

# RESPECTING THE RIGHTS OF UNACCOMPANIED MIGRANT CHILDREN IN EUROPE\*

FABIANA FRAGNITO\*\*

## Abstract:

Copiii migranți neacompaniați reprezintă una dintre cele mai vulnerabile categorii de migranți. Statele trebuie să poată acorda protecția necesară în baza dreptului internațional și a reglementărilor aplicabile la nivel regional. *Interesul superior al copilului* trebuie să prevaleze în orice situație. Lucrarea de față prezintă principalele instrumente juridice utilizate la nivel european, inclusiv la nivelul Uniunii Europene, și dezvoltarea acestora.

**Cuvinte cheie:** migrație, refugiați, solicitanți de azil, migranți, copii neacompaniați, protecție internațională

## Résumé:

Le respect des droits des enfants migrants non accompagnés en Europe. Les enfants migrants non accompagnés représentent une catégorie de migrants des plus vulnérables. Les Etats devraient leur garantir la protection nécessaire fondée sur le droit et les règlements internationaux appliqués au niveau régional. L'intérêt supérieur de l'enfant devrait primer dans toute situation. Cette étude est centrée sur la présentation des principaux instruments légaux utilisés au niveau européen, y compris au niveau de l'Union Européenne, et sur leur développement.

**Mots-clés:** migration, réfugiés, demandeur d'asile, migrants, enfants non accompagnés, protection internationale

## 1. Introduction

At birth, we do not distinguish ourselves from others. All human beings are born with the same rights. We are part of a whole. Moreover, to exist means to coexist and we are in a relationship with all people, without distinction based on sex, race or other features.

Foreign minors are affected by multiple vulnerabilities, because they are foreign and minors at the same time; moreover, they may be unaccompanied and they are entitled to international legal guarantees, including safeguards

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\* This article is part of a research conducted during the internship at the Romanian Institute for Human Rights (RIHR).

\*\* E-mail: fabyfragnito@gmail.com

on the status of the child, refugee<sup>1</sup>, migrant<sup>2</sup> and/or asylum seeker<sup>3</sup>. There are different forms of international protection: the refugee status, subsidiary protection (previously defined as “conditioned humanitarian protection”). Under this type of protection, the vulnerable categories are taken into account.<sup>4</sup> States should respect and protect the rights of these vulnerable categories, according to the obligations they committed to under the ratification of various conventions. It is important to note that international legislation evolved with regard to the centrality it has assumed from the perspective of protecting the foreign minor through the Convention on the Rights of the Child (CRC) of 1989. International law is not the only one manifesting interest in the delicate issue of protection of unaccompanied migrant minors. At regional level, the European Union saw important developments, considering the positive activity of the European Court of Justice that nowadays is important for national legislators, and the European Asylum System, which needs improvements in the field of migration and mostly in the field of children migration. In addition, in June 2019, the Council of Europe called on Member States to assume more responsibility for rescuing migrants at sea and protecting their rights. “European states’ approach to migration in the Mediterranean Sea has become much too focused on preventing refugees and migrants from reaching European shores, and less involved in the humanitarian and human rights aspects. This approach is having tragic consequences”, stated Dunja Mijatović, Council of Europe Commissioner for Human Rights.<sup>5</sup> The Recommendation identifies the deficiencies of the migration field in Europe, and aims at helping Member states to reframe their response according to human rights standards.

## 2. General aspects

Depending on the age of the migrant minors and their “physical and mental immaturity”, they should be considered as being affected by an

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<sup>1</sup> Refugee is the term that describes a person fleeing war or persecution and crossing an international border.

<sup>2</sup> Migrants are people who move from their country of origin where they used to live, to another country and the motivations can be different.

<sup>3</sup> According to Noul Dicționar universal al limbii române, Litera Internațional, Ediția a Treia, 2008, p. 146, asylum implies “not to be caught” or “not to be arrested”, which involves, “protection against persecution”.

<sup>4</sup> For unaccompanied migrant children, temporary protection see Zlătescu M. I., *Migration and Law*, RIHR, Bucharest, 2014.

<sup>5</sup> See Council of Europe, *Lives Saved. Rights protected. Bridging the protection gap for refugees and migrants in the Mediterranean*, June 2019, <https://rm.coe.int/lives-saved-rights-protected-bridging-the-protection-gap-for-refugees-/168094eb87>

objective vulnerability<sup>6</sup>. According to UNHCR, in 2016, in central Europe, unaccompanied and separated minors represented, in average, 2-3% of all asylum applications. In some countries, the rate reached as high as 10%. The UNHCR addresses the risks and needs of unaccompanied minors and separated children in the Age, Gender and Diversity strategy (AGD).<sup>7</sup> The number of migrant children arriving unaccompanied to Europe remained high at the beginning of 2018 and throughout the year.

It is worth mentioning that the European Commission's Directorates-General – the Directorate-general for Migration and Home Affairs (DG HOME) and the Directorate-general for Justice and Consumers (DG JUST) – continued to monitor the progress made by Member States in implementing the Communication on the protection of migrant children of April 2017<sup>8</sup>, and to support the Member States (including with funding) to achieve these objectives. On the one hand, most Member States did not report or incur any significant increase or decrease of staff working with asylum-seeking unaccompanied minors, but on the other hand, half of all Member States reported developments in improving the protection and care of unaccompanied minors, mostly in legislation and practice.

