Detention, Schubhaft and trattenimento.
Deprivation of liberty of unaccompanied minors: a problem of terminology?

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Innsbruck, im September 2019
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<tr>
<td>ABGB</td>
<td>Allgemeines Bürgerliches Gesetzbuch</td>
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<td>AIDA</td>
<td>Asylum Information Database</td>
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<tr>
<td>App</td>
<td>Application</td>
</tr>
<tr>
<td>BGBI</td>
<td>Bundesgesetzblatt</td>
</tr>
<tr>
<td>BWV</td>
<td>Berliner Wissenschafts-Verlag</td>
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<tr>
<td>CEAS</td>
<td>Common European Asylum System</td>
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<tr>
<td>CoE</td>
<td>Council of Europe</td>
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<td>CPMS</td>
<td>Child Protection Minimum Standards Working Group</td>
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<td>CRC</td>
<td>Convention on the Rights of the Child</td>
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<td>CRPD</td>
<td>Convention on the Rights of Persons with Disabilities</td>
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<tr>
<td>CUP</td>
<td>Cambridge University Press</td>
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<tr>
<td>dlgs</td>
<td>decreto legislativo</td>
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<tr>
<td>dpCm</td>
<td>decreto del presidente del Consiglio dei ministri</td>
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<tr>
<td>dpr</td>
<td>decreto presidenziale</td>
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<tr>
<td>DRC</td>
<td>Democratic Republic of Congo</td>
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<td>DTM</td>
<td>Displacement Tracking Mix</td>
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<tr>
<td>EASO</td>
<td>European Asylum Support Office</td>
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<tr>
<td>EC</td>
<td>European Commission</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>ECJ</td>
<td>European Court of Justice</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>EP</td>
<td>European Parliament</td>
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<td>EU</td>
<td>European Union</td>
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<tr>
<td>EU Charter</td>
<td>Charter of Fundamental Rights of the European Union</td>
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<td>fasc</td>
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<tr>
<td>ff</td>
<td>and following</td>
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<tr>
<td>FNG</td>
<td>Fremdenbehördenneustrukturierungsgesetz</td>
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<tr>
<td>FPG</td>
<td>Fremdenpolizeigesetz 2005</td>
</tr>
<tr>
<td>FRA</td>
<td>European Union Agency for Fundamental Rights</td>
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<td>GA</td>
<td>General Assembly</td>
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GDP

Global Detention Project

i.a.

inter alia

i.e.

id est

IAWG-UASC

Inter-agency Working Group on Unaccompanied and Separated Children

ICCPR

International Covenant on Civil and Political Rights

ICJ

International Court of Justice

ICRC

International Committee of the Red Cross

ICRMW

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

IOM

International Organization for Migration

L

Legge

MRI

magnetic resonance imaging

MSNA

Minori Stranieri Non Accompagnati

NAG

Niederlassungs- und Aufenthaltsge setzes

No.

Number

no

number

nos

numbers

OUP

Oxford University Press

p

page

pp

pages

para

paragraph

paras

paragraphs

TEU

Treaty on European Union

TFEU

Treaty on the Functioning of the European Union

TU

Testo Unico

UAC

Unaccompanied Children

UAM

Unaccompanied Minors

UASC

Unaccompanied and Separated Children

UDHR

Universal Declaration of Human Rights

umF

unbegleitete Minderjährige Flüchtlinge

UN

United Nations

UNHCR

United Nations High Commissioner for Refugees

UNICEF

United Nations Children’s Fund
<table>
<thead>
<tr>
<th>UNTC</th>
<th>United Nations Treaty Collection</th>
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<td>v</td>
<td>versus</td>
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<td>vol</td>
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**Introduction**

“The Child is a pure soul born in the unnatural condition of civil society”.

Worldwide, in 2017, 68.5 million people have been forcibly displaced. This means, in every 110 individuals one person has been forcibly displaced due to persecution, conflict or other forms of violence. This data includes refugees (25.4 million), internally displaced people (40.0 million) and asylum-seekers (3.1 million). Among all of them, 173,800 were unaccompanied and separated minors. Of all the refugees, 52% were minors. Shifting from a global perspective to an European one, at the beginning of 2017 16% of all arrivals between Bulgaria, Italy, Greece and Spain were minors. Even more relevant is that among these 16,524 minors, 72% were unaccompanied or separated. In Italy, among the 12,239 minors who arrived crossing the Mediterranean Sea, 93% were unaccompanied and separated.

