the child's best interests as one of its core principles, it

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[425] UNHCR, Guidelines on Determining the Best interests of the Child, May 2008, p. 9. Retrieved from https://www.refworld.org/docid/48480c342.html (Accessed on 28 December 2020)

[426] Pobjoy, 2019, p. 840-841.

[427] Hilal Kaya et al., "Mülteci ve sığınmacı çocuklarda yüksek yararın değerlendirilmesi (Assessment of Best interests of Refugee and Asylum Seeker Children)". *Toplum ve Sosyal Hizmet*, 31 (2), 2020, p. 764.

[428] UNCRC, 2012, p. 21.

does not provide "a right to best interests as an outcome".[429] Except in only two situations, Article 9 on separation of the child from the family and Article 21 on adoption, the child's best interests principle is not defined as the determining factor in the Convention.[430]

As stated by the UNCRC, whilst “the flexibility of the concept of the child’s best interests” is useful for developing a specific response to each child's particular situation, it also carries the risk of being used as a manipulation tool by states. In this regard, the Committee states that:

> The concept of the child’s best interests has been abused by Governments and other State authorities to justify racist policies, for example; by parents to defend their own interests in custody disputes; by professionals who could not be bothered, and who dismiss the assessment of the child’s best interests as irrelevant or unimportant.[431]

Accordingly, the UNHCR states that international law offers "limited guidance" regarding making functional the principle of the child's best interests.[432] Although this gap has been filled to some extent by UNHCR's 2008 BIP Guidelines, states have imprecisely transposed this principle into their legislation. Even in some cases, they do not transmit it at all. For instance, as Bhabha points out, the migration and refugee legislation of the USA, the only state that is not a party to the CRC, lacks the principle of the child's best interests.[433] Similarly, as Sizer points out, Turkish legislation does not have any reference to the principle, although Turkey has been a party to the Convention since 1994. In Turkey’s administration and judicial system, the principle is treated as an issue that may only be relevant in certain circumstances.[434] Although

[429] Crock and Martin, 2018, p. 87.

[430] Ibid.

[431] UNCRC, GC14, 2013, para. 34.

[432] UNHCR, 2008 Guidelines, p. 5.

[433] Bhabha, 2016, p. 12.

[434] Sizer, 2020, p. 162.

the EU law attaches importance to the principle, it has also been criticised, as the meaning of the best interests principle remains too vague in the absence of guidelines.[435] In addition to courts' struggle with it, the concept's ambiguity in the absence of binding rules or guiding principles also causes decisions to be unquestioned and leaves a wide margin of appreciation to the decision-maker.[436] As cited by Wener and Goeman, for instance, neither Dutch legislation nor policies address the implementation of the CRC or the best interests principle in migration cases.[437] Accordingly, Van Os et al. further argue that in the Netherlands, judges dealing with family law cases regarding protecting the best interests of the citizen child apply this principle much more easily. On the other hand, in cases involving migrant children, the judges may overlook this principle since it is thought that the primary purpose of immigration legislation is not to protect the child but to keep immigration under control.[438] Therefore, it results in the arbitrary and unstandardised implementation of the EU Member States.

Secondly, even if the regional and domestic laws contain a specific reference to and a guarantee of the principle of the child's best interests, the implementation of this principle is in most cases out of the question. The UNCRC frequently raises its concerns related to the failure of states to apply this principle, particularly in asylum and immigration procedures. In this respect, the Committee states that:

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[435] Touzenis and Farrugia, 2010, p. 39.

[436] High Court of Australia, Secretary- Department of Health and Community Services v. JWB and SWB, (Marion's Case), 6 May 1992, para. 13. Cited in Crock and Martin, 2018, p. 87.

[437] Jorg Werner and Martine Goeman, *Families constrained: An analysis of the best interests of the child in family migration policies*, Defence for the Children and Addessium Foundation Publication, October 2015, p. 12. Retrieved from: http://www.defenceforchildren.org/wp-content/uploads/2015/12/20151021_DC_Families-constrained.pdf (Accessed on 20 March 2022).

[438] Carla Van Os et al. "Methodology for the assessment of the best interests of the child for recently arrived unaccompanied refugee minor, in in Mateja Sedmak, et al. (Eds.), *Unaccompanied children in European migration and asylum practices: in whose best interests*, Routledge, London, New York, 2018, p. 59. Retrieved from https://www.taylorfrancis.com/chapters/edit/10.4324/9781315639888-4/methodology-assessment-best-interests-child-recently-arrived-unaccompanied-refugee-minors-carla-van-os-elianne-zijlstra-erik-knorth-wendy-post-margrite-kalverboer?context=ubx&refId=8f72be20-149d-40de-8ec4-037e1fba16c5 (Accessed on 20 October 2020)

> (…) Yet, the best interests of the child are largely absent from migration decision-making. In migration-related decisions, including review of migration and international protection applications and implementation of migration control policies, such as arrest, detention, deportation and restrictions on access to basic rights, the child's best interests are rarely considered, and even at times disregarded. Even in decisions regarding family unity, when according to the CRC the best interests of the child should be paramount, these are not systematically assessed, if at all.[439]

Accordingly, the best interests of the migrating children are often neglected by States since the primary priority of states when formulating migration policy is the prevention and control of irregular migration. Although the UNCRC notes that migration control policies, which are "non-rights-based arguments", cannot "be overidden best interests considerations"[440], in practice, these children are treated first as immigrants and then as children, regardless of their best interests. In some cases, this neglect is due to a lack of systems and awareness about the child's principle of the best interests. In particular, the staff responsible for managing migration processes may lack adequate training in this regard.

On the other hand, in some other cases, states explicitly refer to this principle when making decisions regarding UASC. However, it seems that in these cases, this fundamental principle is applied in a way which does not serve its original purpose. In this regard, Bhabha reveals such an interpretation of the best interests principle: unaccompanied child migrants are sent back to their countries of origin under the pretext that they can receive better care and considers this practice an inconsiderate way to discourage future unaccompanied migrant children.[441] She also draws attention

[439] UNCRC, 2012, p. 20.

[440] UNCRC, GC6, 2005, para. 86.

[441] Jacqueline Bhabha, "Women, children and other marginalised migrant groups", in Brian Opeskin and Richard Perruchoud (Eds.) Foundations of International Migration Law, Cambridge University Press, Cambridge, 2012, p. 312. Retrieved from https://www.cambridge.org/core/books/foundations-of-international-migration-law/women-children-and-other-marginalised-migrant-groups/A09D41AC9B9E4A3B4B7896B1CD6C708D (Accessed on 25 November 2020)

to the cases where the child's best interests and national child protection laws are in a contradiction. She cites examples from Serbia where the child's best interests require that the child be allowed to continue his or her journey, while Serbian law prohibits the child from travelling without a legal guardian.[442]

Furthermore, the UNCRC points out that States sometimes use the best interests principle to justify the child's detention. They argue that the decision of detention aims to keep children with their family members. In many cases, however, the decision to detain is made without real consideration of the more appropriate alternatives and thus the child's best interests.[443] These examples indicate that states do not have adequate, integrated and effective BID Procedures in many cases, especially for migrating children and children in the need of international protection, including UASC. In this regard, Gornik suggests that distinction must therefore be made between the child's and the host state's interests, which is the border and migration control for public security and order.[444] As convincingly stated by Öztürk et al., the best interests of the refugee child should be prioritized over political, social or other considerations.[445] State policies to maintain immigration control to ensure economic well-being and security should not be given more weight than the child's best interests. Therefore, it is necessary to ensure that the primary consideration is the best interests of the child, not the state's interest, while making decisions and implementing policies.

Another challenge is that many children, particularly in the displacement cycle, have unique vulnerabilities, which requires a specific and rigorous best interests determination process on a case-by-case basis. As stated by the IOM, determining the child's best interests is not an easy process since there is no single correct or standardised answer. For example, there is a general assumption that family

[442] Bhabha et al., 2016, p. 12.

[443] UNCRC, 2012, p. 20.

[444] Gornik, 2018, p. 25.

[445] Öztürk et al., June 2019, p. 110.

reunification is the durable solution in the child's best interests, particularly in the case of UASC. In practice, this is one of the most preferred methods by states, as it often involves returning the child to their home country.[446] On the other hand, it is clear that the repatriation of children, especially those fleeing the persecution of their own families, with the purpose of family reunification contradicts the principle of the child's best interests. In this respect, Touzenis and Farrugia emphasise the importance of the children's right to participate and express their views. They argue that as the traditional perception of "good" and "bad" is not applicable in every child's situation, their thoughts and experiences should be considered when determining their best interests.[447]

Contrarily, disregarding the children's views, claims and decisions constitutes one of the most common shortcomings in practice. In this regard, the situation of unaccompanied children transitioning into adulthood is another critical dimension of the UASC problematique. As Gornik correctly argues, especially these children decide to leave their homeland and embark on a difficult journey alone as they believe it is the best for them. At this point, adults and children may have different views on what is best for them. In this regard, Gornik highlights that in Europe, for instance, official authorities often ignore the child's agency, the right to participation and choice irrespective of the child's age and maturity, especially when they decide to return the child to the country of origin.[448] To set an example, in Spain and Italy, like many other countries in Europe and other regions of the world, the authorities tend to repatriate migrants, including UASC, by claiming that it is in the child's best interests.[449] However, in its several decisions, the UNCRC concluded that Spain's BID procedures

[446] IOM, 2008, p. 26.

[447] Touzenis and Farrugia, 2010, p. 25

[448] Gornik, 2018, p. 25.

[449] See Leila Tawfik, National Laws and Practices Regarding Unaccompanied Children and Their Adequacy with regard to International Law", in Daniel Senovilla Hernandez and Philip Langrange (Eds.*), The Legal Status of Unaccompanied Children within International, European and National Frameworks: Protective Standards vs. Restrictive Implementation*, Publication of PUCAFREU Project, 2011, pp. 40-42 and 44-46.

are contrary to the CRC's provisions with a special reference to the principle of the child's best interests under Article 3.[450]

Similarly, Allsopp and Chase take up the need to define the best interests of UASC and demonstrate that the best interests of these children do often conflict with the objective of the host states, which aim to send them back to their countries of origin. Such conflictual approaches lead to ambiguity regarding the situation of UASC in the EU. Even though there are concepts like best interests, durable solutions or belonging to a state, in the opinion of Allsop and Chase, the policies of receiving states mostly underestimate young people's will and willingness to make risky efforts to have a viable future. As such, they argue that the policies of durable solutions or children's best interests represent a failure for the UASC and society.[451]

The Court of Justice of the European Union (CJEU) also deals with the issue through the case law. In the Case of MA and Others v. the UK[452], the CJEU has concluded that Article 6/2[453] of the Dublin Regulation is incompatible with Article 24 of the Charter

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[450] OHCHR, *"Spain's age assessment procedures violate migrant children's rights, UN committee finds"*, 13 October 2020. Retrieved from https://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26375&LangID=E (Accessed on 22 November 2020).

[451] Jennifer Allsopp and Elaine Chase. "Best interests, Durable Solutions and Belonging: Policy Discourses Shaping the Futures of Unaccompanied Migrant and Refugee Minors Coming of Age in Europe" *Journal of Ethnic and Migration Studies*, 45 (2), 2017. p. 293.

[452] "The case is related to three joined cases lodged by unaccompanied children who applied for asylum in the UK regarding alleged violation of Article 24 of the EU Charter of Fundamental Rights. "This case concerns the interpretation of Article 6 of Regulation (EC) No 343/2003 when an unaccompanied child submits more than one asylum application in two Member States and does not have any family members present in the territories of the Member States. In such circumstances the CJEU held that the responsible Member State is the one in which the child is present after having lodged an asylum application there." CJEU , "*The Queen on the application of MA, BT, DA v Secretary of State for the Home Department*", C-648/11, 06 June 2013, Retrieved from: https://www.asylumlawdatabase.eu/en/content/cjeu-c-64811-queen-application-ma-bt-da-v-secretary-state-home-department (accessed on 12 July 2021).

[453] Article 6 of the Dublin II Regulation reads: "Where the applicant for asylum is an unaccompanied minor, the Member State responsible for examining the application shall be that where a member of his or her family is legally present, provided that this is in the best interests of the minor. In the absence of a family member, the Member State responsible for examining the application shall be that where the minor has lodged his or her application for asylum."

and cannot be interpreted in a way that disregards the principle of the child's best interests. Accordingly, UNHCR points out the incompatibility and insufficiency of the EU's Dublin II Regulation in protecting UASC since it lacks the consideration of the best interests determination regarding the return of UASC to their home countries or third countries.[454]

Analysing a particular example in the EU, the report of the UNHCR highlights Greece as a country whose treatment of refugees and irregular migrants, including UASC, has been heavily criticised in recent years. In this respect, the report refers to another statement issued by the organisation PRO ASYL in October 2017, which accused Greece of illegal practices such as refoulement of refugees at sea and land, issuing illegal deportation orders and exercising inhumane and degrading conditions of detention.[455]

Similarly, in the Rahimi Case, the ECtHR has reiterated the Greek authorities' failure to ensure the best interests of an unaccompanied child. Regarding the facts of the case, despite being an unaccompanied child, Rahimi has not been appointed and represented by a legal guardian. He has also been detained with adults in a detention centre that were inadequate in terms of accommodation, hygiene and other detention conditions and incompatible with human dignity. Furthermore, he has not been adequately informed about his rights and detention process in a child-friendly manner. The only information available to him was a pamphlet in Arabic, a language Rahimi did not speak or understand. The Court has considered "the extremely vulnerable position" of the unaccompanied child and has concluded that the conditions of detention and release of him in the absence of any protection and care arrangements were incompatible with the principle of the best interests of the child enshrined in Article 3

[454] UNGA, A/60/300, 2005, p. 7.

[455] UNHCR, 2010, p. 24.

of the CRC and "amounted a degrading treatment" within the context of Article 3 of ECHR.[456]

Furthermore, the Court has also taken into consideration the child's best interests principle under Article 8 of the ECHR, in several contexts including the "expulsion of foreigners".[457] In the case of Maslov v. Austria, the Court underlines that:

> (…) the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant were likely to encounter in the country to which the applicant was to be expelled, was a criterion to be taken into account when assessing whether an expulsion measure was necessary in a democratic society. The Court considers that the obligation to have regard to the best interests of the child also applies if the person to be expelled is himself or herself a minor, or if – as in the present case – the reason for the expulsion lies in offences committed when a minor.[458]

In some cases, involving children, the ECtHR balances the best interests of the child with the interests related to the case. In this balancing process, the Court examines the compatibility of the intervention in the best interests of the child and evaluates whether other interests are strong enough to override the best interests of the child.[459] Accordingly, in the case of Moustahi v. France related to arbitrary detention of an unaccompanied child with an unrelated adult, the Court has considered that family reunification of children was refused not as a requirement of the best interests of the child, but in line with the state's aim to remove the children expeditiously from the country as opposed to the domestic law. Accordingly, the Court has held that there has

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[456] ECtHR, *"The Case of Rahimi v. Greece*", Application No. 8687/08, 5 July 2011, Translated and summarized by European Database of Asylum Law, Retrieved from https://www.asylumlawdatabase.eu/en/content/ecthr-rahimi-v-greece-application-no-868708-1 (Accessed on 16 January 2021)

[457] ECtHR, *"The Case of Maslov v. Austria",* Application No. 1638/03, 23 June 2008, para. 82. For other decisions of the ECtHR regarding the best interests of the child, see "for instance in the field of childcare; see Scozzari and Giunta v. Italy [GC], nos. 39221/98 and 41963/98, § 148, ECHR 2000-VIII".

[458] Ibid.

[459] Sizer, 2020, p. 56.

been a violation of Article 8, stating that the intervention had not pursued a legitimate aim under Article 8/2 of the ECHR.[460] As seen from these decisions, the ECtHR attaches special importance to the principle of the best interests of the child, especially in the decisions regarding the detention or removal of unaccompanied children, whether the interference with the child's private and family life has a legitimate aim.

In addition to the international agencies' and courts' remarks, scholarly efforts complement international engagement aiming to improve and synchronise policies and practices across the EU. Similar to others, Barreto focuses mainly on the human rights of UASC in Europe/the EU and shares the analysis that in the European multilevel system (the Member States, the EU and the Council of Europe), the best interests of UASC is not correctly and consistently enforced and due to recent irregular refugee crisis, their human rights have been undermined. Drawing attention to the vulnerability of UASC, Barreto sees several gaps in the EU's implementation and protection standards and shares the expectation that European states will address these gaps and pay closer attention to enforcement of the child's best interests consistently.[461]

Turning to another part of the world, Mexico, practices in this country do not allow for much optimism for UASC. Cernadas et al. reveal the fact that Mexico has failed to reform its migration law in line with international standards; it has not developed proper procedures to determine the best interests of migrant and refugee children. [462] In 2016, UNICEF reported that Mexico repatriated more than 85% of UASC from

[460] ECtHR, *"The Case of Moustahi v. France",* Application No. 9347/14, 25 June 2020, para. 114-115. The judgment has been published only in French. For a Press Release in English, see: https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-6731531-8975568%22]}

[461] Barreto, 2018, p. 87.

