

Unaccompanied Minors: current challenges in view of their mistreatment and the European and International response

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Introduction

In 2010, 4% of the asylum seekers worldwide were unaccompanied minors while in 2019 27% of the migrant children who arrived in European countries were also unaccompanied.¹ Migrant children embark on dangerous journeys because they fled armed conflicts or persecutions in their countries of origin. However, due to irregular migration, unaccompanied minors are often found in challenging situations where there are limited ways to claim international protection themselves. Because of their child status, unaccompanied minors are also vulnerable to human trafficking, sexual exploitation, and child labour while they are often denied basic services.² The Human Rights Watch found that thousands of unaccompanied

minors are “trapped in their status as migrants, with officials giving little consideration to their vulnerabilities and needs as children”.³ It is, therefore, rationally inferred that unaccompanied minors are in a position for which they are not legally or morally accountable and are entitled to the fulfillment of their fundamental rights.

Despite the aforementioned global experience in the recent historic memory, unaccompanied children still remain a gruesome reality and an ongoing humanitarian crisis,⁴ with a shared experience of loss, separation and the essence of not belonging,⁵ especially after the 2015 flows, a year deemed the worst

¹ Alix Pierard, Caroline Roublin, Right to asylum for unaccompanied minors in the European Union, France terre d'asile, 1 January 2012, Available at: <https://resourcecentre.savethechildren.net/library/ri-ght-asylum-unaccompanied-minors-european-union-comparative-study-27-eu-countries>.

² European Migration Network, Unaccompanied Minors – an EU comparative study, Available at: https://www.ab.gov.tr/files/ardb/evt/1_avrupa_birli-gi/1_9_politikalar/1_9_8_dis_politika/Policies_on_reception_return_and_integration_for_and_number_s_of_unaccompanied_minors.pdf.

³ Human Rights Watch, Available at:

<https://www.hrw.org/topic/childrens-rights/refugees-and-migrants>.

⁴ L FEIJEN, “The Challenges of Ensuring Protection to Unaccompanied and Separated Children in Composite Flows in Europe” (2008)27(4) Refugee Survey Quarterly <:https://www.jstor.org/stable/4505437>, 63.

⁵ D DELANEY, “The Asylum Process and Psychological Need of Unaccompanied Asylum-Seeking Children in Ireland” (2006)95(377) An Irish Law Quarterly Review <:https://www.jstor.org/stable/30095790>, 19.

year for children since 1945.⁶ Before this article embarks on their international protection, few introductory remarks are necessary.

Conceptual Clarifications

While there is a legal debate over the term, an unaccompanied minor constitutes a child under the age of 18, who is separated from both parents and is not being cared for by an adult who by law or custom has a responsibility to do so (primary caregivers).⁷ Given this physical and mental state, they are extremely vulnerable and subject to mistreatment,⁸ while their heterogeneity as a group in terms of age, sex, ethnicity, religion,⁹ and degree of separation,¹⁰ hinder their effective protection.

Guiding Principles

However, the extent of the issue still remains undocumented,¹¹ urging for an international response. A guiding principle for any such attempt should be, though, the “best interests of the child” principle, entrenched in the CRC (article 3),¹² which must be taken into account by relevant authorities, and with a lasting duration,¹³ according to ECtHR. Following this consideration, unaccompanied children

should be seen firstly as children, and secondarily as refugees,¹⁴ in order to establish a threshold of international protection. Although, it can be comprehended that unaccompanied children, as a group, require special protection and distinguished assistance, one should take into consideration that there have been attempts to obscure the age of children and misclassify them, rendering them legally entangled while profiting from a favorable regime, without fulfilling the necessary preconditions.¹⁵

International Protection of Unaccompanied Minors

Unaccompanied minors are entitled to international protection, apart from national legislation, which is sometimes proven inadequate. The evident transnational element makes international law applicable.¹⁶ In the context of the constitutionalism and fragmentation of international law, protection is awarded both by general international law provisions, as well as complementary international fields, such as International Refugee Law and Children's Rights Law, which are interrelated, sometimes as *lex specialis* to *lex generalis*.¹⁷ From these derive legal obligations of States to take all appropriate measures to grant protection to

⁶ V FILIPPOV et al, “Didactic Dimensions to Ensure Refugee Minors Protection Against Sexual Abuse Within European Refugee Crisis”, (2017)13(8) <10.12973/eurasia.2017.00994a>, 5205, 5206.