These numbers should make one think and reflect. One might see these unaccompanied minors only as a side-effect connected to uncontrolled migration flows. A problem which could be easily solved by stopping these flows. One might see these unaccompanied minors simply as migrants and therefore we should treat them in the same way we treat adult migrants. But one might also see these unaccompanied minors simply for what they really are: children. And looking at them in this way I asked myself what exactly happens to them once they arrive in Europe, independently of how they arrived.

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Every day we are overwhelmed with news concerning migration flows. Every day we read and listen how migration is dangerous for our ‘idyllic’ society or how Europe might not survive without these migration flows. But what one really does not hear, what one really does not read is where the most fragile of these people go once they have arrived in Europe. Who is welcoming unaccompanied minors when they reach European soil? Are they actually ‘welcomed’?

This paper tries to answer these questions focusing in particular on the possibility that unaccompanied minors (or children) might be detained at their arrival. This paper takes into consideration four different legal frameworks, which are placed in an imaginary pyramid. The bottom of this pyramid is formed by international law principles and rights, in particular the ones contained in the CRC and in the ECHR and their interpretation through the jurisprudence of the ECtHR. In the middle part of this hypothetical pyramid are placed EU law dispositions. The apex represents the concrete application of these various legal rules, principles and rights at national level. I took as examples the Austrian and the Italian legislations.

As can be seen, today National legislations may be considered as a compromise between different legal frameworks. This is even more true within the EU Member States, such as Austria and Italy, whose legal frameworks contain directly the whole EU law as an integrated part of their national law itself.

There are several issues related to such a complicated structure. In the specific there are several problems connected to the simplistic translation of legal words from International and EU dispositions to a National one.

This paper will therefore show that under international law unaccompanied minors are always and only called unaccompanied children, meanwhile EU and national law tend to not use the term “child” at all. This paper will explain the meaning of detention, show the possible consequences of imprecise translations of this word and how this might affect unaccompanied minors. In the end the concise Austrian legislation allowing in some cases the detention of unaccompanied minors will be compared with the (definitely not concise) Italian one prohibiting it.

The choose of the Austrian and the Italian legal frameworks is because as an Italian student living in Austria, I am particularly concerned about these two countries.
Moreover, as I am speaking both languages, I could read the sources in their original language and thus see the discrepancies in the translations from English. Additionally, the Austrian and the Italian legal frameworks related to migration detention of unaccompanied minors present some interesting differences. The most important one is the possibility to detain under specific circumstances unaccompanied minors in Austria and the prohibition of such form of detention in Italy.
CHAPTER I
CHILDREN AND UNACCOMPANIED MINORS
1.1 Definition of children

1.1.1 Under international, EU and national law

Under international law, children are “human beings below the age of eighteen years old” (Article 1 of the CRC). This parameter is the one normally used also in Europe.\(^\text{10}\)

Under Council of Europe law, the ECHR does not give any definition of “children”. Nevertheless, the rights contained in it should be ensured from the Contracting States “to everyone” (Article 1 of the ECHR) and “without discrimination of any ground” (Article 14 of the ECHR), namely, \(i.a.,\) without age-based discrimination.\(^\text{11}\)

If international law generally refers to any person under eighteen years of age as a “child”, the EU law might be more sophisticated. Depending on the legal framework the EU legislator identifies different phases of childhood.\(^\text{12}\) For example, the Directive 94/33/EC on the protection of young people at work, distinguishes between “young persons”, “adolescents” and “children”, taking into consideration not only an age criterion but also considering whether the person is still subject to compulsory full-time schooling under national law or not (Article 3 (a) (b) (c) of the Directive 94/33/EC). Under the Directive 2004/38/EC on the freedom of movement of EU citizens and their family members, “minors” are “the direct descendants who are under the age of 21 or are dependants” (Article 2 (c) of the Directive 2004/38/EC).\(^\text{13}\) In this case, the EU legislator used a biological and an economical factor rather than a general notion of minority.\(^\text{14}\) The EU legal framework related to the detention of migrant minors, generally uses the parameter set by the CRC (Article 2 (k) of the Directive 10 FRA, *Manuale di diritto europeo in materia di diritti dell’infanzia e dell’adolescenza* (FRA/CoE 2015) p 20.

\(^{10}\) See also FRA, *Handbook on European Law relating to the rights of the child* (FRA/CoE 2015) p 19.


2011/95/EU). Sometimes the EU law gives EU Member States leeway to establish the age of minority.