The term “foreign” has different nuances/connotations and a univocal notion is impossible to formulate. There are three universally used terms to define a foreigner: *migrant*, *asylum seeker* and *refugee*. In the EU, Council Directive 2004/83/CE, defines minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who need international protection. The forms of protection that are available to foreign citizens of the host country are the refugee *status*, subsidiary protection and temporary protection.

The refugee *status* and the subsidiary protection are different types of protection. Foster is granted to those who, in their country of origin/usual residence, are subject to persecution due to race or nationality, membership in a specific social group, religious or political conviction, or to those whose fear of persecution is well founded. Subsidiary protection is for those who do

<sup>6</sup> See Geraci A., “Il minore straniero non accompagnato nel diritto internazionale, dell’Unione Europea e italiano: criticità attuali e prospettive future”, in *La comunità internazionale*, 4/2017, pp. 585-608, cit., *The preamble to the Convention on the Rights of the Child*, 20 November 1989.

<sup>7</sup> See UNHCR website <https://www.unhcr.org/ceu/90-enwhat-we-docaring-for-the-vulnerableunaccompanied-minors-and-separated-children-html.html>

<sup>8</sup> COM(2017) 211 final, Communication from the Commission to the European Parliament and the Council, The protection of children in migration, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170412\\_communication\\_on\\_the\\_protection\\_of\\_children\\_in\\_migration\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170412_communication_on_the_protection_of_children_in_migration_en.pdf)

not qualify for refugee's *status* but are at risk of serious harm if they return to their country of origin and are unable/unwilling to seek protection there.<sup>9</sup> Generally, asylum-seekers are one of the most vulnerable groups of people in the world. This group includes unaccompanied children separated from their parents or from other adult having them in his or her care.

### **3. Particularities of the international and European protection of unaccompanied minors**

The 2016 *Global trends forced displacement Report* of the UN High Commissioner for Refugees specified that 65.6 million people sought protection and living opportunities in another country than their country of origin.<sup>10</sup> Migrant minors arrive in Europe from third States (Eritrea, Libya, Somalia and Afghanistan), countries that are theatres of war and civil conflicts. With regard to the age of this category of minors and their physical and mental immaturity, the definition of minor is included in the most important instrument of international law, the UN Convention of 1989 on the Rights of the Child. The CRC is an important instrument in the field of Human Rights, which places full and definitive recognition of the rights of the child. The first article establishes that a minor must be understood as: “every human being under the age of eighteen, unless he or she has reached maturity beforehand by virtue of the applicable legislation”. Thus, minors have rights, recognized and guaranteed by the CRC, in accordance with their nature of living human beings. The CRC is one of the instruments of international law, which have contributed to the recognition and expansion of the sphere of rights of the child. It is necessary first that minors should be considered children and consequently, through the instrument of law, states should recognize all of the guarantees required, by virtue of the universal principle of the “*best interests of the child*”.<sup>11</sup> Article 3 of the CRC, provides that “the best interests of the child must always be the main parameter of reference in all decisions concerning the child, taking into account his cultural and social background, as well as his primary needs concerning the person and all the elements of particular vulnerability”.

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<sup>9</sup> Asylum Seekers and Beneficiaries of International Protection in V4 Countries (Updated Report) V4NIEM: Visegrad Countries National Integration Evaluation Mechanism Report 2019.

<sup>10</sup> UNHCR, *Global trends forced displacement* 2016, on the website, [www.unhcr.org](http://www.unhcr.org)

<sup>11</sup> See Martone A., “The treatment of unaccompanied foreign minors between European provisions and national legislation”, in CAGGIANO, pp. 297.

By contrast, in the Geneva Convention of 1951 relating to the status of refugees there are no specific references to the particular vulnerability of children. However, the absence of specifications has not prevented UNHCR from addressing the issue. The High Commissioner, in the UNHCR recommendations and programs, promoted the importance of considering minors as active subjects and holders of rights<sup>12</sup>. Therefore, it highlights the importance of minors' rights and the proper evaluation of their "best interest".

It seems necessary to analyse the minor-foreigner binomial, in the case in which the minor is affected by multiple vulnerabilities, given the situation they are facing, migrant and/or refugee, and at the same time owner of rights connected with their nature of minor age. In addition, if migrant children are unaccompanied, the problem of defining an "unaccompanied foreign minor" occurs, considering the failure to clearly define it at international law level. The General Comment No. 6 adopted by the Committee on the Rights of the Child in 2005 clarifies that with regard to "the treatment of children separated from their families and unaccompanied children, outside their country of origin, there are two distinct definitions: on the one hand that of separated children and on the other, that of unaccompanied children."<sup>13</sup> The "locus ingressum" of unaccompanied foreign minors must be analysed. The choice of "locus ingressum" depends on push and pull factors, which are different from each other.

Access by sea, remains one of the most common paths taken into account by migrants but not the only one. Frontex maps show that, since 2015, access to Europe occurred primarily through the two routes of the Mediterranean: Central Mediterranean Route and Western Mediterranean Route. Nowadays, another important route is the Western Balkans route, usually left in the shadows in political debates. A number of 34,559 migrants (mostly Syrians and Afghans) entered on the Western Balkans route, and once they arrived in Greece and Bulgaria, they crossed the Western Balkans and returned to the European Union through the border with Serbia.<sup>14</sup> However, migration by

<sup>12</sup> UN High Commissioner for Refugees (UNHCR), *Executive Committee General Conclusion on International Protection* No. 41 (XXXVII)– 1986; UN High Commissioner for Refugees (UNHCR), *Executive Committee Refugee Children*, 12 October 1987, No. 47 (XXXVIII)– 1987; UN High Commissioner for Refugees (UNHCR), *Executive Committee Conclusion on Children at Risk* No. 107 (LVIII)– 2007.