⁷ U WERNESJO, “Unaccompanied Asylum-Seeking Children: Whose Perspective?” (SAGE 2009), 2.

⁸ Ibid, WERNESJO, 3-6.

⁹ Ibid, WERNESJO, 2.

¹⁰ I BANTEKAS, “Unaccompanied Children and Their Protection Under International Refugee Law” in S JUSS (eds) *The Ashgate Research Companion to Migration Theory and Policy* (Routledge 2013), 345,348.

¹¹ Ibid, WERNESJO, 1.

¹² Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) UNGA Res 44/25, Article 3.

¹³ Ibid, BANTEKAS, 351.

¹⁴ A MACDONALD, “Protection Responses to Unaccompanied and Separated Refugee Children in Mixed Migration Situations (2008)27(4) *Refugee Survey Quarterly* <<https://www.jstor.org/stable/45054373>>, 48, 49.

¹⁵ F M CHAK, “Europe’s Dystopia: The Exploitation of Unaccompanied and Separated Children Child Refugees” (2018)15(3) *Policy Perspectives* <<https://www.jstor.org/stable/10.13169/polipers.15.3.0007>>, 7, 8-9.

¹⁶ Ibid, BANTEKAS, 346.

¹⁷ Ibid, BANTEKAS, 346-347.

unaccompanied children,¹⁸ for instance by developing multilateral and bilateral frameworks,¹⁹ and child and age sensitive migration management systems,²⁰ with the mutual cooperation of State and non-state actors, such as NGOs. Nevertheless, receiving States still find ways to abstain from their international obligations, either with legal tricks, such as the non-extraterritorial application of legislation, while children are being detained purposefully in specific areas outside the territory, in which they cannot exercise effective control,²¹ or because of the panacea of “political reasons”.²² As a result children fall between the gaps of national protection,²³ while classified as “informal refugees”.²⁴

Granting rights should take place without any discrimination, meaning that States should treat their citizens and aliens the same way, as it is declared in the International Covenant on Civil and Political Rights.²⁵ Furthermore, unaccompanied children fall within the scope of the 1951 Convention relating to the Status of Refugees (1967 Protocol), granting them the right to “non-refoulement”,²⁶ which is further expanded for unaccompanied children, since they cannot possibly be returned, even in the case of dismissal of their asylum application.²⁷ However, the 1989 UN Convention on the Rights of the Child plays the most crucial role in the effective

protection of unaccompanied minors. By entrenching their protection from inhumane, degrading treatment and punishment in Article 37,²⁸ and especially by acquiring particular provisions for asylum-seeking children in Article 22,²⁹ it paved the way to enact legislation addressing the particular treatment of unaccompanied and separated children and build up a functioning asylum system. A similar legal status is granted by the African Charter on the Rights and Welfare of the Child, which has a broader “*ratione materiae*” than the CRC. It stipulates that unaccompanied children should *ab initio* be awarded with refugee status, if they are displaced ‘through natural disaster, internal armed conflicts, civil strife, breakdown of economic and social order or howsoever caused.’³⁰ While this current study established that minors should be primarily approached as that, and secondarily as refugees, acquiring the legal status of asylum is necessary,³¹ since unaccompanied children are individuals with fundamental rights. Moreover, their asylum application should be examined by properly trained asylum judges, respecting their right to a fair trial.³²

The protection offered by ECHR and ECtHR is also worth mentioning. With “*Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*”,³³ a precedent for unaccompanied children was established. The Court found that the distress that a 5-

¹⁸ Ibid, FEIJEN, 67.