[462] Pablo Ceriani Cernadas et al. "Childhood and Migration in Central and North America: Causes, Policies, Practices and Challenges", *Center for Gender & Refugee Studies, University of California, and Justice and Human Rights Center, National University of Lanús,* Argentina, 2015, p. 17. Retrieved from https://gdc.unicef.org/resource/childhood-and-migration-central-and-north-america-causes-policies-practices-and-challenges

Central America.[463] Padilla notes that this has been contrary to their best interests. In 2019, 71% of cases involving UASC resulted in deportations, and deportees did not have safe places to go and faced the risk of being subjected to violence in their home countries.[464]

In summary, all these examples show that there are many challenges in the legislation and practice regarding implementation of the principle of the child's best interests. These problems apply to almost all regions of the world, although they are more intense in some regions, such as Europe and North America, that pursue policies based on securitisation and prevention of migration. Therefore, as recommended by the UNCRC, for States, there is an urgent need to establish comprehensive and well-developed BID procedures, which evaluate the child's best interests and adopt a durable solution on a case-by-case basis.[465] As Macdonald strongly advises, the protection of UASC should be treated as a priority issue and integrated as a central purpose in the design and implementation of assistance programmes throughout the asylum process.[466] The best interests of UASC require the decision-makers to see them not purely as migration or asylum issues to be dealt with but as children and treat the matter accordingly. In this context, trained, experienced, and qualified personnel are needed to determine the child's best interests. It is clear that a system with a child rights-based approach and the personnel in this system will prioritise the interests of the child rather than the perceived security understanding of the state.

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[463] UNICEF, *"A child is a child: Protecting children on the move from violence, abuse and exploitation*", May 2017, p. 31. Retrieved from:

https://www.unicef.org/media/49571/file/UNICEF_A_child_is_a_child_May_2017_EN.pdf (accessed on 12 May 2021.

[464] Monica Trigos Padilla, "Unaccompanied Children on the Move: From Central America to the United States via Mexico" in Jasmin Lilian Diab (ed.) *Dignity in Movement: Borders, Bodies and Rights*, E-International Relations, 2021., p. 125.

[465] UNCRC, 2012, p. 21.

[466] Anthony Macdonald, "Protection Responses to Unaccompanied and Separated Refugee Children in Mixed Migration Situations", *Refugee Survey Quarterly*, 27 (4) , 2009, p. 48-51.

4.2. Access to Territory

The right to seek and enjoy asylum is recognised as one of the fundamental human rights under international human rights and refugee law. Furthermore, the issue of access to territory is essential not only because of the right to seek asylum but also because access to international protection is accepted as an effective remedy against refoulement. For instance, the case-law of ECtHR is very clear in this sense. In fact, under international law, states are entitled to the right and power "to control entry, residence and expulsion of non-nationals", and the ECHR does not explicitly include the right to asylum and access to the territory for non-nationals.[467] However, in the case of Soering v. the United Kingdom, the Court has accepted for the first time that the denial of entry or deportation of non-nationals by the states parties might bring the state's responsibility under Articles 2 and 3 of the Convention regarding the non-refoulement principle. In this context, the ECtHR recognises that the CoE Member States have the right to regulate and control aliens' entry, residence, and deportation under established international law. Still, this power must be exercised in harmony with the obligations stemming from the ECHR, especially with the non-refoulement principle under Article 3.[468] Furthermore, the Court underlines that the non-refoulement principle covers "the protection of asylum-seekers in cases of both non-admission and rejection at the border".[469]

Accordingly, children fleeing from persecution have the right to seek asylum and to be protected from unlawful refoulement in other countries. For migrant and asylum seeking children, the principle of the child's best interests first finds its application at

[467] ECtHR, *Guide on the case-law of the European Convention on Human Rights: Immigration, Updated on 31 December 2021,* p. 6. Retrieved from: https://www.echr.coe.int/Documents/Guide_Immigration_ENG.pdf (Accessed on 24 February 2022).

[468] See Soering v. UK, Abdulaziz, Cabales and Balkandali v. the United Kingdom Cruz Varas and others v. Sweden and Vilvarajah and others v. UK

[469] ECtHR, "*The Case of N.D. and N.T. v. Spain",* Applications nos. 8675/15 and 8697/15, 13 February 2020, para. 178.

the borders, which is the moment of the first encounter with the child in many cases.[470] As a requirement of the child's best interests determination procedure, the UNCRC and UNCMW note that children must be ensured the right to "access to the territory, regardless of the documentation they have or lack, and to be referred to authorities in charge of evaluating their needs in terms of protection of their rights, ensuring their procedural safeguards".[471] In many cases, however, children face significant challenges in enjoying this fundamental right as states pursue policies to secure and prevent migration rather than protect migrant and asylum seeking children, including UASC.

For instance, European states that are seen as the first entry point into the EU area appear to have developed and used some methods and processes to prevent the immigrants from setting foot on the EU soil. Because once they enter the EU territory, the relevant international legal and policy instruments and frameworks become applicable. For instance, Spain's practices regarding the refusal of entry to the territory, collective expulsions, and pushbacks are great of a concern. In 2018, Tomáš Boček, the Special Representative of the CoE's Secretary-General on migration and refugees, reported that "the issue of migrants and refugees' access to Melilla and Ceuta highlights the challenges to the principle of non-refoulement". He states that the authorities in Spain have arbitrarily removed people from Sub-Saharan Africa attempting to enter Melilla and Ceuta in the absence of proper identification and assessment process. They have not been given a chance to apply for asylum.[472] He points out that the refusal of legal and safe entry into Spain has increased the USAe of

[470] Kanics, 2018, p. 46.

[471] UNCRC and UNCMW, CMW/C/GC/4-CRC/C/GC/23, 2017, para. 17.

[472] CoE, *Report of the fact-finding mission by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees, to Spain, 18-24 March 2018,* 3 September 2018. Retrieved from: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016808d2c31#globalcontainer (Accessed on 14 March 2022).

organised crime networks and "the risks of trafficking in human beings, violence and sexual abuse", especially for women and children.[473]

Furthermore, these practices of Spain have also been conveyed to the UNCRC through a communications procedure by an unaccompanied child who attempted to enter Spanish territory. [474] The applicant, D.D., was arrested and expeditiously sent back to Morocco without "performing any form of identity check or assessment of his situation".[475] In addition to the failure of Spanish authorities regarding the identification of an unaccompanied child, which is discussed below, the Committee has stated that:

> The State's obligations to provide special protection and assistance to unaccompanied children, in accordance with article 20 of the Convention, apply even 'with respect to those children who come under the State's jurisdiction when attempting to enter the country's territory.[476]

Furthermore, regarding Article 37 of the CRC and the principle of non-refoulement, the Committee has reiterated Spain's obligation "to carry out a prior assessment of the risk, if any, of irreparable harm to the child and serious violations of his or her rights in the country to which he or she will be transferred or returned" by considering the best interests of the child. In this regard, the UNCRC has recalled that an appropriate BID procedure must ensure the right to access the territory "regardless of the documentation they have or lack".[477] Therefore, the UNCRC has concluded that Spain has failed to assess "the risk of irreparable harm" and the applicant's best interests and violated Articles 3, 20 and 37 of the CRC. Since the D.D's case is the first case

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[473] Ibid.

[474] UNCRC, *Views adopted by the Committee on the Rights of the Child on 12 February 2019 under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 4/2016,* CRC/C/80/D/4/2016, 15 May 2019.

[475] Ibis., para. 2.4. and 14.2.

[476] Ibid., para. 14.3.

[477] Ibid, para. 14.4.

regarding the pushback and summary deportation of children in front of the UNCRC, the violation decision is significant for future cases. Therefore, it requires policy and implementation changes for the states, especially in Europe, to prevent further violations.

Similarly, Amnesty International reports that, migrants including UASC, have been unlawfully pushed back at land and sea as an ordinary practice in Greece.[478] As also noted by the UNHCR, most immigrants, including women and children, are not in receipt of any assistance and simply are homeless. In Greece, international protection cannot correctly be granted to persons who require such protection because the system that determines the status of refugee/illegal migrants does not function effectively, and those who need such protection are not identified as they should be.[479]

In fact, pushback practices are not unique to Greece. In several judgments, ECtHR has found violations of the ECHR concerning collective expulsions under Article 4 of Additional Protocol No. 4.[480] Many countries in Europe have been criticised due to their pushback practices against migrants, including UASC. In this regard, in 2021, UNICEF portrayed this alarming situation. In its submission to "the Thematic Report of the United Nations Special Rapporteur on the Human Rights of Migrant", it points out that despite the UNCRC's comments regarding the states' obligation not to reject a child at a border, children have often experienced pushbacks during the COVID-19 pandemic, "which has exacerbated many of the dangers faced by migrant, asylum-seeking and refugee children". In many cases, Covid-19 containment measures,

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[478] Amnesty International, *"Europe: Caught in a Political Game Asylum-Seekers and Migrants on The Greece/Turkey Border Pay the Price for Europe's Failures"*, 2020. Retrieved from: https://www.amnesty.org/en/documents/eur01/2077/2020/en/ (Accessed on 24 November 2021).

[479] UNHCR (Press Briefing Note by Spokesperson Adrian Edwards), *"UNHCR says asylum situation in Greece is 'a humanitarian crisis'"*, 21 September 2010. Retrieved from: https://www.unhcr.org/4c98a0ac9.html (Accessed on 25 November 2021)

[480] See, for instance: The cases of Hirsi Jamaa and Others v. Italy, Conka v Belgium, Sharifi and others v Italy and Greece, M.K. and others v Poland

including the closure of borders, have been presented to justify pushbacks. [481] In this regard, UNICEF has stated that:

> Pushing back or deporting children without due process, without giving them an opportunity to apply for asylum or without child protection authorities conducting an assessment of each child's best interests is always a child rights violation and puts children at risk of refoulement by being sent back to situations of violence, trafficking, abuse or exploitation that may be life threatening and cause irreparable harm.[482]

UNICEF also draws attention to the incidents of violence against children at borders during systematic push-backs. In many cases, children were subjected to physical and psychological violence, abusive and ill-treatment by border forces during push-backs, "including potentially life-threatening interceptions at sea".[483]

Indicating that pushing back children poses a greater threat to their health, well-being and protection, especially in the context of the COVID-19 pandemic, UNICEF has called on states to end these practices.[484] In the last few years, many individual applications have been filed to the ECtHR due to the pushback practices of European countries, especially Greece. The ECtHR accepted 32 applications filed by 47 asylum seekers who were illegally and violently pushed back to Turkey from the Maritza and the Aegean Sea by Greek law enforcement officers. On 20 December 2021, the Court raised questions to Greece regarding these applications.[485] Currently, in February 2022, a Norwegian NGO called Aegean Boat Report applied for the ECtHR to

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[481] UNICEF, *Pushback Practices and their Impact on the Human Rights of Migrants: UNICEF Submission to the Thematic Report of the United Nations Special Rapporteur on the Human Rights of Migrants*, February 2021, p. 1.

[482] Ibid.

[483] Ibid.

[484] Ibid. For a similar call from Dunya Mijatović, the Council of Europe Commissioner for Human Rights, see: https://www.coe.int/en/web/commissioner/-/european-states-must-stand-up-against-pushbacks-and-the-attempt-to-legalise-them

[485] Racist Crimes Watch, "ECtHR launched 32 trials of Greece for refoulements – Deafening silence by the Greek media", 23 December 2021, Retrieved from: https://racistcrimeswatch.wordpress.com/2021/12/23/2-318/ (Accessed on 14 March 2022).

intervene regarding the pushbacks carried out by the Greek authorities in the Aegean Sea. As a response to the request, the Court issued an interim decision under Rule 39 of the Rules of Court requesting information from the Greek Government about the push-back allegations and requiring immediate first aid to the asylum seekers.[486]

Abass and Ippolito also underline that this inappropriate situation represents a humanitarian crisis.[487] In addition to malpractices of the EU Member States, EU law also has shortcomings to ensure the right to asylum for UASC by allowing them access to the territory. For instance, the EU Directive on Family Reunification grants the Member States the power to limit the entry and settlement of unaccompanied children. Accordingly, a Member State may require a child over 12 years of age and travelling alone to meet a condition for integration set out in its national legislation.[488] Accordingly, Touzenis and Farrugia rightly remark that these provisions enable the EU Member States to derogate from the most fundamental provision of international law, which defines a child as a person under the age of 18 years.[489] In this respect, especially teenagers may face discrimination based on age and protection deficiency.

Similarly, the Return Directive of the EU also allows the Member States to derogate from all safeguards outlined in the Directive for an unaccompanied child who crosses the borders into the country of destination in irregular ways.[490] Thus, given the fact that unaccompanied children often reach destination countries through irregular

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[486] Aegean Boat Report, "An Important Step Forward in Our Fight Against Pushbacks!". Retrieved from: https://aegeanboatreport.com/2022/02/19/an-important-step-forward-in-our-fight-against-pushbacks/ (Accessed on 14 March 2022).

[487] Ademola Abass and Francesca Ippolito, "Introduction – Regional Approaches to the Protection of Asylum Seekers: An International Legal Perspective", in Ademola Abass and Francesca Ippolito (Eds.), Regional Approaches to the Protection of Asylum Seekers. An International Legal Perspective, Ashgate, 2014, p. 5.

[488] The EU, 2003/86/EC, 22 September 2003, Article 4/1.

[489] Touzenis and Farrugia, 2010, p. 48.

[490] The EU, European Parliament and the Council, *"Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals"*, 16 December 2008, Art. 2/2/a.

routes, sometimes even through human traffickers, it is clear how fragile and unstable the protection provided by the EU for these minors is and is not in line with the CRC. In this regard, the EU migration and asylum legislation has been criticised for developing "an ambivalent attitude". On the one hand, it draws attention to children's vulnerabilities and special protection needs On the other hand, it focuses on immigration and asylum status and treats them the same as adults, ignoring their particular circumstances.[491]

In the context of practices in certain EU member states, French Law looks interesting, as it differentiates the status of children who are at the border or already inside the French territory. The French authorities usually detain the children in transit zones for up to 20 days on the grounds of not fulfilling the conditions to enter their country or not having the necessary identity documents. Children are appointed a legal guardian, called an “ad hoc administrator”, and would represent the child’s rights as soon as the identification process is completed. Yet, the practices of French authorities elicit criticism because these legal guardians are mostly not capable of determining and defending the child’s best interests within such a short period. Furthermore, the French immigration authorities tend not to consider the age and vulnerability of children in these processes in their decision to refuse entry and send children back, which clearly violates the CRC.[492] Accordingly, UNICEF has reported that the law-enforcement officers at the borders (PAF) do not respect and implement the legal safeguards and violate the rights of migrants and other people in need of international protection, especially children. In the absence of an adequate identification and assessment process, people have been arrested and expeditiously removed to their countries. For instance, UNICEF has stated that in Menton, a town in South-eastern France, “more than 310 UASC were turned back by the French authorities to Italy, and many UASC

[491] Danisi and Crock, 2018, p. 152.

[492] Tawfik, 2011, p. 37.

were pushed back during the summer of 2020, according to the associations present between Ventimiglia and Menton".[493]

On this basis, one can argue that the EU Member States' migration policies based on securitisation and prevention of irregular migration cause UASC to face many problems and be excluded from protection in EU member states.

On the other hand, these circumstances are not unique to UASC trying to access and be settled in Europe. In this regard, Rea Granados draws attention to the situation in Mexico and the USA. Both Mexico and the USA strictly prohibit and deny the entry of UASC into the country. In many cases, the immigration authorities detain UASC at the border.[494] Such practices constitute unlawfulness and severe violations of UASC's right to access asylum procedures and international protection. According to the data provided by the UNICEF, in the USA and Mexico, from March 2020 to February 2021, more than 13.000 children, including more than 9.000 UASC, have been forcibly expelled to Mexico and Central America.[495]

4.3. Identification and Age Assessment

Identification and age assessment of UASC rank high among several serious challenges facing destination countries because refugees seeking a better life in more developed countries often arrive irregularly, with no proper travel documents and in mixed groups. As discussed in the previous chapter, the identification of UASC is one of the essential issues addressed by international and regional protection instruments.

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[493] UNICEF, February 2021, p. 4.

[494] Sergio Alejandro Rea Granados, "Difficulties in Identifying Unaccompanied Refugee Children in Mixed Migration Flows: The Case of Mexico and Central America", *Mexican Law Review*, 12 (1), July-December 2019, p. 40. Retrieved from https://doi.org/10.22201/iij.24485306e.2019.2.13637 (Accessed on 22 November 2021)

[495] UNICEF, February 2021, p. 8.

An effective protection system for UASC requires an appropriate identification process as it is a starting point to provide the most appropriate protection to UASC. Otherwise, the specific and vulnerable situation of the child as an unaccompanied child will be ignored and therefore, he/she will not be able to access the special protection and care that should be provided to her.[496]

In this regard, as correctly pointed out by Uppard and Birnbaum, the shortcomings and failures may lead to severe problems. For instance, mistakenly identifying a child as an adult will result in him/her being pushed out of the child protection system. Similarly, the misidentification of a child as unaccompanied when she was actually with her parents or other family members during massive migration flows may result in unnecessary and arbitrary separation of children from their parents. [497] It is also vital to determine the child victims of trafficking, sexual exploitation and any other kind of harm. Furthermore, the exact number and location of UASC can only be determined through the identification process. Therefore, it is also important as it provides the basis for policy and programme setting for national and international authorities.

