

# PROTECTION OF UNACCOMPANIED CHILDREN IN MIGRANT CRISIS – TEST FOR THE EUROPEAN UNION

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## **Abstract:**

*The European Union failed to protect the migrants and to provide special protection and care for unaccompanied and separated children during the massive migrant flows in Europe. Despite the EU and other international regulations, EU as a whole and some member states failed to establish and put in practice quality standards, referral mechanisms and standardized procedures in the reception and care of migrant and asylum seeking children, including with regard to the individual best interest determination, assistance and support for victims of violence, child-sensitive hearings and interviews. Also, it is more than obvious that there is no effective and efficient guardianship services for unaccompanied and separated children migrants and refugees. The aim of this paper is not only to elaborate the legal frame and the past experience in this regard, but also to provide some new ideas and prospects for improvement of the child protection and finding solutions for the children, families, societies and states.*

**Keywords:** *unaccompanied children, migration, EU, legislation, guardianship*

*JEL Classification code: K3 – K36*

## **Introduction**

Migration is not a new thing – it is known historically that people have always had migratory lifestyles. There is enough evidence that people have moved from far away places to inhabit new areas. In more recent years, such as the Industrial Revolution period (1843–1939), over 50 million people left Europe for the USA, Canada, Argentina, Australia, New Zealand and South Africa. Many of them left to escape the poverty and periodic crop failures in Europe.

The concept is very similar today. In fact, people find it easier to move because of the availability of efficient transport, way-finding technology, improved communications, media, and information, even though new policies, laws and controls in entry points are much more rigorous than ever before.

What is human migration? If looking for a definition, you will find dozen. The most simple and comprehensive one defines migration as the movement of people from one place

in the world to another for the purpose of taking up permanent or semi-permanent residence, usually across a political boundary. There are many types of migration: internal, external, emigration, immigration, population transfer, impelled migration, chain migration, return migration, seasonal migration, etc. People who migrate are defined as emigrants, immigrants, refugees, internally displaced persons, illegal migrants, human trafficking, or undocumented immigrants.

Why do people migrate? Human beings are rational. They consider the advantages and disadvantages of staying vs. moving and other factors like distance, costs, travel time, transportation, terrain, barriers, culture etc. What causes the migration? In theory, we differentiate between the so-called push and pull factors (King, 2012, p.12; Aronowitz, 2009, p.14). Push factors relate to reasons for emigrating (leaving a place) because of a difficulty (war, food shortage, flood, poverty, unemployment, etc). Pull factors are related to reasons for immigrating (moving into a place) because of something desirable (better climate, work, food, freedom, peace, democracy, etc.).

What is a migrant crisis? Since the beginning of 2014, over 1 million people have arrived at European Union (EU) borders, through irregular channels, fleeing conflict and violence at home or in search of a better life abroad. This migration surge is the largest and most challenging that Europe has faced since the World War II. The lack of an adequate response by EU has left hundreds of thousands of people, refugees and migrants increasingly vulnerable. What does vulnerability mean regarding migration? The United Nations defines the migrant as any person who is moving across an international border or within a state away from his/her habitual place of residence, regardless of (1) the person's legal status; (2) whether the movement is voluntary or involuntary; (3) what the causes for the movement are; or (4) what the length of the stay is<sup>1</sup>. A refugee is an individual who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of particular social group or political opinion, is outside of 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" (Convention relating to the Status of Refugees, UNHCR, 1951). Amongst the migrants and refugees, there are significant numbers of vulnerable people: unaccompanied and separated children, female, old, disabled, victims of trafficking. Children are not excluded from difficulties facing the long journey.

## **Unaccompanied and separated children – definition and legal frame**

Child migration encompasses many different categories including dependent (travelling with family members) and child migrants who travel without parents or guardians. The latter are legally defined as "unaccompanied" or "separated". In the context of migration to the European Union, an "unaccompanied minor", as defined by Directive 2011/95/UE, refers to a minor who arrives on the territory of a European Union Member State unaccompanied by an adult responsible or who is left unaccompanied after he or she has entered the territory of the Member State (Directive 2011/95/EU of the European Parliament and of the Council, 2011). There is also one other category of children, who arrive with an adult but the relationship to

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<sup>1</sup> *Glossary on Migration*, IOM, 2004, <https://www.iom.int/key-migration-terms#Migrant>.

that adult is uncertain, such as in cases of teenage or child marriage. These children have been described as “accompanied non-accompanied” (Schwarz, “Minor refugees and the German system of protection and best interest determination”, Presentation at IOM Nuremberg, 2016).