¹⁹ Ibid, FEIJEN, 63.

²⁰ Ibid, FEIJEN, 67.

²¹ Ibid, BANTEKAS, 348-349.

²² Ibid, CHAK, 12.

²³ Ibid, FEIJEN, 64.

²⁴ Ibid, FEIJEN, 65.

²⁵ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 2(1).

²⁶ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April

1954) 189 UNTS 137 (Refugee Convention) Article 33.

²⁷ Ibid, BANTEKAS, 354.

²⁸ Ibid, CRC, Article 37.

²⁹ Ibid, CRC, Article 22.

³⁰ African Charter on the Rights of the Child (Adopted and entered into force 29 November 1999), Article 23.

³¹ Ibid, BANTEKAS, 354.

³² Ibid, BANTEKAS, 354-356.

³³ ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application No. 13178/03, Judgment, 12 Oct. 2006.

year old child, separated from its mother and uncle, felt due to its detention under the same conditions as adults, as well as her deportation without ensuring an appropriate caregiver, amounted to inhumane treatment and consequently a violation of Article 3 ECHR,³⁴ with respect to its extremely vulnerable position, as well as a violation of its right to private and family life (Article 8),³⁵ and of its liberty and security (Article 5).³⁶ Particular attention should be paid to ECHR and article 8, since it promotes family unity, according to the best interests of the child as well, when it comes to family reunification of unaccompanied children with their primary caregivers. However, despite this legal obligation of States, caregivers suffer from legislative climates that do not favor their vulnerable position.³⁷

European Union Framework

The CRC is not the only legal document that ensures the protection of children's rights. Articles 3 of the Treaty on European Union³⁸ as well as Article 24 of the Charter of Fundamental Rights of the EU³⁹ inflict legal obligations regarding children's rights on Member States. TEU, as one of the founding treaties of the union, constitutes the child's best interests as one of the guiding principles in regards to national action on the matter.

According to Article 2 (f) of the Council Directive 2001/55/EC the definition of an unaccompanied minor is: "*a third-country*

national or stateless person below the age of eighteen, who arrives on the territory of the Member States unaccompanied by an adult responsible for them whether by law or custom, and for as long as they are not effectively taken into the care of such a person, or a minor who is left unaccompanied after they have entered the territory of the Member".⁴⁰ The definition excludes unaccompanied children who are EU nationals with the aim of identifying the characteristics and needs of third-country nationals and unaccompanied minors.

The EU has designed an asylum system that provides certain regulations necessary for the protection of children in migration. Primarily, the Dublin Regulation is the regulation that outlines the mechanisms and criteria in regards to the provision of asylum and international protection.⁴¹ Recitals 13 and 14 constitute the "respect for family life" and the "unaccompanied child's best interests" core principles when implementing the regulation. As a result, Article 8 dictates that when an unaccompanied minor becomes an asylum applicant, their application should be examined in a Member State where a family member or a relative that can take care of the child is legally present. The regulation also inflicts a legal obligation on the Member State where the application was submitted, to trace the family members of the unaccompanied child while also taking into consideration their best interests. The

³⁴ Ibid, Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, paragraphs 48-63.

³⁵ Ibid, Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, paragraphs 75-87.

³⁶ Ibid, Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, paragraphs 95-105.

³⁷ MMP, "On My Own: Protection Challenges for Unaccompanied and Separated Children in Jordan, Lebanon and Greece" (MMP 2017) <<https://mixedmigration.org/resource/on-my-own/>>, 9.

³⁸ The Treaty on the European Union, Available at: [https://eur-lex.europa.eu/legal-](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012M%2FTXT)

[content/EN/TXT/?uri=CELEX%3A12012M%2FTXT](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012M%2FTXT).

³⁹ Charter of Fundamental Rights of the European Union, Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012P%2FTXT>.

⁴⁰ Council Directive 2001/55/EC, Available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32001L0055>.

⁴¹ Regulation (EU) No 604/2013, Available at: <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32013R0604>.