In this regard, the UNHCR's 1997 Guidelines states that the main purposes of the identification procedures are to determine if the child is unaccompanied, separated or accompanied and if the child is seeking asylum. UNHCR also recommends that the child should be immediately identified by trained persons when he arrives at the point of entry. After identification of a child as unaccompanied, as the next step, the authorities should find out if the child seeks asylum. If so, the child must be immediately directed to international protection and asylum procedures.[498] In this respect, Pobjoy suggests that primarily all necessary arrangements must have been made to ensure that UASC can be efficiently identified because they often do not share their identities fully with the relevant authorities. Once the identification process for a

[496] Sandberg, 2015, p. 236.

[497] Uppard and Birnbaum, 2016, p. 171.

[498] UNHCR, 1997 Guidelines, para. 5.

child has been duly completed, the authorities bear the responsibility to pursue the legal framework and put in place the necessary arrangements and measures to secure the proper representation of the child's best interests to their developmental needs addressed. All these processes necessitate the appointment of a guardian or adviser/legal representative.[499]

In line with Pobjoy, Liv Feijen draws attention to the efforts of the UNHCR to assist the national authorities across Europe in developing effective strategies and approaches to identify those refugees/migrants, particularly UASC, who need and should receive protection under the international law.[500] As a good and efficient example, she mentions a joint project of UNHCR, IOM, and Italian Red Cross implemented in Lampedusa, Italy. Referring to its reports and key findings, UNHCR submitted a "new identification and referral procedures" proposal to the Ministry of Interior. The Ministry adopted a new directive in light of UNHCR's recommendations.[501] On the other hand, despite the few good practice examples in the field, the process of identifying and registering an unaccompanied child is one of the most challenging areas.

The main challenge in identifying UASC is that many countries still lack complete and accurate registration procedures and as a result, UASC are not correctly identified and registered. In this respect, the UNHCR, UNICEF and IRC report that many countries do not have accomplished or precise identification and registration systems. [502] In this regard, the UNCRC's views on the D.D. v. Spain case have significant remarks regarding the identification of UASC. As stated above, it is the first individual

[499] Pobjoy, 2019, p. 846

[500] Liv Feijen, "The Challenges of Ensuring Protection to Unaccompanied and Separated Children in Composite Flows in Europe", *Refugee Survey Quarterly*, 27 (4), 11 May 2009, p. 63. Retrieved from https://doi.org/10.1093/rsq/hdn049 (Accessed on 12 February 2021)

[501] Ibid. p. 72.

[502] UNHCR, UNICEF and IRC, *"The Way Forward to Strengthened Policies and Practices for Unaccompanied and Separated Children in Europe",* 2017, p. 7.

communication in front of the UNCRC concerning summary deportations and pushbacks. In this communication, the Committee has underlined that under Article 20 of the CRC, States have an obligation to offer special protection and care to unaccompanied children. It has further stated that this obligation includes the identification of the UASC "at the earliest possible stage, including at the border". The Committee has reiterated that in accordance with the principle of the best interests of the child, States must carry out an initial assessment before making a decision to remove or return children. In Committee's words, this assessment process must include the following stages:

> (a) assessment, as a matter of priority, of whether the person concerned is an unaccompanied minor, with, in the event of uncertainty, the individual being accorded the benefit of the doubt such that, if there is a possibility that the individual is a child, he or she is treated as such; (b) verification of the child's identity by means of an initial interview; and (c) assessment of the child's specific situation and particular vulnerabilities, if any.[503]

The Committee has not found acceptable the Spanish Government's argument that "in the absence of any express claim or any form of identity document, a person who manages to climb over six-metre high fences cannot be considered to be a minor".[504] Therefore, the UNCRC has concluded that while the absence of an identity procedure violates Articles 3 and 20 of the CRC, the lack of a risk assessment procedure considering specific conditions and vulnerabilities of an unaccompanied child constitutes a violation of Articles 3 and 37.

While, in many cases like D.D.'s case, UASC are even not identified; in others, they are not registered as UASC; or incorrectly identified as unaccompanied although they are together with other family members.[505] Even, there have been some cases where children are mistakenly identified and registered as adults. Existing identification

[503] UNCRC, CRC/C/80/D/4/2016, 15 May 2019, para. 14.3.

[504] Ibid., para. 4.1.

[505] UNHCR, UNICEF and IRC, 2017, p. 7.

mechanisms are often ad-hoc rather than systematic and are not integrated with refugees or migrants. [506] For instance, due to the weakness of the system, the identification and registration processes take a very long time in Greece. To this end, many migrants, including UASC, are kept in reception and identification centres, often in conditions that do not befit human dignity, while identification and registration processes are carried out.[507]

Another challenge regarding the identification of UASC is that the figures rarely reflect the exact number of UASC. There are many reasons for the inaccurate identification practices. As argued by the UNHCR, IRC and UNICEF, the first reason is the reluctance, timidity, and resistance of UASC to be engaged in the identification process. In some cases, UASC refuse identification because of the manipulation of human traffickers/smugglers or the impact of their family members. In other cases, UASC try to avoid being identified and registered for "fear of the police or detention".[508] This fear may stem from their previous bad experiences with public officials. In particular, the practices of states to send immigrants back to their countries of origin or third countries policies also feed this fear. The second reason for the inaccurate identification, as Olusese et al. point out, is the difficulty in identifying and locating UASC "in an urban setting". Addressing the difficulties encountered in identifying unaccompanied minors in Kenya, the authors argue that the identification of unaccompanied minors in a large city such as Nairobi is "daunting and costly".[509]

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[506] Ibid.

[507] IOM, UNHCR and UNICEF report that: "As of February 29 (2020), there are 5,463 unaccompanied children in Greece who remain in urgent need of durable solutions, including expedited registration, family reunification and relocation. Among them, 1,752 are housed in over-crowded reception and identification centres". IOM, UNHCR and UNICEF *"Minimum Child Protection Standards for Identification of Unaccompanied Children to be Relocated from Greece to other countries in the European Union",* 8 April 2020. Retrieved from: https://data2.unhcr.org/en/documents/details/75298 (on 12 July 2021).

[508] UNHCR, UNICEF and IRC, 2017, p. 7.

[509] Agnes Olusese et al., "Under siege: alternative care for urban unaccompanied and separated refugee children in Kenya", in Mary Crock and Lenni B. Benson (Eds.), *Protecting Migrant Children: In Search of Best Practice*, Edward Elgar Publishing, Cheltenham, & Northampton, MA, 2018, p. 177.

In addition to its cost, there is a scarcity of trained and experienced personnel in identification processes in many underdeveloped and developing countries. Finally, as UNGA also reiterates in many cases, unaccompanied or separated girls cannot be identified, as girls are more easily employed as domestic workers, used as sex workers by human traffickers or forced into early marriage before they even reach the stage of registration and documentation.[510]

Finally, the deficiencies in age assessment procedures constitute a severe problem for promptly and properly identifying children. International human rights bodies emphasise the importance of age assessment because it determines all subsequent procedures.[511] Age assessment is vital for applying a child's rights. It is generally argued that when the age is not yet determined, the migrant should enjoy the benefit of the doubt and be treated as a child.[512] In this line, Bhabha draws attention to the necessity that, when the age of a trafficking victim cannot be known for sure, they should be considered the child until confirmed otherwise. This is considered particularly important for the child's protection because those, who are above 18 and seem to have consented to migration for exploitation, are not considered to have been trafficked.[513]

On the other hand, many states' age assessment procedures and practices are not in compliance with the guidelines of relevant bodies. There is no single and integrated age assessment procedure across the world. For instance, the Joint Report of UNHCR, UNICEF and IRC draws attention to unstandardized age assessment procedures in Europe, which lead to inconsistent decisions regarding the age of the child in

[510] UNGA, 2005, A/60/300, p. 13.

[511] UNHCR, UNICEF and IRC, 2017, p. 9.

[512] CoE, *Age Assessment for Children in Migration: A human rights-based approach*, December 2019, p. 8.

[513] Bhabha et al., 2016, p. 9.

question.[514] The EU/FRA/CoE Joint Handbook also underlines the fact that there is significant variation in the nature and scope of age assessment methods applied across the EU.[515] In this regard, Lawrence refers to the difficulty, for instance, of determining the age of child refugees, including those from Afghanistan, because these children do not have appropriately issued birth certificates. Another interesting example that Lawrence gives is the practice in Belgium, which differentiates the treatment of children based on whether they are below or above the age of 14. She also mentions that the UK deported those children from Afghanistan as bureaucratic doubt considered them above the age of 18.[516]

Moreover, as UN Agencies highlight, in many countries, the age determination process is carried out by focusing entirely on the medical aspect of the issue. [517] In many EU countries and the USA, medical examinations "such as dental examinations and x-rays of various bones" are used to determine the age of the child.[518] This causes the social and cultural dimensions of the subject to be overlooked and often leads to wrong results.[519] Furthermore, these examinations are ethically criticized for their potential traumatic impacts on UASC, who had already been traumatized by past persecution experiences.[520] For instance, Boček reports the NGOs' concerns regarding the age assessment procedures in Spain. They argue that even when children submit documents proving their age, medical doctors arbitrarily conduct the age assessment

[514] UNHCR, UNICEF and IRC, 2017, p. 7.

[515] The European Union Fundamental Rights Agency and Council of Europe, 2015, p. 220.

[516] Jeanette A. Lawrence, et al. "The Rights of Refugee Children and the UN Convention on the Rights of the Child", *MDPI- Laws Journal*, 8 (3), 2019, p. 12. Retrieved from https://doi.org/10.3390/laws8030020 (Accessed on 16 October 2021)

[517] UNHCR, UNICEF and IRC, 2017, p. 7.

[518] Mary Anne Kenny and Maryanne Loughry, "'These don't look like children to me': age assessment of unaccompanied and separated children" in Mary Crock and Lenni B. Benson (Eds.), *Protecting Migrant Children: In Search of Best Practice*, Edward Elgar Publishing, Cheltenham, & Northampton, MA, 2018, p. 328.

[519] UNHCR, UNICEF and IRC, 2017, p. 7.

[520] Kenny and Loughry, 2018, p. 328.

process and use only medical methods. They also state that the views of the child have not been included in this process prior to issuing a decree on the child's age and that they have not been provided with the assistance of a lawyer and effective access to the courts during the age determination process.[521] Similarly, many countries lack an appeal mechanism, which is a safeguard against age determination results.[522]

Kenny and Loughry draw attention to another aspect of the issue, "a culture of scepticism and suspicion". They illustrate this perception with the statement of David Davies, a British Parliamentarian. In 2016, 300 children entered the UK from France and were verified to be under 18. After the photographs of these children were published in the media, a great debate started on their ages. David Davies stated that *"These don't look like 'children' to me. I hope British hospitality is not being abused."*[523]As shown by Kenny and Loughry, this perception is a clear indication that children in the migration process are trapped in protection and immigration control, prejudice and xenophobia.[524] Furthermore, UNICEF has also reported that based on this "culture of scepticism and suspicion" accompanied by security lenses, in France, many UASC have been immediately returned to Spain and Italy, as PAF officers subjectively assessed that these children "have an adult appearance".[525]

The proper age assessment is vital for including the child in the child protection mechanism. It also plays a crucial role in matters such as asylum claims, separation of children from adults in detention or reception centres, as well as criminal liability. Therefore, because UASC often lack proper birth certificates or identity documents due to the emergency they are in, the age assessment procedures should be harmonized with a system based on "the benefit of doubt". UNHCR, UNICEF and IRC strongly

[521] CoE, *Report of the fact-finding mission by Ambassador Tomáš Boček,* 3 September 2018.

[522] UNHCR, UNICEF and IRC, 2017, p. 7.

[523] Kenny and Loughry, 2018, p. 321.

[524] Ibid., p. 324.

[525] UNICEF, February 2021, p. 4.

recommend an enhanced assessment, which includes identification and proper age assessment "when age is in question", thus serving the child's best interests and should therefore be given priority and carried out as soon as the child is identified.[526] As stated by the Separated Children in Europe Programme, the main objective of the age assessments is to protect UASC rather than ensuring immigration control.[527]

Inadequacies and inaccuracies in the identification and age assessment process deprive UASC of protection, leaving them vulnerable to all forms of violence and exploitation. These children, who travel undocumented, often without even identity documents, become the easiest targets for human smugglers and traffickers. Regarding the assessment and identification process, the UNHCR report underlines the importance of creating a child-friendly environment for obtaining as much information as possible so that decisions in their best interests can be made.[528] The UNHCR acknowledges that the issue of "proof" presents a challenge for UASC. UASC should be given the "benefit of the doubt" in such situations, and the burden of proof should not be placed on the child, and their story should be considered credible.[529] Furthermore, as Goldberg argues, the appropriate identification procedures do not only contain the consideration regarding the specific needs of UASC. They also require the consideration of "the ways in which violence, trauma and fear affect them and their ability to recall and recount these kinds of experiences".[530] Therefore, to ensure that UASC fully enjoy the protection afforded to them by international law, states should first resolve identification issues and establish the necessary well-structured, fast and effective identification mechanisms.

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[526] UNHCR, UNICEF and IRC, 2017, p. 8-9.

[527] Separated Children in Europe Programme, *Position Paper on Age Assessment Developing the Context of Separated Children in Europe*, 2012, p. 7. Retrieved from: www.refworld.org/docid/4ff535f52.html (Accessed on 1 April 2022)

[528] UNHCR, 2010, p. 14.

[529] UNHCR, 1994 Guidelines, p. 43.

[530] Pamela Goldberg, "In search of solutions for unaccompanied children fleeing Central America", in Mary Crock and Lenni B. Benson (Eds.), *Protecting Migrant Children: In Search of Best Practice*, Edward Elgar Publishing, Cheltenham, & Northampton, MA, 2018, p. 483.

4.4. The Appointment of a Legal Guardian and Representative

Both the CRC and resolutions and guidelines of international and regional bodies attach significant importance to the child's representation during the displacement cycle. The UNCRC's 2005 Guidelines urges states to appoint a legal guardian immediately after the child's identification as unaccompanied or separated.[531] Neither the CRC nor the guidelines provide one legal and standard definition of a legal guardian due to the variety of its "function and manner of appointment".[532] A UNHCR Handbook published in 2019 defines a guardian as a person appointed to promote decisions that will serve the child's best interests. If there is no parent or guardian, the relevant authorities bear the responsibility to safeguard the minor's best interests.[533] While the CoE describes a legal guardian as a "point of contact and information for the child"[534] IOM also identifies the main role of a legal guardian as to guarantee that the child's rights are protected.[535]

The appointment of a legal guardian is one of the essential procedural safeguards for protecting UASC'S rights and promoting their best interests from the beginning of the identification of UASC until the adoption and implementation of a durable solution.[536] In this regard, the CoE highlights the role of a legal guardian in preventing a child from being missing or victim of trafficking, in addition to enhancing the UASC's legal

[531] UNCRC, 2005 Guidelines, para. 33.

[532] IOM, 2011, p. 19.

[533] UNHCR, *"Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees",* April 2019, p. 46. HCR/1P/4/ENG/REV.4. Retrieved from tps://www.refworld.org/docid/5cb474b27.html

[534] CoE, HELP, Refugee and Migrant Children.

[535] IOM, 2011, p. 19.

[536] Kanics, 2018, p. 47.

capacity by assisting them during administrative and judicial processes.[537] UNHCR, UNICEF and IRC also draw attention to the importance of the timely appointment of guardians for UASC. Based on their analysis of the practices in Europe, they emphasize that guardians can play a central and valuable role in addressing many challenges facing UASC if they are appropriately trained, equipped and supported. In their view, a guardian, who earned the trust of the child and all other relevant parties, can help a child have their voice be heard and thereby, the child can exercise their "right to participate" in the administrative and legal processes that would determine her/his future. Such an arrangement would also effectively counter and eliminate the ill-intended plans of smugglers, traffickers, or criminal organisations. In this process, the child's cooperation in tracing their family would still remain a key input. It is also evidenced that UASC, who maintain regular contacts with a well-equipped and committed guardian, would benefit much better from relevant public services and appropriate care arrangements, and also have the possibility to raise requests and concerns throughout the asylum process.[538]

In addition to a legal guardian, the UNCRC states, "in cases where children are involved in asylum procedures or administrative or judicial proceedings", they should be appointed a legal representative.[539] The UNHCR Handbook refers to a definition of the legal representative, who is "a lawyer or other person qualified to provide legal assistance to and inform the child in the asylum procedure and concerning contacts with the authorities on legal matters".[540] As stated by the UNCRC, in the case of UASC, the appointment of a guardian and legal representative should be free of charge.[541]

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[537] CoE, HELP, Refugee and Migrant Children.

[538] UNHCR, UNICEF and IRC, 2017, p. 16- 20.

[539] UNCRC, 2005 Guidelines, para. 35.

[540] UNHCR, ExCom, Conclusion No. 107, para. g/viii. For further details, see CRC, GC6, 2005, paras. 33–38, 69. UNHCR, Guidelines on Unaccompanied Children Seeking Asylum, op cit., p. 2 and paras. 4.2, 5.7, 8.3, 8.5

[541] UNCRC, GC6, 2005, para. 69.