<sup>13</sup> See Bichi R., "Separated children, un fenomeno europeo", in *Separated children: i minori stranieri non accompagnati*, Milan, 2008.

<sup>14</sup> *Frontex Eastern European Borders Risk Analysis Network Quarterly Report, Quarter 2. April – June 2015*, [frontex.europa.eu](http://frontex.europa.eu); and also UNHCR, *Flows through Western Balkans Route. Daily estimated arrivals 1 October – 11 December 2015*, see the website [data.unhcr.org](http://data.unhcr.org)

sea remains one of the most complex issues. In the International Law of the Sea the connection between the *status* of a minor migrant in each different maritime area and the international rules applicable to this status is of outmost importance. On the one hand, each State can determine its own immigration policies, and on the other, it cannot limit the protection of fundamental human rights that should be respected. The International Tribunal for the Law of the Sea has stated “*that humanitarian provisions must be applied to the Law of the Sea as in any other area of international law*”, in judgment *Saiga* No. 2, and that “*States Parties to the 1994 Law of the Sea Convention must fulfil obligations under international law, in particular human rights law*”, in the *Louisa* judgment.<sup>15</sup>

With regard to the inclusion of unaccompanied minors, they could be refugees, defined as such. The Refugee Status Convention of 1951 and the New York Protocol of 1967 establish that coastal states are required to apply all provisions to their territorial sea, in accordance with the rules of general international law, among which, the important principle of *non-refoulement*, enshrined in art. 33 of the Refugee Convention.<sup>16</sup> The purpose of prohibiting the *refoulement* should be seen as extension *rationae loci* to this maritime area<sup>17</sup>, and EU law and the ECHR<sup>18</sup> prohibit the rejection at borders of persons at risk of persecution or other serious harm.<sup>19</sup> Article 2 of the CRC establishes the principle of non-discrimination. Thus the child should not be given unjustifiably different treatment on reasons of political or other opinion, ethnic or social origin, property, disability, birth or other status, and “*of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion national, ethnic or social origin, property, disability, birth or other status*”. Article 8, of the above Convention, provides that each State Party has the obligation to protect the child. This complex obligation consists in guaranteeing to the child the right to assistance in the country in which they are requesting protection, in adopting appropriate measures for the enjoyment of fundamental rights, as

<sup>15</sup> Sentence “SAIGA” (No. 2) (Saint Vincent e Grenadines v. Guinea), 1 July 1999, in *ITLOS Reports*, 1999, p. 62, par. 155; and “Louisa” (Saint Vincent e Grenadines v. Spanish), 28 May 2013, in *ITLOS Reports*, 2013, p. 46, par. 155.

<sup>16</sup> See Ronzitti N., *Introduction to International Law*, Turin, 2016.

<sup>17</sup> See Virzo R., “Coastal States and the protection of migrant children at sea”, in *Migrant Children*, Napoli, 2016.

<sup>18</sup> European Convention on Human Rights.

<sup>19</sup> See European Union Agency for Fundamental Rights, *Handbook on European law relating to asylum borders and immigration*, 2014.

set forth in art. 22 of CRC.<sup>20</sup> The abovementioned principles are supported by a fundamental principle and right enshrined in art. 3 of the CRC, that the child's best interest should prevail. This is now seen as a criterion – guide, in determining any decision that has a decisive impact on the life of the child, especially regarding an unaccompanied migrant children's life.

The rights of foreigners theme encompasses a series of issues, which are comprised within the framework of the right of foreign minors, mostly of those not accompanied. The minor is a subject potentially exposed to various factors of weakness and vulnerability and needs a high level of protection. The international dimension of protection further establishes and defines the minor as self-determinable and capable of expressing conscious and autonomous manifestations of self. Despite the universal recognition of the “*best interest of child*” as criteria<sup>21</sup>, it is often violated and disregarded because children's rights are “subtle rights”.<sup>22</sup> These rights are fragile and delicate. Many times their protection has been avoided by using the *escamotage* of legal capacity and the authoritative element of parental authority. Sometimes, in the case of foreign minors, the clause of the protection of their preeminent interest was used for actually hiding inefficiencies, poor coordination, scarcity of resources and the lack of legislation in the field of immigration that does not always respond to the real needs of these children.

The increase in the number of migrant children, including separated and unaccompanied children, has led the international community to talk about possible forms of cooperation to protect children as the most vulnerable individuals. In 2014, the United Nations General Assembly, by Resolution No. 69/187, urged all Member States to deal with the irregular migration of children, promoting the protection of their rights and fundamental freedoms. State Parties of the CRC should take all the necessary measures to implement the rights enshrined in it while the best interest of the child should guide the legislation, policies and measures put in place by States in the legislation regarding the protection of the child.<sup>23</sup> In addition, the 1989 Convention establishes the obligation of the State Parties to apply the rights enshrined in the Convention on their entire territory and to all minors who are under

<sup>20</sup> See Parisi N., “The status of the unaccompanied migrant in the light of European law: the contribution of international jurisprudence on the subject of international protection and detention”, in, *Questione Giustizia*, 3/2014, 156 ss; cit., art. 2, 8 and 22 of CRC.

<sup>21</sup> Art. 3 and 12 of CRC; Art. 24 EU Charter of Fundamental Rights.

