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The Need for Sensitive Treatment of Unaccompanied Asylum-seeking Minors under International Public Law and the Common European Asylum System

A Human Rights Based Approach

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Abstract

Unaccompanied asylum-seeking minors are exceptionally more vulnerable than adult refugees and children in a normal situation. Most unaccompanied children have personally lived the realities of war, family disintegration, sexual violence, underage recruitment, mal-nutrition, disease and denial of education or health services in their countries of origin. After fleeing persecution and serious violations of human rights, they are often exposed to risks of human trafficking, and are exploited by smugglers to engage in criminal activities. When they reach the country of asylum, unaccompanied minors continue to suffer from lack of protection as they are often considered to be undocumented or illegal immigrants, and are treated in the same way as adults. Regardless the grounds for their immigration status, unaccompanied children should be treated as children living in exceptionally difficult conditions.

Although the Convention on the Rights of the Child is the most widely ratified international treaty, there is little discourse around unaccompanied children in the context of asylum and forced migration at both international and regional levels. The international community has failed to explicitly address the rights of refugee children with a specific legal instrument. The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol do not make any distinction between adults and children. In addition, the set of legal standards that apply to adults also apply in the same manner to children.

Due to their vulnerability, children, in particular unaccompanied minors, need effective protection and assistance in a systematic and comprehensive manner during the asylum cycle in its totality. Hence, laying down a right based and separate legal foundation for the protection of unaccompanied asylum-seeking minors and the rights attached to it should be the primary step. This will help to ensure a practical and responsive system to address the particular vulnerability and special needs of children in migration.

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TABLE OF CONTENTS

List of Acronyms

ACHR	American Convention on Human Rights
APD	Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEAS	Common European Asylum System
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CJEU	Court of Justice of the European Union
CRC	Convention on the Rights of the Child
Dublin III Regulation	Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
Geneva Convention	Convention relating to the Status of Refugees (1951), as amended by its Protocol (1967)
HRC	Human Rights Committee
IACPPT	Inter American Convention to Prevent and Punish Torture
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICPPED	International Convention for the Protection of All Persons from Enforced Disappearance
MS	Member States

OAU	Organization of African Unity
OAU Refugee Convention:	Convention Governing the Specific Aspects of Refugee Problems in Africa
QD	Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)
RCD	Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)
TFEU	Treaty on the Functioning of the European Union
UASM	Unaccompanied Asylum-seeking Minor
UDHR	Universal Declaration of Human Rights UN United Nations
UK	United Kingdom
UNCRC	UN Committee on the Rights of the Child
UNHCR	Office of the United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
VCLT	Vienna Convention on the Law of Treaties

1. INTRODUCTION

1.1 Background

Since the last decade, the evolutionary asylum system in Europe has undergone radical changes, ranging from visa restrictions, strict border controls, reduced welfare and accommodation supports, instalment of detention centres and rejection of asylum applications. Political pressures for restricting migration flows have increasingly dominated the sense of a right-based protection approaches even when dealing with vulnerable asylum-seekers such as children. ¨Combating illegal migration and secondary movement¨, as mentioned in many official documents of the European Union (EU) communications, has become central to the asylum procedures and policy priorities of the region.[1] However, all these restrictions have led asylum seekers to use more irregular and dangerous routes falling into the hands of smugglers and traffickers.

According to the United Nations Children's Fund (UNICEF), children constitute half of the refugee population.[2] In the year 2015, one in four asylum-seekers in the EU was a child, that is 96,000 unaccompanied minors applied for asylum in the EU.[3] In 2016, the proportion of children, both accompanied and unaccompanied, who arrived by sea was as high as 40%.[4] Unaccompanied minors are particularly targeted by traffickers and coerced into criminal activities and exploitation.[5] Based on Europol's report, 10,000 unaccompanied children went missing from reception centres in the EU in 2015, and the figure was reported to have increased from 2 to 7% in 2016.[6] Incidents such as underage girls giving birth before and after arrival to the EU Member States´ (MS) reception centres and disappearing with their infants, have become very common.[7] In 2016, only 31% of those who went missing were found.[8]

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[1] European Parliament, ¨Report on the evaluation of the Dublin system¨. *Committee on Civil Liberties, Justice and Home Affairs*. 2 July 2008, A6-0287/2008, 12.
[2] UNICEF reports that ¨there are 50 million children in migration worldwide and one in every 200 children is a refugee.¨; ¨The Protection of Children in Migration¨ *10th European Forum on the Right of the Child.* 29 March 2017, p 3.
[3] European Commission, ¨Children in Migration¨, http://ec.europa.eu/justice/fundamental-rights/rights-child/protection-systems/index_en.htm
[4] *Ibid.*
[5] European Commission, ¨Report on the progress made in the fight against trafficking in human beings¨. 19 May 2016 267 final, p 8.
[6] ¨Figures and Trends 2016 From Hotlines for Missing Children and Cross-border Family Mediators¨, http://missingchildreneurope.eu/Portals/0/Docs/Annual%20and%20Data%20reports/Missing%20Children%20Europe%20figures%20and%20trends%202016.pdf
[7] *Ibid.*
[8] *Ibid.*

Children, particularly unaccompanied minors are categorized as persons entitled to special protection.[9] Therefore, setting forth the basic legal foundation for the rights of unaccompanied asylum-seeking minors (UASMs) is a logical prerequisite to dealing with their treatment before and after they reach the countries of asylum.

The **second chapter** highlights the basic principles and rules of international law that deal with asylum rights of children. In doing so, it outlines the exigencies and limitations of the international refugee law in addressing vulnerable groups, particularly child asylum-seekers. The 1951 Convention Relating to the Status of Refugees (the Geneva Convention)[10] and the Protocol Relating to the Status of Refugees[11] notably lack a number of basic protection guarantees from a human rights point of view, *inter alia*, the omission of any child-specific provision in the determination of refugee status in the context of child asylum. The flaws of using the definition of the Geneva Convention in interpreting refugee and the notion of persecution on child specific issues leave the existence of a child´s right to seek asylum in question. Thus, the importance of the human rights law, particularly the Convention on the Right of the Child (CRC)[12] as a complementary form of protection in determining the status of child asylum-seekers and guaranteeing their basic rights will be examined. The right to seek asylum, access to asylum procedures, the principle of the best interest of the child, the principle of non-refoulement, and the protection against detention will be the main themes in analysing the relevant areas of refugee law as it currently exists- the *lex lata* perspective- with a view to reconcile the gaps of protection by employing the human rights based approach.

The **third chapter** assesses the extent to which the measures adopted by the MS meet the basic standards of protection afforded to a minor asylum-seeker by the international human rights law. Pursuant to Art. 78(1) of Treaty on the Functioning of the European Union (TFEU), the EU developed its own regional system of asylum in the form of the Common European Asylum System (CEAS). This paper deals with the current CEAS instruments, notably the area

[9] Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 U.N.T.S. 3, art. 77

[10] Convention relating to the Status of Refugees, (adopted 28 July 1951, entered into force 22 April 1954) 189 U.N.T.S.

[11] The Protocol Relating to the Status OF Refugees, (adopted 31 January 1967, entered into force 4 October 1967) 606 U.N.T.S.

[12] UN General Assembly, Convention on the Rights of the Child, (adopted 20 November 1989, entered into force 2 September 1990) 1577 U.N.T.S.

pertaining to asylum rights of unaccompanied children, and expounds on its limitations in light of the human rights approach. Although the MS are bound to implement the CEAS, the Geneva Convention remains the corner stone of refugee law in the region. However, due to the lack of child-specific provisions in determining the status of refugee, MS are given broad margin of appreciation when dealing with the examination of asylum claims of UASMs and the implementation of their rights. On the other hand, the States as members of the international community are obliged to observe their human rights obligations which profoundly require them to find complex solutions. It is therefore crucial to show that the international human rights instruments form legal basis for the obligation of the EU MS in granting protection for UASMs. The CRC will be used as the main tool in examining the compliance of the current CEAS instruments with the international norms and standards on the treatment of UASMs.

The **concluding chapter** reflects the legislative developments at the EU level and where that reformation is heading in the future. Based on the listed gaps of protection both at the international and EU refugee system, persuasive suggestions for the formulation of a new child-specific legal instrument as part of the refugee law will be made. The jurisprudence of the European courts is equally important to narrow the gaps by rendering judicial protection and effective remedy for UASMs. In order to strengthen the protection of UASMs in the EU, the paper proposes the need for the establishment of regional child-asylum courts with specific legal mandates.

1.2 Statement of the Problem

Despite the fact that children comprise considerable proportion of refugees, their right as asylum seekers is, to a large extent, overlooked both in doctrine and practice. Children, particularly unaccompanied and separated minors are among the most vulnerable groups and victims of human rights abuse who are in great need of sensitive treatment and special protection in the process of asylum.[13] The UN Committee on the Rights of the Child (UNCRC) defines unaccompanied minors as *¨children, as defined in article 1 of the Convention, who have*

[13] UN Committee on the Rights of the Child, General comment No. 6(2005): *Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6.

been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so¨.[14]

However, there is no specific definition of an unaccompanied minor in relation to the qualification for international protection, neither at the international nor at the European level. The legally binding and fundamental global definition on the qualification of refugee is the one provided in article 1 of the Geneva Convention which is adult biased and age-inappropriate. Hence, due to the restrictive meaning of refugee and the notion of persecution, unaccompanied minors most of the time fall out of the category of asylum-seekers eligible for protection. The clear contention in the discussion of this paper is the argument that the present refugee regime, both internationally and regionally, limits the right of the child to seek and enjoy protection.

Notwithstanding that the EU MS have a common asylum system in the region, balancing the opposing objectives for securitization of the so-called ´area of freedom, security and justice´ on one hand, and the sense of refugee protection on the other hand, leave the EU asylum laws much to be desired. In addition to setting up minimum standards on asylum related rights in the MS, the CEAS was also formulated with the spirit to tackle illegal immigration and secondary movement of third country nationals. As Velluti notes *¨the EU protection regime for refugees remains characterized by an underlying tension between a security paradigm and a human rights-based approach. The strong focus on securitization has almost eroded the distinction between refugee protection and migration control in asylum law and policy, and has legitimized the pursuit of restrictive asylum policies, even though it fundamentally contradicts the international obligations of the EU Member States with the international refugee and human rights law¨*.[15]

Taking into consideration the human rights-based refugee protection perspective, the EU measures on asylum procedures, including those taken at the external and internal borders not only limit access to international protection but, in effect, also infringe the right to seek asylum. Since legal migration and safe routes to countries of asylum are almost impossible for

[14] *Ibid.,* 5; UNHCR *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum* (February 1997) 1; see also Article 2(l) of Directive 2011/95/EU (The Qualification Directive)
[15] Samantha Velluti, *Reforming the Common European Asylum System - Legislative Developments and Judicial Activism of the European Courts,* Springer Briefs in Law (Berlin, Heidelberg: Springer Briefs in Law, 2014): 2.

those fleeing persecution, asylum seekers, particularly vulnerable groups such as unaccompanied minors, continue to suffer from serious violations of human rights during their journey to seek international protection and, in many instances, after they reach the country of asylum.