Although there are guarantees in international law regarding the appointment of a guardian or legal representative to the child, as stated by the UNGA, in reality, guardianship arrangements are insufficient in many respects in many countries.[542] Especially, in cases of intense migration flows, it is not possible to appoint a legal representative or guardian quickly and properly to each child, as a result of states not having well-structured identification procedures. In this regard, Thomas Hammarberg, the Former Commissioner for Human Rights of the Council of Europe, identifies three main challenges regarding the appointment of legal guardians or representatives. Firstly, he argues that the legal representation of UASC in host countries is either biased or not provided at all in many cases. Secondly, since the appointment procedures are too slow, UASC are deprived of effective protection, especially during their first arrival in the country where they need it most.[543] In this regard, Bhabha draws particular attention to the situation of UASC in Australia and the USA. She highlights the fact that in Australia, a legal guardian or representative is not appointed for a child during "the initial screening stage" of asylum eligibility. Similarly, in the USA, UASC are not entitled to legal assistance within the first 72 hours, while they are under the care of authorities of immigration enforcement. This lack of protection leads children to take the decision of forced return, often under pressure from immigration authorities.[544]

The situation is not different in Europe. For instance, as Lageot and Hernandez point out, the obligation to appoint a legal guardian under Article 31/1 of the Qualification Directive is only applicable after international protection has been granted to the child. Therefore, the first paragraph of the Article is not compatible with the recommendations of UNCRC and UNHCR calling upon the appointment of a legal

[542] UNGA, 2005, para. 49.

[543] Thomas Hammarberg, "Unaccompanied and separated migrant children in Europe: legal perspectives and policy challenges", in Kanics et al. (Eds.), *Migrating Alone, Unaccompanied and Separated Children's Migration to Europe*, UNESCO Publications, France, 2010, p. 176.

[544] Bhabha, 2010, p. 99.

guardian the instant that a child is identified as unaccompanied.[545] In Spain, for instance, children close to the age of 18 are not appointed legal guardians by regional authorities, and thus they do not get a residence permit.[546]

On the contrary to recommendations and guidelines of UN agencies and other international governmental and non-governmental organisations, the Directive makes a distinction based on refugee/migration status. It excludes UASC who have not been granted refugee status or any other secondary protection status from protection. Finally, Hammarberg argues that even when the appointment process is swiftly complete, guardians appointed to UASC often lack specific training and experience to ensure the best interests of the child.[547]

Furthermore, the shortcomings regarding the appointment of a legal guardian or representative may be a result of states parties' failure to reflect the relevant provisions of international conventions in their national legislation and/or to have them implemented by their authorities duly to identify and protect the bests interests of the child. For instance, the absence of a regulation ensuring the immediate appointment of a legal representative to UASC is cited as one of the important shortcomings in Turkish law[548]. Öztürk et al. point out that the practitioners working in the field have also emphasized this issue. It is reported that there is severe confusion in this regard in practice since there is no explicit provision in the legislation regarding the appointment of the legal representative, who will play a dominant role in the child's access to legal aid. They state that in an interview, the lawyers argued that there were problems in issuing power of attorney for unaccompanied children because the child did not have

[545] Céline Lageot and Daniel Senovilla Hernández, "Unaccompanied Minors" within the European Union Legislative Framework, in Daniel Senovilla and Philippe Lagrange (Eds.), *The Legal Status of Unaccompanied Children within International, European and National Frameworks Protective Standards Vs. Restrictive Implementation,* PUCAFREU Project, 2011, p. 21.

[546] CoE, *Report of the fact-finding mission by Ambassador Tomáš Boček,* 3 September 2018

[547] Hammarberg, 2010, p. 176.

[548] Öztürk et al., 2019, p. 142.

the capacity to sue. In addition, in cases where the international protection applications are requested from the administration for unaccompanied children to benefit from legal aid, access to this application is not provided because there is no power of attorney. Furthermore, it has been argued that since no system has been developed for appointing a legal representative to the child, it is tried to solve the problems with individual efforts and approaches that can save the day.[549]

Regarding the role of the guardians, Tawfik also points out several criticisms, including the guardians' insufficient skills on migration law, the absence of independence, slowness and lateness in appointment procedures and use of guardianship as a tool for legitimizing repatriation of UASC.[550] In this regard, she also deals with the legal presentation gap for UASC. For instance, in France, UASC are under the jurisdiction of the "Children's Judge's" regarding care arrangements, and also of the "Juge des tutelles", who is responsible for the appointment of a guardian. However, there is no clear provision about their roles. Furthermore, there is no mechanism to directly inform them when an unaccompanied child is identified.[551]

Furthermore, the policies on the securitization of migration result in the increase of xenophobia and discrimination against migrants. This leads to two important consequences. On the one hand, as Bantekas points out, the authorities and community show reluctance to prioritize the issue of the protection of UASC. Accordingly, in many cases, a single person or institution is appointed as the guardian of many children. This results in many children not being able to meet and consult their guardians one-on-one.[552] On the other hand, in some cases, the persons or institutions appointed as guardians may pursue the interests of their state rather than the best

[549] Ibid., p. 137.

[550] Tawfik, 2011, p. 38.

[551] Ibid. p. 39.

[552] Bantekas, 2013, p. 355.

interests of the child.[553] Furthermore, particularly in cases where the guardian is unfamiliar with the child's ethnic, religious, linguistic or cultural background, this leads to the misdirection of the child and not being able to benefit from the rights granted to him by international law[554].

When the issue is approached from the perspective of the guardians, it is seen that there are many problems. A significant study carried out by Carla van Os et al. shows that many guardians feel that their ideas or assessments are not considered by immigration authorities in the asylum process. Consequently, they avoid making explicit assessments of the child's best interests and sharing these assessments with the authorities. Furthermore, guardians claim that in many cases, children are guided by adults and their peers, so they seek to create stable stories to stay in the host country. Accordingly, they claim that children do not always share their real situation and experiences with them.[555] Therefore, the legal guardians also face the difficulties in determining the child's best interests.

The determination of the legal representative has a close relationship with the determination of the child's legal status in the country, and consequently, access to international protection.[556] Furthermore, the appointment of a guardian matters not only for administrative and judicial procedures but also regarding the child's access to public services. Some public services like education are essential for all migrant children but are not accessible to all. The fact that many countries do not have appropriate guardianship legislation and procedures leads to unaccompanied children not benefiting from many rights granted to them by international law, especially the CRC. It must be noted that the legal representative should consider that the refugee is a child, not an adult, not only at the point of communication but also when determining

[553] Tawfik, 2011, p. 39.

[554] Bantekas, 2013, p. 357.

[555] Carla van Os et al, 2018, p. 67.

[556] Öztürk et al., 2019, p. 121.

the scope of legal aid.[557] As Öztürk et al. recall that this issue is an essential point to pay attention to, especially in the process of accessing international protection. As mentioned in Chapter Three, there is a risk that special procedural safeguards, measures and rights for children may be overlooked, as the legislative framework on international protection is predominantly designed for adults. For this reason, it is expected that the legal representative has a command of the dimension of refugee law regarding children, including the processes of BID, age assessment, family reunification and detention.[558] Therefore, it is essential to establish a well-structured guardianship system that works quickly and effectively, with staff experienced in children's rights and the best interests of the child.

4.5. Family Tracing and Reunification

The right to family, which consists of two elements, family life and family unity, is one of the most important rights recognized by international human rights, humanitarian and refugee laws. In this regard, the UNCRC highlights the universal consensus on the recognition of family as "the fundamental unit of society" and the need for respect and protection of family.[559]

The Final Act on UN Convention and Protocol Relating to the Status of Refugees-1951 includes only one reference to unaccompanied children under Section B (Principle of unity of the family). In the two preambular paragraphs of this section, the Conference, which adopted the Convention, registers its view that the family is a natural and fundamental unit of society. Therefore, its unity is a fundamental right of the refugee. As such, it welcomes the tendency that the rights granted to a refugee are extended to their family as well. In this regard, the governments are recommended to take necessary measures for maintaining the unity of the refugee's family, amongst

[557] Ibid.

[558] Ibid.

[559] UNCRC, 2012, p. 21.

others, by ensuring the protection of minor refugees, particularly unaccompanied ones, with a particular reference to guardianship and adoption.[560]

In addition, the CRC includes specific provisions addressing the child's right to family life. As discussed in Chapter Three, Article 9 of the CRC urges states to ensure children not to be separated from their families against their will unless it is necessary for their best interests. As Article 22 (2) of the Convention on the Rights of the Child stipulates that a family is a unit that cannot be separated arbitrarily, states must spare no effort to reunite families which got separated during their journey to a safer destination, Grover highlights, as an exception, the possibility that children are kept separate from the family/parents only if their best interests so indicate or require.[561] Given the situation of unaccompanied children, family separation has already taken place, the important issues for UASC are the family tracing and reunification, which must be applied "in a positive, humane and expeditious manner".[562]

In this regard, the concept of family tracing refers to a process to scrutinize the child's parents, family members or other caregivers; and to search for alleged missing children.[563] Family reunification, on the other hand, is the process of bringing the child and their parents or other caregivers and family members together after tracing, taking into account the best interests of the child.[564]

Although international law attaches significant importance to family unity, prevention of separation and family reunification, they are viewed as one of the significant challenges facing UASC in the country of destination. In this regard, the UNCRC notes

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[560] UNHCR, "1951 Convention and Protocol Relating to the Status of Refugees, 60 Years, with an Introductory Note by the Office of the United Nations High Commissioner for Refugees", 2010, p. 270-272.

[561] Grover, 2018, p. 5.

[562] Supra. p. 58

[563] Uppard and Birnbaum, 2016, p. 225.

[564] Ibid., p. 254.

that the immigration policies of some states lead to the separation of children from their families in contradiction to their best interests. As significant examples, the Committee draws attention to the policies of Italy and the UK. According to the legislation of these countries, the deportation of the child is prohibited. In this case, they provide protection only for children and deny the access of the parents to their territory. Therefore, during migration movements, children often face the risk of separation from their families.[565]

Furthermore, ECtHR has adopted several judgments and raised its concerns regarding family reunification of the child under Article 8 of the Convention. [566] For instance, in the case of Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, which is related to the detention of five-year-old unaccompanied girl who aimed at joining her mother and her deportation to the country of origin, the Court has considered that the detention of the child has resulted in family separation and consequently she became an unaccompanied child. Therefore, because of the detention, the family reunification was delayed. The Court has reiterated that while Belgium was obliged to facilitate the family reunification of an unaccompanied child, "the authorities' actions, in fact, hindered it".[567] Therefore, the Court has concluded that there has been a violation of Article 8.

Similar to Europe, the USA's immigration policies are also based on family separation. In this regard, during the Trump Administration, there have been many cases of separation of children from their parents at the USA-Mexico border. To give an example, in 2018, "a class action lawsuit" was brought into the court against the new

[565] The UNCRC, 2012, p. 21.

[566] For a detailed analysis on the ECtHR's case-law on the family reunification, see: CoE, *Family Reunification for Refugee and Migrant Children: Standards and promising practices",* CoE, April 2020. For some important judgments from the ECtHR's case-law on family reunification, see: Tuquabo-Tekle and Others v. the Netherlands, Şen v. the Netherlands, El Ghatet v. Switzerland ("positive obligation to allow for family reunification derived from the right to family life"); I.A.A. and Others v. the United Kingdom ("no positive obligation to allow for family reunification derived from the right to family life").

[567] ECtHR, The Case of Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, para. 82.

US immigration policy that separates children from their families, alleging that the policy violated the child's right to asylum and had a devastating effect on families and children.[568] In this regard, Arthur argues some of the existing policies, further encourage UASC to enter the United States illegally and encourage the parents of UASC to hire smugglers to bring their children to the United States.[569] Accordingly, in a recent article, Einhorn et al. share their observation that, despite the pledge by the new USA President Joe Biden to reform the USA immigration policy, migrant families remain separated, and family reunification is still an unresolved issue. On the other hand, the authors draw attention to the fact that, acting upon President Biden's pledge to unify separate families, some immigrants in the camps in northern Mexico have been sending their children to the USA border unaccompanied, hoping that they will be able to cross into the USA. [570] This is interpreted as the result of the current US policies and practices, which prevent many Mexican citizens from entering the USA through legal and straightforward routes. In fact, this picture appears to present a challenging dilemma for the USA Administration, as the challenge of striking a right balance of facilitating regular and legal migration and countering illegal migration flow remains to be addressed.[571]

The other challenge is directly related to restrictive policies on family reunification. As Bhabha emphasises, states traditionally assume that this principle has only a one-way function. In this framework, the primary attitude is to send the child to his/her family, instead of sending the parents to places where the child is settled.[572] In this

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[568] "Ms. L and Ms. C. v. US Immigration and Customs Enforcement, Case No. 18-cv-00428-DMS-MDD filed in the USA Dist. Ct. S.D. Ca. Mar. 9, 2018. Litigation materials available at: https://www.aclu.org/cases/ms-l-v-ice." cited by Crock and Martin, 2018, p. 96.

[569] Andrew R. Arthur, "Unaccompanied Alien Children and the Crisis at the Border", *Centre for Immigration Studies*, March 2019, p. 3. Retrieved from: https://cis.org/sites/default/files/2019-03/arthur-uacs.pdf (Accessed on 20 June 2021)

[570] Madelynn Einhorn et al. "Analyzing Views of the Ease of Legal Immigration from Mexico into the USA". E-International, July 11, 2021, p. 1. Retrieved from https://www.e-ir.info/pdf/93063 (Accessed on 25 July 2021)

[571] Ibid. p. 2.

[572] Bhabha et al., 2016, p.7.

regard, Gornik deals with the situation in Europe. She argues that the European States have voluntarily and expeditiously applied this principle where family reunification is achieved through the return of the child to the country of origin. On the other hand, this principle is often overlooked when the child flees from persecution in their home country and where the best interests require family reunification by bringing the family together in the destination country. To support this argument, she refers to the reports of the Separated Children in Europe Programme, noting restrictive practices of Cyprus, Denmark, Finland, Sweden, Norway and Austria.[573] The GC6 of the UNCRC states that family unification in the country of origin may not be in the best interests of UASC. In cases when there is a "reasonable risk", it should be avoided because it would violate the fundamental human rights of the child. In this respect, the UNCRC encourages states to be generous when assessing the best interests of the child. [574] Therefore, the practices of states are at odds with the Committee's recommendation.

The report edited by Bathily and Atger for the EU and Red Cross sheds light on the varying practices across the EU countries regarding the application of the EU Directive 2003/86/EC on the Right to Family Reunification. They tackle various aspects of the matter, including the obligation and responsibilities of Members States concerning family reunification. In this respect, they share the observation that despite the explicit provisions of the said Directive, the Member States interpret the concept of "dependency" very narrowly, which, as a practice does not facilitate family reunifications.[575] In this regard, it also must be noted that the Family Reunification Directive also contains other shortcomings to provide safeguards to UASC. For instance, Article 4/6 of the Directive authorises the Member States not to consider applications for family reunification of children over the age of 15 and not to allow

[573] Gornik, 2018, p. 29.

[574] UNCRC, GC6, 2005, para. 82.

[575] Anne Bathily and Anaïs Faure Atger (Eds.). "Disrupted Flight-The Realities of Separated Refugee Families in the EU", ECRE and Red Cross EU Office Report, 2014, p. 10. Retrieved from https://resourcecentre.savethechildren.net/library/disrupted-flight-realities-separated-refugee-families-eu

such children to enter and stay in their country for the sole purpose of family reunification.[576]

Furthermore, similar to other issues, many states' legislations lack the explicit provisions and safeguards for family reunification of UASC. For instance, when the Turkish legislation is examined, it is seen that there is no clear regulation regarding family reunification, especially in tracing the families of UASC and realizing family reunifications. The only regulations on the subject are included in Article 49/2 of the Temporary Protection Regulation (TPR)[577] and Article 10/1/n of the Unaccompanied Minors Directive (UMD)[578]. Under Article 49 of the TPR, it is regulated that family reunification requests can be made, and procedures regarding family reunification will be initiated without waiting for the request of unaccompanied children. On the other hand, under Article 10/1/n of the UMD, the tracking of the family is conditioned on the request of the child. As Öztürk et al. rightly point out, an important component of the consideration of the best interests of the child is to take the necessary measures for family reunification for unaccompanied children. In this framework, taking the initiative in this direction at the child's request poses the risk of violating the child's rights. Firstly, the provisions in question have a limited scope of application as they lack a legal basis. In addition, these provisions, both of which are different and contradictory in content, are quite inadequate in protecting the child's right to family reunification, as they do not contain any information or assurance regarding the procedures for family reunification. Finally, it is noteworthy that the provisions in question only mention unaccompanied children; there is no reference to separated

[576] The EU, 2003/86/EC, 22 September 2003, Article 4/6.

[577] The Temporary Protection Regulation, Regulation No. 6883, , published in Official Gazette No. 29153 dated 22.10.2014, Art. 49/2. Retrieved from: https://www.mevzuat.gov.tr/MevzuatMetin/21.5.20146883.pdf (Accessed on 20 March 2022)

[578] The Unaccompanied Minors Directive, published by Ministry of Family and Social Policies on 20.10.2015, Art. 10/1/n. Retrieved from: https://www.aile.gov.tr/uploads/sgb/uploads/pages/yonergeler/refakatsiz-cocuklar-yonergesi-20-10-2015.pdf (Accessed on 20 March 2022)

children. Therefore, this situation risks excluding separated children from protection regarding family reunification depending on practitioners' interpretation.