<sup>22</sup> See Bobbio N., *I diritti sottili del bambino*, Rome, 2007.

<sup>23</sup> See Geraci A., *The unaccompanied foreign minor in international law, of the European Union and Italian: current criticalities and future prospects*, cit., Resolution adopted by the General Assembly of the United Nations, Migrant Children and Adolescents, 69/187, 2014.

their jurisdiction (art. 2, par. 1, CRC). On this point, in its General Comment No. 6 of 2005 on the treatment of minors separated from their families and unaccompanied outside their country of origin, the Committee of the Rights of the Child (CRC Committee), stated that these rights should be: “*available to all children – including asylum-seeking, refugees and migrant children – irrespective of their nationality, immigration status or statelessness*”.<sup>24</sup> There are practices of migrants’ rejection by various Contracting States, especially at sea by the authorities of a coastal State and such practices are illegitimate. The harm is even greater in case of the rejection of migrant children, since this category is more vulnerable. By the principle of *non-refoulement*, enshrined in art. 33 of the Refugee Convention, the right of entry of the foreign minor should be guaranteed. Also, the CRC indicates the obligations of a State, first of all, to allow the entry of a minor, without implying any rejection, and then to start the necessary procedures for the identification and evaluation of the age of the minor.<sup>25</sup>

#### **4. European legislation concerning unaccompanied minors**

Since the adoption of the Resolution of the EU Council on 26 June 1997 the protection of foreign minors has been a topic of particular interest for the European Union, with a focus on this issue in the context of European asylum policies and legislation.<sup>26</sup> The Treaty of Lisbon has introduced the protection of children’s rights as EU level objective as envisaged in art. 3 par. 3 of the Treaty on the European Union (TEU).<sup>27</sup> Article 3 contains two important points for the supranational body: first, paragraph 3 which provides the protection of the rights of the child, and second, paragraph 5, in close connection with the first, referring to the strict observance of international law.

Another legislative reference is the general protection of children’s rights in art. 24 of the Charter of Fundamental Rights of the European Union, which grants the child the right to be protected and to receive the necessary care for

<sup>24</sup> General comments No. 6, of the Committee on the Rights of the Child, 3 June 2005, par. 12.

<sup>25</sup> See Geraci A., “The unaccompanied foreign minor in international law, of the European Union and Italian: current criticalities and future prospects”, in *The international community*, 4/2017, pp. 585-608.

<sup>26</sup> See Palladino R., *The protection of unaccompanied foreign minor in the building of a common European system of asylum*, Milan, 2014.

<sup>27</sup> Considerate: “*the most symbolic constitutional change*” with the Lisbon Treaty in the field of protection of minors. See Stalford H., Schuman M., “Are We There Yet? The Impact of the Lisbon Treaty on the EU Children’s Rights Agenda”, in *Int. J. Children’s Rights*, 2011, pp. 381-403.



their well-being.<sup>28</sup> Another reference to migrant minors is found in the Treaty on the Functioning of the European Union (TFEU). Article 79 refers to the protection of foreign minors in the context of the fight against trafficking in human beings and, specifically, the reference falls on two types of subjects: women and children, by virtue of their condition of greater vulnerability (both in the phases of crossing the borders and in reaching the reception centres for migrants).<sup>29</sup>

With regard to the Stockholm Program approved by the European Council in December 2009, and the 2010-2014 Action Plan on unaccompanied minors, it should be mentioned that this was the subject of the Commission communication to the European Parliament and the Council on 6 May 2010, COM (2010) 213. The Program aims at providing a common approach to address the challenges related to the arrival of unaccompanied minors in the European Union. This approach is based on respect for children's rights as defined by the EU Charter of Fundamental Rights and the CRC, as well as on solidarity between the countries involved and also on the cooperation with civil society and international organizations.<sup>30</sup> In addition, with the Recommendation 1969 of 15 April 2011 on "*Unaccompanied children in Europe: issues of arrival, stay and return*", the Council of Europe highlighted the need for greater cooperation between States and countries of origin with regard to migrant minors. The approach should rely on the basic principle according to which unaccompanied minors must be treated "*first and above all as minors, not as migrants*", to be protected as such and independently of their status.

Through the best possible cooperation between Member States and third States, the European Union goals aim at adopting long-term solutions, to make the protection of migrant minors effective and efficient.

The European Agency for Fundamental Rights (FRA) published two reports in 2016 and 2017: the former, dedicated to the migration issue, the latter, to the assessment of respect for fundamental rights in Europe. The

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<sup>28</sup> See Geraci A., "Il minore straniero non accompagnato nel diritto internazionale, dell'Unione Europea e italiano: criticità attuali e prospettive future", in *La comunità internazionale*, 4/2017, pp. 585-608.

<sup>29</sup> *Ibidem*; it should be noted that both subjects are more exposed to the risk of sexual exploitation, abuse and trafficking in human beings. From *Lanzarote Committee Report: "The increased proportion of children applying for asylum who are unaccompanied is a rising concern since unaccompanied children are particularly vulnerable and exposed to a higher risk of sexual exploitation and sexual abuse compared to unaccompanied migrant children"*, 3 March 2017.

<sup>30</sup> See Martone A., "Il trattamento dei minori stranieri non accompagnati tra disposizioni europee e normativa nazionale", in CAGGIANO, pp. 297 e ss.

reports reveal a series of critical issues, mostly related to the registration phase and then to the reception phase of migrant children.