1.3 Objectives

The objective of the paper is to draw attention to the exceptionally vulnerable situation of UASMs. The writer intends to outline the multifaceted limitations of both the international and EU refugee laws in guaranteeing child asylum rights, and to show the important role of the human rights law, particularly the CRC on the protection, care and proper treatment of unaccompanied minors based on, inter alia, the principle of equality and the best interest of the child. Finally, by identifying the protection gap of the CEAS instruments in the area of UASMs, the paper proposes the need for a different approach of addressing the eligibility of children for international protection and the rights attached to it.

1.4 Research Question

The main research questions that this paper intends to answer are whether the present international refugee law guarantees the right of unaccompanied minors to seek asylum, and whether the model of the CEAS reflects a rights-based policy formulation which leads to the recognition of the principles and standards of the international human rights law when dealing with child-specific asylum cases, particularly that of UASMs.

1.5 Methodology

This study will employ a doctrinal approach, and thus it will primarily rely on the sources of international law, mainly treaties, case laws, principles of law and scholarly writings. At the international level, the Geneva Convention and the CRC will be the leading instruments throughout the paper. However, other relevant instruments will also be analysed. The analysis will draw on soft laws such as the General Comments and Concluding Observations of the UNCRC, and the UNHCR Guidelines and handbooks in relation to the treatment of unaccompanied minors. At the regional level, the EU laws; the instruments of the Council of Europe, including the ECHR; and various official EU documentations as well as policy analysis, position papers and reports commissioned by the European Parliament and the European Commission will be examined. The jurisprudence of the European courts will take

an authoritative role in interpreting the provisions of the CEAS instruments and in identifying the gaps of protection under the instruments. Thus, relevant ECtHR and CJEU case laws will be assessed.

1.6 Scope and Limitation

The aim of the paper is to deal with UASMs in the EU, but the rights of refugee children in general will also be given major consideration throughout the paper. It is also important to note that there are two regional entities in Europe, the Council of Europe and the EU with different mandates, yet complementary in various fundamental values such as human rights.

Due to the time and space constraints, the analysis of the paper is limited to doctrinal approach, and will not cover a discussion on state practice and the implementation of the CEAS instruments by MS. Hence, the case laws are provided with the aim to interpret and bring clarity to the EU laws in relation to the rights and protection of UASMs. Although equally important, the issue on the right of family reunification will not be covered within the scope of the paper.

2. International Perspective on the Protection of Unaccompanied Asylum-seeking Minors

2.1 The Human Rights and Refugee Law Discourse as Contextual Factor of Protection

Refugees are entitled to international protection under various regimes of international law. Although the primary international regime for the protection of refugees is the Geneva Convention and its 1967 Protocol, refugees also benefit from the human rights legal framework which is basically grounded on the universal principle of equality and non-discrimination where refugees, like any other human beings, are entitled to rights and freedoms regardless of their status, nationality and age. There is, however, a strong debate over the primacy of each legal regime in matters relating to the rights of those who seek asylum. The argument whether the human rights legal framework accords a supplementary or complementary protection has been prominently controversial in the legal world of many scholars and refugee lawyers. Politicians would always question the human rights aspect of the refugee regime as migration crises are easily resolved and addressed by setting restrictions on asylum rights on grounds of national security and sovereignty. In order to identify and monitor a State´s obligation towards asylum-seekers and their rights, one must examine the relationship between human rights law and refugee law in broader sense as both regimes put limitations on the claim of state sovereignty and give obligation to give access.

Although both human rights law and refugee law, by some scholars, are conceived to establish separate regimes under international law, their intertwining and cross-cutting nature towards each other has led in a shift of paradigm both in theory and practice. Historically, the relationship between both legal regimes developed with the emergence of a perception that ´casual-link´ is established where violation of human rights becomes the primarily cause of forced migration.[16] As Chetail noted, this type of relationship later evolved into a deeper perception of ´interactive approach´ between both regimes where linkages were created on

[16] Vincent Chetail, ¨Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law¨, *Human Rights and Immigration,* ed. R. Rubio-Marin (Oxford: Oxford University Press, 2014): 19.

specific principles such as non-refoulement.[17] However, the third type of relationship commonly referred as ´complementary approach´ has dominantly become a centre of discussion in a number of scholarly or academic writings to the extent that a systematic analysis of both human rights law and refugee law was made to identify their interactions.[18]

In analysing those interactions, scholars such as Hathaway and McAdam focus on the limitations of human rights law and perceive refugee law as the principal and fundamental legal framework in the protection and treatment of refugees.[19] For some refugee lawyers, human rights law is ¨not sufficiently detailed, lacking coherent structure¨ and enforceability.[20] Hathaway would describe it as having ¨inappropriate assumptions¨ and ¨not addressing many refugee-specific concerns¨.[21] McAdams underlines the point that total dependency on the legal framework of human rights would be ¨a dangerous op1-tion¨ because it is rather stronger in principle than in practice.[22] Such arguments have, however, been challenged by a serious of opposing arguments that refugee law has similar limitations of ¨redundancy, functional inefficiency, complexity, inflexibility and difficulty to apply within a world of competing priorities¨.[23]

In any case, refugee lawyers perceive human rights law as supplementary and therefore secondary source of law in the area of refugees.[24] To Chetail the contrary is rather true. He argues that human rights law has greatly influenced the evolution and transformation of refugee law and thus should be the ¨primary source of refugee protection, while the Geneva Convention is bound to play a complementary and secondary role¨.[25] Moreover, Chetail argues that the fact that human rights law is ¨subsequently interpreted by treaty bodies¨ makes it ¨more precise and even clearer than its refugee law counterparts¨[26], and further describes it as a ¨gravitational force which attracted the Geneva Convention into its orbit and anchored it as a satellite within the

[17] *Ibid.,* 20.; Helene Lambert, ¨Protection against Refoulement from Europe: Human Rights Law Comes to the Rescue¨, *ICLQ* 48 (1999): 515.
[18] Lambert, 515.
[19] James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005): 119–147.
[20] Kate Jastram, ¨Economic Harm as a Basis for Refugee Status and the Application of Human Rights Law to the Interpretation of Economic Persecution¨, *Critical Issues in International Refugee Law: Strategies Toward Interpretative Harmony,* ed. J. C. Simeon (Cambridge University Press, 2010): 143
[21] Hathaway, 121, 154.
[22] Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford: Oxford University Press, 2007): 202-203.
[23] Guy S. Goodwin-Gill, ¨Editorial: Asylum 2001—A Convention and A Purpose¨, *IJRL* 13, no. 1 and 2(2001): 1-2.
[24] Chetail, 22.
[25] *Ibid*
[26] *Ibid*.

constellation of other applicable human rights treaties¨.[27] At the same time, the Geneva Convention under article 5 gives primacy to human rights law to provide refugee protection: *"Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention"*. Whatever view is taken, based on the sources of international law, mainly general principles of law, judicial decisions and scholarly writings, it is now well established that international human rights law is key in forming a complementary form of protection to asylum-seekers.

The limitation of the refugee law as a legal regime is more evident in the area of asylum-seeing children and more specifically UASMs where it fails to provide child-specific protection provisions. Children constitute more than half of the refugee population, and unlike other refugees, their degree of vulnerability puts them under special category in need of special protection and care. However, a reference to children in the Geneva Convention is very difficult to trace. Regional instruments of the refugee law such as the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention) and the 1984 Cartagena Declaration do not make any distinction between adults and children.

The only article in the Geneva Convention specifically relating to children is article 22 where *¨refugees must receive the ´same treatment´ as nationals in primary education, and treatment at least as favorable as that given to non-refugee aliens in secondary education¨*. Despite their special needs and vulnerable situation, children seem to be forgotten in the premises of the refugee law. Hence, in many countries, unaccompanied children are denied entry and access to asylum procedures, and end up in detention facilities while attempting to seek international protection. Even if they are admitted, poor and insensitive procedures on registration, personal interviews, guardianship and legal assistance hinders them from making successful asylum applications. As a result, many UASMs are granted only temporary status until they turn 18, and sent back to unsafe environment again.[28]

This is the reason why international human rights law should be supported as the main tool for the protection of asylum-seeking children as its legal framework provides distinct room for child rights. Comparing human rights law to refugee law, the latter has ¨much more to receive than to give¨.[29] Thus a holistic approach on refugee protection in its human rights context is

[27] *Ibid.,* 70.
[28] H. Lidén, E. Gording-Stang and K. Eide: ¨The gap between legal protection, good intentions and political restrictions. Unaccompanied minors in Norway¨ *Social Work & Society* 15, no. 1 (2017): 4.
[29] Chetail, 70.

strongly required to achieve a systematically comprehensive and effective response to UASMs at a national, regional and international levels.

2.2: International Human Rights Law on the Protection of Refugee Children

There are 9 core international human rights instruments where some of them are supplemented by optional protocols dealing with specific issues. The entire system of international human rights law is potentially applicable to refugee children as the language of ´humanity´ refers to ´all individuals´, ´every human being´, ´everyone´ and ´all persons´ including children and refugees regardless of their status and location.[30] The rights enshrined in the international human rights instruments are meant to be enjoyed without distinction by everyone including refugees and asylum-seekers whether they are children, women or adults. More specifically, the international human rights law provides relevant rights in the asylum context, including the right not to be arbitrarily detained[31], which is important in prohibiting asylum detentions; the prohibition against torture, inhuman or degrading treatment[32], which protects refugees from refoulement to countries where there is substantial risk of persecution; the right to private and family life[33]; and the procedural guarantees that should be afforded to asylum seekers such as the right to be heard, the right to an effective remedy and the right to appeal[34], as well as to a range of socio-economic rights. Hence, State parties are obliged to ensure that non-citizens are equally entitled as citizens to enjoy their rights to the extent recognized under international law.[35]

The CRC is, however, the most relevant and authoritative human rights instrument on refugee children because it specifically covers all aspects of a child´s right without any discrimination whatsoever. The Convention is followed by three optional protocols: the Optional Protocol on the involvement of Children in Armed Conflict, the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography and the Optional Protocol on a Communication Procedure. [36] The latter which entered into force in April 2014 enables individual children to

[30] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, (ICCPR) art. 2.
[31] *Ibid.,* art 9 and 10.
[32] *Ibid.,* art. 7.
[33] *Ibid.,* art. 17.
[34] *Ibid.,* art. 13.
[35]UN Committee on the Elimination of Racial Discrimination(CERD), *General Recommendation XXX on Discrimination Against Non-Citizens,* 1 October 2002, para. 3.

[36] A/RES/54/263; A/RES/66/138.

submit complaints on violations of their rights under the Convention and optional protocols. The moral and political commitment of States towards the Convention is evidenced by its highest number of ratifications among the other UN Conventions.

CRC comprises all aspects of a child right including civil, political, economic and socio-cultural rights, and derogation from any of its provisions is not permitted at any time. The four main principles governing the CRC are non-discrimination (article 2), the best interests of the child (article 3), the child's right to life, survival and development (article 6) and respect for the views of the child (article 12).

Article 2 and 22 of CRC explicitly address equal rights of refugee children, and require State parties, within their jurisdiction, to take appropriate measures to eliminate all forms of discrimination on grounds of the child´s or his/her parents´ or legal guardian´s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. More specifically, article 22 states that a refugee child or an asylum seeking minor whether unaccompanied or accompanied shall be accorded protection and humanitarian assistance to enjoy the rights enshrined in the Convention or other international instruments. Noting the particular vulnerability of unaccompanied minors or children deprived of their family environment, article 20 of the CRC plays major role in addressing the rights of such minors to higher protection and assistance by the State parties.