As another challenge, international agencies draw attention to the fact that the family reunification process takes too long and is carried out in uncertainty. In this regard, UNICEF, UNHCR and IRC point out that the application process of a durable solution including family reunification is too slow because of the bureaucratic barriers. In some cases, it takes months, while in others it is even years. Since only a few countries accept UASC to be relocated, the process requires a long time. In addition, some national laws set up a waiting time limit to apply for reunification. [579] Therefore, these bureaucratic and legislative barriers delay family reunification and often lead to the placement of children in alternative care centres in inadequate conditions.

In sum, family reunification is a very complicated, long and challenging process for UASC. Therefore, it requires comprehensive and integrated procedures starting with proper family tracing. In this regard, due to their obligations under the CRC and other international law instruments, states must develop harmonised legislation and programmes in coordination with the relevant stakeholders including UNHCR, UNICEF and ICRC. When deciding family reunification, the primary consideration must be the child's best interests, instead of host states' priorities. In this regard, apart from family reunification, other types of durable solutions also must be taken into account, such as return to the country of origin, settlement and integration of UASC into host society, intercountry adoption and resettlement in third country.[580] Finally, it must be noted that family reunification is not the only option for protecting UASC. Especially for unaccompanied children who are fleeing from the persecution of their abusive parents, reunifying with their parents is clearly not in their best interests. Therefore, authorities must consider each child's unique situation on a case-by-case basis and determine the best option for them.

[579] UNHCR, UNICEF and IRC, 2017, p. 19.

[580] UNCRC, GC6, 2005, para. 79-94.

4.6. Detention

Article 37 of the CRC provides safeguards against torture and ill-treatment, capital punishment, and unlawful and arbitrary deprivation of liberty. It also ensures that the detention conditions cannot be incompatible with the child's human dignity. Another critical aspect of the Article is that considering the best interests principle, it obliges states to keep children separate from adults. Finally, Article 37 requires states to provide the child's right to access legal assistance and challenge the detention decision before a court or other relevant authority.[581]

In its interpretation of Article 37, the UNCRC states that children's right to liberty is the general rule, whilst detention of children is exceptional. The mere being unaccompanied, or immigrant status of the child does not justify their detention. In the few cases where detention is legitimate, such detention must be lawful under Article 37/b and "only be used as a measure of last resort and for the shortest appropriate period of time".[582] Therefore, to fulfil their obligations under international law, states should refrain from detaining the child or use it only as a last resort.

Despite the existing safeguards against child detention, the states' practice of detaining children arbitrarily and for long periods and in conditions incompatible with human dignity, which constitutes serious human rights violations, is a global phenomenon. As Gerald Neuman, a former member of the UN Human Rights Committee, argues, these practices have reached a crisis level for some countries, including the USA and Australia.[583]

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[581] CRC, 1989, Art. 37.

[582] UNCRC, GC6, 2005, para. 61.

[583] Gerald L. Neuman, "Detention as a last resort: the implications of the Human Rights Committee's General Comment No. 35", in Mary Crock and Lenni B. Benson (Eds.), *Protecting Migrant Children: In Search of Best Practice*, Edward Elgar Publishing, Cheltenham, & Northampton, MA, 2018, p. 381.

In addition to the unlawful detention in many cases, living conditions offered to refugees, including UASC in detention centres, appear to be generally below the acceptable standards and are often criticised by the relevant international organisations and some scholars. In this respect, Grover assesses the living conditions of refugees in various locations during their quest and classifies them as seriously substandard. According to her findings, child refugees, including very young ones, are usually kept even without their parents or family members in poorly maintained government-run facilities that are unsuitable for their stay. In her opinion, some of these facilities with deleterious living standards may be detrimental even to migrant child's mental health. As such, Grover considers this a violation of the international legal framework on protecting human rights, which foresee children being put together with their families.[584]

To address the challenges experienced by UASC through the detention process, the case law of the ECtHR is one of the essential resources. In addition to the abovementioned cases of Mubilanzila Mayeka and Kaniki Mitunga v. Belgium and Rahimi v. Greece[585], in many other cases, the Court has questioned the conditions and lawfulness of detention practices in many European countries, mainly in Greece. For instance, in the case of Muhamad v. Greece, filed by an Iraqi unaccompanied child detained for five months and complaining about his detention conditions at the Soufli border post, the Court has found a violation of Article 3 of the ECHR because the low standards at the border post amounted to “inhuman and degrading treatment". The Court also has decided that there was a violation of Article 13 since Greece did not provide “an effective remedy for the applicant”.[586] Similarly, the case of Abdullahi Elmi and Aweys Abubakar v. Malta is related to two unaccompanied children who were detained for eight months during their age assessment process. The applicants have complained about the conditions and unlawfulness of their detention. In its

[584] Grover, 2018, p. 5.

[585] Supra, p. 84-85.

[586] ECtHR, “*The Case of Mohamad v. Greece*”, Application no: 70586/11, 11 December 2014.

judgment, the ECtHR has highlighted "the cumulative effect of the conditions complained of, which had involved overcrowding, lack of light and ventilation, no organised activities and a tense, violent atmosphere". By addressing the specific vulnerability of child asylum seekers, the Court has concluded that the detention conditions violated Article 3; whilst the lengthy and unlawful nature of detention led to the violation of Article 5.[587] In this regard, the judgments of the European Court of Human Rights regarding the violation draw attention to both the gaps in the legislation of the States and their unfair practices.

In addition to ECtHR's case law, the European Committee for Prevention of Torture (CPT), another body of the CoE, also reports malpractices of European States regarding the detention of unaccompanied and separated children. For instance, in March 2020, the CPT visited detention centres in Greece and published its findings. In its report, the CPT draws attention to the detrimental effect of the "continued and routine detention for lengthy periods in poor conditions and with insufficient care" in UASC's development and well-being. The committee recommends Greek authorities review their policies and practices.[588] It also reiterates that UASC should not be kept in "a closed immigration detention facility" as a general rule. In this regard, the CPT urges Greece to establish special open or semi-open accommodation centres for children and provide UASC with adequate protection and care.[589]

When the ECtHR's case-law and the CPT's reports are examined, it is clear that among the EU countries, Greece has been one of the most criticised countries due to its malpractices and poor standards in this field. Accordingly, scholars like Galante extensively criticise Greece for various practices towards migrants, including UASC

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[587]ECtHR, *"The Case of Abdullahi Elmi and Aweys Abubakar v. Malta*", Application nos: 25794/13 and 28151/13, 22 November 2016.

[588] The CPT, "*Report to the Greek Government on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 13 to 17 March 2020*", CPT/Inf (2020) 35, 19 November 2020, para. 45. Retrieved from: https://rm.coe.int/1680a06a86 (Accessed on 24 November 2021).

[589] Ibid.

and recall that the detention of migrants in substandard conditions in Greece has been found to violate the ECHR, and UASC face the same illegal conditions. Galante argues that through the assistance of EU's specialised agencies and some amendments to relevant EU directives and increased resources, Greece may be able to protect the interests of UASC better and bring its practices into line with what is expected by the CRC and ECHR.[590]

Similar to Greece, Spain is criticized due to detention conditions for UASC in the country. Spain does not allow UASC to enter the mainland of the country until they turn 18, keeping them in autonomous cities such as Melilla and Ceuta. According to Boček, the centres in these autonomous cities are heavily overcrowded and are not suitable places for long-term accommodation.[591] Accordingly, he states that:

> The centre La Purísima in Melilla, with a capacity of 350 places, was accommodating 535 boys at the time of our visit. In some of the dormitories, up to 30 boys were sleeping in very small rooms, in cramped conditions with beds touching each other; one of the rooms in particular had a very small window which prevented access to sufficient natural light and air. In some other rooms boys were also sleeping on mattresses on the floor. The rooms were locked during the time that children were at school or doing other activities in the centre.[592]

To give examples from other parts of the world, according to a study undertaken by Cernadas et al. in Mexico, migrants, including UASC, are detained and held in migration stations, lacking enough food, sufficient privacy and access to medical service. Furthermore, it is seen that migrant children are not informed about their

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[590] Victoria Galante, "Greece's Not-So-Warm Welcome to Unaccompanied Minors: Reforming EU Law to Prevent the Illegal Treatment of Migrant Children in Greece", *Brooklyn Journal of International Law*, 39 (2), 2014, p. 752-753. Retrieved from

http://brooklynworks.brooklaw.edu/bjil/vol39/iss2/5?utm_source=brooklynworks.brooklaw.edu%2Fbjil%2Fvol39%2Fiss2%2F5&utm_medium=PDF&utm_campaign=PDFCoverPages (Accessed on 24 November 2021)

[591] CoE, *Report of the fact-finding mission by Ambassador Tomáš Boček,* 3 September 2018.

[592] Ibid.

rights, nor a guardian or child advocate is appointed for them.[593] Padilla also considers the impact of the COVID-19 pandemic on the circumstances facing UASC and shares her observation that their challenges have gotten worse because shelters and detention centres in Mexico, like any other part of the world, are overcrowded, and this increases the probability of contagion whereas access to health services remains problematic.[594]

Furthermore, Sandberg argues that in the USA, migrant and asylum-seeking children are automatically detained at the border as an ordinary procedure. Furthermore, in these physically inadequate detention centres, children face the risk of ill-treatment, malnutrition, poor hygiene and overcrowding.[595] in the USA, the Department of Homeland Security's Customs and Border Protection apprehends and detains unaccompanied children arrested at the border. Another government agency coordinates and implements the care and placement of unaccompanied children in appropriate custody. Arthur argues that some criminal gangs tried to abuse the Obama administration's “catch-and-release policies” applicable to UASC who are intercepted at the border by law-enforcement authorities. In fact, it has been observed that several of these unaccompanied minors have been arrested and incarcerated for various crimes.[596]

To sum up, although there is a consensus on the child's detention only as a measure of last resort in international law, the national laws and practices seem to ignore this fundamental safeguard for UASC. It is evident that being deprived of their freedom has a very negative effect on the mental and physical health and well-being of unaccompanied children, who are already in a very vulnerable situation and have often been traumatised. In this respect, as a starting point, the case-law of the courts and international agencies' guidelines and reports are significant in raising the visibility of

[593] Cernadas et al., 2015. p. 18.

[594] Padilla, 2021, p. 125.

[595] Sandberg, 2015, p. 239.

[596] Arthur, 2019, p. 3.

the situation of UASC. As recommended by these bodies, states should refrain from detaining children in detention centres, often with poor conditions and for an extended period. They must consider adopting alternative measures to detention in the case of children, particularly for UASC.

CHAPTER 5

CONCLUSION

In today's world, which is delineated by the demarcated borders of nation-states protected by various ways and means, as well as natural boundaries like mountains, deserts and seas, immigrants and refugees face multiple existential risks and challenges on their way to safer destinations. The forced displacement movements caused by internal and international conflicts, disasters, economic and humanitarian crises and systemic violations of human rights constitute significant challenges to protecting and implementing human rights. In many cases, people who are out of the protection of their country of origin also experience significant challenges to be granted protection by other states and the international community.

Irregular and forced migration tend to give utmost damage to family unity by, at times, separating children from their families or guardians. While they share the universal vulnerability of being a child, UASC also experience the particular vulnerability of being deprived of a family environment and alien in another country. As children deprived of a family environment and in need of the international protection, UASC have a heightened risk of abuse, exploitation, violence, and trafficking.

Therefore, due to their vulnerable situation, UASC are entitled to specific protective measures in international humanitarian law, refugee law and human rights law. Accordingly, the 1949 Geneva Conventions and the Additional Protocols; 1951 Convention relating to the Status of Refugees and its 1967 Protocol; above all, the Convention on Rights of the Child and its Optional Protocols contain protection regulations for UASC.

International human rights law provides the most comprehensive international legislation related to the protection of UASC. Among the international law

instruments, the CRC occupies a central place because its extensive standards address all aspects of a child's life, including education, health, social and political rights. Since the CRC applies to all children in the jurisdiction of a State Party without discrimination based on race, colour, religion, national, ethnic or social origin or migration status of the child or their parents, UASC are under the protection of the CRC. In addition to provisions that apply to all children, the CRC includes specific and additional protection for UASC under Article 22.

Furthermore, several regional and soft law instruments are also applicable to UASC. Accordingly, international legislation has been complemented by the regional human rights mechanisms in Europe, America and Africa and the soft-law documents of international agencies. International organisations like the UN and its treaty-based committees, the UNCRC in particular, and agencies such as UNHCR and UNICEF, regional organisations including the EU and humanitarian organisations like Save the Children and ICRC appear to have been giving increasing attention to this critically important issue. They have prepared an impressive set of regulatory frameworks, including reports and guidelines. Furthermore, ECtHR has announced several essential judgements to serve as a critical benchmark for all concerned parties. In this regard, regional and soft-law instruments have made a significant contribution to the protection of UASC.

Concerning improvements achieved around the world, because their rights have been recognised by the CRC and most of the national laws in recent decades on a global scale, the status of children as right-holders has been significantly improved, yet still argue that there is a long way to go because adults enjoy far more rights as compared to children.[597]

The situation of UASC is even worse. Although they are recognised as right-holders and entitled to specific protection measures under international and regional law,

[597] Kosher et al., 2016, p. 14.

UASC still face human rights violations, exploitation, discrimination, and even deaths and disappearances in some cases. This worrisome situation mainly stems from the shortcomings in the international legislation related to the protection of UASC and malpractices of States considering UASC as non-nationals or migrants first and as children second, contrary to safeguards provided by international law. As one of the most vulnerable categories among the migrants and asylum-seeking refugees, UASC are often neglected and not adequately addressed in the relevant documents and policies of the nation-states, despite the disturbing reports that human rights organisations have published about the dangers and risks facing these children, who may also be subject to human trafficking or smuggling. The primary motivation behind this neglect is the prevention and control of irregular migration. Despite the existence of international legal safeguards, in practice, these children are treated first as immigrants and then as children, regardless of their best interests. Accordingly, as a result of the securitized and criminalized notion of migration, UASC suffer from multiple discriminations, as being children, deprived of parental care and attention, and being migrant/alien in destination and transit countries where they face xenophobic movements and policies.

In terms of international law's shortcomings in protecting UASC, it should be noted that international law lacks a single piece and consolidated legislation which systematically, directly and comprehensively addresses the protection of these children. Therefore, despite its diversity and extensity, the existing legislation has "an inconsistent and incomplete impact" on children on the move and particularly on unaccompanied children.[598] While the 1951 Convention and its 1967 Protocol are the main instruments of international refugee law, they are far off from providing adequate protection for UASC. As a product of the Cold War and immediate response to the massive displacement movements after the Second World War, the 1951 Convention has been shaped by “male-adult experiences” and has reflected the understanding of its time, which accepts children as adult-dependent objects instead of legal subjects as

[598] Bhabha et al., 2016, p. 6.

right holders. It does not cover many significant issues related to today's complex migration movements, such as burden-sharing and gender and age-based persecution. Furthermore, even though the soft-law instruments adopted to complement the Convention serve as guides and provide technical assistance for states, they are unable to fill the gaps in the international protection of UASC.

Moreover, as pointed out by Guy Goodwin-Gill, despite the CRC representing a revolutionary approach and serving as "a model of achievable" and "somewhat in the sense of a checklist", existing international legislation on protection of UASC is not adequate to provide all answers.[599]

It is evident that the CRC entered into force in 1990 and has since served its States Parties well in facilitating legislative reforms, undertaking constitutional amendments, and developing and implementing policies aiming to safeguard children's rights. However, as stated by the UNCRC, regarding the protection of children's rights within the framework of migration policies and practices, the CRC is yet to be adequately applied and promoted by policymakers, even though it has so far borne significant impacts. Moreover, some State Parties still appear to have reservations about the principle of non-discrimination, make declarations to that effect, consequently, continue discriminating between citizen children and migrant children and hesitate to grant the same rights to the latter.

The child protection system based on a rights-based and child-sensitive approach and child-friendly services and mechanisms is a primary condition for the children to enjoy their rights to survival, development and well-being enshrined, especially in the CRC and other international documents, as well as national laws. It must address and respond to their concerns and needs, which are both common for each child and unique to them. As stated by the CRC, previous isolated, fragmented and reactive initiatives in child protection systems should be replaced with a holistic approach based on an

[599] Goodwin-Gill, 2018, p. 37.

integrated, cohesive, interdisciplinary, and coordinated child rights-based system. In this regard, to overcome the shortcomings and fragmentation in international law, international legislative documents should be interpreted in a way that is evolutionary, functional, rights-based and complementary to each other, bearing in mind the best interests principle. For instance, CRC Article 3 and 22 has the potential to guarantee further protection and support for refugee children if it is read and interpreted in light of Article 1 of the 1951 Refugee Convention in a comprehensive manner. This means that such an interpretation of the CRC makes the 1951 Refugee Convention universally applicable in the context of children, including states that would not otherwise have ratified the 1951 Convention. In the case of a child who has not been eligible to be granted a refugee status under the 1951 Convention, CRC should serve as "an alternative or complementary regime" for UASC's protection.

Furthermore, as a reality of international law, unclarities and ambiguities frequently appear in definitions of children, including UASC. These might have resulted from the need to reach a consensus that would satisfy all UN member states, which have different cultural and social approaches to these concepts. As the understandings of different members states may converge over time, there may be opportunities to revisit certain concepts to come up with more universally accepted and recognized definitions.