There are broad differences in international, European and national definitions of children travelling alone. For example, according to the UN Convention on the Rights of the Child, “child” is defined as “...every human being below the age of eighteen years” (Convention on the Rights of the Child).

Same or very similar definitions provide the European Union asylum instruments, which instead of “child”, refer to the notion “minor” and define it as “a third-country national or stateless person below the age of 18 years old” (Regulation (EU) No 604/2013 of the European Parliament and of the Council). Regarding the “unaccompanied children”, also called “unaccompanied minors”, the most accepted and inclusive definition is the one deriving from the General Comment no. 6 on the Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, according to which, “unaccompanied children are children as defined in article 1 of the Convention on the Rights of the Child, who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so” (General Comment no.6, Convention on the Rights of the Child, 2005). In the same document, “separated children” are defined as: children, as defined in article 1 of the CRC, who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members”.

There are significant differences between Member States with respect to national definitions regarding the age limit and whether or not the children are unaccompanied. In some Member States, information about the unaccompanied children in process of data collection includes all those who claim they are unaccompanied children, before an age assessment has confirmed this, whereas other Member States only count those recognized as such by competent authority.

## **Problems and challenges**

Children and youths do migrate. Whether between or within countries and whether accompanied by their relatives or not, they become a recognized part of today’s global migration. The migration of children is considered as a new area of concern and focus. Unaccompanied children are entitled to international protection under international human rights law, international refugee law, international humanitarian law, various regional instruments, and EU law as well. It is essential that they are provided with effective protection and assistance in a systematic, comprehensive and integrated way. Obligations deriving from the Convention on the Rights of the Child vis-a-vis unaccompanied and separated children include the obligation to develop national legislation, establish administrative structures, carry out research and data compilation and provide proper training. There are many problems and challenges when it comes to unaccompanied and separated children. The main concerns for the governments and international organizations are: reception and integration in the country of destination, health and resettlement-related activities, return and reintegration in the country of origin or a third country, family tracing and reunification, etc.

Regarding the migration of children, the following principles must be respected: non-discrimination, best interest of the child, life and full development, family unity, evolving capacities, participation and confidentiality. These principles derive from the Convention on the Rights of the Child. States shall respect and ensure rights for children set out in the Convention to all children in their jurisdiction without discrimination, including the asylum-seeking, refugee and migrant children, irrespective of their nationality, immigration status or statelessness. Many articles of the CRC are related to ensuring the maximum development of the child (health, adequate standard of living, education, leisure and play). This also means that children should be protected from violence and exploitation. In addition, the Convention states that all efforts should be made to return an unaccompanied or separated child to his or her parents except where further separation is necessary for the best interest of the child. The receiving states must respect the principle of non-refoulement: it must 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. As for the principle of participation, the views of the children should be given due weight in accordance with the age and maturity of the child. Last but not least, all information received in relation to an unaccompanied or separated child should be protected, consistent with the obligation to protect the child's rights, including the right to privacy.

From another point of view, there are also some other issues which are of great importance. For example, data collection, double counting, immigration detention, age assessment and return. There are significant differences in the way data is collected and identification of unaccompanied and separated children occurs. Many countries differ in the way they collect and publish their statistics. This also leads to the problem of double counting. Data on unaccompanied and separated children is aggregated at the European Union level. This process inevitably produces double counting of unaccompanied and separated children and produces "missing" children. In addition, this means that a large number of people who were counted when they arrived in the European Union (e.g. Greece) were counted again when entering the EU for the second time through another country (e.g. Croatia or Hungary). The problem with the "missing" children migrants deserves extra attention. In general, across European Union Member States, there is no consistency in the definition of "missing" children. Only half of the EU Member States hold statistics of this category of children. It is also a matter of concern whether this data is comparable or systematically collected. Only few EU Member States have specific legal or procedural regulations on missing migrant children (Austria, Finland, Ireland and Romania)<sup>2</sup>. One of the main challenges of the European Union remains the fact that there is no cross-border system with a mandate to trace the "missing" children.

Immigration detention refers to an established practice by some Member States and governments to detain refugees, asylum-seekers and other migrants in institutional facilities. Fourteen Member States adopt detention measures for unaccompanied and separated children or for those whose age is disputed. This means that the authorities have legal opportunity to put detention in practice<sup>3</sup>.