The implementation of the Convention and the optional protocols is regularly monitored by the UNCRC, a body comprising 18 independent experts.[37] As part of its mandate the Committee examines and delivers concluding observations on the periodic reports submitted by each state parties regarding how the rights are being implemented.[38] Additionally, the Committee publishes general comments interpreting specific thematic issues on human rights provisions.[39] Although those general comments are not legally binding on State Parties, they serve as important tools of interpretation and implementation of the CRC provisions.

According to the General Comment number 6 which deals with treatment of unaccompanied and separated children outside their country of origin: the UNCRC notes that the CRC is not limited to children who are citizens of the State parties, but shall be made available to all

[37] Available at http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx
[38] *Ibid.*
[39] *Ibid.*

children within the State´s territory and under its jurisdiction including asylum-seekers, refugees and migrant children, irrespective of their nationality, immigration status or statelessness.[40] In paragraph 12, the Committee stresses that ¨*State obligations under the Convention apply within the borders of a State, including with respect to those children who come under the State's jurisdiction while attempting to enter the country's territory*¨. This particular general comment was motivated by the increasingly identified protection gaps of UASMs who are discriminated against, and deprived of their liberty and the provision of basic needs such as food, shelter, health services and education. The principle of non-discrimination in the Convention as interpreted by the Committee entails legal obligations both positive and negative in nature, extending to the State´s responsibility to identify children as being unaccompanied at the earliest stage and prioritize them for special protection measures. [41]

2.3 The Definition Gap and the Right to Seek Asylum

Article 14(1) of Universal Declaration of Human Rights (UDHR) states that everyone has the right to seek and to enjoy in other countries asylum from persecution.[42] Despite the development of many of the provisions of the UDHR into a customary international law or into more specific binding laws, an international treaty on a right to asylum has failed to emerge, mainly, due to the unwillingness of States to accept an obligation to grant asylum. The Geneva Convention is silent on the right to asylum and its provisions were intentionally designed not to impose an obligation on States to grant asylum.[43] It rather creates an obligation on the asylum-seeker to prove and establish his/her claim in order to enjoy protection from the State. Hence, the right to asylum or the duty to grant asylum does not exist until the State recognises the refugee status of a person seeking international protection in accordance to its domestic law, although there is a strong obligation not to refoul to a country of persecution.

As observed by Chetail, the main element conditioning access to international protection is the definition of ´refugee´, that means protection under the Geneva Convention is extended only to

[40] UNCRC GC no. 6 (2005) par 12.

[41] *Ibid.,* par 13.

[42] This provision was also reaffirmed by the Vienna Declaration and Programme of Action which was endorsed by General Assembly Resolution 48/121: World Conference on Human Rights, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 Jul. 1993, para. 23.

[43] Chetail, 31; The UK representative at the 1951 Conference noted that ¨the right of asylum [. . .] was only a right, belonging to the State, to grant or refuse asylum not a right belonging to the individual and entitling him to insist on its being extended to him¨. UN Doc A/CONF.2/SR.13 (1951): 13.

those who meet the definition of refugee and recognition as a refugee unlocks all the benefits and rights as a refugee.[44]

The authoritative and legally binding definition of the term refugee in international law is laid down in Article 1 of the Geneva Convention and its Optional Protocol: *¨the term "refugee" shall apply to any person who: owing to 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¨*. Unlike the human rights law which is applicable to everyone, the purpose of this definition is to allow countries to identify eligible persons for international protection. The term persecution as derived from the notion of ´being persecuted´ in the Convention is the key element in defining ´refugee´.

Since the notion ´being persecuted´ is not further defined in the Geneva Convention or the Optional Protocol, the human rights law is a widely accepted device in interpreting the notion.[45] The UNHCR, in its Handbook on Procedures and Criteria for Determining Refugee Status, states that a threat to life and freedom, and 'serious violations of human rights' constitute persecution.[46] However, there is a strong view that not all human rights violations amount to persecution. As Lehmann in his article discusses, ¨an act of persecution is not just any violation of any human right, but a '*serious* violation of a *basic* human right¨.[47] The CJEU in the case of *Germany v Y and Z*, is the first to address the definition of 'persecution' under the EU law which became an authoritative interpretation of persecution, internationally. [48] In the ruling, the Court held that ´an act of persecution´ must constitute a ´severe violation having a significant effect on the person concerned´.[49]

However, many theorists argue that a threat to life and freedom should be broadly interpreted

[44] Chetail, 23.
[45] Julian M Lehmann, ¨Persecution, Concealment and the Limits of a Human Rights Approach in (European) Asylum Law – The Case of *Germany v Y and Z* in the Court of Justice of the European Union¨. *IJRL* 26, no.1 (2014): 65.
[46] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (reissued 2011) para 51.
[47] Lehmann, 65.
[48] CJEU, *Bundesrepublik Deutschland v Y and Z* (5 Sept 2012) C-71/11, C-99/11.
[49] *Ibid.*

to involve all human rights including economic, social and cultural rights since human rights are recognized as indivisible and interdependent to each other.[50] In the context of children seeking protection, the traditional influence of the concept persecution coming from only one side of the human rights law, namely the civil and political rights, resists the inclusion of the basic rights of the child as a refugee-relevant factor. A denial of socio-economic rights such as the right to health, adequate standard of living and protection from exploitation could however amount to grave and serious violations on a child´s right to life, survival and development. That is the reason why none of the rights in the CRC are subject to derogation even in times of public emergency.

The absence of a child sensitive definition of refugee in the international refugee law thus raises the legal question whether the right to seek protection exists as an absolute right for children without any arbitral or unilateral discretion of a State. Article 22 of the CRC stipulates that *¨States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.¨*[51] In spite of the fact that this article gives children an implied right to seek asylum, it is still conditioned by the rule that the child should seek refugee status or be considered a refugee according to applicable international or domestic laws and procedures while the only applicable international law on the determination of refugee status is the Geneva Convention.

As provided in Article 1 of the CRC, a child is *"every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier"*. Children are mentally less mature and physically more vulnerable, hence in greater fear of risk than adults. Children may flee their country for reasons outside the five stated grounds in the Convention, for instance, generalized violence such as armed conflict, recruitment to an army, sexual abuse, human trafficking, forced labour and displacement.[52] The UNCRC in its General Comments no. 6 notes that children, particularly girls are highly vulnerable to exploitation and abuse, and

[50] P.V. Sainz-Pardo, ¨The Contemporary Relevance of the 1951 Convention Relating to the Status of Refugees¨. *The International Journal of Human Rights* 6, no. 2 (2002) 23.
[51] CRC, art. 22.
[52] *Supra footnote* 9.

hence need serious protection within the meaning of Articles 34 to 36 of the CRC.[53] Underage military recruitment is also regarded as a serious risk causing irreparable harm to the child´s life and mental development under article 38 of the CRC and articles 3 and 4 of the Optional Protocol to the CRC on the involvement of children in armed conflict.

In line with the UNHCR Guideline on Procedures and Criteria for Determining Refugee Status, article 6 of the CRC on the right of a child to ´life, survival and development´ which is a fundamental right underlying the whole structure of the CRC should be the threshold in assessing whether the child is in need of international protection because a threat to the life or survival of a child would amount to persecution or serious harm.[54]

Therefore, the complementary form of protection argument, as also described in paragraph 77 of the General Comment no. 6, extends the restrictive definition of a refugee to a broader concept of persecution so that those who do not meet the requirements of the Geneva Convention but who are in need of protection would benefit from acquiring international protection. This form of protection serves as a means to create child sensitive grounds for international protection, because if a child's need for protection is assessed in the same manner as an adult, it is undeniable fact that the child will remain under the requisite threshold qualifying a refugee status since the degree of vulnerabilty and risks of persecution of an adult and a child greatly vary. Considering that unaccompanied asylum-seeking children are at greater risk and vulnerability, denying them the right to protection based on the given criteria of the Geneva Convention may seriously endanger their life and survival.

Thus, one may conclude that the international refugee regime does not take into account the particular situation of children in defining the term refugee and setting the threshold for persecution, in particular that of unaccompanied minors who are unable to ascertain the facts of their case and the circumstances that made them flee their country of origin. Both the definition of refugee and notion of persecution are very limited in scope and practically inappropriate to apply when determining the right of a child to international protection. Circumstances that might not lead to asylum for adults might be grave violations of human rights for children. As the UNCRC recommends, age and gender-sensitive approach should be

[53] UNCRC GC no. 6 (2005), par 50-53.

[54] Article 6 of CRC provides: (1) States Parties recognize that every child has the inherent right to life. (2) States Parties shall ensure to the maximum extent possible the survival and development of the child.

employed to assess the risks of serious violations, particularly considering the serious consequences for children of insufficient food provision or health services.[55] Therefore, human rights law, particularly the CRC should be employed to interpret the term ´refugee´ and the notion ´persecution´ in order to accommodate and respond to the special needs of UASMs. Unaccompanied children should benefit from ´available forms of complementary protection´ that would enable them to enjoy, to the fullest extent, all the human rights granted to children including the right to lawful stay in the territory of the country of asylum.[56]

2.4 Guaranteeing the Right of Unaccompanied Minors to Seek Asylum

2.4.1 The Principle of Best Interest of the Child

Article 3(1) of the CRC states: *¨in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration¨.*

The provision on the best interest of the child as stated above denotes one of the basic principles of the CRC which is not subject to derogation at all times.[57] The concept pre-dates the ratification of the Convention and has been subject to a number of scholarly analysis and legislative works before its inclusion in the treaty. Principle 2 of the 1959 Declaration of the Right of the Child provides that the best interest of the child shall be ¨the paramount consideration¨ in the enactment of legislations that provide a child ¨special protection and opportunities to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity¨.[58] The principle of the best interest of the child is also included in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the African Charter on the Rights and Welfare of the Child (ACRWC) and in many other international and domestic instruments. [59]

However, it is worth noting to emphasise on the language used to articulate the principle when it was originally perceived vis-a-vis its current formulation in the latter international and

[55] UNCRC GC no. 6 (2005), par 27.
[56] *Ibid.*, par 77.
[57] UNCRC, *Report on the second session*, September/October 1992, CRC/C/10, par. 67.
[58] UN General Assembly, *Declaration of the Rights of the child*, 20 November 1959, A/RES/1386(XIV).
[59] Furthermore, the Human Rights Committee (HRC) has interpreted article 24(1) of the ICCPR that *¨every child shall have without discrimination {…}the right to such measures of protection as are required by his status as a minor¨*, as encompassing the principle of the best interest. HRC, Bahktiyari v Australia, Communication No. 1069/2002, Views of 6 Nov 2003, par 9.6.

domestic instruments including article 3 of the CRC. The original articulation of the principle that the best interest of the child should be ´the paramount consideration´ is now replaced by ´a primary consideration´. This weakening of the language signifies the weakening of the principle in practice because ´the best interest of the child´ has not become the only option, rather States are given a discretion to prioritise between different options, including other considerations on how to limit immigration when dealing with children.