Under national law, the Austrian legislator distinguishes between “mündige” and “unmündige Minderjährige” (para 21 (2) of the ABGB), depending on whether the person is below eighteen or sixteen years old. The Italian legislator established the age of majority at eighteen years old (Article 2 of the Codice Civile), meanwhile Article 31 of the Italian Constitution (Costituzione) affirms that the Italian Republic protects “l’infanzia e la gioventù” (Article 31 (2) of the Costituzione).

As it can be seen, differently from International and in part European law, nor the Italian or the Austrian legislator refer to minors as children.

1.1.2 Questioning whether all minors are also children

Although there are small differences, all the legal frameworks previously examined set the age parameter of eighteen years old to distinguish whether a person is a child or an adult. This approach does not take into consideration, however, that “the characteristics (in terms of features and needs) of childhood are universal, its duration is not”. Or that “child-rearing practices vary greatly among different cultures, as does the age-linked picture of the ‘normal child’”.

Against the setting of one universal fixed age parameter, whether it is twenty-one, eighteen or sixteen, several objections might be raised. Objections, which are also

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15 EP and Council Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2001] OJ L 337. As follows Directive 2011/95/EU.
reflected in the second part of Article 1 of the CRC, when affirming that a child is a person below the age of eighteen years old “unless under the law applicable to the child, majority is attained earlier” (Article 1 of the CRC).19

I personally find the compression of the complex mechanism of childhood into only one extremely wide and universal phase to be too vague. In particular, when it comes to rights and duties connected to migration and detention of children/minors. In this context, considering indistinctly all minors as children and not defining for example what adolescents are, causes a lack of adequate protection measures for this last category of minors.20 The absence of a common definition of “adolescents” and therefore the absence of adequate adolescents’ policies under international law or within the EU Member States, is according to Bhabha a “paradoxical and perverse myopic approach”.21 On one hand and on the disadvantage of adolescents, it does not encourage the “independence, exploration, and self-advancement” typical of this stage of late childhood.22 On the other hand, “it defeats central socio-political and economic goals”, ‘depriving’ States for example “of a skilled, technologically competent and linguistically versatile work force [...]”.23

The general use of the term “children” to describe all these individuals, especially by international organisations, is too simplistic. Are we not acting in an exaggerated paternalistic way by not giving due weight to the diverse responsibilities and needs of children, adolescents or young adults? On the other hand, which other solution might be adopted? Establishing case per case basis whether a person is mature enough to be

considered legally independent and responsible for his or her own choices (or ‘half mature’ or completely ‘immature’) may be not only an irrational answer to the problem but also a risky one.24 A way to widen the Spielraum would then be left to the legal players. A wide Spielraum which can obviously be used not only to grant more rights and measures of protection, but also to get rid of them.

Connected with the assumption that all minors are indistinctly children in need of protection, is the believe that all children are indistinctly extremely vulnerable human beings. Considering all minors as children and all children as extremely vulnerable human beings is a quite “reductionist” approach.25 In “Mainstreaming children’s rights in migration litigation: Muskhadziyeva and others v. Belgium”, Vandenhole and Ryngaert states that:

“There is an often mistaken claim of inherent, personal or automatic vulnerability of a child. Due to the status of ‘being a child’, it is assumed that children need special attention. This concept of vulnerability is based on personal factors only, i.e. the simple fact of age, of ‘being a child’”.26

The authors mentions an interesting study commissioned by the EP, which classifies three different factors responsible for the level of vulnerability of children.27 Children’s vulnerability has to be considered as the interaction between personal, environmental and risk factors.28 Therefore, vulnerability as a “contextual

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vulnerability” and not as a reductionist concept of a general situation of vulnerability involving all children (or minors).²⁹

The solution generally adopted under International, European and national law, to define children/minors is the age parameter of eighteen years of age, as established in primis under Article 1 of the CRC. Eighteen years of age to establish whether the person is still subjected to special forms of protection or not. However, to establish the degree of vulnerability of that person, it would be desirable (above all from the ECtHR) to consider the different factors on which the vulnerability of children relies on. In the end, children are first of all “fully fledged human beings with agency”.³⁰

1.2 Definition of unaccompanied children

Unaccompanied minors are a special category of vulnerable persons. They are foreign and without any legal representative at the moment of their arrival. In other words they are “tre volte indifesi, perché minori, stranieri e inermi”. There are several explanations for the journey of this category of minors. Some of them are escaping from war or persecution. Some try to reunite with their family, others are escaping from their family. Many of them arrive due to human trafficking, many others are just searching a better life. Contributors are talking about minors as “economical subjects”. They are sent by their family to other countries to support them financially. At the same time the number of minors who leave on their own initiative seeking their independence or in some cases outright fleeing from their families is increasing.