Last but not least, one of the key challenges is the return policy of the EU Member States. There is lack of official data on voluntary and forced returns of unaccompanied and separated

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<sup>2</sup> European Commission (2013). Missing children in the European Union: Mapping, data collection and statistics. Publication Office on the EU, Luxembourg.

<sup>3</sup> Medland, Pavlou, Darbishire, Anderica, Kubiak, Balson and Lani (2015). *The Uncounted*. [www.globaldetentionproject.org/the-uncounted-the-detention-of-migrants-and-asylum-seekers-in-europe](http://www.globaldetentionproject.org/the-uncounted-the-detention-of-migrants-and-asylum-seekers-in-europe)

children, and there is no consistent data regarding the outcomes of children who have been returned by EU Member States. In March 2016, the Treaty between EU and Turkey came into force, allowing all new irregular migrants to be returned to Turkey (Official Journal of the EU, Agreement between the EU and the Republic of Turkey on the readmission of persons residing without authorization). However, under newly adopted Greek legislation, children and vulnerable groups cannot be returned.

There are great challenges in relation to two particular issues: first, the best interest of the child and second, the guardianship. The best interest of the child is a primary consideration in all actions concerning children, including the search for short and long-term solutions (art. 3, CRC). This principle, must be respected during all stages of the displacement, it must be documented in preparation of any decision fundamentally impacting on the unaccompanied or separated child's life. This determination requires a clear and comprehensive assessment of the child's identity, including his or her nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs.

The appointment of competent guardians as expeditiously as possible is a key to ensure respect for the best interest of unaccompanied or separated children. This means that the states and organizations working on this issue should work on behalf of these children and represent the best interest of the children including the asylum procedures or administrative or judicial proceedings which means that the guardians should also be legal representatives of the unaccompanied or separated children. The "legal guardian" has no proper definition in international law because its precise definition, function and manner of appointment varies from jurisdiction to jurisdiction<sup>4</sup>. The main characteristics of the function include, inter alia: a designated individual or competent entity that under relevant national legislation has been formally assigned responsibility for the child and is vested with the legal right and responsibility to make decision in the place of parents, in full consultation with the child. The "legal guardian" should have relevant knowledge of children's issues, an ability to work directly with children and an understanding of any special and cultural needs of the children to be entrusted to them so as to ensure that the interest of the child is safeguarded and that the child's legal, social, health, psychological, material and educational needs are appropriately covered. The main problem in protecting the best interest of the unaccompanied or separated children via the legal guardians is the lack of adequate people who have appropriate training and professional support in this regard since the overall role and responsibility of the legal guardian is to ensure that the rights of the child are protected.

## **Recommendations and conclusions**

In order to list several recommendations and to propose solutions, it is very important to give several answers on a few remaining questions. It is important to highlight that immigration rules are not the same in every EU country. This is because most EU countries have both EU rules and their own national rules. Since 1999 the EU has been developing a Common Immigration Policy for Europe. The EU Member States have agreed that the EU should have

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<sup>4</sup> International Committee of the Red Cross (2004). Inter Agency Guiding Principles on Unaccompanied and Separated Children, Geneva, p. 47.

common or EU-wide immigration and visa rules that will be valid all across the EU. The common rules include: entry and residence conditions for migrants, procedures for issuing long-term visas and residence permits, the rights of migrants living legally in an EU country, tackling irregular migration and unauthorized residence, fight against human trafficking, agreements on readmission of citizens returning to their own countries and incentives and support for EU Member States to promote the integration of migrants. The common measures include: EU-wide rules that allow citizens of countries outside the EU to work or study in an EU country, EU-wide rules that allow citizens of countries outside the EU to bring their families to live with them and/or to become long-term residents, and shared visa policies that enable non-EU citizens to travel freely for up to 3 months within Europe's single travel zone – Schengen Area. It is important to emphasize that some EU Member States do not apply EU-wide rules related to immigration: Denmark, Ireland and UK. Also, each EU Member State alone decides on the following: the total number of migrants that can be admitted to the country to look for work, all final decisions on migrant applications, rules on long-term visas and conditions to obtain residence and work permits when no EU-wide rules have been adopted.