In addition to shortcomings of international law, the most significant challenges faced by UASC are rooted in the malpractice of the international norms and standards by states. In practice, one cannot argue that there are harmonised practices worldwide. Bhabha argues that, despite the practical application of the well-developed norms, UASC still cannot benefit from consistent and high-quality care and human rights-based protections.[600] Similarly, Gornik draws attention to the relationship between the UASC and the international child's rights regime, which in her view, is deeply delineated by the citizenship status of the minors and their status as a foreigner outside

[600] Bhabha, 2014, p. 52.

their country of origin. She also underlines her observation that even though the child's rights enshrined in the CRC are considered as transcending the national borders, in practice, the UASC mostly find themselves in situations not equal to that of national children.[601] Gornik's observations and conclusions also confirm the reality that despite the existence of a well-developed international legal framework, their implementation is not straightforward and varies from one country to another.

There is often a disparity between the migrants' rights under international law and the realities of life in the host countries where they live and work. States' practises, especially in best interests determination, identification, proper age assessment, legal guardianship, family tracing and reunification, and detention of UASC as a last resort, often contradict their obligations stemming from international law.

Although the principle of the child's best interests and its determination and due application lies at the heart of all processes concerning the rights and future of UASC, the meaning of the interest principle remains too vague, and the implementation of this principle is in most cases out of the question in the migration context. The best interests of these children do often conflict with the objective of the host states, which aim to send them back to their countries of origin. For many states, the primary concern is the prevention and control of irregular migration; consequently, the child's best interests are often neglected or misused by States.

Similarly, although children, like adults, are entitled to the right to seek and enjoy asylum by international law, in many cases, children experience significant challenges in enjoying this fundamental right, as states pursue policies to secure and prevent migration rather than to protect migrant children, including UASC. States' practices, including denial of UASC's access to territory and push-backs without identifying the child as an ordinary procedure, constitute a breach of the non-refoulement principle and severe violations of UASC's right to access to asylum procedures.

[601] Gornik, 2018, p. 16.

Furthermore, many countries still lack complete and accurate registration procedures, and as a result, UASC are not correctly identified and registered. In this regard, the malpractices in age assessment procedures constitute a severe problem for promptly and adequately identifying children since the process is carried out by focusing entirely on the medical aspect of the issue, irrespective of social and cultural dimensions of the subject.

UASC face similar procedural and practical challenges regarding the appointment of legal guardians and representatives and the family tracing and reunification process. In reality, guardianship arrangements are inadequate or even absent in many countries, while procedures take too long. As convincingly argued by Bhabha, this lack of protection leads children to decide on forced return, often under pressure from immigration authorities.[602] Regarding the shortcomings of the family reunification process, the immigration policies of some states lead to the family separation in contradiction to their best interests. Furthermore, like the guardianship process, the family reunification process takes too long and is uncertain.

Detention of children as an ordinary and widespread measure remains one of the most significant challenges experienced by UASC. Although international law declares that children's detention must only be used as a last resort and for the shortest time, in many cases, states detain children arbitrarily and for long periods and in conditions incompatible with human dignity, which constitutes serious human rights violations.

To overcome the challenges stemming from the failure of states to protect UASC in practice, the international, regional and soft-law legislation and instruments, which are interlinked, are significant in protecting UASC. All duty bearers must respect them in every stage of the displacement cycle. As a result of their obligations stemming from international and regional law, states are responsible for providing adequate,

[602] Bhabha, 2010, p. 99.

systematic, comprehensive and integrated protection and support to the children.[603] In this respect, Feijen emphasises the legal obligations of the governments in countries of destination to pay special attention to and adequately protect UASC in line with international and European legal framework by developing and implementing child-sensitive migration management systems.[604] Although states as sovereign entities have the authority to control their borders and create immigration policies accordingly, this authority is not unlimited. Policies and laws regarding migration must comply with international law and should not violate the human rights of migrants, especially children who need special protection and care. On the other hand, Rosenblum puts very bluntly an apparent contradiction and hesitation between the protection and prevention facing the states receiving UASC. [605] This dilemma can be best addressed and resolved by a rights-based approach on a case-by-case basis assessment.

As stated by Sandberg, a child rights-based approach has two faces. It requires a specific emphasis on the child's rights on an individual level. However, in line with the vulnerability theory, it also needs a broad understanding based on establishing institutions and adopting safeguards to realize children's rights.[606] In this regard, considering that many norms in human rights conventions are not self-executing, it is of great importance that international safeguards are reflected in the domestic laws of states. Accordingly, norms on the protection of UASC should be included in binding domestic legal documents, and institutions overseeing the implementation of these norms should be established, or existing institutions should be strengthened.

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[603] Ibid., p. 48.

[604] Feijen, 2009, p. 65.

[605] Marc S. Rosenblum, "Unaccompanied Child Migration to the United States: The Tension Between Protection and Prevention", *Washington DC, Migration Policy Institute*, April 2015, p. 1. Retrieved from https://www.migrationpolicy.org/sites/default/files/publications/TCM-Protection-UAC.pdf (Accessed on 18 November 2020)

[606] Sandberg, 2015, p. 244.

Considering children's developmental needs and vulnerabilities as covered by the CRC, Lawrence et al. argue that they should have certain precedence. Childhood and refugee status are interconnected, and therefore a balanced response should be developed addressing both the difficulties as a refugee and vulnerabilities and special needs as a refugee child.[607]

It goes without saying that UASC outside their country of origin are vulnerable to exploitation and abuse. Therefore, necessary measures to prevent such maltreatment should be taken decisively and effectively. Such measures include identifying UASC, age-appropriate and gender-sensitive information campaigns using understandable language and medium appropriate for children. Law enforcement authorities must effectively combat criminal organisations as a priority to prevent their child trafficking and exploitation activities.

It must be recalled that an effective protection system for UASC requires an appropriate identification process as it is a starting point to provide the most appropriate protection to UASC. The main challenge in identifying UASC is that many countries still lack complete and accurate registration procedures, and as a result, UASC are not correctly identified and registered. To ensure that UASC fully enjoy the protection afforded to them by international law, states should establish the necessary well-structured, fast and effective identification and registration mechanisms.

Furthermore, only a few countries have collected and reported data regarding UASC. Data collection is essential to determine the challenges and shortcomings in the protection systems and capacity building. Therefore, States should establish well-functioning data collection systems in cooperation with the international community.

The protection of the rights of the people in need of international protection, including UASC, is not an issue to be dealt with only by receiving countries. As explicitly

[607] Lawrence et al., 2019, p. 4

emphasized by the international community through Global Compacts on Migration and Refugees, to guarantee proper international protection for people who have been forced to leave their homelands, for children first and foremost, there is an urgent need for well-structured and monitored burden and responsibility-sharing mechanism. The plight of UASC requires coordinated efforts and assistance from all actors of the international community so that the rights of these children can be respected.

The invisibility is considered a major obstacle before the reception and integration of UASC in the host societies. In this context, invisibility means that these children cannot participate in the decision-making and policy-making processes concerning their future. Efforts and activities of certain international actors like international organisations, NGOs, the case-law of regional courts like ECtHR and Inter-American Court of Human Rights address this issue of invisibility by advocating for these children and making their voices heard. Therefore, regarding the challenges facing UASC and how to handle them, it is essential to ensure and prioritise UASC's participation in the necessary administrative and legal processes. As a significant point, it must be underlined that, as perfectly stated by Sandberg, children, including UASC, are not only "vulnerable, but as capable as well – capable actors in their own lives."[608] Therefore, UASC should be treated as persons who have their own rights. Their right to self-expression, self-determination and participation should not be overlooked, which gives the CRC its revolutionary character. When making decisions about UASC, their views should be considered, and they should be included in all processes, including policy and decision-making processes.

Under the current circumstances, the attention placed upon the situation of UASC needs to improve. Even though several dilemmas facing the authorities of destination countries are understandable, the determination of the best interests of UASC should remain a guiding principle because it serves as the starting point of a well-designed and smoothly running reception system. From their arrival until a durable solution for

[608] Sandberg, 2015, p. 246.

them is found and put in place, UASC's specific situation, such as cultural and ethnic background, must be considered carefully so that the best decision can be made, taking into account their vulnerabilities and need for special care.

It is a vitally important point that children are entitled to the right to access to territory and seek and enjoy asylum. Therefore, states should refrain from practices of denial of UASC's entry to territory, pushbacks and summary and forced returns. Furthermore, after children enter a state's territory, they should not be discriminated against or face persecution or insecurity. Even if they are removed, their rights should be respected during transit or detention. In this regard, it is crucially important to note that the CRC contains provisions about the obligations of States parties to abstain from violating children's rights and actively prevent them from being violated. These obligations result from the fact that the CRC guarantees children's rights even if they enter a country irregularly. As such, their development should not be undermined by negating their rights.

As stated above, substandard and inhumane detention conditions constitute another major challenge for UASC because child migration detention has become a standard practice in some countries rather than an exceptional measure that should be considered a last resort. Considering the devastating effects of detention on UASC, who are already traumatised and in a very vulnerable situation, states should refrain from detaining children in detention centres, often with poor conditions and for an extended period. In this respect, alternatives to detention must be taken into consideration.

As stated above, the protection of UASCs is not an issue that states can tackle with their own agencies and agents alone. It requires cooperation and sharing of knowledge and experience at both local, regional and global levels. In this context, the contributions of non-governmental organizations (NGOs) within the country as well as international organizations working in this field are of great importance. Considering that UASC come into direct contact with NGOs or international agencies

in significant cases, states should develop solid and collaborative relationships and joint studies with them.

In terms of adequately managing the processes concerning UASC, officials dealing with their cases should be well-trained. This is important for the effective implementation of the rights of UASC. As IOM also underlines, such training programmes should include major international and national law provisions, interview techniques, knowledge about children's country of origin, child psychology and development, cultural sensitivity and intercultural communication.[609]
Bhabha considers the situation of UASC as a widespread yet neglected global problem and looks into the challenges facing children on the move escaping war or civil conflict to find a better life. She underlines the need to increase the awareness of societies about this humanitarian issue and urge the international community to consider more carefully children's human rights from an ethical perspective.[610] Therefore, there is an urgent need for awareness-raising companies in host countries. In this regard, regular annual studies, research and reports focusing mainly on the situation of UASC may help keep close attention to this humanitarian issue. In this respect, practices regarding the detention of UASC deserve particular attention as they may bear significant psychological effects on minors. Similarly, the children who reach the age of 18 during their reception procedures may benefit from another look based on best interests determination.

Last but not least, drawing on the already available rich literature on the subject matter, this thesis seeks to make a modest contribution to the literature on UASC, highlight the significant threats, risks and challenges facing them and evaluate the toolbox and mechanisms available to address and remedy their difficulties to the extent possible.

[609] IOM, 2011, p. 52.

[610] Jacqueline Bhabha, "*Child Migration and Human Rights in a Global Age*", Princeton University Press, Princeton and Oxford, 2016, p. 392.

In this spirit, further academic research and studies may be undertaken by researchers in the future to zoom into any particular sub-issue of this comprehensive subject.

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APPENDICES

A. TURKISH SUMMARY / TÜRKÇE ÖZET

Refakatsiz ve Ailelerinden Ayrı Düşmüş Göçmen ve Mülteci Çocukların Uluslararası Hukuk Kapsamında Korunmaları başlıklı bu tez, kendi başlarına göç eden veya göç sırasında yolda veya tehlikeli göç yolculuğu sonrasında refakatsiz duruma düşen çocukların sayısında son yıllarda gözlemlenen kayda değer artışı dikkate alarak bu önemli konuyu araştırmak ve bulguları paylaşmak amacıyla yazılmıştır.

Günümüzde çocuklar uluslararası göç akımlarının önemli bir kısmını teşkil etmektedirler. Çok çeşitli sebepler çocukları ebeveynleriyle birlikte veya onlardan ayrı yaşamakta oldukları ülkelerini terk etmeye ve yeni yaşam alanları aramaya zorlamaktadır. Her bir göçmen çocuğun göç etme tercihinin arkasında yatan nedenler ve koşullar farklı ve bazen muhtelif koşulların bileşimi olsa da, çocukları sıklıkla düzensiz, güvenliksiz ve yalnız başlarına bu yolculuklara çıkmaya zorlayan bazı ortak sebepler bulunmaktadır.

Birleşmiş Milletler Mülteciler Yüksek Komiserliği (BMMYK-UNHCR) bu alanda yoğun çabalar harcayan uluslararası kuruluşların başında gelmektedir. BMMYK'nın hazırladığı "Küresel Eğilimler, Zorla Yerinden Edilmeler 2019" Raporuna göre, krizlerin ve yerinden edilmelerin ortaya çıkardığı koşullar çocukların, özellikle de refakatsiz ve ailelerinden ayrı düşen çocukların, sömürülmelerine ve istismar edilmelerine yol açmaktadır.

Güvensizlik ortamı ve ağırlıklı olarak kaynak ülkedeki silahlı çatışmaların sebebiyet verdiği temel insan hakları ihlallerine ek olarak, kendi ülkelerinin devlet kurumlarının ayrımcı uygulamaları, eğitim ve istihdam olanaklarından yoksunluk, fakirlik ve yetersiz sosyal-ekonomik koşullar çocukların göç etme kararını etkileyen temel etkenler olarak öne çıkmaktadırlar.

BMMYK tarafından da tespit edildiği üzere, ebeveynleri veya aile üyeleri olmadan göç hareketlerine katılan çocuklar evlerini uygun yaşam koşulları bulmak için terk

etmektedirler. Bu çocuklar savaş ve çatışmadan uzakta daha iyi ve güvenli bir yaşam, kendi yaşamlarını kazanabilmek ve gerekiyorsa ailelerine destek olabilmek için eğitim ve uygun istihdam olanaklarına erişim umuduyla bu tehlikeli yolculuklara çıkmaktadırlar.

Göç yolundaki bazı çocuklar sınırları ebeveynleriyle geçerken, başkaları ailelerini geride bırakmakta veya onlarla birleşebilmek amacıyla yalnız ve sıklıkla zor koşullarda geçen yolculuklara çıkmaktadırlar. "Refakatsiz" ve "ailelerinden ayrı düşmüş" çocuk terimlerinin her ikisi de göç eden çocukların belirli alt gruplarını ifade etmek için kullanılmaktadırlar. "Refakatsiz" çocuk terimi, 18 yaşının altında, her iki ebeveynin ve diğer aile üyelerinin veya hukuken veya gelenekler çerçevesinden onlardan sorumlu bir yetişkinin gözetiminden ve bakımından mahrum çocukları tanımlamak için kullanılmaktadır. "Ailesinden ayrı düşmüş" çocuk terimi de her iki ebeveynin bakım ve gözetiminden mahrum kalmış çocuklar için kullanılmakla birlikte, bu alt kategorideki çocuklar diğer aile üyeleri veya akrabalarının refakatinde bulunabilmekte ve onların gözetim ve bakımından yararlanabilmektedirler.

Tek başına göç eden veya tehlikeli göç yolculuğu sırasında ya da sonrasında refakatsiz veya ailesinden ayrı düşen çocukların sayısında son yıllarda büyük artış gözlemlenmektedir. Cecilia Menjivar ve Krista M. Perreira günümüzde güney yarımküre kaynaklı düzensiz göçmenlerin arasında refakatsiz veya ailelerinden ayrı düşmüş duruma gelen çocukların (UASC-Unaccompanied or Separated Children) yüksek bir sayıda olduklarını teyit etmektedirler. Örneğin, Eurostat verilerine göre, AB bölgesine giren UASC'lerin sayısı 2013'ten 2014'e ikiye katlanarak 12.725'ten 23.150'ye yükselmiş, bir yıl içinde de dörde katlanmıştır (2015'te 95.205). Yine bu verilere göre AB bölgesine giren UASC kategorilerindeki çocuklar ağırlıklı olarak Suriye, Afganistan, Irak, Venezuela, Kolombiya ve Eritre'den gelmişlerdir.

Sınırlı sayıdaki ülke refakatsiz ve ailelerinden ayrı düşmüş çocuklara ilişkin istatistiki verileri topladıkları ve raporladıkları için, bu kategorilerdeki çocukların sayılarının esasında çok daha yüksek olduğu tahmin edilmektedir. Bu çerçevede, anılan kategorilerdeki çocuklar arasındaki kız çocuklarının sayılarının bilinememesi de ayrı

bir sorun olarak karşımıza çıkmaktadır ve meselenin bu boyutu da ayrıca dikkate alınmalı ve üzerinde durulmalıdır.

Konu sadece çocuklar küresel mülteci nüfusu içindeki geniş bir grubu oluşturdukları için önemli değildir. Pek çok açılardan çocuklar sayılardan çok daha fazlasıdırlar. Stuart N. Hart çocukları insanlığın en fazla zarar görmesi muhtemel alt grubu ve geleceği olarak tanımlamaktadır, zira onlar kendi refahlarını temin edemeyecek ve kendilerini kötü muamele ve sömürüye karşı koruyamayacak durumdadırlar.