Despite the principle´s wide influence in most domestic child related procedural matters, its substantive role in determining the refugee status of children is still yet to be desired. There is nothing more relevant than the role of this principle of international law in the determination of a child´s need for international protection and in giving clarity to the requirements defining persecution and the well-founded fear criteria in child specific asylum cases.[60] The Supreme Court in Baker v Canada noted that this provision obliges decision-makers to ¨consider child's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them¨.[61] Both the UNCRC and the UNHCR interpreted article 3 using a broader approach, that the best interest of the child should be respected in actions taken during all stages of the displacement cycle.[62]

Although the CRC does not provide a precise definition of the best interest of the child while the term may broadly indicate the ´wellbeing of a child´.[63] According to the UNHCR Guidelines on the Formal Determination of the Best Interests of the Child, all the rights of the child should be assessed when determining the best interest.[64] The best interest of the child may further be determined by a diligent assessment of the child´s identity, nationality, upbringing, ethnic, cultural and linguistic background, as well as vulnerabilities and protection needs.[65] In order to do so, the child should be allowed to enter the territory of the State party and such assessment must be undertaken by qualified personnel with a child and gender sensitive procedures.[66] The refugee status determination and the asylum procedures including registration, identification,

[60] J. Bhabha and W. Young, ¨Not adults in miniature: unaccompanied child asylum seekers and the new U.S. guidelines¨, *IJRL* 11, no. 1(1999): 97.
[61] *Baker* v *Canada* [1999] 2 S.C.R. 817, para. 75.
[62] UNCRC GC no. 6 (2005), par 19; UNHCR Guidelines on the Formal Determination of the Best Interests of the Child (May 2008).
[63] UNHCR Guidelines (2008) 14.

[64] *Ibid.,* 17.
[65] UNCRC GC no. 6 (2005), par. 20.
[66] *Ibid.*

reception conditions, appointment of guardian, and family reunification, should be instilled with considerations of the best interest of the child.[67]

As McAdam argues, this article of the CRC should add an extra layer to Article 1A(2) of the Geneva Convention by way of forming a complementary ground of protection, particularly for children fleeing generalized violence.[68]

2.4.2 Access to Asylum Procedures

Access to asylum procedures guarantees the right to seek international protection. As the UNCRC states, ¨asylum seeking children, including those who are unaccompanied and separated, shall enjoy access to asylum procedures and other complementary mechanisms providing international protection irrespective of their age¨.[69] The Committee further indicates that unaccompanied children outside their country of origin are vulnerable to various risks that affect their life, survival and development such as trafficking or involvement in criminal activities which results damaging effect or harm to the child, or in extreme cases, in death, and hence need immediate and permanent protection.[70] This is mainly because UASMs greatly depend on smugglers and human traffickers to enter irregularly the country of asylum.

However, scholars like Smyth argue that the typical features of asylum procedures are adult-oriented and not child-friendly which make the access to the procedures ineffective. This is because the determination of refugee status greatly depends on the interviews and information acquired from the applicant. The child who has been separated from both parents and other relatives, and is not being cared for by an adult becomes the principal applicant, and is required to lodge and substantiate his/her application for international protection. Even if the child applicant meets one of the five grounds for persecution, it might still be difficult for him/her to remember all the factual information to establish his/her claim. The fear of persecution may not be necessarily related to a personal experience as children are easily traumatized by what they see or hear. Hence, age-appropriate individual assessment, that is subjective fear as an essential

[67] UNHCR Guidelines (2008) 17.
[68] Jane McAdam, ¨Seeking Asylum under the Convention on the Rights of the Child: A case for Complementary Protection¨. *The International Journal of Children's Rights* 14 (2006) 251.

[69] UNCRC GC no. 6 (2005), par. 66.
[70] *Ibid*, par. 23.

element should be taken in testing the well-founded fear of persecution in order to guarantee the minor applicant´s right to seek asylum.

One of the key procedural safeguards in guaranteeing access to asylum procedures and ensuring the best interest of UASMs is the appointment of competent guardian and legal representative at early stage before the start of the asylum procedures.[71] The appointment of an adult representative is highly crucial because the system of asylum generally works better when the UASM is assisted by an adult who can give ¨factual information to document the claim, speaking on behalf of the child, helping the child understand the procedures, giving emotional support and offering advise¨.[72] Accordingly, article 20 of the CRC stipulates that States shall provide special protection and assistance to a child who is temporarily or permanently deprived of his or her family environment. Although the CRC does not establish specific procedural mechanisms for the appointment of a guardian and for decisions on alternative care for UASMs deprived of their family environment, article 20 of the CRC refers to national laws for such specific safeguards. However, the UNCRC recommends that States should establish review mechanisms to ´monitor the quality of guardians appointed to ensure that the best interests of the child are represented and abuse prevented´.[73]

Another important aspect in realizing the best interest of the child and access to asylum procedures in the context of UASMs is the right of the child to be heard and express his/her views. The CRC in article 12 sets forth a child´s right to be heard and freely express his/her views in all matters affecting him/her, be it in a judicial or administrative proceedings. As Touzenis describes, ´the child should be at the centre of the asylum process, and the process should be seen from the child´s point of view so that the child´s special needs and rights are taken into consideration throughout the process´.[74] In order to enable the child to give informed views, it is important to provide him/her with all the required information including his/her rights and benefits, the asylum process, and family tracing procedures, in line with article 13, 17 and 22(2) of the CRC. At the same time, in order to make reliable communication in the

[71] UNCRC GC no. 6 (2005), par. 21.
[72] Kristina Touzens, *Unaccompanied Minors: Rights and Protection* (Roma: XLedizioni, 2006): 92.
[73] UNCRC GC no. 6 (2005), par 33-38.

[74] Touzens (2006), 101.

language the child understands, interpreters should be made available in every step of the asylum process.[75]

Finally, as Crawley argues ¨a child asylum seeker is a child first and a refugee second¨, thus subjecting him/her to restrictive asylum procedures or immigration control would further expose the child to risks of serious harm.[76] Therefore, taking into account their vulnerability and risks of trafficking, UASMs should not be denied access to procedures or criminalized for reasons of their illegal entry or presence in the country of asylum.[77]

2.5 Protection against Return: The Principle of Non-Refoulement

Ever since its incorporation in the Geneva Convention and in many human rights instruments, the principle of non-refoulement has achieved the status of an international customary law where reservation on the rule is prohibited. Article 33 of the Geneva Convention states that *¨no Contracting State shall expel or return (" refouler ") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion¨.* According to Article 42 of the Convention, no derogation or reservation to Article 33 on non-refoulement is allowed.

The principle indicates a prohibition against any forced removal of a person from a State´s territory that may eventually put him/her into a risk of persecution. As articulated in article 2(3) of the OAU Refugee Convention and in many scholarly writings, forced removal may include rejection at the frontier, expulsion, deportation, extradition, non-admission at the border, interception, transfer, or rendition where the person´s life, physical integrity or liberty would be threatened regardless of the legality or illegality of his/her entrance to the territory of a particular State.[78] In the absence of any explicit law on the right to seek asylum in the international law, many legal scholars argue that the principle of non-refoulement indirectly establishes its existence.

International human rights law has played a crucial role in ¨strengthening the protection against

[75] UNCRC GC no. 6 (2005), par. 25.
[76] Anthony Macdonald, "Protection Responses to Unaccompanied and Separated Refugee Children in Mixed Migration Situations." *Refugee Survey Quarterly* 27, no. 4 (2009): 53.
[77] UNCRC GC no. 6 (2005), par. 62; Geneva Convention, ar.t 31.
[78] See also Chetail, 30.

refoulement and promoting the right to asylum as a human right¨.[79] A number of international and regional human rights instruments have expressly endorsed the principle, *inter alia*, article 3 of the Convention against Torture, article 16 of International Convention for the Protection of All Persons from Enforced Disappearance, article 22(8) of the American Convention on Human Rights, and article 19(2) of the EU Charter. Article 7 of ICCPR on the prohibition of torture or cruel, inhuman or degrading treatment or punishment has been interpreted by the UN Human Rights Committee (HRC) as ¨including a prohibition on sending anyone to a country where there is a substantial risk that he or she would suffer treatment contrary to Article 7¨.[80] Similarly, article 3 of ECHR prohibits torture, inhuman or degrading treatment or punishment and has been interpreted for the first time by the ECtHR in the Soering v UK (1989) case as including a prohibition on being sent to a country where there is a substantial risk that such treatment will occur.[81] The International Human Rights Monitoring Bodies have also clarified the absolute nature of the principle of non-refoulement and the jurisprudence on the rights of refugees in relation to entry, stay, and non-removal from their countries of asylum.[82]

Hither to though, the principle of non-refoulement is at greater risk when the asylum-seeker is unaccompanied child because of the difficulty in establishing a well-founded fear of persecution according to the Geneva Convention. The European human rights framework as affirmed by a number of case-laws was the first to develop a jurisprudence on the right of individuals who are outside the scope of the Geneva Convention to get complementary protection in the context of non-refoulement.[83] On the other hand, scholars like Hailbronner argues that the principle of non-refoulement only applies when the fear of persecution relies on torture and should not be ¨supported by the requirements of broad and consistent state practice and opinion juris¨.[84] However, if a State returns a child who does not meet the requirements of the restrictive refugee definition, the existence of a child´s right to international protection is

[79] M. T Gil-Bazo, "Refugee Protection under International Human Rights Law: From Non-Refoulement to Residence and Citizenship." *Refugee Survey Quarterly* 34, no. 1 (2015): 13.
[80] Directorate-General for External Policies of the Union, *Current challenges for International Refugee Law, with a focus on EU Policies and EU Co-operation with the UNHCR.* Briefing Paper, December 2013; UN HRC, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, par. 9.
[81] Soering v. The United Kingdom, 1/1989/161/217, Council of Europe: European Court of Human Rights, 7 July 1989.
[82] N. Mole and C. Meredith, ¨Asylum and the European Convention on Human Rights¨, *Human Rights Files* 9 (Strasbourg, Council of Europe, 2010).
[83] Gil-Bazo, 16.
[84] Kay Hailbronner, ¨Nonrefoulement and Humanitarian Refugees: Customary International Law or Wishful Legal Thinking?¨ in Martin (ed.), *The New Asylum Seekers* (Dordrecht: Nijhoff, 1988).

questionable because ¨the right of non-refoulement implies a right to seek protection¨.[85]

Moreover, according to the UNHCR Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum, unaccompanied children seeking asylum should not be refused access to the territory because of their vulnerability.[86] ¨Authorities at ports of entry should take necessary measures to ensure that unaccompanied children seeking admission to the territory are identified as such promptly and on a priority basis.¨[87]

In response to the obligation on non-refoulement for refugees outside the scope of the Geneva Convention, States have followed a practice of providing temporary protection or sending the asylum-seeker to a third country. [88] Both practices have negative implications on asylum-seekers, particularly minors since they do not provide permanent solution which is vital in the mental and physical development of children. It is important to note that article 37 of the CRC on the prohibition against ´torture or other cruel, inhuman or degrading treatment or punishment´ has been interpreted as having direct effect on the principle of non-refoulement. The UNCRC, invoking article 6 and 37 of the CRC, also stresses that ´States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child´.[89]

In the case of UASMs, clashes may emerge between the principle of non-refoulement and the principle of family unity where the family of the child lives in the country of origin. Article 9 of the CRC stipulates that a State party shall ensure that a child is not separated from his/her parents unless it is necessary for the best interest of the child. In response to that, the UNCRC stated that ¨family reunification in the country of origin is not in the best interests of the child and should therefore not be pursued if there is a "reasonable risk" that such a return would lead to the violation of fundamental human rights of the child¨.[90] Moreover, in case the situation in the country of origin is believed to have less risks and the child was affected by ´indiscriminate effects of generalized violence´, the risks must be compared against other rights including the

[85]Ciara Smyth, *European Asylum Law and the Rights of the Child* (London and New York: Routledge, 2014) 57.
[86] UNHCR Guidelines (1997), 1.
[87] *Ibid.*
[88] Sainz-Pardo, 28.
[89] UNCRC GC no. 6 (2005), par 27.
[90] *Ibid.* par 82.

family unity. In such circumstances, the survival of the child should be prioritized over the enjoyment of any other right.[91] Instead the child should be allowed to re-unite with his family members in the country of asylum.[92]

2.6 Protection of UASMs against Detention

International human rights law guarantees the right of every person to liberty and security, and hence, arbitrary arrest or detention is strictly prohibited thereof. [93] Article 9 of the ICCPR stipulates that a court of law should immediately decide whether a person who is deprived of his/her liberty is lawfully detained or arrested, and order the release of such person if detained or arrested unlawfully. Article 10 of the ICCPR further lays down minimum standards on detention conditions, inter alia, the treatment of the detained person with humanity and inherent dignity.