Children’s law seeks to protect all children in an adequate manner, no matter their nationalities or state of birth or reason for migration. The difficulty when it comes to unaccompanied minors is that children’s law and migratory law will often be in conflict. One seeks to protect all children, the other seeks to protect the State.

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34 See also Tatiana Guarnier, “I minori stranieri non accompagnati nell’ordinamento italiano. Guida alle disposizioni vigenti e alla loro applicazione”, in Andrea Anzaldi e Tatiana Guarnier (eds), Viaggio nel mondo dei minori stranieri non accompagnati: un’analisi giuridico fattuale (Edizioni Fondazione Basso 2014) p 24.
1.2.1 Unaccompanied children under international law

One of the generally adopted definitions of unaccompanied children is the one set out in the 2005 General Comment No. 6 from the UN Committee on the Rights of the Child:

“Unaccompanied children (also called unaccompanied minors) are children, as defined in article 1 of the Convention, 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”.

Usually the legal framework concerning unaccompanied minors includes also separated minors. Those are children, who have been separated from both their parents or legal representative, but who might be accompanied by other relatives or adult family members.

To distinguish from these two categories of children are orphans, who are children, “both of whose parents are known to be dead”. This is an important distinction since the procedures and needs of unaccompanied minors are different from the procedures and needs of orphans. In the first case the State’s goal is to reunite the child with his or her parents; in the second, the State needs to find suitable legal guardians for the orphans.

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36 Committee on the Rights of the Child, General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin (2005) para 7.
37 Committee on the Rights of the Child, General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin (2005) para 8.
1.2.2 Unaccompanied minors under EU law

The EU legal framework related to migration and asylum law adopted a more specific definition of unaccompanied minors. As it is set out under Article 2 (l) of the Directive 2011/95/EU:

“Unaccompanied minor means a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States”.

As it can be seen, unaccompanied children (UAC) and unaccompanied minors (UAM) are used as synonymous. Mostly, the first term is utilised by the International Community, the second one within Europe. In Austria, UAC/UAM are called "unbegleitete Minderjährige" or "unbegleitete Minderjährigen Flüchtlinge (umF)", which refers specifically to refugee minors. In Italy, the abbreviation normally used is MSNA ("minori stranieri non accompagnati"). Both the Austrian and the Italian law use the term "minor" instead "child".

1.2.3 Unaccompanied minors under national law

Under Austrian law, unaccompanied minors are “minderjähriger Fremder, der sich nicht in Begleitung eines für ihn gesetzlich verantwortlichen Volljährigen befindet” (para 2 (1) (17) of the NAG).

Under Italian law, an unaccompanied (foreign) minor, as set out under Article 2 of the Legge 7 aprile 2017, n 47, is a:

“Minorenne non avente cittadinanza italiana o dell'Unione europea che si trova per qualsiasi causa nel territorio dello Stato o che è altrimenti sottoposto alla

39 Article 2 (l) of the Directive 2011/95/EU.
giurisdizione italiana, privo di assistenza e di rappresentanza da parte dei genitori o di altri adulti per lui legalmente responsabili in base alle leggi vigenti nell'ordinamento italiano”.40

This definition, similar to the one used under EU law, concerns only foreign minors (therefore not Italian or EU Citizens). However, Article 1 of the same law establishes the principle of equal treatment between Italian, EU and third-country children/minors. As a practical consequence State can not discriminate between Italian, EU or third-country children/minors, especially from an economic view point.41

40 Article 2 of the Legge 7 aprile 2017, n 47, “Disposizioni in materia di misure di protezione dei minori stranieri non accompagnati” (also called Legge Zampa) As follows, L 47/17.
CHAPTER 2
DETENTION: A MULTITUDE OF MEANINGS
2.1 The meanings of the word “detention”

This chapter is dedicated to the definition of “detention”. In the previous chapter I explained the different definitions of child, in this chapter I will explain the different definitions of detention.

Finding a common definition of legal terms, such as “minor” or “detention”, is extremely hard when we imagine that each EU Member State is just the apex of a pyramid, where the base is formed by international law and the middle part by EU law. The difficulties for any provision to be applied in the same way within different States is clearly understandable. Besides, words themselves might be translated or defined in dissimilar ways. “Detention” is the perfect example.