Conspicuous *cogent laws* and *soft laws* were adopted during the last decade by international organizations, and recent specific legislative provisions were adopted regarding age assessment. It is worthwhile mentioning the recommendations and other acts of the Council of Europe, United Nations agencies and *position papers* of international NGOs, including Médecins du monde and Save the Children. Most of the documents issued by international, governmental and non-governmental organizations specify that the age assessment procedure must be carried out following a holistic and multidisciplinary approach.<sup>31</sup> The age evaluation procedure should be taken into consideration, because it affects the fundamental rights of the migrant minor.

In Europe, European Union bodies addressed the matter, especially the Parliament and the Commission. It is necessary to mention art. 13 paragraph 2 of Directive 2011/36/EU concerning the prevention and repression of trafficking in human beings and the protection of victims. This Directive replaces the Council framework decision 2002/629/GAI with reference to unaccompanied foreign minors requesting international protection; art. 25 paragraph 5 of the Directive 2013/32/EU provides common procedures for the recognition and revocation of the status of international protection. The protection of an unaccompanied minor should be implemented as soon as they enter the territory.

Among the cases submitted to the European Court of Human Rights for violations of the ECHR, attributable to the Member States are those due to problems deriving from the failure (or partial) transposition of the relevant EU law into the state system. Such poor implementation means negligent, inert and sometimes even intentional approaches of the State authorities that are not taking adequate measures of classification and accompaniment of unaccompanied migrant children. Specifically, this was stated in the judgement *Rahimi v. Greece* regarding the failure of the reception centre authorities to identify an unaccompanied migrant child and the assessment of their age in a reasonable time period.<sup>32</sup> Moreover, in this case the unaccompanied migrant child was an asylum seeker detained in an adult detention centre. Another significant case, *Darboe and Camara case v. Italy*, was one in which the minors

<sup>31</sup> See Rozzi E., “In primo luogo minori? I diritti violati dei minori stranieri non accompagnati in Italia”, in *Il diritto d’asilo, Report, Fondazione Migrantes. Minori rifugiati, vulnerabili e senza voce*, 2017, pp. 247-284, in website: [www.fondazionemigrantes.it](http://www.fondazionemigrantes.it); see also Moyersoer J., “Minori non accompagnati: l’articolata ed ostica questione dell’accertamento dell’età”, in *Minori giustizia*, 2017, fasc. 3, pp. 79-95.

<sup>32</sup> ECtHR, sentence *Rahimi v. Greece*, 5 July of 2011.

were identified as adults on the basis of X Rays examinations attesting that their bone age corresponds to that of two 18-year-old boys. In fact, the assessment of their age had taken place in violation of national and European legislation, and therefore, the authorities manifested illegitimate methods of execution.<sup>33</sup> It should be noted that the existence of a *genus*, unaccompanied migrant children, can be divided in two subgroups or *species*: unaccompanied minors who are not applicants for international protection and unaccompanied minors applying for international protection.<sup>34</sup>

In general, according to the international protection procedure, it is necessary to specify who are the asylum seekers, even if they are minors. They are those subjects who seek shelter and protection in order to avoid dangerous situations or serious restrictions of their personal freedom suffered in the country of origin. Their situation is recognized and they are granted protection, precisely by virtue of the particular situation of social vulnerability in which they find themselves. Thus, they receive guarantees, access and the right to stay in the destination country.<sup>35</sup> Minors must be included among asylum seekers, foreigners and stateless persons. It should be recognized that their rights are limited in their own country and that they need the effective exercise of the fundamental freedoms proper to each democratic nation. It is for this reason that they are submitting an application for recognition of the status of asylum.<sup>36</sup> The main corollary of the right to asylum is the principle of *non-refoulement*, that is to say *non-refoulement* of foreigners or stateless persons, sanctioned in *primis* by art. 33 of the Refugee Convention, and in addition by art. 32, sanctioning the exception to the prohibition of *non-refoulement*, where there is the possibility of being expelled from the host country for reasons of national security or public order. Furthermore, the unaccompanied foreign minor may be considered a refugee, pursuant, to art. 1-A paragraph 2 of the 1951 Geneva Convention. Unaccompanied minors, and those who are not applicants for international protection, receive recognition of temporary protection, or subsidiary protection according to Directive 2001/55/EU, that authorizes the migrant's stay, even they are minors. The Qualification Directive 2011/95/EU defines the subsidiary protection. Over

<sup>33</sup> See Rozzi E., "L'accertamento dell'età e l'accoglienza dei minori non accompagnati all'esame della Corte EDU", in *Miniori giustizia*, 2017, fasc. 3, pp. 220-228.

<sup>34</sup> See Ippolito F., "(De) Constructing Children's Vulnerability in European Law", in Ippolito F., Iglesias Sanchez S. (eds.), *Protection of Vulnerable Group. The European Human Rights Framework*, Oxford, 2015, p. 23 ss.

<sup>35</sup> See Roverso C., "La protezione internazionale: diritto d'asilo e status di rifugiato", in *Immigrazione e Diritto d'asilo*, Padova, 2016.