Article 37 of the CRC invokes that *¨no child shall be deprived of his or her liberty unlawfully or arbitrarily¨*. Based on this article and the principle of the best interest of the child, UNCRC in its General Comments No. 6 clearly states that detention of the child, as a general rule, is prohibited. Detention of minors is regarded as detrimental to the wellbeing and development of a child, and for that reason, the CRC under article 37 establishes stringent standards to ensure that a child is protected from detention. As stipulated in article 37 (b) of the CRC, detention should only be permitted under exceptional circumstances in accordance to the law of the concerned State, as a measure of last resort and for the shortest appropriate period of time.

The first requirement for permissible detention, as articulated in the ICCPR, is that the grounds for detention should be clearly and precisely prescribed by law.[94] As UNCRC notes, such prescription should not be only limited to national laws as States have also international obligations as part of the legal requirements on lawful detention.[95] In cases relating to UASMs, article 31(1) of the Geneva Convention should be observed. The article obliges State parties not to penalize a person fleeing a country where according to article 1 of the Convention, his/her life or freedom is endangered and seeking asylum in the territory of another country, for illegally entering that territory. Any restriction on the movement of such person shall not be

[91] *Ibid.*
[92] *Ibid.,* 83.
[93] ICCPR, art. 9.
[94] See also ECtHR, Abdolkhani and Karimnia v Turkey. Appl No. 30471/08, Judgement of 22 September 2009.
[95] UNCRC GC no. 6 (2005), par. 62.

allowed unless it is necessary and, if so, until the status of the person is regularized.[96] Therefore, the UNCRC concludes that immigration status of a child whether unaccompanied or accompanied should not be used as a ground to justify detention of such child.[97]

In determining whether a detention is arbitrary or not, the HRC under article 9 of the ICCPR examines if the individual detention is ¨reasonable, necessary and proportionate in the circumstance of the particular case¨[98]. Detention is considered arbitrary if an alternative other than detention could have been used in the particular case.[99] Based on article 24(1) of ICCPR, the HRC further considers the best interest of the child as a basis for the individual assessment of the arbitrariness of a minor´s detention.[100]

If lawfully and non-arbitrarily detained, article 37(c) of the CRC similar to article 10 of the ICCPR, develops minimum conditions to ensure that the child whose liberty is deprived is protected, and humanely treated in accordance to the needs of his/her age in the detention. As Sax observed, the needs of their age should be assessed not as a homogenous factor but subjectively in relation to their personal development, degree of maturity and personal circumstances.[101] Additionally, article 37 (c) requires that detained minors should be separated from adults unless it is contrary to their best interest, and shall remain in contact with their family. Furthermore, it should be noted that a detained child is equally entitled to the rights enshrined under the CRC, for instance, the right of the child to special protection and care; seeking and enjoying refugee status, family unity, education, health, leisure, play and recreation, but more importantly the right of the child to protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment or exploitation, including sexual abuse.[102]

The procedural protection under article 37(d) of the CRC is that any child deprived of his/her liberty shall be promptly provided with legal or other appropriate assistance, the opportunity to

[96] Geneva Convention, art 31(2).
[97] UNCRC GC no. 6 (2005), par 61.
[98] HRC, A v Australia, Communication No. 560/1993, UN Doc CCPR (C/59/D/560/1993, Views of 3 April 1997.
[99] HRC, C v Australia, Communication No. 900/1999, UN Doc CCPR (C/76/D/900/1999, Views of 28 Oct 2002
[100] HRC, Bahktiyari v Australia, Communication No. 1069/2002, Views of 6 Nov 2003, par 9.6
[101] W. Schabas and H. Sax, *A Commentary on the United Nations Convention on the Right of the Child, Article 37, Prohibition of torture, Death penalty, Life Imprisonment and Deprivation of Liberty*, (Leiden/Bosten: Martinus Nijhoff Publishers, 2006): 89.
[102] CRC, art. 2(1) and 19.

challenge the legality of the detention, and an immediate decision regarding the detention must be made by an independent and impartial authority. However, unlike the ICCPR, article 37(d) is silent on the requirement that the detained or arrested child should immediately be informed of the reasons for the detention. Article 12(1) on the right to express views may impliedly contain the child´s right to information regarding to his /her situation.

3. Rights and Protection of UASMs in the European Union

3.1 An Overview of the European Legal Framework and the CEAS

Rights and protection of UASMs in the EU fall under three separate legal frameworks: international and European human rights law; international and EU refugee law; and international and European law applicable to children. Although the international aspect of child refugee protection is dealt within the previous chapter, it is equally important to examine the conformity of the EU laws to the international legal norms and standards.

In Europe, there are two main regional human rights instruments; the European Convention on Human Rights (ECHR)[103] and the Charter of Fundamental Rights of the European Union (EU Charter) which is part of the EU legal system[104]. Adopted on 5 November 1950, the ECHR is the major binding instrument in Europe which provides list of core human rights.[105] According to article 14, the rights and freedoms guaranteed under the Convention shall be enjoyed by everyone without any discrimination on the basis of *¨sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, or other status¨*. Interestingly, unlike the Geneva Convention and the international human rights law, the ECHR in article 18 guarantees the right to asylum. The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; the European Convention on Extradition, and the European Agreement on the Abolition of Visas for Refugees are also some of the legal instruments related to human rights and asylum rights of refugees in Europe. [106]

At the international level, all the EU Member States are signatories to the UN Charter where pursuant to articles 55 and 56 of the UN Charter, States are obliged to *¨promote [...] universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion¨*. All the EU MS are at the same time signatories

[103] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5. The ECHR is ratified by all member States of the Council of Europe.
[104]European Union *Charter of Fundamental Rights of the European Union,* 26 October 2012, 2012/C 326/02. Since the entry into force of the Lisbon Treaty, the Charter is binding on both the EU institutions and the EU Member States.
[105] Touzenis, 122; *See also* William A. Schabas, *The European Convention on Human Rights*. Oxford Commentaries on International Law, 24 (Oxford: Oxford University Press, September 2015).
[106] CETS No. 126, entry into force 1 February 1989; CETS No. 024, entry into force 18 April 1960; CETS No. 031, entry into force 4 September 1960.

to the Geneva Convention, although there are States which are signatories only to the Convention and not to the Additional Protocol, and vice versa.

At the regional level, the EU MS have developed their own regional system on asylum which is called the Common European Asylum System (CEAS). The current CEAS instruments, which are the subject of the discussion of this thesis, comprise recast of the phase-one instruments, namely the Dublin III Regulation; the recast Qualification Directive (QD); the recast Reception Conditions Directive (RCD); the recast Asylum Procedures Directive (APD) and the recast EURODAC Regulation. According to Article 63 of Treaty Establishing the European Community (TEC), the phase-one CEAS instruments include Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national; Council Directive 2004/83/EC on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted; Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status; Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers; Council Regulation (EC) No 2725/2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention. Additionally, Council Directive 2001/55/EC on minimum standards for giving temporary protection was adopted but did not come into effect.

If one looks at the evolution of the CEAS instruments, their foundation is primarily based on maximizing and securing the common area of interest among the EU MS.[107] By creating a common and centralized system, MS would benefit from limited secondary movements of asylum seekers, at the same time, from the reduction of costs and complex administrative tasks in retrieving information about the asylum seekers and their countries of origin.[108] Although the need for establishing the common policy appears from the outside as having a protection oriented perspective, it reflects the strive to balance between maximizing the interests of the MS on the so-called the area of freedom, security and justice, and their international obligation

[107] Olga Ferguson Sidorenko, The Common European Asylum System: Background, Current State of Affairs, Future Direction. (Hague: T.M.C. Asser Press, 2007): 7-39.
[108] Velluti, 5.

to respect fundamental rights and freedoms of individuals.[109] Interestingly, the key challenge in setting up the fully-fledged CEAS with a common policy and procedures on asylum was to keep this balance. Therefore, the control oriented political measures in the evolution of the regional asylum system, coupled with complex legislative procedures produce a profound implication in achieving human rights based approach in the EU asylum law.

Nonetheless, article 78 of the TFEU provides that the CEAS instruments must be in accordance with the Geneva Convention and ¨other relevant Treaties¨.[110] Despite that the so mentioned ¨relevant treaties¨ are not explicitly referred in the TFEU, it is generally agreed that they include the CRC, CAT and the ICCPR.[111] According to the Vienna Convention on the Law of Treaties, the EU MS are bound to the international law principle of *¨pacta sunt servanda¨* where they are obliged to uphold all the international treaties which they are parties to.[112] Pursuant to Article 27 of the Vienna Convention, international law has primacy over domestic law: ¨a state may not invoke the provisions of its internal law as justification for its failure to perform a treaty¨. Hence, MS may not invoke provisions of domestic or regional instruments including the EU legislations over their international obligations. It is therefore clear that compliance with the EU law on asylum is secondary to the legal obligation of MS required by the international human rights and refugee law.

3.2 The Eligibility of UASMs for International Protection under the CEAS

The eligibility of any asylum seeker for refugee status under the CEAS is determined by ¨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* (QD)¨.

Article 2(d) of the QD employees the same definition of a ´refugee´ as the Geneva Convention. Despite the deficiency of both the Geneva Convention and international human rights law in providing a clear meaning of ´persecution´ which is the key element in defining a ´refugee´, the QD defines the acts of persecution as *¨sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which*

[109] *Ibid.*
[110] Consolidated Version of the Treaty on the Functioning of the EU [2010] OJ C83/47, art 78.
[111] Velluti, 11.
[112] Vienna Convention on the Law of Treaties 1155 UNTS 331; entered into force 27 January 1980, art 26.

derogation cannot be made under Article 15(2) of the ECHR¨[113]. Furthermore, such acts of persecution must be ¨an accumulation of various measures, including violations of human rights which is sufficiently severe¨.[114] One observation is that the threshold for identifying the level of harm is very high in the QD and the so mentioned ´basic human rights´ denotes the derogable rights in the ECHR comprising only the civil and political rights.[115] Accordingly, the CJEU uses ECHR as a benchmark to identify the basic human rights as may be used to define the notion ´persecution´,[116] and this judicial practice of the Court has shown consistency. The Court in Y and Z cases held that acts violating any of the rights in the EU Charter but which are not equivalent to the non derogable rights in the ECHR do not amount to acts of persecution within the meaning of article 9 of the QD[117]. Limiting the benchmark only to the ECHR and not to other human rights instruments particularly the non-derogable rights which are specified in the CRC, clearly shows the child insensitive approach of the CEAS in dealing with UASMs.