The word “detention” derived from Latin “detinere”, which means “hold back”. 42 In every day language it is defined “as the action of detaining someone or the state of being detained in official custody”.43 In legal terms it means “depriving a person of his liberty against his will following arrest”.44 “Detenzione” is the Italian literal translation of “detention”. “Detenzione” can refer to one of the punishments which restricts liberty under Article 18 of the Codice Penale.45 “Detenzione” could also refer to the use of a tangible asset (corpus) from a person, which is conscious that this asset is property of someone else (animus detinendi).46 However, when it comes to the application of EU law concerning detention related to migration, detention has been translated with “trattenimento”. The verb “trattenere” could mean “to hold”, “to stop” or “to detain”.47 Also the translation by the Austrian legislator can be used as an example of the absence of harmonization within EU Member States. Detention is usually translated into

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45 Article 18 of the Italian Criminal Code (Codice Penale or c.p.) classifies under “pena detentive”: “ergastolo” (life imprisonment), “reclusione” (imprisonment) and “arresto” (arrest).
“Haft”, but when it comes to implementing the EU Directives concerning migration-related reasons for detention, the Austrian legislator adopts the term “Schubhaft”. “Schubhaft” does not have any translations in the English official dictionaries.

In the opinion of Campesi, EU Member States consciously avoid the use of the term “detention” in relation to immigration detention centres. According to Campesi, this choice is made by EU Member States governments in order to hide the repressive nature of such centres. Other examples next to the Italian and the Austrian one, are the French (“retention administrative”) and the English (“centres”). Hiding the repressive nature of such centres is possible, explains Campesi, because immigration detention is generally an administrative measure relying on the administrative discretion of local authorities and therefore it does not entail any criminal charges. Indeed, as stated by the ECtHR in the case of Amuur v. France:

“[...] account should be taken of the fact that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country.”

The legal status of immigration detention centres is then shady: detained applicants are substantially deprived of their physical liberty but, at the same time, they are free to go (back to their country) to regain their own physical liberty.


49 See for instance the Austrian Alliance Police Act (Fremdenpolizeigesetz 2005).


54 Amuur v France App no 19776/92 (ECtHR, 25 June 1996) para 43.

2.2  The European Court of Human Rights: deprivation of and restriction upon liberty

“Everyone has the right to liberty and security of person […]”.

Article 5 (1) of the ECHR

“Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. […]”.

Article 2 (1) of Protocol No. 4 to the ECHR

The starting point for the legal definition of “detention” is the individual itself. Under the Jurisprudence of the ECtHR an individual can be detained in an airport transit zone;66 on an island where he or she can actually move around;57 in a police station where he or she freely decided to go.58 These examples reveal firstly that “detention” means a deprivation of physical liberty and not just a restriction of movement.59 Secondly, that “detention” is not necessarily related to the place in which the person is detained. Therefore, it follows that to distinguish whether a person is being detained or not, it is necessary to distinguish whether that person has been deprived of his or her physical liberty or has ‘just’ been restricted in his or her movement.

Under Council of Europe Law, Article 5 (1) of the ECHR and Article 2 of Protocol No. 4 to the ECHR are fundamental to this differentiation. The right to liberty enshrined in Article 5 (1) of the ECHR refers to the physical liberty of a person, namely “the individual liberty in its classical sense”.60 Its ratio is “to ensure that no one should be dispossessed of this liberty in an arbitrary fashion”.61 Reading the first part of the disposition of Article 5 (1), it is clear that “no personal

56 Among others, Amuur v France App no 19776/92 (ECtHR, 25 June 1996).
57 Among others, Guzzardi v Italy App no 7367/76 (ECtHR, 06 June 1980).
58 Among others, De Wilde, Ooms and Versyp v Belgium App no 2832/66; 2835/66; 2899/66 (ECtHR, 18 June 1971).
60 Engel and others v the Netherlands App no 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (ECtHR, 8 June 1976) para 58.
61 Guzzardi v Italy App no 7367/76 (ECtHR, 6 June 1980) para 92.
condition bears influence on the entitlement to such freedom”.\textsuperscript{62} The right to liberty is therefore enjoyable from everyone, independently from their status. Article 2 of the Protocol No. 4 to the ECHR protects the freedom of movement of a person ensuring that no one should be restricted in his or her liberty of movement.\textsuperscript{63}

To distinguish whether a person has been deprived of his or her liberty or has been restricted in his or her movements, the ECtHR in \textit{Guzzardi v Italy} affirmed that:

\begin{quote}
“The starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question […] The difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance”.\textsuperscript{64}
\end{quote}

Nevertheless, it should be pointed out that also the ECtHR is conscious of the difficulties that derive from the opaque border between “deprivation of liberty” and “restriction upon movement”. Being more precise, in \textit{Guzzardi v Italy}, the ECtHR stated that “some borderline cases are a matter of pure opinion”.\textsuperscript{65}


\textsuperscript{63} \textit{Guzzardi v Italy} App no 7367/76 (ECtHR, 6 June 1980) para 92.