Psikolojik güçlükler ile evlerini terk etmenin ve ailelerinden ayrılmaktan kaynaklanan travmaların yanı sıra, refakatsiz ve ailelerinden ayrı düşmüş çocuklar çoğu zaman transit ve hedef ülkelerde cinsel saldırı, silahlı gruplar tarafından kullanılma, şiddet, insan ticareti, zorla çalıştırma, ayrımcılık ve damgalanma gibi risklerle karşı karşıya bulunmaktadırlar. Bu yüzden bu kategorilerdeki göçmek çocukların durumları önemli bir kaygı nedeni haline gelmiştir. Bu kapsamda Gottfried Schweiger, eğer hedef ülkeler sınırlarına gelen tüm göçmenleri kabul edemiyorlarsa da bu ülkelerin çocuklara öncelik vermeleri gerektiğini savunmaktadır.

Uluslararası hukuk bütün çocukların ve çocuk haklarının korunması amacıyla pek çok norm ve standartlar belirlemiş ve bu kapsamda refakatsiz ve ailelerinden ayrı düşmüş çocukların haklarına özel bir vurgu yapmıştır. Ayrıca, ABD hariç tüm ülkeler BM Çocuk Hakları Sözleşmesine (ÇHS) taraftırlar. Bununla birlikte, tüm taraf ülkelerin ÇHS'de ve diğer düzenleyici belgelerde yer verilen hakların uygulanması konusunda tamamen istekli olduklarını iddia etmek güçtür. Bu bağlamda, Jacqueline Bhabha iyi geliştirilmiş normlar, iyi organize edilmiş sivil toplum girişimleri ve yüksek nitelikli alternatif koruma önlemleri yoluyla kaydedilen ilerlemeye rağmen, refakatsiz ve ailelerinden ayrı düşmüş çocukların tutarlı bir korumadan mahrum olduklarının altını çizmektedir.

Son yıllarda Avrupa ve kuzey Amerika'daki en gelişmiş ülkelere göç eden ve buralarda sığınma imkânı arayan çocukların sayısındaki yüksek artış nedeniyle refakatsiz ve ailelerinden ayrı düşmüş çocuklar ve onların korunması konusundaki ilgi

ve kaygının da arttığı dikkati çekmektedir. Ancak bu konuya yönelik dikkatin hala sınırlı olduğu belirtilmelidir.

Yukarıda özetlenen hususlar ışığında bu tezin ana amacı, uluslararası hukuk bağlamında UASC'nin korunmasına yönelik mevcut hukuki çerçeve ve politika araçlarının kapsamlı şekilde gözden geçirilmesidir. Bu amaç doğrultusunda tezin incelediği temel sorun şu şekildedir: "Uluslararası hukuk, özellikle de uluslararası insani hukuk, mülteci hukuku ve insan hakları hukuku kapsamında refakatsiz ve ailelerinden ayrı düşmüş çocukların korunmalarına yönelik temel hukuki araçlar nelerdir? Bu araçlar bu çocukların yeterli düzeyde korunmalarını temin etmekte midirler?"

Giriş bölümünden sonra ikinci bölümde UASC'nin korunmasına yönelik kavramsal çerçeve üzerinde durulmaktadır. Bu bağlamda, çocukların korunması kavramı ÇHS'ye özel bir referans da yapılarak tarihi bir çerçeve içinde tanımlanmaktadır. Bu bölümde refakatsiz ve ailelerinden ayrı düşmüş çocuk kavramlarına ilaveten "yetim" kavramı da ele alınmakta ve bu iki kavramla arasındaki fark açıklığa kavuşturulmaktadır.

Üçüncü bölümde, UASC'ye yönelik hukuki çerçeve incelenmektedir. Bu bağlamda, UASC'ye uygulanan geniş bir yelpazedeki hukuki araçlar uluslararası insani hukuk, mülteci hukuku ve uluslararası insan hakları hukuku kapsamında tartışılmaktadır. ÇHS özel bir dikkatle incelenmektedir. Ayrıca, Çocuk Hakları Komitesi (ÇHK) Genel Yorumları ve BMMYK Yönergeleri gibi bölgesel ve bağlayıcı olmayan (soft) hukuk araçları da ele alınmaktadır.

Dördüncü bölüm uluslararası koruma önlemleriyle ve devletlerin uluslararası hukuk kapsamındaki taahhütleriyle çelişkili şekilde, UASC'nin karşılaştığı başlıca zorlukların üzerinde durmakta ve bu çocukların hedef ülkeler tarafından kabul edilmelerinin önündeki güçlükler ve göç alıkonulma merkezleri gibi kaygı sebebi pek çok konuyu tahlil etmektedir. Bu bölümde, kimlik tespiti, uygun yaş değerlendirmesi, vasilik, çocuğun üstün yararının belirlemesi (BID), aile birleşimi ve çocukların alıkonulması gibi belli başlı temel zorluklar değerlendirilmektedir.

Yukarıdakiler ışığında, tezin temel çıkarımlarından biri, UASC'nin daha iyi korunmasına katkıda bulunan uluslararası hukuktaki gelişmelere rağmen, uluslararası mevzuattaki ve devletlerin uygulamalarındaki pek çok ağır güçlüklerin ve önemli eksikliklerin devam ettiği ve bunların bu kategorideki çocukların haklarının korunmasını tehdit ettiği yönündedir.

ÇHS çocuğu "çocuk için geçerli olan yasaya göre, çoğunluğa daha erken ulaşılmadığı sürece, on sekiz yaşın altındaki her insan" şeklinde tanımlamaktadır. Bununla birlikte, uluslararası insan hakları hukuku belgelerinde "çocuk" terimi tanımlanmış olmasına karşın, göçmen/mülteci çocuk veya refakatsiz veya ailesinden ayrı düşmüş çocuk terimlerinin hukuken bağlayıcı tanımları bulunmamaktadır. Bu durum çocukların göç kapsamında bağımsız bireyler olarak değil de, aile biriminin ayrılmaz ve bağımlı unsurları olarak kabul edilmelerinden kaynaklanmaktadır.

Bu kapsamda Guy S. Goodwin-Gill de mültecilik bağlamında "koruma" kavramının anlamının her zaman açık olmadığını belirtmektedir. Göç konusundaki hukuki belgeler ve araçlar çocukları göz ardı etmişlerdir ve onlarla ilgili belirli hükümleri ve tanımları içermemektedirler. Çocuklar, özellikle de refakatsiz ve ailelerinden ayrı düşmüş çocuklar farklı derecelerde korunma ve bakım ihtiyacında olduklarında ve statüleri her zaman çok net olmadığından, onların belirlenmesi ve kimliklerinin tespiti uygun koruma ve bakımı alabilmeleri açısından hayati önem arz etmektedir.

"Çocuğun korunması" kavramı çocukların her türlü zararlardan korunabilmelerine yönelik güvenceler sağlanmasını ifade etmektedir. Bu çocukların fiziksel bütünlüğünü ve güvenlikleri kadar, duygusal ve psikolojik sağlıklarını da kapsamaktadır. Günümüzde çocukların korunmasının nihai amacı onlar için herhangi bir istismar, kötü muamele, saldırganlık, ihmal veya sömürü tehdidi veya korkusu olmayan, sağlıklı, güvenli ve destekleyici ortamlar oluşturulması ve onurla yaşayabilecekleri ve haklarına saygı gösterilen bir hayat sağlanmasıdır.

Çocukların haklarının korunmasından ve ilerletilmesinden dünya çapında sorumlu bulunan BM Uluslararası Çocuklara Acil Yardım Fonu (UNICEF), "çocuğun korunması" kavramını çocuklara yönelik istismar, sömürü ve her türlü şiddetin önlenmesi ve giderilmesi amacıyla alınan bir dizi önlemler olarak tanımlamaktadır. Bu kapsamda çocuğun korunması muhtelif zararlı faaliyet ve uygulamalara karşı bir kalkan vazifesi görmek suretiyle çocukların haklarının ihlal edilmesini önleyen ve bu tür ihlallere karşı mücadele eden bir yaklaşımdır.

Çocukların korunmasının kavramsallaştırılması bağlamında, BM Çocuk Hakları Komitesi'nin eski Başkanı YangHee Lee, bu sürecin üç aşamada ilerlediğini, ilk aşamada çocuğun esenliği perspektifinin baskın olduğunu, ikinci aşamada ise çocukların nesnelerden hak sahipleri durumuna geçtiklerini ve üçüncü aşamada ise çocukların kendi adlarına hareket edebilen göreceli olarak bağımsız unsurlara dönüştüklerini kaydetmektedir. Benzer şekilde, Stuart N. Hart ve diğerlerine göre de, insan haklarının gelişmesiyle zaman içinde çocukların statüsü de (ailelerinin) mal varlığından bireye evirilmiştir. Hart bu olumlu değişikliği insanlık tarihinde bir ilerleme olarak yorumlamaktadır ve ona göre bu yöndeki belirleyici adımlar 19. yüzyılda atılmıştır. Kosher ve diğerleri de bu tespiti paylaşmakta ve ayrıca özel vakıfların ve hükümet birimlerinin çocukların ebeveynlerin istismarı ve ihmalinden korunması yönündeki çabalarının yoğunlaşmasının bu süreçte etkili olduğunu vurgulamışlardır. Bu süreçte 1900lerin ilk yarısından itibaren çocukların korunması konusunda kaydedilen ilerlemeler sayesinde çocuklar "kademeli şekilde "potansiyel bireyler" olmuşlardır.

Save the Children adlı uluslararası hükümet dışı sivil toplum girişimini 1919 yılında kuran Eglantyne Jebb ve kızkardeşi Dorothy Buxton 1924 yılında o dönemde Birleşmiş Milletlerin öncülü olan Milletler Cemiyeti tarafından kabulü amacıyla bir taslak çocuk hakları bildirgesi hazırlamışlardır. Adları geçenler bu taslak bildirgede 1. Dünya Savaşı'nın yıkıcı etkilerinin ve toplu göçlerin çocukların yerlerinden edilmelerine ve acılar yaşamalarına neden olduğu ve çocukların yaşamlarını, fiziksel ve psikolojik durumlarını derinden etkilediğini belirtmişlerdir. Bu çaba neticesinde

Cenevre Çocuk Hakları Bildirgesi olarak da tanınan Milletler Cemiyeti Çocuk Hakları Bildirgesi 1924 yılında kabul edilmiştir.

UNICEF de Avrupa'da savaştan etkilenen çocuklara gıda, giyecek malzemesi ve sağlık hizmetleri sağlama amacıyla 1946 yılında kurulmuştur. Bu adımı 1959 yılında BM Çocuk Hakları Bildirgesi'nin kabul edilmesi izlemiştir. Bu ilerici adımlara rağmen Mary Crock ve Hannah Martin çocukların korunması gereken objelerden haklara ve seslerini duyurma imkanına sahip bir öznelere dönüşmelerinin o dönemde gerçekleşmediğini ve yetişkinlere bağımlı olmaya devam ettiklerini ileri sürmektedirler.

David Finkelhor and Lisa Jones 1960'larda gerçekleşen kültürel devrimler neticesinde kadın hareketlerinin etkilerinin artmasının ve medeni haklar hareketlerinin de katılmalarının çocukların hakları ve korunması akımları bağlamında önemini vurgulamaktadırlar. Yine de o dönemde çocukların tehlikeye açık olmaları nedeniyle özel ilgi, korunma ve kontrol ihtiyaçları bulunduğu anlayışından hareketle bir "ihtiyaçlar temelli yaklaşım" öne çıkmaktaydı.

20. yüzyılın ikinci yarısında, korumacı ve ihtiyaçlar temelli yaklaşım çocukların kendi hayatlarının gidişatı konusunda belirleyici rol oynayabilme ve kendilerini ifade etme ve ilgili kararlara katılabilme haklarını da tanıyan bir perspektife dönüşmeye başlamıştır. Bu kapsamda BM Genel Kurulu 21 Aralık 1976 tarihinde 31/169 sayılı "Uluslararası Çocuk Yılı" kararını kabul etmiştir. Geraldine Van Bueren, UNESCO tarafından Uluslararası Çocuk Yılı ilan edilen 1979 yılına çocuk haklarının gidişatında gerçek anlamda değişikliklerin yaşandığı bir sürecin başlangıcı olarak atıfta bulunmaktadır, zira bu yılda yürütülen çabalar BM ÇHS'nin kabulüyle taçlanmıştır.

Michele Peterson-Badali and Martin D. Ruck çocukların ailelerinin malları değil kendi haklarına ve özgürlüklerine sahip hukuki bireyler olduklarının ÇHS'de en açık ifadesini bulduğunu vurgulamışlardır. O noktadan itibaren, çocukların korunması kavramı evrim geçirmeye ve çocuklar uluslararası insan hakları gündeminde hak sahipleri olarak yerlerini almaya başlamışlardır.

Bu noktada, BM ÇHS'nin kabulünün çocukların hakları ve korunmaları kapsamında bir kilometre taşı olduğu ve o yüzden devrimsel bir yaklaşımı ifade ettiğini vurgulamak yanlış olmayacaktır. Sözleşme çocukları yetişkinlere bağımlı kılan yüzyıllar boyu hâkim anlayışa karşı çıkmış ve çocukların onuruna saygı duyulmasını ve onlara hak sahibi bireyler olarak davranılmasını teşvik eden bir anlayışın önünü açmıştır. BM ÇHS BM Genel Kurulunda 20 Kasım 1989 tarihinde kabul edilmiş ve 02 Eylül 1990 yılında yürürlüğe girmiştir. ÇHS hem çocukların zararlardan ve şiddetten korunma haklarını, hem kendilerini ifade ve katılım yoluyla bir kişilik geliştirmelerini tanıyan bir anlayış üzerine inşa edilmiştir. Bu manada, Sözleşmenin en önemli özelliklerinden biri çocukların özerkliği ve katılımı kavramları üzerine yaptığı vurgudur. Özetle, çocukların ihtiyaçları temelli bir anlayıştan çocukların hakları temelli yaklaşıma geçişin temelini bu sözleşme sağlamaktadır. Bu yaklaşım değişikliği Çocuk Hakları Komitesi'nin çocuk hakları temelli yaklaşımın önceliklerini, politikalarını ve uygulamalarını yeniden belirleyen ve 18 yaşın altındaki tüm çocuklara uygulanması gerektiğini tespit eden 13 sayılı Genel Yorumunda (GC13) kurumsallaştırılmıştır.

Çocuk Hakları Komitesi ayrıca, çocukların şiddetin her türüne maruz kalma riskleri bulunduğunu kabul etmekle birlikte, çocuklara yönelik şiddetin sıklıkla cinsiyet boyutu olduğuna da dikkat çekmiştir. Bu bağlamda kız çocuklarının fuhuşa zorlanma, cinsel sömürü ve zorla evlendirilme gibi uygulamalara maruz kalmalarının olası olduğuna dikkat çekmiştir.

Özetlemek gerekirse, çocukların korunması ve onlara yönelik şiddetin önlenmesi sıklıkla çocukların göç yolculuğuna çıkma nedenlerini azaltacak önlemler arasında sayılmaktadır. Ebeveyn bakım ve korumasından mahrum mülteci / göçmen çocukların şiddet, istismar, sömürü gibi risklerle karşılaşma olasılıkları daha yüksek olduğundan, bu kategoridekiler çocuk koruma sistemlerinde ayrı bir yere sahiptirler. Bu çocuklara etkin bir koruma sağlayabilmek için, haklar temelli yaklaşım doğrultusunda çalışan koruma sistemleri her çocuğu kapsayan ve aynı zamanda her birine özgü kaygılar ve ihtiyaçları belirlemeli ve onlara çözüm getirmeye çalışmalıdır.

Çocukların korunması kavramları bağlamında zaman zaman kullanılan "yetim (orphan)" kavramı anne ve babasından her ikisi de ölmüş olan çocukları kapsamaktadır ve bu manada refakatsiz ve ailelerinden ayrı düşmüş çocuklardan farklı bir kategoridir.

1951 Mülteci Sözleşmesi yetişkin ve çocuk mülteciler arasında bir ayrım yapmamaktadır. Tabiatıyla, refakatsiz ve ailelerinden ayrı düşmüş çocuklar hakkında da herhangi bir hüküm içermemekte, mülteci olma koşullarını karşılayan herkesi mülteci olarak sınıflandırmakta ve benzer muameleleri öngörmektedir. Benzer şekilde, 1989 Çocuk Hakları Sözleşmesi (ÇHS) de refakatsiz çocukların tanımını içermemektedir. Ancak 1951 sözleşmesinden farklı olarak ÇHS 22. maddesiyle refakatsiz çocukları refakat sahibi çocuklardan ayırmakta ve onlar için özel koruma gerektiğini belirtmektedir.

Refakatsiz çocukların resmi tanımına ilk kez BMMYK'nin 1997 Yönergelerinde (Refakatsiz ve Sığınma Arayan Çocuklara Uygulanan Politikalar ve Prosedürler Hakkındaki Yönergeler) yer verilmiştir. Anılan belgenin 3/1 paragrafında refakatsiz çocuk, "çocuk için geçerli olan yasaya göre, çoğunluğa daha erken ulaşılmadığı sürece, on sekiz yaşın altındaki ve her iki ebeveynden ayrı düşmüş olan ve yasa veya gelenek gereği çocuğun bakımından sorumlu olan bir yetişkin tarafından bakılmayan kişi" şeklinde tanımlanmaktadır. Bu tanım BM'nin yanısıra, diğer uluslararası ve Avrupa Birliği (AB) gibi ulus-üstü örgütler tarafından daha sonra kabul edilen belgelerde de kullanılmıştır.