Furthermore, the dominant influence of the civil and political rights in defining persecution both in the jurisprudence and laws of the EU on asylum restricts the opportunity to incorporate the basic rights of a child as a refugee-relevant factor. Due to their indivisible nature and considering the vulnerability of children, it is difficult to categorize all the rights in the CRC into civil and political rights on one hand, and economic, social and cultural rights on the other. For example, the right to survival and development, the right to health (which prohibits harmful traditional practices such as female genital mutilation), the right to adequate standard of living which are mainly classified as social, economic and cultural rights directly affect the right to life which is a civil and political right.

In addressing this issue, the UNHCR states ¨*children´s socio-economic needs are often more compelling than those of adults, particularly due to their dependency on adults and unique developmental needs. Deprivation of economic, social and cultural rights, thus, may be as relevant to the assessment of a child´s claim as that of civil and political rights. It is important not to automatically attribute greater significance to certain violations than to others but to*

[113] QD, art. 9(1)(a).
[114] *Ibid.,* art. 9(1)(b).
[115] ECHR, art. 2,3,4 and 7.
[116] Lehmann, 65-81.
[117] Y and Z, joined cases C-71/11 and C-99/11, Judgment of 5 September 2012, para 61.

assess the overall impact of the harm on the individual child¨.[118] Additionally, the CRC comprises 23 protection-related rights which do not fall under the traditional category of the so called ´civil and political or socio-economic and cultural rights´.[119] These include, *inter alia*, protection from physical, mental and sexual violence or exploitation; protection against underage recruitment, trafficking; and special protection for the child deprived of family life.[120] The relevance of those rights in determining the refugee status of UASMs is often overlooked by decision-makers.

Article 9(2) of the QD lists some examples of the forms in which the acts of persecution can be carried out. Three of the listings can be related to the above-mentioned protection-related rights; acts of physical or mental violence as corresponding to article 19 and 35 of the CRC; acts of a gender-specific or child-specific nature which may potentially reflect all the protective rights in the CRC including socio-economic and cultural rights; and prosecution or punishment for refusal to perform military service which may relate to article 38 of the CRC on underage recruitment. Although article 9(2) is regarded as a neutralizing or mitigating factor to the high threshold of article 9(1) which might be employed by MS as an excuse to exclude child asylum seekers who fall outside the Conventional definition of refugee, the problematic side is that according to article 9(3), there must be a connection between the acts of persecution and the five reasons for persecution which relate to aspects of civil and political identity, as specified in article 10 of the QD. Additionally, the applicant is at the same time required to prove the connection between the reasons for persecution and the absence of protection against the acts of persecution. Smyth illustrates this as the absence of the State´s protection should be linked to one of the five grounds for persecution even if the violation of the child-rights was perpetrated by a non-State actor for private purposes.[121] In any case, the requirement to establish such connection makes the test even more difficult for UASMs to meet.

Another form of protection provided by the QD for those who do not qualify the status of refugee but would face a real risk of serious harm if returned back to their country of origin is called subsidiary protection. This type of protection is very relevant in the case of UASMs

[118] UNHCR, Guidelines on International Protection: 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. 22 December 2009, HCR/GIP/09/08. par 14.
[119] Smyth, 70.
[120] *Ibid.*
[121] *Ibid.,* 79.

because as discussed above, most of them are unable to meet the requirements of the refugee definition. Article 15(c) of the QD defines serious harm as consisting *¨death penalty or execution; torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict¨*. This definition is criticised for being too narrow and inflexible to incorporate serious child-right violations in times of peace. Moreover, the focus on armed conflict, whether internal or external, overlooks the protection gap that may occur during internal disturbance or low-level insurgency.[122]

With the radical increase of refugee flows to Europe after 2009, and particularly in the years 2015 and 2016, restrictions in law and policy emerged in most MS. Due to those restrictions, the threshold for the subsidiary form of protection (or as commonly referred to protection on humanitarian grounds) was raised, leaving restricted room for interpretation. [123]

It is worth noting that all the rights and benefits listed in Chapter 7 of the QD, including article 31 which particularly deals with unaccompanied minors, are granted only to persons beneficiaries of refugee status or subsidiary protection. Those rights include *inter ali*a protection from refoulement; maintaining family unity; full access to education, health care and social welfare. Those who are ineligible for international protection according to the directive are thus not entitled to the listed benefits as a virtue of rights. In most cases, if UASMs are not granted refugee status or subsidiary protection, they only get access to emergency health services in the MS where they sought asylum.[124]

In short, the QD comprises adult-biased rules in the sense that the core standards and the high threshold qualifying the status of refugee or subsidiary protection, including the exclusion clauses equally apply to minors. Owing to the degree of vulnerability, immaturity and dependency, children need age-specific threshold on their eligibility for international protection. Absence of specific and appropriate rules as basis for ensuring their rights to asylum would further leave UASMs vulnerable to risks of persecution, human trafficking and death. As the ECtHR in Tarakhel v. Switzerland established, it is very crucial to consider the child's

[122] *Ibid.,* 80.
[123] Lidén, Gording-Stang and Eide, 4.
[124] *Ibid.*

extreme vulnerability and protection needs as the decisive factor which should take precedence over considerations relating to the status of illegal immigrant.[125]

3.3 Access to Asylum Procedures

The Directive 2013/32/EU on common procedures for granting and withdrawing international protection (APD) is the main CEAS instrument on asylum procedures. The Dublin III Regulation which is set up under the CEAS to identify a single MS responsible for the examination of a given asylum application also contains various procedural rules in relation to UASMs.

As stated in the UNHCR Guidelines, ¨Children should always have access to asylum procedures, regardless of their age.[126] The key factor in determining access to asylum procedures in the context of UASMs is giving the minor applicant the right and full opportunity to be heard. Pursuant to article 12 of the CRC and 24(1) of the EU Charter, *¨children shall have the right to express their views freely and such views shall be taken into consideration on matters which concern them in accordance with their age and maturity¨*. This particular right enables the minor to freely present the merits of his/her application to the authority responsible for determining whether the concerned child fulfils the criteria for refugee status or subsidiary form of protection. In order to express his/her views, a child should be adequately informed about his/her status, rights and obligations throughout the asylum cycle. The right to information, *inter alia*, includes interpretation, legal assistance, the right to notification on family tracing, the possibility to challenge a transfer decision, and the right to an effective remedy.[127]

Article 24(2) of EU Charter states that *¨in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration¨*. In order to assess the best interest of the child, ´the views of the minor in accordance with his or her age and maturity´ is considered as a decisive factor along with the other three requirements specified in all the CEAS instruments. Article 6(3) of the Dublin III Regulation: In assessing the best interests of the child, MS should, in particular, take due

[125] Tarakhel v. Switzerland (Application no. 29217/12), 4 November 2014.; See also *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, no. 13178/03; *Popov v. France*, no. 39472/07 and 39474/07.
[126] UNHCR (1997), 2.
[127] APD, art. 4(d).

account possibilities for family reunification, the minor's well-being and social development, safety and security considerations and the views of the minor in accordance with his or her age and maturity, including his or her background.

However, the bulk of the APD confer a wide margin of discretion on MS to determine, in their own national legislations, inter alia, access to procedures in cases where minors are involved. In article 14(1) sub-para. 4 of the Directive, a minor´s right to a personal interview which is very important in ensuring the minor´s right to be heard, is left to be determined by the MS responsible to examine the asylum application. Relevant for this purpose is the accelerated or border procedures where MS are permitted to derogate from the basic principles and guarantees of the asylum procedures under chapter 2 of the APD, and fast-track applications without examining the merits or giving the applicants the opportunity for personal interview.[128] According to article 25(6)(a) of the APD, accelerated procedures on UASMs can be applied if the minor comes from a safe country of origin; or lodged a subsequent asylum application which is admissible under article 40(5) of the directive; or the minor is deemed as a danger to the national security or public order for serious reasons. Border procedure may be applied if there is a safe third country for the minor applicant; the UASM has presented false documents to mislead the authorities; or he/she has intentionally destroyed an identity document which proves an identity or nationality of the applicant.[129]

Two observations can be made on the above stated procedures. First in relation to the latter condition, most MS in practice reject asylum applications on grounds of false or insufficient facts where the only reasons to assume that is because the unaccompanied minor was not able to tell his/her story during his/her first encounter with the authorities.[130] UASMs face a number of challenges in providing full information about their cases, which some of them are related to traumatic experiences; lack of trust in public authorities, particularly if the child came from a repressive regime; shame or fear if he/she was exposed to sexual or other forms of abuse.[131] Stang and Lidén, in their review of Immigration Appeals Board decisions, reflect a case of a 14 years old boy who was terrified of being killed by his trafficker if he reveals that he was forced by his trafficker to kill another person. His claim was rejected by the immigration authority as

[128] Smyth, 23.
[129] APD, art. 25(6)(b).
[130] Lidén, Gording-Stang & Eide, 5.
[131] *Ibid*, 6.

"not documented a need for protection."[132] Although this particular case was taken from the Norwegian practice and Norway is not an EU MS, it still represents a common practice in most of the EU MS. Furthermore, it is also important to emphasise that Norway is governed by the Dublin system and article 10 and 11 of the Reception Conditions Directive on detention.[133]

In any event, article 31 of the Geneva Convention strongly obliges Contracting States not to impose any sort of penalty on refugees on grounds of their illegal entry or presence in the territory of the States. Hence, denying access to appropriate asylum procedures or penalizing UASMs for holding documents which they acquired from smugglers in order to get through the irregular routes is violating the minor´s right to seek protection. As discussed in the first chapter, the only possible route for most of UASMs is the illegal or irregular one.

Moreover, an unaccompanied minor needs an assistance from an adult in order to properly present or lodge his/her application. In article 7 of the APD, MS have the discretion to decide the type of cases in which the application of an unaccompanied minor has to be lodged by a representative; or whether the minor can make an application on his/her own behalf. This creates a gap of protection because it is not clear which criteria the MS follow in order to assess the capacity of the UASM to independently make an application for asylum.