\textsuperscript{64} \textit{Guzzardi v Italy} App no 7367/76 (ECtHR, 6 June 1980) paras 92-93.

\textsuperscript{65} \textit{Guzzardi v Italy} App no 7367/76 (ECtHR, 6 June 1980) paras 93.
2.3 The European Court of Justice and the uncertainty of the Directive 2013/33/EU

“Everyone has the right to liberty and security”.

Article 6 of the EU Charter of Fundamental Rights

Despite the efforts made by the EU legislator to define “detention” and the efforts made by the ECJ to interpret the consequent legal framework, the outcome leaves something to be desired. Indeed, the EU legal framework, in contrast with the ECtHR, connects the term detention with a deprivation (or restriction) of freedom of movement and not with a deprivation of the right to (physical) liberty. Besides, the legislative text itself, in which “detention” is defined, did not always make it clear whether border posts or transit zones are or are not detention centres.66

2.3.1 EU law: Detention as a mere deprivation of freedom of movement?

In contrast with the jurisprudence of the ECtHR, EU law under Article 2 (h) of the Directive 2013/33/EU, describes “detention” as “confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement”.67 The distinction made by the ECtHR between “deprivation of (physical) liberty” under Article 5 (1) ECHR and “restriction on movement” under Article 2 of the Protocol No. 4 to the ECHR, has not received proper consideration.68

Nevertheless, the ECJ seems to have another opinion on the matter. As stated in Al Chodor:

“The objective pursued by Article 2 (n) of the Dublin III Regulation, read in conjunction with Article 28 (2) […] by authorising the detention of an applicant in order to secure transfer procedures […] provide for a limitation on the

68 See also ELI, Statement of the European Law Institute – Detention of Asylum Seekers and Irregular Migrants and the Rule of Law (ELI 2017) paras 64 ff.
exercise of the fundamental right to liberty enshrined in Article 6 of the Charter [...] (and) for the purpose of interpreting Article 6 of the Charter, account must be taken of Article 5 of ECHR as the minimum threshold of protection”. 69

In short, while the EU legislator did not properly follow the principles established by the ECtHR, the ECJ seems to have paid more attention to it.

2.3.2 Directive 2013/33/EU: the status of asylum seekers in transit zones

The other question raised by the Directive 2013/33/EU concerns the fact that reading the legislative text it “is unclear if an asylum seeker in a transit zone is accommodated, detained, or both”. 70

Under Article 18 (1) of the Directive, applicants find material reception in accommodation centres, private houses, flats, hotels or other premises adapted for housing applicants. Applicants might find material reception also in premises made at the border or in transit zones, which are used for the purpose of housing applicants during the examination of an application for international protection (Article 18 (1) of the Directive 2013/33/EU). However, under Article 10 (5) of the same Directive, applicants are detained at border posts or in transit zones. Moreover, when applicants are detained at border posts or in transit zones, “Member States may derogate in duly justified cases and for a reasonable period from providing information which explains the rules applied in the facility and sets out their rights and obligations” (Article 10 (5) of the Directive 2013/33/EU). To note is, that this temporary lack of guarantees applies also when vulnerable persons are detained at a border post or in a transit zone (Article 11 (5) of the Directive 2013/33/EU).

Combining these provisions, the EU legislator “creates a loophole [...] in the law which allows Member States to ‘legally’ detain asylum seekers at the border”. 71 This ambiguity (to not say incoherence between different provisions within the same legal framework) is sadly connected with simplistic translations made by national legislators

70 AIDA, Boundaries of liberty – Asylum and de facto detention in Europe (ECRE 2017) p 15.
71 AIDA, Boundaries of liberty – Asylum and de facto detention in Europe (ECRE 2017) p 15.
of international and EU law. It is also connected with the absence of a common definition of legal terms at international and EU level, namely, as already said in the previous chapter, with a lack of harmonization within different legal frameworks. Obvious consequence is the extreme flexibility left to Member States when applying international provisions or implementing or transposing EU law.\textsuperscript{72}

\textsuperscript{72} See also AIDA, \textit{Boundaries of liberty – Asylum and de facto detention in Europe} (ECRE 2017) p 16.
2.4 Issues related to a simplistic translation of the word “detention”

In the previous section I illustrated the numerous meanings and possible translations of the word detention. But why, at International and European level, would it be preferable to have one clear definition of “detention”, which consequently could not be misused through simplistic and imprecise translations by the national legislator?