<sup>36</sup> *Ibidem*.

a third of Member States implemented changes to their national legislation, policy or practice with regard to unaccompanied minors who do not apply for asylum, albeit to a varying degree as well. This is partly due to the fact that many Member States (e.g. the Czech Republic, Germany, Italy, Spain, Sweden, etc.) do not distinguish between provisions for unaccompanied minors, i.e. measures apply to all unaccompanied minors regardless of their status (as asylum-seekers or otherwise).<sup>37</sup> Unaccompanied foreign minors who do not require international protection are a group that includes also those who receive a regular residence permit, without having applied for political asylum and without being victims of trafficking, but simply by virtue of their *status* as minors.<sup>38</sup> They may obtain a certain degree of protection, based on different assumptions, as subjects eligible for subsidiary protection, because they are not European migrant minors who, despite not meeting the requisites for obtaining refugee status, could suffer serious harm or violations of their rights by repatriation to their country of origin.

The current regulation of the European Union concerning the *status* of unaccompanied foreign minors is based on a series of programmatic acts, which have defined the main guidelines of the EU in providing protection to this category of persons favouring the development of their personality.<sup>39</sup> In *primis*, the Council Resolution of 26 June 1997 on unaccompanied minors refers to the art K. 1 TEU, which considered these matters of common interest in the policy on asylum and immigration (limited to the conditions of entry and residence of third country nationals in the territory of the Member States).<sup>40</sup> Although this resolution has outlined for the first time the notions of *unaccompanied minor* and *separated minor*, it does not have a binding legal nature. It offers the political basis for the future legislation of the European Union towards the protection of the fundamental rights that the Union has consecrated with the Charter of Nice, which with the entry into force of the Lisbon Treaty has obtained a binding legal recognition. The Charter of Fundamental Rights establishes in art. 24 the best interests of the child, which must be preeminent in all acts relating to minors, recalling art. 3 of the 1989 New York Convention, so that the principle of “*best interests of the child*” receives primary consideration also at European level, in the context of the European

<sup>37</sup> See European Commission, Annual Report on A&M 2018, 8 May 2019.

<sup>38</sup> See Valtolina G., “Tra rischio e tutela. I minori stranieri non accompagnati”, in *Studi emigrazione*, 2016, vol. 53, fasc. 201, pp. 81-95.

<sup>39</sup> See Palladino R., “La protezione dello straniero minore non accompagnato nel costruendo sistema comune europeo di asilo”, in *Minori e immigrazione: quali diritti?*, Napoli, 2015.

<sup>40</sup> Council Resolution of 16 June 1997 on unaccompanied minors, third-country nationals (97 / C 221/03), in GUCE C 221 of 19 July 1997.

Union's political strategy in building a common European asylum system. The existence of a common asylum system enables the harmonization of the legal frameworks of European states and guarantees minimum standards of protection, standardizing definitions and procedures concerning international protection.<sup>41</sup> The common European asylum system, for a homogeneous reconstruction, takes into consideration the following provisions: the Dublin III Regulation System 604/2013, the Directive No. 2011/95 (Qualification Directive) which replaced the previous Directive 2004/83/EC; Directive 2013/32 (Procedures Directive) which replaced Directive 2005/85/EC; and Directive 2013/33 (Reception Directive) replacing the previous 2003/09/EC.

The European system allows a foreigner or stateless person to obtain, in the event of a positive outcome of the screening of the application for protection, the recognition of the refugee status or, alternatively, that of a migrant worthy of subsidiary protection. The United Nations High Commissioner for Refugees has stated that the applicant for international protection has a real subjective right from the moment they enter the territory of the receiving State.<sup>42</sup> The notion of refugee as outlined in article 1/A.2 of the 1951 Geneva Convention, was literally recalled by the Community legislator, since Directive 2004/83/EC, the Qualifications Directive, was replaced by Directive 2011/95/EU, but it restricts the subjective scope of application for international protection to third-country citizens and to stateless persons, excluding citizens of the Member States. This exclusion of EU citizens from access to international protection seems to be in contrast with Article 42 of the Geneva Convention, which prohibits reservations and restrictions on the subjective applicability of the Convention itself and is in clear contradiction with the prohibition of non-discrimination.<sup>43</sup> Therefore, the unaccompanied migrant minor can also be defined as a refugee if they meet the subjective conditions required, such as: being outside the country of origin; cannot or does not want to take advantage of the protection of the country of origin; complains of a well-founded fear of being persecuted for reasons related to race, religion and others.<sup>44</sup> The persecutory reasons referred in art. 1/A.2 of the 1951 Convention are important in the context of granting the refugee status, only the applicant must

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<sup>41</sup> See Roverso C., "La protezione internazionale: diritto d'asilo e statusdi rifugiato", in *Immigrazione e Diritto d'asilo*, Padova, 2016.

<sup>42</sup> UNHCR: "Recognition of his refugee status does not therefore make him a refugee but declares him to be one. A person does not become a refugee because he is declared a refugee, but he is recognized as such because he is a refugee". See UNHCR, *Manual on procedures and criteria for determining refugee status*, September 1979, Geneva.

<sup>43</sup> See Morandi N. e Bonetti P., *Lo status di rifugiato*, 2013.

<sup>44</sup> See Roverso C., "La protezione internazionale: diritto d'asilo e statusdi rifugiato", in *Immigrazione e Diritto d'asilo*, Padova, 2016.

demonstrate the logical connection, between one of the persecutory reasons and the possibility that these would be repeated in the future. In the European context, the treatment of unaccompanied migrant children falls within the framework of the Common European Asylum System (CEAS).