Secondly, the APD does not provide special procedural guarantees when applying on UASMs the concept of ¨safe country of origin¨ or ¨safe third country¨ in the accelerated or border procedures. Unless carefully examined, sending unaccompanied minors to what the MS consider safe without giving them full access to asylum procedures may result risks of refoulement, because what is safe for adults may not be so for children. As will be thoroughly discussed in the subsequent section on non-refoulement, assessment in such cases should be carried out with special regard to the child's best interest and the need for special care and protection. Thus, unaccompanied minors should be given full opportunity to present their case, the cause that made them flee from their country and what would happen to them if they get back to their country of origin even if the country is categorized by the MS as ´safe country of origin´. Additionally, MS shall ensure that the UASM has access to exhaust, before a court or

[132] Elisabeth Gording Stang and Hilde Lidén, ¨Barn i asylsaker: evaluering og kartlegging av hvordan barns situasjon blir belyst i Utlendingsnemndas saksbehandling, herunder høring av barn¨. *NOVA-rapport* (2014).
[133] Vigdis Vevstad, *Hva er en Flyktning*. (Oslo: Universitetsforlaget, 2017)

tribunal, the right to an effective remedy and the right to remain in the territory until the final decision is made.[134]

Another issue worth examining is the efficiency or fairness of the procedures employed for the examination of asylum applications from UASMs. Most UASMs in the MS suffer from excessively long waiting time for decision on their asylum applications. Although, the fairness or efficiency of a procedure varies subjectively, complicated and lengthy asylum procedures often hinder the full realization of the right to seek asylum. The APD in article 31(7) under the title ¨examination procedure¨ stipulates that MS may prioritize the examination of an UASM´s application. However, unlike the other sub articles in the same article, the wording of sub article 7 is not mandatory, meaning that the decision to prioritize the application of UASMs is left upon the good will of the MS. The UNHCR, taking into account the vulnerability and special needs of UASMs urges States to give their asylum applications priority with every effort made to reach a prompt and fair decision.[135]

3.4 The Right against Refoulement

Under the EU legal framework, the principle of non-refoulemet is expressly reflected in Article 78 (1) of the TFEU, articles 18 and 19 of the EU Charter and article 21 of the QD. Pursuant to article 21 of the QD, MS are obliged to respect the principle of non-refoulement in line with their international obligations. Along with the Geneva Convention and the human rights treaties which the MS are party to, the legal source for the MS´s international obligations is also derived from the international customary law on non-refoulement.[136] Despite the exceptions laid down in article 33 of the Geneva Convention and article 21(2) of the QD, article 3 of ECHR holds the principle of non-refoulement to be jurisprudentially absolute in the sense that once a real risk of inhumane or degrading treatment has been established, ¨neither the individual's past criminal behaviour nor his/her present risk to national security or to the community¨ can limit the right of non-refoulement.[137] The decision of the ECtHR in the Soering v UK case where the applicant who is a German national applied to the court alleging the breach of articles 3, 6 and 13 of the ECHR if extradited to USA to face trial on a murder

[134] APD, art.46.
[135] UNHCR (1997), 2.
[136] UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (Geneva 26 January 2007) 7-11.
[137] ECtHR, *Othman (Abu Qatada) v UK*, Appl. No. 8139/09, Judgment of 17 January 2012.

charge, gave rise to the first fundamental interpretation of the extra-territorial applicability of article 3 of the ECHR on non-refoulement.[138]

ECtHR has also interpreted the phrase 'inhuman or degrading treatment or punishment' on a high degree of subjectivism which can originate from a generalized violence or deprivation of socio-economic rights, if the violation is sufficiently severe and the State´s responsibility is clearly established.[139] Furthermore, ECHR provides procedural guarantees such as the right to an effective remedy, the right to be heard and the right to an appeal, when article 3 is violated.

However, article 21 of the QD on the protection from refoulement only applies to those who have refugee status or beneficiaries of subsidiary protection. If directly interpreted, the provision fails to protect UASMs whose asylum application is rejected because they are not able to meet the high threshold of refugee status or could not substantiate or prove their claims. It also creates a protection gap in relation to those who are refused to seek asylum based on the cotemporary control activities and non-admission measures at EU´s land or sea borders.[140] It is crucial to note that non-refoulement not only refers to returns or expulsions from the MS, but also includes rejection at the borders.[141]

To this effect, the UNHCR stresses that the principle of non-refoulement equally applies on ¨a state's territory, at a state's borders, and on the high seas¨.[142] The Directive 2008/115/EC on common standards and procedures in MS for returning illegally staying third-country nationals (the so-called Return Directive) provides common rules and procedural safeguards for the return and removal of the irregularly staying migrants, however MS are not obliged to observe those procedures when taking return measures on persons who are *¨subject to a refusal of entry, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State*¨.[143] This immigration controls and coercive return measures without identifying those in need of international protection,

[138] Mole and Meredith (2010).
[139] Smyth, 65; See also ECtHR, *Sufi and Elmi v UK*, Appl. Nos. 8319/07 and 11449/07, Judgment of 28 June 2011.
[140] Scope of the principle of non-refoulement in contemporary border management: evolving areas of law. European Union Agency for Fundamental Rights, 2016 (available at file:///Users/kisanetg/Downloads/fra-2016-scope-non-refoulement_en.pdf).
[141] Goodwin-Gill and McAdam (2007), 208.
[142] UNHCR (1997).
[143] Return Directive, art. 2.

particularly children, contradicts with the principle of non-refoulement and leads to gross violation of human rights by MS.

Another Observation on the risks of refoulement under the CEAS instruments is that the Dublin Regulation does not prohibit the transfer of a minor to another MS or a third country. Chapter 6 of the Regulation dealing with taking charge and taking back of asylum seekers who have lodged multiple applications in different MS does not provide any specific guarantees or exemptions on the return or transfer of UASMs to another MS. Article 31(2)(c) under the title ¨Exchange of relevant information before a transfer is carried out¨, states that the transferring State has the obligation to transmit, among other things, information on the education of the minor to be transferred.

Particularly, in cases where the UASM has no family members in one of the MS and the minor has lodged multiple asylum applications in different MS, the Dublin Regulation in article 6(2) does not clearly specify which MS is responsible to examine the application. In *MA and Others v. Secretary of State for the Home Department*, the CJEU dealt with the question whether Article 6(2) of the Dublin Regulation means that, where an UASM with no family member legally present in the MS has lodged an application in more than one MS, the responsible MS must be the one which the minor lodged his first application or that where the minor lodged the most recent application.[144] The Court, taking into account the vulnerability of UASMs and best interest of the child as referred in article 24(2) of the EU Charter, concluded that the responsible MS should be the one where the most recent application was made and that unaccompanied minors as a rule should not be transferred to another MS. In Tarakhel v. Switzerland, ECtHR held that it would be a violation of article 3 of the ECHR if the Switzerland authorities were to transfer an Afghan family with six children to Italy under the Dublin Regulation without receiving individual guarantees from the Italian authorities based on the age of the children.

The Dublin Regulation at the same time gives, as a virtue of right, MS the discretion to send an asylum seeker to a third country pursuant to its national laws.[145] This provision is general and again in the absence of any specific exception, UASMs may be refouled to another country. The Reception Condition Directive (RCD) also makes it clear that expulsion of minors from a

[144] CJEU, *MA and Others v. Secretary of State for the Home Department*. Case C-648/11 [2013] 3 CMLR 49.

[145] Dublin III Regulation, art. 3(3).

MS is allowed. Article 14 of the Directive states that minor asylum seekers shall have access to the education system under similar conditions as nationals of the host MS as so long as an ¨expulsion measure against them or their parents is not actually enforced¨. Furthermore, article 24(2) of the Directive also notes that ¨unaccompanied minors who make an application for asylum shall, from the moment they are admitted to the territory to the moment they are obliged to leave the host Member State¨ be placed in a place as provided there in the article. There are a number of case scenarios where UASMs disappear from the reception centres of MS fearing to be sent back to the MS they first arrived or a third country where their safety is jeopardized. For instance, 143 UASMs disappeared from the reception centres of Norway during the first four months of 2017.[146]

According to the UNCRC, the measures on the transfer or return of unaccompanied minors should be assessed individually using the ´best interest of the child´ approach.[147] The return shall be arranged only if it is in the best interests of the child and with advance secured and concrete arrangements of care and custodial responsibilities in the country where the minors are to be transferred.[148] The best interest determination in such cases should take into account *¨safety, security and conditions, including socio-economic conditions awaiting the child upon return; views of the child expressed in exercise of his or her right to do so and those of the caretakers; the child's level of integration in the host country and the duration of absence from the home country; the child's right ´to preserve his or her identity, including nationality, name and family relations´; and the ´desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background¨*.[149]

3.5 The Right to Liberty

Hitherto though, it is evident that a great number of UASMs have been detained in the EU MS, and hence detention of child asylum-seekers has repeatedly been a theme on the concluding observations of the UNCRC to the EU MS.[150] Unlike the international human rights law, the ECHR does not contain the requirement of arbitrariness but rather lists permissible grounds for lawful detention or arrest. The ECHR under article 5(1)(f) permits lawful arrest or detention of

[146] Lidén, Gording-Stang & Eide, 10.
[147] UNCRC GC no 6 (2005) para. 84.
[148] *Ibid.*
[149] *Ibid.*
[150] Commission evaluation of RCD. *Report from the Commission to the Council and the European Parliament on the application of Directive 2003/9/EC*; COM (2007) 745 final section 3.5.2, p 9.

a person to prevent unauthorised entry into a country or to effect deportation, in accordance with a procedure prescribed by law. In contrast to article 37(b) of the CRC, article 5 of ECHR when applied in child specific cases, allows detention without the requirement of the ´last resort measure´ and the ´shortest appropriate period of time´. The ECtHR in Chahal v the UK, declined to apply the ´proportional, reasonable and necessary´ requirement in respect to article 5(1)(f). This approach endangers the protection of UASMs because it shows that no individualized assessment is required to allow a best interest determination when permitting the detention of a child for his/her unauthorized entry. Both the UNHCR and UNCRC strongly oppose administrative detention of minors in the context of asylum, and stress that alternative care arrangements with adequate accommodation and appropriate supervision should be made.[151]

Interestingly, detention under the CEAS is dealt within the Directive 2013/33/EU on Reception Conditions (RCD)**,** that is, as a general rule, detention is not allowed for an asylum seeker on the sole reason that he/she is an applicant for international protection. If detention becomes necessary on an individual basis and if other alternative measures cannot be applied, the applicant may be detained for the purpose of verifying his/her identity or application; national security; or return process.[152] Detention of minors is not absolutely prohibited under the Directive. Pursuant to Article 11, minors are categorized under ¨vulnerable persons and applicants with special reception needs¨. With regard to UASMs, the Directive expressly states that they can only be detained in exceptional circumstances, however, it does not specify what those exceptions are. Similar to article 37 of the CRC, article 11(2) of the RCD states that minors can be detained only as a measure of last resort and when other less coercive alternative measures cannot be applied effectively. The detention shall be for the shortest period of time with all efforts to release the detained minors.[153] Similarly, in the case of detention for the purpose of removal from the territory of a MS, article 17(1) of the Return Directive stipulates that unaccompanied minors shall only be detained as a measure of last resort and for the shortest appropriate period of time. It further states that ¨the best interests of the child shall be a primary consideration in the context of the detention of minors pending removal¨.[154]

[151] UNHCR *Guidelines on Applicable Standards and Criteria relating to the Detention of Asylum-seekers* (1999) 10; see also UNCRC GC no. 6 (2005) 18.
[152] RCD, art. 8(3).
[153] *Ibid*., art. 11(2).
[154] Return Directive art. 17(5).

Article 10 of the RCD sets out the conditions of detention, including the facilities for detention and access to communication by detainees. The general conditions for detention of UASMs are that they should not be placed in prison accommodations, rather placed, as far as possible, in institutions with personnel qualified for their needs and age, and shall be separated from adult detainees.[155] This creates a loophole because it is not clear where UASMs should be detained in the absence of such special institutions.