With specific regard to EU law, I find that introducing uniform and comprehensive definitions of the main legal terms throughout EU law, not just of the word “detention” itself, will reduce the Spielraum of the Member States during the transposition of directives or generally during the application of EU law. Indeed, leaving too wide a leeway to Member States in the transposition of directives, might lead to a loss of significance of the directives itself, which it is supposed to be the Rechtsangleichung of the EU law within the Member States.\(^73\) The same argument can clearly be made also with regard to international law.

The lack of uniform and comprehensive legal terminology can also lead to graver consequences and the word “detention” is a great example. Since the meaning of detention is tightly connected with the physical liberty of a person, a stricter definition of “detention” might be helpful to distinguish whether people are restricted on their movements or deprived of their liberty. Giving a concrete example, the European Council on Refugees and Exiles (ECRE) referring to the fact that the definition of detention adopted by individual States national law might not reflect reality, explained that:

\[\text{“An asylum seeker is: ‘held in waiting zone’ in France; ‘accommodated in… a contained environment’ in Malta; ‘required to stay in a designated place’ in the Netherlands; ‘placed or retained in Temporary Installation Centres’ in Portugal; ‘supervised’ in the airport or staying ‘under a regime of restriction of movement within the (Reception and Identification) centre’ in Greece”}.\(^74\)

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\(^73\) See also Werner Schroeder, Grundkurs Europarecht, 5. Auflage (C.H. Beck 2017) p 94.

\(^74\) AIDA, Boundaries of liberty – Asylum and de facto detention in Europe (ECRE 2017) p 19.
Nevertheless, under Council of Europe Law, the ECtHR “does not consider itself bound by the legal conclusions of the domestic authorities as to whether or not there has been a deprivation of liberty”\textsuperscript{75}. Indeed, in the light of the ECtHR, a person can be deprived of his or her liberty through various and different measures, whereas arrest or conviction are only the most common one.\textsuperscript{76} To give an example, we just have to think that “even measures intended for protection or taken in the interest of the person concerned may be regarded as a deprivation of liberty”.\textsuperscript{77}

To conclude, it can be seen that the right to liberty of a person can be violated because states use their own terminology in an attempt to avoid their obligations connected with detention. To define a place as a “detention centre”, whenever the State did not specifically use this term, it is essential to look at the objective and subjective elements of the concrete situation in which the person is held. To be precise, is this person held in a \textit{de facto} detention?\textsuperscript{78} Has he or she agreed to this deprivation of liberty? Bearing also in mind that “the right to liberty is too important in a ‘democratic society’ […] for a person to lose the benefit of the protection […] for the single reason that he gives himself up to be taken into detention”.\textsuperscript{79}


\textsuperscript{77} \textit{Khlaifia and Others v Italy} App no 16483/12 (ECtHR, 15 December 2016) para 71.

\textsuperscript{78} AIDA, \textit{Boundaries of liberty – Asylum and de facto detention in Europe} (ECRE 2017). But see for example \textit{Khlaifia and others v Italy} App no 1648/32 ECtHR, 15 December 2016) para 106.

\textsuperscript{79} \textit{De Wilde, Ooms and Versyp v Belgium} App no 2832/66; 2835/66; 2899/66 (ECtHR 18 June 1971) para 72.
CHAPTER 3
IMMIGRATION DETENTION
3.1 A non arbitrary detention in the light of the ECtHR: the list of exceptions under Article 5 (1) of the ECHR

As explained in the second chapter, under Council of Europe Law, Article 5 (1) of the ECHR plays a key role in distinguishing whether someone has been deprived of his or her liberty or has been restricted in his or her freedom of movement. Article 5 (1) of the ECHR is of great interest also because it lies down the two necessary conditions to guarantee the lawfulness and consequently non-arbitrariness of detention. In accordance with the mentioned Article, a person can not be deprived of his or her liberty “save in the following cases and in accordance with a procedure prescribed by law” (second part of Article 5 (1) of the ECHR).