There is EU legislation on asylum, immigration and trafficking in human beings that include specific provisions on the protection of unaccompanied children. For example, on asylum, there is a so-called Dublin Regulation, Temporary Protection Directive, Qualification Directive, Reception Conditions Directive, Asylum Procedures Directive, etc. The aim of this legislation is to ensure representation of the unaccompanied children, place them with the adult relatives, with a foster family, in accommodation centres with special provisions for minors or in other suitable accommodation. Also, the aim of the listed legislation is to attempt to trace the unaccompanied children family members as quickly as possible, to ensure appropriate training for people working with this vulnerable group. Last but not least, the goal of the legislation is to take due action of family unity, welfare and social development of the unaccompanied children as well as their safety – all in accordance with the principle of the best interest of the child.

From immigration perspective, EU also has a wide legislative palette: the Return Directive and the Schengen Borders Code. The aim of this legislation is to consider unaccompanied children as being children first, before being migrants. The legislative acts allow the admission of parents or grandparents of unaccompanied children refugees for the purpose of family reunification. Prior to deciding on the return of unaccompanied children, the legislation obliges to provide assistance by appropriate bodies other than the authorities enforcing return. Also, the legislation states that the authorities should be ensured that the unaccompanied child will be returned to a member of his/her family, a nominated guardian or adequate reception facilities in the country of return. Therefore, if necessary, the authorities should extend the period for voluntary departure, taking into account school attendance and the existence of other family and social ties. Pending return ensures that the family unity is maintained, emergency healthcare is provided, minors have access to the basic education system during their stay and special needs of vulnerable persons are taken into account. Last but not least, unaccompanied children shall only be detained as a measure of last resort and for as short period of time as possible in institutions that take into account the needs of persons of their age.

Regarding trafficking in human beings, EU's legislation is composed of Directive on preventing and combating trafficking in human beings and protecting its victims and Directive

on combating the sexual abuse and sexual exploitation of children and child pornography. The goal of these Directives is to consider all children as particularly vulnerable and respect the best interest of the child in all actions. Also, the legislation guarantees special measures for prevention as well as for assistance and support based on individual assessment of the child's circumstances, needs and views in order to find a durable solution. Next, the legislation establishes an obligation for the authorities to appoint guardian or representative for unaccompanied children victims of human trafficking or victims of sexual abuse/exploitation. It is important to note that the standards of the EU Charter of Fundamental Rights and of the UN Convention on the Rights of the Child dictate all EU actions concerning unaccompanied children.

One may conclude that the European Union has a proper legislation. But there are many practical problems and challenges. There are many challenges with the first step/contact which is reception and care of migrant and asylum seeking children, as well as with unaccompanied children. There is a need of promoting quality standards, referral mechanisms and standardized procedures in this process including with regard to the individual best interest determination, assistance and support for victims of violence, child-sensitive hearings and interviews. EU Member States should ensure that age assessment procedures are dignified, multi-disciplinary and apply the principle of benefit of doubt according to the scientific reliability of the methods used. EU Member States must promote effective guardianship services for unaccompanied children oriented at the best interest of the child and quality standards as well as training, supervision and monitoring of guardianship services. EU should define minimum quality standards for guardianship services for unaccompanied children and ensure that a guardianship institution is in place that is oriented at the best interest of the child and provides effective support, supervision and monitoring of guardians with special care for cases where guardianship is given to an unaccompanied child's sibling. EU should provide training for officials and professionals working with and for the unaccompanied children, including multi-disciplinary training on the proper EU and UN legislation. Training should prepare professionals and officials to better help and support children by understanding sources of risk and resilience, signs of exploitation and trafficking, and social determinants of health. EU should work more on cross-border cooperation on transnational child protection cases with the objective to identify and implement a durable solution in the best interest of the child, including continuity of care and longer-term follow up in the case of return. EU should cease the detention of unaccompanied children for immigration related matters including for purposes of determining migration status or due to their parents' immigration status. EU should develop a model for monitoring of the situation and the human rights of migrant and asylum seeking children with a mandate to promote and support the implementation of international standards in this area.

To sum up, the EU should adopt some extra legislation with special attention to unaccompanied and separated children migrants. EU should promote quality standards and standardized procedures for the EU and national institutions dealing with unaccompanied and separated children on a move. Also, EU should ensure access to services and social integration, in particular through effective guardianship. Also, EU should enhance the cooperation across regions and between countries of origin and destination as well as cooperation between EU Member States. Last but not least, EU should pay more attention on capacity building, knowledge and allocation of resources.

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