The Dublin III Regulation no. 604/2013 is influenced by the 1989 Convention on the Rights of the Child, and from its recitals it recalls the EU Charter of Fundamental Rights and the 1989 UN Convention. The Dublin Regulation no. 604/2013 recalls the “fundamental criterion” of the best interests of the child for the Member States and this criterion is consecrated in the moment the Regulation is applied. Article 6 reaffirms the central role of the “*best interests*”. In the field of asylum seekers, article 8 of the Dublin III Regulation outlines specific criteria for determining the competent State. If the applicant is an unaccompanied minor, the responsible Member State is the one in which a family member or sibling of the minor is legally located. In other cases, where the applicant unaccompanied minor has a relative living legally in another Member State, who can take care and offer protection for them, the Member State provides for the reunification of the child with the relative and this is the competent Member State<sup>45</sup>. Finally, if family members, siblings or relatives are staying in more than one Member State, the competence is determined on the basis of the *best interests* of the unaccompanied minor, provided this is “in the interest of the minor” which must be ascertained case by case. It remains an important issue if an unaccompanied minor, who has no relative legally living in the territory of a Member State, has submitted asylum applications in more than one Member State. On this point the Court of Justice intervened, for instance in the case *MA, BT, DA, c. Secretary of State for the Home Department*<sup>46</sup>, which acknowledges the extreme vulnerability of the unaccompanied foreign minor. The ruling states that if the latter has applied for international protection in more than one Member State, the State competent to examine it, may be the one in which the minor finds himself/herself. Although the minor does not have family members or relatives legally living in this State, in order to avoid unnecessary travel to the State of transit or to that of first entry, according to the purpose of the Dublin system, rapid access is guaranteed to prevent unnecessary procedural delays in refugee

<sup>45</sup> See Palladino R., *op. cit.*

<sup>46</sup> The ruling by the Court of Justice of the European Union, in the case of *MA, BT, DA, c. Secretary of State for the Home Department*, made a significant change to the Dublin II Regulation, and the main interpretative node derives from the art. 8 of Regulation No. 604/2013, in which the article 6 was transfused of the previous regulation n. 343/2003 (c.d. Dublin II Regulation). There would be no doubt of interpretation, if the asylum application presented by an unaccompanied minor to the Member State in which his or her family member is legally present, provided which is his/her “best interest”.

status attribution.<sup>47</sup> The criterion that must prevail is based on the current presence of the unaccompanied minor, on a given national territory for the purposes of assessing the asylum application, and the possibility of submitting it if it is not yet submitted in the Member State. “*The best interest of the child*” principle is the solely guiding criterion, for the purposes of determining the competent State that evaluates the application for international protection of the foreign minor. If the child is on the territory of a State and submits a request, the competent State would be that in which the child submitted the last application, “unless this is in contrast with the best interests of the child”.<sup>48</sup> The UN High Commissioner for Refugees welcomed the proposed amendment of the Dublin III Regulation.

European institutions should direct their forces towards strengthening of the CEAS, in order to improve, and harmonize the discipline regarding the status of the unaccompanied minor.<sup>49</sup> The evolution of the CEAS remains as the fulcrum of the European institutional debate, which inevitably spills the effects on the concept of unity of the European Union. Therefore, it is necessary to introduce mechanisms that allow rapid access to protection, preventing unaccompanied minors from being victims of illegal immigration networks.<sup>50</sup> This particular category of migrant minors needs *de jure condendo* perspectives, which are shared in order to redefine the CEAS by strengthening the protection of the fundamental rights of unaccompanied foreign minors, requiring international protection, based on European principles of solidarity and shared responsibility. A structural reform of the CEAS is needed, aimed at the convergence of national asylum systems according to the model of harmonization of regulations with the main objective of achieving a single protection system for unaccompanied migrant children.<sup>51</sup> The objective of the complex reform is the provision of rapid procedures for the recognition of international protection and the reduction of asylum shopping and irregular secondary movements practices for which migrants can be penalized in the reception system. The European legislator is currently examining several proposals, with a view to recasting the Dublin IV regulation.

<sup>47</sup> See Sciacovelli A., “Minori stranieri non accompagnati criticità e nuovi sviluppi giurisprudenziali”, in, *Studi dell’immigrazione europea*, 2018, fasc. 2, pp. 499-518.

<sup>48</sup> See Palladino R., *op. cit.*

<sup>49</sup> *Ibidem.*

<sup>50</sup> See the decisions (UE) n. 2015/ 1523 del Council 14 September 2015, in *GUUE* L 239 del 15 September 2015, p. 146 ss., e 2015/1601, del 22 September 2015 *ivi* L 248 del 24 September 2015 p. 80 ss.

<sup>51</sup> See Sciacovelli A., *op. cit.*, fasc. 2, pp. 499-518.

UNHCR made significant progress in increasing refugee access to national child protection systems across the priority countries. Globally, 21 refugee operations are reporting improvements in access to national child protection and social services.<sup>52</sup> The role played by some political documents relating to minors is very important. The Minimum standards for child protection in humanitarian action established by Global Protection Cluster (GPC), in 2012<sup>53</sup>, recommended that in all actions concerning children the best interests of the child should be a primary consideration. This principle should guide the design, monitoring, and adjustment of all humanitarian programmes and interventions<sup>54</sup>; and with regard to unaccompanied migrant children, these minimum standards should be applied in all parts, especially the protection, care and the guarantee of health and education rights. During 2018, Member States and Norway adopted new policies and measures on international protection including asylum. The implementation the CEAS and related policies is of outmost importance and so are the Relocation and Resettlement programmes implemented by Member States.<sup>55</sup>