According to the jurisprudence of the ECtHR, poor detention conditions may constitute inhumane or degrading treatment in violation to article 3 of ECHR. The Court in *Mayeka v Belgium* found that the detention of a five-year old unaccompanied minor in a closed centre for adults for about two months constituted inhuman or degrading treatment in violation of article 3 of ECHR.[156] The child was left without any supervision, counselling or educational assistance during the detention period. The UNCRC in paragraph 63 of the General Comment no. 6 notes that even under exceptional cases of detention, the aim should be ¨care and not detention¨, and special arrangements which are suitable for children should be made in full respect to article 37(a) and (c) and the principle of the best interest of the child.

In the case *Mohamad v. Greece,* the Greece authorities ordered the expulsion of the minor applicant to Turkey on grounds of his irregular entry to Greece, and arrested him for over 5 months considering that he would abscond.[157] The ECtHR concluded that, for reasons that the applicant had been kept in a centre with adults which does not suit to his needs as an unaccompanied minor and for a length exceeding the reasonable time to meet the aim of the detention, the detention constituted a violation of article 3 of ECHR, the right to an effective remedy and the right to liberty and security[158].

Pursuant to article 11(2) of the RCD, detained minors ¨shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age¨. However, those conditions fall under the discretionary power of MS, for example, MS in justified cases may derogate from the provision stipulating that detained minors shall have the possibility of engaging in leisure activities.[159] Outside those derogable rights to leisure and recreational

[155] RCD, art. 11(3); Return Directive, art. 17(4).
[156] ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* (Application no. 13178/03). 12 October 2006.
[157] ECtHR, Mohamad v. Greece (Application no. 70586/11), 11 December 2014.
[158] *Ibid.*
[159] RCD, art. 11(6).

activities, the Directive is silent about the full enjoyment of other rights as provided in the CRC by minor detainees. There are no express provisions in the RCD on the equal treatment of detained minors visa vis non-detained children, including the right not to be discriminated. The Commission on the evaluation of the RCD notes that a number of MS deny detained minors access to education or make it very limited.[160] The UNCRC strongly urges States to ensure that children in detention get education which presumably ought to take place outside the detention facilities inorder the education to continue after their release.[161]

Procedural guarantees for detained applicants are laid down in Article 9 of the RCD. One of the significant guarantees provided is that a speedy judicial review shall be made available to verify the lawfulness of the detention, either ¨ex officio or at the request of the detained¨[162]. In order to access such request for judicial review, the detained may get free legal assistance or representation according to the procedures of national laws.[163] However, the mandatory appointing a representative for a detained UASM seems to be absent in the RCD, and this raises an alarming concern in ensuring the best interest of the child and the rights provided by article 37(d) in the context of child detention. As stressed by the UNCRC, unaccompanied children whose liberty is deprived should be promptly and freely granted access to legal and other appropriate assistance, including the appointment of a representative.[164]

Generally speaking, the directive lacks child-specific guarantees in the provisions related to procedural safeguards of asylum seekers in detention. It is also worth noting that the broad discretionary power conferred to MS, coupled with the bulk of generic and derogable provisions renders the RCD to not fully conform to the requirements of article 37 of the CRC, and prevents UASMs from receiving appropriate detention conditions and procedural guarantees with a dignified standard of treatment.

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[160] *Report from the Commission to the Council and to the European Parliament on the Application of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers´*, COM (2007) 745 final §3.4.4, p.8.
[161] UNCRC GC no 6 (2005) para. 63.
[162] RCD, art. 9(3).
[163] *Ibid.,* art. 9 (6-10).
[164] *Supra footnote* 161.

CHAPTER - 4
CONCLUSION

The clear contention in the discussion of this paper is that the present refugee regime, both at the international and EU levels, limits the right of unaccompanied minors to seek and qualify for international protection because a child like any adult applicant has to meet the qualification criteria which are adult biased. Moreover, UASMs face significant challenges during the asylum cycle which are, inter alia, their limited mental capacity to remember and provide sufficient and adequate information, the language barriers throughout the asylum procedures, the insecurities of being on their own, the long waiting periods for decision on their asylum applications which in most cases limit their right to education and health services.

4.1 Pitfalls of the EU Asylum System

Although the second phase CEAS instruments in their preambles re-affirm the principles of human rights treaties and the Geneva Convention, they still reflect a securitized approach to asylum and immigration. Generally speaking, one of the main problems with the current CEAS instruments is that MS are given a broad discretionary power to interpret the provisions of the instruments and to enact specific national regulations when implementing them. This creates a lack of coherence in applying the CEAS by MS in relation to mainly the recognition and type of protection granted to asylum seekers, asylum procedures and reception conditions. And in most cases, those national regulations are found to be contradictory with the international principles and norms of human rights law.

This great variation in the interpretation and implementation of the CEAS provisions by MS has led the EU Commission to propose a phase-three CEAS instruments in July 2016. The aim of the new proposals is mainly to change the current instruments from being directives into regulations. [165] However, in doing so, the EU is increasingly stressing on formulating more restrictive standards. The new proposals aim to narrow the variations in implementing the CEAS because the different practices in the MS are presumed as contributing to ¨secondary movements and asylum shopping¨ and leading to unequal distribution of burden among the MS

[165] Except the Dublin III Regulation and the EURODAC Regulation, the rest of the CEAS instruments are in the form of directives which require the transposition of the instruments in to national laws of the MS.; *An Introduction of the Common European Asylum System for Courts and Tribunals, A judicial analysis*. Produced by the International Association of Refugee Law Judges European Chapter under Contract to EASO. (August 2016), 17.

in granting protection.[166] Not taking into account the protection needs of asylum-seekers, especially vulnerable groups such as children, this particular approach of reforming the CEAS significantly limits the human rights-based approach. For instance, the 2016 Legislative Proposal on Reception Conditions states that *¨the introduction of more targeted restrictions to the applicants´ freedom of movement and strict consequences when such restrictions are not complied with will contribute to more effective monitoring of the applicants´ whereabouts¨*.[167] Moreover, the proposals aim to limit equal treatment of asylum-seekers concerning education, employment, family benefits and daily allowances.[168]

Another key challenge in guaranteeing the human rights of refugees under the EU asylum system is clearly observed when MS opt to act collectively through the regional organ over a range of policy areas.[169] The gap of protection, then, emerges as MS try to implicitly confer the obligations to guarantee human rights on the regional organ and where such organ´s rules and policies conflict with the international obligations. The EU MS, upon implementing the EU Laws, are required to act in consistence with the EU internal rules.[170] This creates ´a two-tier system of protection´ in the MS, which subsequently results a significant gap to protect and promote rights of asylum-seeking children.[171] The main challenge in this case could be the position of EU as an organ not being able to sign a human rights treaty such as the CRC. According to Articles 46 and 48, the CRC is open for signature only by States, excluding international organisations such as the EU. Thus, the UNCRC does not have the power to make recommendations to the EU.[172] The strategy of EU on children's rights is therefore ¨a policy commitment, not underpinned by any direct obligation in international law as is the case for a Member State¨.[173]

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[166] Legislative Proposal Reception Conditions, 2016/0222(COD)- 13/07/2016.
[167] *Ibid.*
[168] *Ibid.*
[169] Israel de Jesús Butler. The European Union and International Human Rights Law, UN Human Rights Commission, Regional Office, Europe, available at: http://www.europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf.

[170] *Ibid.,* 6.
[171] *Ibid.*
[172] Nigel A. Thomas, Karl C. Hanson and Brian B. Gran. ¨An independent voice for children's rights in Europe? The role of independent children's rights institutions in the EU¨, *International Journal of Children's Rights* 19 no. 3 (2011): 439.
[173] *Ibid.*

It is also interesting to observe that the EU is not a party to the Geneva Convention although all the MS are parties to the Convention which makes them individually accountable for the observation of its provisions. This means that a MS which infringes the Geneva Convention and the CRC will be held responsible even though it acted in compliance to the EU laws.

4.2 Recommendations

The overall conclusion of the thesis is that since the issue of refugee children has globally reached humanitarian crises, the most sustainable way of addressing the gap of protection in the context of unaccompanied asylum-seeking minors is by devising a child-specific legal instrument with age-sensitive set of standards, both internationally and regionally, based on the principles of international human rights and refugee law.

Additionally, designing sufficient legal safeguards which include age-sensitive procedures should be central to any child-asylum legislation. Increased use of the Dublin Regulation and applying measures such as accelerated procedures on unaccompanied minors at the borders of MS may hinder access to procedures which in effect violates the right to seek protection. Children, in an appropriate manner and under suitable reception conditions, should be given full opportunity to provide adequate information on their application for protection. The subjective element in establishing fear of persecution should be the decisive factor in order to ensure the best interest of the concerned child applicant in examining the asylum application. Specific laws which prioritize UASMs in the asylum procedures should be put in place. Personnel working with UASMs as well as guardians and legal representatives should be required by law to be specifically and continuously trained in a child sensitive manner to facilitate the asylum procedures at all stages of the asylum cycle.

Within the EU, both the European Commission and Parliament have significant roles in creating new laws.[174] Although the Commission has the sole power to initiate legislation, the Parliament can also request the Commission to propose legislations to the Council.[175] In vast majority of the EU laws including asylum and immigration, both the Parliament and Council have equal power in adopting the proposed legislations.[176] Despite the fact that the European

[174] http://www.europarl.europa.eu/aboutparliament/en/20150201PVL00004/Legislative-powers
[175] *Ibid.*
[176] *Ibid.*

Council most of the time stresses on preserving the national interests of MS and criminalizing asylum, the UNCRC, UNHCR and independent bodies advocating for child rights should closely work with the institutions to promote the formulation of a child-specific legislation on asylum which is founded on the principles of equality and best interest of the child.

The jurisprudence of the European Courts in the field of asylum is equally important to narrow the gaps of protection by rendering case laws based on the human rights instruments. As observed by Velluti, both the ECHR and the EU Charter have great impact on the development of the CEAS instruments to substantiate the principles of human rights which are merely vague in the asylum laws.[177] ¨The ECJ's judicial activism combined with the equally important 'monitoring' function of the ECtHR is filling in the *lacunae* of EU asylum legislation, which in spite of the recast process remain¨.[178] Although the EU as a regional organ could not accede the ECHR considering that the Convention system was meant only for States and that EU´s specific features and autonomy should be preserved,[179] the ECtHR can effectively render human rights protection for asylum-seekers by holding MS individually accountable for violations of asylum-seeker´s fundamental rights according to ECHR.

Both at the international and regional levels, there is no judicial system established with specific legal mandate on child related claims. The UNCRC only adopts general comments to explain in detail the rights under the CRC and issue concluding observations in a form of recommendation to State parties without any direct legal effect. The Committee can hear individual complaints from children whose rights have been violated only if their government ratifies the Optional Protocol to the CRC on a Communication Procedure. Hitherto though, only 36 States have ratified the Protocol. Hence the establishment of an independent judicial institution is crucial to ensure effective justice, particularly for children in forced migration. The existing human rights courts are generally characterized by large volume of claims which makes them impossible to render a decision within a reasonable period of time. Therefore, a separate international and regional court with qualified experts would enhance efficiency and accessibility for asylum-seeking minors to seek remedy for the violations of their rights.

[177] Velluti, 77-101.
[178] *Ibid.*
[179] Opinion 2/13, p.161; Inga Daukšienė and Simas Grigonis, ¨Accession of the EU to the ECHR: Issues of the co-respondent mechanism¨, *International Comparative Jurisprudence* 1 (2015): 98–105.

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