Benzer ama daha geniş bir bağlamda 1 Aralık 2005 tarihli ve 2005/85/EC sayılı AB Konseyi Direktifi üye ülkelerde mülteci statüsü verilmesi ve bu statünün geri alınmasına ilişkin prosedürler hakkındaki asgari standartları belirlerken, refakatsiz çocuğu "18 yaşının altında bulunan ve üye ülkelerin topraklarına kendisinden kanunen ya da gelenekler çerçevesinde sorumlu bir yetişkinin refakatinde olmayan, böyle bir kişi tarafından etkin şekilde bakılmayan kişi" olarak tanımlamakta ve bu tanımın üye ülke topraklarına girdikten sonra refakatsiz kalan küçükleri de kapsadığını

belirtmektedir. ABD'nin 2002 tarihli İç Güvenlik Yasası da benzer bir tanıma yer vermektedir.

Refakatsiz çocuğun tanımlanmasında onun bakımından birincil derecede sorumlu kişinin yokluğu önem taşıdığı cihetle, bu kişinin de tanımlanmasına ihtiyaç bulunmaktadır. Bu bağlamda Ilias Bantekas çocuğun bakımından birinci derecede sorumlu kişinin çocuğun yasal veya biyolojik ebeveyni olması gerekmediğini, bahse konu yetişkinin çocukla ilişkisinin niteliği ve sürekliliğinin de dikkate alınması gerektiğini ifade etmektedir. Bu itibarla, refakatsiz çocuğun resmi tanımı ağırlıklı olarak ebeveynlerin veya çocuğun bakımından sorumlu diğer yetişkinlerin yokluğu temelinde yapılmaktadır.

Ailelerinden ayrı düşmüş çocuklar da her iki ebeveynin bakımından mahrumdurlar, ancak refakatsiz çocuklardan farklı olarak, bu kategorideki çocukların diğer aile üyelerinin veya akrabaların refakati ve bakımından yararlanmaktadırlar. Sarah Uppard ve Lili Birnbaum bu kapsamda çocuğun ebeveynlerinden ayrılmasının kendi isteği dışında gerçekleşmiş olması ve çocuğun koruyucu bir ortamdan uzakta bulunması gerektiğini ileri sürmüşlerdir.

Bir ara sonuç olarak, refakatsiz ve ailelerinden ayrı düşmüş çocuklar aile desteği ve korumasından mahrum bulunmaları ve risklere daha açık olmaları nedeniyle, bu durumda olması muhtemel çocukların refakatsiz olup olmadıklarının mümkün olan en hızlı şekilde tespit edilmeleri önem taşımaktadır. Bu şekilde, bu çocukların ihtiyaçlarının daha iyi takibi ve aileleriyle veya diğer akrabalarıyla birleştirilmeleri konusunda daha etkin çaba gösterilmesi mümkün olabilecektir.

Refakatsiz ve ailelerinden ayrı düşmüş çocuklara ilişkin uluslararası yasal mevzuat çerçevesi ile bölgesel ve yumuşak yasa araçları konusu da bu tez kapsamında dikkatle analiz edilen konulardan biridir ve üçüncü bölüm bu alana ayrılmıştır.

Mülteci çocukların korunmasına yönelik uluslararası yasal düzenlemelerin ilk olarak 1. Dünya Savaşı'ndan sonra ortaya çıktığı yukarıda belirtilmişti. Bu kapsamda,

refakatsiz ve ailelerinden ayrı düşmüş çocukların insan hakları ihlalleri ve sömürüye daha açık olmaları nedeniyle, uluslararası hukuk uzun bir zamandır bu çocukların özel bakım ihtiyacını dikkate almaktadır ve bu amaçla pek çok koruma önlemleri kabul etmiştir. Jacqueline Bhabha'nın da belirttiği gibi, uluslararası insani hukuk, mülteci hukuku ve özellikle uluslararası insan hakları hukuku kapsamında refakatsiz çocuklarla ilgili çok sayıda yasal araç mevcuttur. Çok sayıda bölgesel ve yumuşak hukuk araçları da refakatsiz çocukların korunması konusunda uygulanmaktadır.

2. Dünya Savaşı'ndan sonra uluslararası hukuk araçları refakatsiz ve ailelerinden ayrı düşmüş çocukların mültecilerin insani bir bağlamda korunması uygulamasının parçası olmaları yönündeki çabaların yolunu açmıştır. Uluslararası insani hukuk kapsamında 1949 Cenevre Sözleşmeleri uluslararası ve uluslararası olmayan tüm çatışmaların tarafları için bağlayıcıdır ve savaş sonucu yetim kalan veya ailelerinden ayrı düşün çocuklar için özel koruma önlemleri öngörmekte, aile birliği ve temasının önemini vurgulamaktadır.

Uluslararası mülteci hukuku ve bu kapsamdaki koruma önlemleri mülteci statüsüne sahip veya sığınma arayan refakatsiz ve ailelerinden ayrı düşmüş çocukları da kapsamaktadır. Mültecilerin Statüsüne İlişkin Sözleşme (1951) ve 1967 Protokolü mültecilerin göç statüleri ve hakları konusundaki temel belgelerdir ve mültecilere yaş açısından yaklaşmamaktadırlar. Buna mukabil, bu önemli belgelerin uygulayıcısı konumundaki BMMYK uluslararası mülteci hukukunun refakatsiz ve ailelerinden ayrı düşmüş çocukları da kapsadığı görüşündedir ve faaliyetlerinde bu şekilde hareket etmektedir.

Refakatsiz ve ailelerinden ayrı düşmüş çocukları da kapsayan göçmen/mülteci çocukların haklarına ilişkin en kapsamlı yasal düzenlemeler uluslararası insan hakları hukuku çerçevesinde yapılmışlardır. Bu bağlamda, ÇHS de çocukların haklarına ilişkin uluslararası hukuk açısından bağlayıcı en önemli bir belge olarak refakatsiz ve ailelerinden ayrı düşmüş çocukların korunması kapsamında bir köşe taşı niteliğindedir.

Uluslararası hukuk araçlarına ilaveten, Çocuk Hakları ve Esenliği Konusunda Afrika Şartı, Amerika İnsan Hakları Sözleşmesi ve Avrupa İnsan Hakları Sözleşmesi gibi bölgesel insan hakları mekanizmaları da çok sayıda koruma önlemleri getirmişlerdir.

Çocuklar konusuna gelince, silahlı çatışma durumunda çocukların korunmaları uluslararası insani hukuk tarafından garanti altına alınmıştır. Cenevre Sözleşmelerinin yirmi beş maddesi ve iki ek protokolü çocuklara ilişkin özel hükümler içermektedirler. Bu sözleşmeler bağlamında, refakatsiz ve ailelerinden ayrı düşmüş çocuklar dahil tüm çocuklar hem tüm siviller kapsamında hem çocuklara yönelik hükümler kapsamında koruma önlemlerinden yararlanabilmektedirler.

Uluslararası insani hukuk tarafından refakatsiz ve ailelerinden ayrı düşmüş çocuklar kapsamında en öncelikli bir unsur olarak korunan ve önem atfedilen bir boyut aile birliğinin korunması ve bu kapsamda aile üyeleri arasındaki temasın sağlanması, kayıp aile üyelerinin ve çocukların tespiti, aile takibi ve yeniden birleştirilmesi süreçleridir. Bu konular özellikle tahliye operasyonları kapsamında hayati önemi haizdir. Çocukların ebeveynlerinden veya diğer aile üyelerinden ayrı olarak tahliyeleri sadece son çare ve geçici bir adım olarak düzenlenmektedir.

Hukuki mevzuat kapsamında kaydedilen tüm ilerlemelere rağmen, refakatsiz ve ailelerinden ayrı düşmüş çocukların uygulamada hala pek çok sorunla karşı karşıya bulundukları değerlendirilmekte ve bu sorunun uluslararası insani hukuka saygı yoluyla aşılabileceği düşünülmektedir.

Bu kapsamda, “Geri göndermeme (non-refoulement)” ilkesi uluslararası mülteci hukukunun ve Mülteci Sözleşmesi’nin en temel ilkelerinden biri haline gelmiştir. Sözleşmenin 33. maddesi altında düzenlenen bu ilke bir mültecinin sözleşmede sayılan beş nedenden dolayı hayatına yönelik bir tehditle karşılaşacağı bir yere geri gönderilmesini yasaklamaktadır. Bu yüzden, eğer resmi devlet kurumları koruma altına alınması gereken kişileri teşhis etmekte başarısız olur ve bu kişileri zorla geri gönderirlerse bu geri göndermeme ilkesinin ihlalini oluşturur.

Öte yandan, 1951 Sözleşmesi çocuklara ilişkin belirli hükümler içermese de, Sözleşme ve içerdiği mülteci tanımı yaş konusunda hassas bir yaklaşımla ve çocukların tehlikelere açıklıkları ve ihtiyaçlarını da içeren özel durumlarını dikkate alan bir anlayışla yorumlanmalı ve uygulanmalıdır.

Eva Nykanen, mülteciler için özel koruma sağladığını dikkate alarak, 1951 Sözleşmesini "hukuki açıdan bağlayıcı en önemli küresel araç" olarak tanımlamaktadır. Bununla birlikte, eleştirel bir açıdan da bakarak, Nykanen bahse konu sözleşmeni mülteci çocukların korunma ihtiyaçlarını karşılamakta yetersiz olduğunu, çünkü çocuklar dahil başkalarının durumlarına yeterince dikkat göstermeyen yetişkin erkek normları üzerine bina edildiğini ileri sürmektedir.

Paula S. Fass, ÇHS'ni 2. Dünya Savaşından sonra insan haklarına yönelik uluslararası taahhüdün teyidi olarak görmektedir, zira Sözleşme insan hakları tarihinde ve çocuklara ve çocuk haklarına saygının gerçekleştirilmesinde pek çok açıdan eşsiz ve önemli bir yere sahiptir. En kapsamlı ve en hızlı şekilde onaylanan ve yürürlüğe giren bir BM sözleşmesidir, ABD dışındaki tüm ülkeler onaylamış ve taraf olmuşlardır. Ayrıca çocukların haklarını açıkça ele alan ve hukuken bağlayıcı ilk insan hakları enstrümanıdır. Bu açıdan, Bhabha ÇHS'ni çocukların haklarını tanımada bir dönüm noktası olarak tarif etmekte ve insan haklarına ilişkin geniş kapsamlı sorunlar kapsamında çocuklara merkezi bir yer verdiğini belirtmektedir. ÇHS'nin tüm temel prensipleri refakatsiz ve ailelerinden ayrı düşmüş çocuklar için de geçerli ve taraf devletler açısından yetki alanında bulunan bu kategorilerdeki çocuklar için de bağlayıcıdır.

Uluslararası insani, mülteci ve insan hakları hukuku kapsamındaki sözleşmelerin eksikliklerini gidermek amacıyla, uluslararası örgütler tarafından pek çok bölgesel ve yumuşak hukuk insan hakları araçları geliştirilmiş ve kabul edilmiştir. BM Çocuk Hakları Komitesi, antlaşmalara dayanan insan hakları organları ve bölgesel mekanizmaların yönergeler, genel yorumlar ve tavsiyeler yoluyla, bölgesel insan hakları mahkemelerinin de içtihatları yoluyla yerlerinden edilme döngüsü içinde çocukların korunmasına önemli katkılar sağladıklarını teyit etmiştir.

BM Çocuk Hakları Komitesi, BMMYK, UNICEF ve Uluslararası Kızıl Haç Komitesi (ICRC) refakatsiz ve ailelerinden ayrı düşmüş çocukların korunması konusunda en kapsamlı yönergeler ve uluslararası standartları sağlayarak teorik yaklaşımların uygulamaya yansıtılmasında önemli rol oynamaktadırlar. Bu kuruluşlar anılan kategorilerdeki çocuklara güvenceler sağlarken, devletlere de uluslararası insani, mülteci ve insan hakları sözleşmelerinden kaynaklanan yükümlülüklerini nasıl yerine getirebilecekleri konusunda rehberlik etmektedir.

Avrupa Konseyi de 2016 yılında Çocuk Hakları İçin Strateji (2016-2021) belgesini kabul ederek, çocuk hakları konusunda öncelikli alanlar belirlemiştir. Strateji, üye ülkeler, uluslararası kuruluşlar, hükümet dışı kuruluşlar ve milli insan hakları kurumlarının yanısıra, çocukların görüşlerini de içermektedir. Bu bakımdan Strateji çocukların karşılaştıkları en yaygın tehlikeleri ve güçlükleri ele almakta, yüksek çıkar ilkesinin ihmal edilmesi, alıkonulma uygulamasının standart bir prosedüre dönüşmesi, vasi atanması ve yaş tespiti süreçlerinin kötü yönetilmesi, insan tacirlerinin ağına düşülmesi gibi olumsuz uygulama ve riskler üzerinde durmaktadır.

Avrupa Konseyi'nin korumasına ilaveten, refakatsiz ve ailelerinden ayrı düşmüş çocuklar ayrıca AB hukuku kapsamında da korunmaktadırlar. Örneğin en başta AB Temel Haklar Şartı çocuk hakları konusunda belirli hükümler içermektedir. Bu gibi ilk derece AB hukuku araçlarının yanısıra, AB yönetmelikleri, direktifleri, kararları, tavsiyeleri ve görüşleri gibi ikinci hukuk araçları da tamamlayıcı katkılar yapmaktadırlar.

Sonuç olarak, egemen devletler sınırlarını kontrol etme ve göç politikalarını belirleme yetkisine sahip olmakla birlikte taraf oldukları uluslararası sözleşmeler nedeniyle bu yetkileri sınırsız değildir. Göç alanındaki milli mevzuat uluslararası hukukla uyumlu olmak ve özel koruma ve bakım ihtiyacı bulunan çocuklar başta olmak üzere göçmenlerin insan haklarını ihlal etmemek zorundadır. Marc S. Rosenblum refakatsiz çocuklar bağlamında devletlerin mültecilerin korunması ve önlenmesi arasında açık bir çelişki ve tereddüt yaşadıklarına işaret etmekte ve bu ikilemin bahsekonu

kategorideki çocuk mültecilerin gerçekten yardıma ihtiyaçları olup olmadığının belirlenmesi amacıyla yapılacak titiz bir değerlendirme süreciyle giderilebileceğini savunmaktadır.

Çocukların korunması ve haklarına ilişkin uluslararası belgelerde belirsizlikler ve karışık tanımlamalar sıklıkla karşımıza çıkabilmektedir. Bu durumun temel bir sebebi sözkonusu belgelerin müzakereleri sırasında katılımcı ülkelerin farklı tutumları nedeniyle bir uzlaşmaya varılmasını temin amacıyla "yapıcı belirsizlik" denilen bir anlayış temelinde bazı maddelerin her ülkenin kendi bakış açısından olumlu yorumlayabileceği şekilde formülü edilmeleridir. Bu nedenle, insanlığın ilerlemesi ve ülkelerin yönetimlerinin değişmesi neticesinde bazı konulara bakış açılarının da değişebildiğini dikkate alarak, sözkonusu belirsizliklerin zaman içinde çocukların haklarını ve korunmalarını güçlendirecek yönde gözden geçirilmesi ve değiştirilmesi imkanlarını aramak yararlı olabilecektir.

Öte yandan, uluslararası hukukun parçalı yapısı, birleşik ve kodifiye edilmiş bir uluslararası mevzuatın bulunmayışı ve devletlerin uluslararası yükümlülüklerinin aksine uygulamaları nedeniyle, refakatsiz ve ailelerinden ayrı düşmüş çocuklar koruma ve bakım arayışlarında pek çok zorluklar yaşamaktadırlar. Bu güçlükler genellikle çocukların kabul süreci ve yetersiz koşullarda alıkonulmalarının standart bir uygulamaya dönüşmüş olmasıyla ilgilidir.

BMMYK çocukların kabul edilme süreçlerinin iyi organize edilmiş, olumlu ve insani şekilde yürütülmesinin önemini vurgulamakta, bu süreçte refakatsiz ve ailelerinden ayrı düşmüş çocukların ev sahibi ülkedeki çocuklara sağlanan bütün sosyal hizmetlerden ve hukuki korumadan yararlandırılmalarını tavsiye etmektedir. Yine BMMYK yönergelerine göre, bu iki özel kategorideki çocukların ev sahibi ülkedeki çocuklara sağlanan haklardan en azından asgari düzeyde yararlandırılmalarını teminen, çocukların durumlarının ulusal ve yerel çocuk destek hizmet birimleri tarafından izlenmesine ihtiyaç bulunmaktadır. BMMYK ayrıca kardeşlerin ve birbirleriyle yakın bağlara sahip çocukların birlikte tutulmalarını, bunun için çocukların yerleştirilmelerine ilişkin kararların her bir durum dikkatle incelenerek

alınmasını, bu süreçte çocukların kişilikleri, yaşları, ihtiyaçları ve tercihlerinin göz önünde bulundurulmasını tavsiye etmektedir. Tezin dördüncü bölümü kabul güçlükleri ve göçmen çocukların alıkonulması başlıkları altında bu önemli kavramları ve uygulanmalarını analiz etmektedir.

Bu tezin refakatsiz ve ailelerinden ayrı düşmüş mülteci/göçmen çocuklarla ilgili akademik literatüre mütevazi bir katkı sağlamasından ve araştırmacıların bu önemli insani konunun çeşitli yönlerine eğilmelerini teşvik etmesinden memnuniyet duyulacaktır.

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