Qualification Directive⁴² as well as the Return Directive⁴³ also underline the principle of “family reunification” as they facilitate the tracing of unaccompanied minors’ relatives and ensure their return to suitable guardians.

In light of the recent refugee crisis, the European Commission developed the Action Plan on Unaccompanied Minors, which was released in 2010 and shed light on the needs of unaccompanied children.⁴⁴ It also set the goal for the minors to be taken care of within 6 months upon arrival in European territory. Complementary to the Action Plan, the Asylum Procedures Directive obliges Member States to appoint an individual or an organisation as the representative of the accompanied minor, in order to serve its best interests.⁴⁵ The representative will assist the child in the asylum proceedings and will legally represent the minor if necessary. Lastly, dignified reception conditions are also ensured through the Reception Conditions Directive which stipulates that unaccompanied minors should receive accommodation tailored to their gender, age and other specific reception needs.⁴⁶

However, despite the legal framework in place, the increased migratory pressure has often led Member States to not fulfill their legal obligations. Even though it can be comprehended that due to their vulnerable nature, unaccompanied children deserve tailored legal protection, the lack of

targeted action regarding the issue combined with the absence of a unified stance across the EU has led to numerous human rights challenges affecting unaccompanied minors.⁴⁷ For instance, children often encounter obstacles when accessing asylum procedures due to lack of child-specific information about the issue. A lot of Member States have also implemented unlawful returns without completely assessing the situation of the minor. The aforementioned combined with the fact that certain aspects of the procedure could deter children from applying for asylum consequently leads to a number of children being left internationally unprotected. Experts claim that all of the above could be attributed to the absence of a unified legal framework that will specifically identify what the child’s best interests are and set the ground for a decision-making body specialised in child protection.⁴⁸ As a result, a child-centred approach regarding the issues as well as international and inter-agency coordination should be made a priority.

Conclusion

As a concluding remark, this article will shed light into the sexual exploitation of refugee children, a phenomenon to which unaccompanied children are understandably more vulnerable, to the point that it has been characterised by some scholars as an “epidemic of sexual

⁴² Directive 2011/95/EU, Available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:337:0009:0026:EN:PDF>.

⁴³ Directive 2008/115/EC, Available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0098:0107:EN:PDF>.

⁴⁴ Action Plan on Unaccompanied Minors 2010 - 2014 (6/5/2010 - COM (2010) 213 final), Available at: https://ec.europa.eu/anti-trafficking/action-plan-unaccompanied-minors-2010-2014_en.

⁴⁵ Directive 2013/32/EU, Available at: <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32013L0032>.

⁴⁶ Directive 2013/33/EU, Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0033>.

⁴⁷ European Parliament Briefing, Vulnerability of unaccompanied and separated child migrants, 2021, Available at: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690575/EPRS_BRI\(2021\)690575_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690575/EPRS_BRI(2021)690575_EN.pdf).

⁴⁸ François Crépeau, Children on the Move, International Organization for Migration, 2013, Available at: https://publications.iom.int/system/files/pdf/childre_n_on_the_move_15may.pdf.

violence”.⁴⁹ Unaccompanied minors are in legal limbo, cases of abuse are repeatedly unreported while they get victimized both by adults and other children, out of fear of reprisal.⁵⁰ Since the New York Declaration for Refugees and Migrants entrenches specific obligations to States to combat sexual violence,⁵¹ governments should battle with the detrimental absence of representation for children, by offering them legal representatives and create and effectively set in function a comprehensive and adequately resourced child protection system.⁵²

⁴⁹ V DIGIDIKI, J BHABHA, "Emergency with an Emergency: The Growing Epidemic of Sexual Exploitation and Abuse of Migrant Children in Greece" (FXB Center for Health and Human Rights-Harvard University 2015).

⁵⁰ Ibid, DIGIDIKI, BHABHA, 19-21.

⁵¹ UNGA, New York Declaration for Refugees and Migrants (Adopted 19 September 2016), A/RES/71/1.

⁵² Ibid, DIGIDIKI, BHABHA, 28,33.