The legislative procedures on the proposals for a reform of the CEAS are currently ongoing.<sup>56</sup> In December 2017, the European Council had set a target to reach a position on an overall reform of the CEAS by June 2018. However, Member States were *inter alia* linking the conditional confirmation as a step towards adoption of some of the discussions files on the Dublin Regulation and the Asylum Procedure Regulation that have not yet been concluded within the Council. Several Member States, however, reported changes because of the transposition of the Asylum Procedures or the Reception Conditions Directive.<sup>57</sup> In some cases regarding the reception of asylum applicants, several Member States initiated or implemented changes in legislation. For example Austria, introduced legal changes in its Federal Basic Care and Federal Office for Immigration Procedures Acts that allowed authorities to seize a limited amount in cash in possession of new asylum applicants to contribute to the costs of material reception. Italy introduced substantial changes to its

<sup>52</sup> See UNHCR, *Global Strategy Implementation Report*, 2015.

<sup>53</sup> See UNHCR website <https://www.refworld.org/children.html>

<sup>54</sup> Global Protection Cluster (GPC), *Minimum standards for child protection in humanitarian action*, 2012.

<sup>55</sup> General Inspectorate for Immigration, during a meeting with Romanian Institute for Human Rights representative, 26 July 2019, Bucharest.

<sup>56</sup> Romanian National Council for Refugees – CNRR, during a meeting with Romanian Institute for Human Rights representative, July 2019, Bucharest.

<sup>57</sup> European Commission publishes Annual Report on A&M 2018, *improvements made in protection of unaccompanied minors*, border control still a concern, 8 May 2019.



asylum and reception system in December 2018.<sup>58</sup> However during 2018, the institutional changes in the national asylum system were mostly related to the creation of new entities or the restructuring of existing ones, the transfer of competences, the introduction of new competencies, as well as adjustments made to the number of staff. In general, they were introduced in response to legislative changes or the shift of policy priorities.<sup>59</sup>

The relocation and resettlement programmes play a central role in the field of Intra-EU relocation mechanism. A relocated person is one who was transferred having their status defined by the Geneva Refugee Convention and Protocol or benefiting of subsidiary protection according to the Directive 2011/95/EU (Recast Qualification Directive). The transfer may take place from the EU Member State which granted international protection to another EU Member State which grants similar protection, or which is responsible for examining the application. In contrast, resettlement, in the EU context, means the transfer (based on the need for international protection) of a third-country national or stateless person from a third-country to an EU Member State where permission is granted to reside acquiring one of the following statuses: refugee status within the meaning of Art. 2 (d) of Directive 2011/95/EU (Recast Qualification Directive); or a status which offers the same rights and benefits under national and EU law as that of refugee status.<sup>60</sup>

## 5. Conclusions

In light of recent global events and in the context of constant violation of the principles of human rights, some have put forward the proposal to create a new common protocol in Europe regarding unaccompanied migrant children and their detention, in search for a “durable solution” as the guiding principle of any procedure around a detained foreign child.<sup>61</sup>

The unaccompanied children migration phenomenon is characterized by phases, starting from the entrance to the relocation of the foreign minor. It is in these phases that the legal and non-legal operator must take into due consideration the “*best interes*” of the unaccompanied foreign minor when it takes actions and makes decisions that may concern them.

<sup>58</sup> *Ibidem* and see the Italian Law no. 132/2018.

<sup>59</sup> See European Commission, Annual Report on A&M 2018, 8 May 2019.

<sup>60</sup> See EMN Glossary V6 online and European Commission publishes Annual Report on A&M 2018, *improvements made in protection of unaccompanied minors*, border control still a concern, 8 May 2019.

<sup>61</sup> See Lopez Ulla J. M., “La necesidad de un Procolo común en Europa sobre la detención de menores extranjeros no acompañados”, in *REV. DER. COM. EUR.*, n. 46, 2013. pp. 1061 ss.

In the field of cooperation between EU Member States, taking into account the primary objective, a recasting of the Dublin III Regulation 604/2013, in light of balancing the need to find adequate solutions to deal with migratory pressures and the need to ensure a high level of protection of the fundamental rights of migrants, is necessary. The only beacon that can guide the European and national legislators is the protection of fundamental human rights and in particular the rights of unaccompanied foreign minors. Every decision should be taken with a view to have the “best interests of the child” at heart.

In December 2018, the Global Compact for Safe, Ordinary and Regular Migration was adopted. The document outlines a series of common principles, strongly encouraged by the United Nations. The document is not legally binding and indicates only the willingness of the States to follow some common principles inspired by international norms. The Global Compact is a “non-binding platform” that starts from the assumption that “migration” is part of the human experience and has always been like this throughout history and that its impact can be improved if the “immigration policies will become more effective”.<sup>62</sup> Some of the guidelines that the document identifies are: “The centrality of people, international cooperation, respect for the sovereignty of each state, respect for international standards, promotion of sustainable development, respect for human rights, gender differences, children’s rights and a multilateral and participatory approach.” Worthy attention should be given to the guidelines of the Global Compact, in particular with regard to the rights of the minors involved in the migration phenomenon. It is in this direction that national policies will have to move in the future: in the spirit of a common understanding of the phenomenon, sharing of responsibilities, the unity of objectives to stop the violation of human rights that take place for too long in different States, and any violation should be legally sanctioned.

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<sup>62</sup> See Camilli A., *Cosa prevede il decreto sicurezza e immigrazione*, in *Internazionale*, reperibile online, [www.internazionale.it](http://www.internazionale.it)

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