The first condition (“save in the following cases”) refers essentially to the “permissible derogation grounds” listed under paragraphs (a) to (f) of Article 5 (1) of the ECHR.80 These exceptions represent a “numerus clausus”.81 Their interpretation has been object of numerous judgments of the ECtHR. Among others, the ECtHR stated in Khlaifia and others v Italy that:

“Sub-paragraphs (a) to (f) of Article 5 (1) contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty and no deprivation of liberty will be lawful unless it falls within one of those grounds. Moreover, only a narrow interpretation of those exceptions is consistent with the aim of that provision, namely to ensure that no one is arbitrarily deprived of his or her liberty”82.

82 Khlaifia and others v Italy App no 16483/12 (ECtHR, 15 December 2016) para 88. This principle was first established in Engel and others v the Netherlands App no 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (ECtHR, 8 June 1976) para 58.
Furthermore, in the case *Engel and others v Netherlands*, the judges affirmed that through the use of the words “save in the following cases”, the list under Article 5 (1) of the ECHR is truly exhaustive.83

### 3.1.1 The quality of the law and the principle of legal certainty

The second condition to ensure the lawfulness of any deprivation of liberty is “the accordance with a procedure prescribed by law” (second part of Article 5 (1) of the ECHR). This sentence refers to domestic law and to the quality of the law. On one hand, any deprivation of liberty requires a legal basis under national law; on the other hand, the ECHR requires the fundamental respect of the rule of law.84 Therefore, in each individual case and above all when foreign asylum-seekers are involved, the Court must value “the legislation in force in the field under consideration, but also the quality of other rules applicable to the persons concerned.”85 In short, the requirement of the quality of the law is satisfied, when the procedure is clear, precise and foreseeable and the general principle of legal certainty is respected.86

To have a better idea of the application of this principle, one can recall among others the case of *Khlaifia v Italy*.87 In this case, Italy has been condemned for the violation of Article 5 (1) of the ECHR due to its “legislative ambiguity (which) has given rise to numerous situations of de facto deprivation of liberty”.88

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83 *Engel and others v the Netherlands* App no 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (ECtHR, 8 June 1976) para 57.  
86 *Amuur v France* App no 19776/92 (ECtHR, 25 June 1996) para 50; *Khlaifia and others v Italy* App no 16483/12 (ECtHR, 15 December 2016) para 92.  
87 See also Marcello Di Filippo, “The human right to liberty in the context of migration governance: some critical remarks on the recent practice in the light of the applicable legal framework”, in Giorgio Battisti and Gian Luca Beruto (eds), *Deprivation of Liberty and Armed Conflicts: Exploring Realities and Remedies* (FrancoAngeli 2019) pp 244-246.  
88 *Khlaifia and others v Italy* App no 16483/12 (ECtHR, 15 December 2016) paras 91 ff.
The detention of the applicants in the island of Lampedusa and then on board a ship were based on a bilateral agreement between Italy and Tunisia.\(^8^9\) However, the agreement had not been officially published and therefore the applicants would have had a hard time to be aware of it and to know the reasons why they were actually being detained.\(^9^0\) Moreover, since the applicants were placed in a reception facility and not in a detention centre, they could not enjoy the guarantees they would have had if they were actually put in a detention centre. Because their ‘detention’ was only \textit{de facto} and not \textit{de jure}, they could not enjoy the legal protections that come with an actual \textit{de jure} detention.

\subsection{A non-necessary detention, but in good faith. What “arbitrariness” means?}

It is by now clear that the fundamental human right enshrined in Article 5 of the ECHR is “the protection of the individual against arbitrary interferences by the State with his (or her) right to liberty”.\(^9^1\) And it should also be clear, that any (lawful) deprivation of liberty has to fall within one of the exceptions listed under sub-paragraphs (a) to (f) of Article 5 (1) of the ECHR and it has “to conform to the substantive and procedural rules of national law”.\(^9^2\) However, respecting the substantial and procedural national law does not always guarantee the non-arbitrariness of detention. Indeed, as recalled by the ECtHR in the salient case of \textit{Saadi v the United Kingdom}:

\begin{quote}
“[...] the notion of “arbitrariness” in Article 5 (1) extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention”.\(^9^3\)
\end{quote}

As can be seen, the pivot for the lawfulness of any detention measures is its non-arbitrariness.


\(^{9^1}\) \textit{Saadi v the United Kingdom} App no 13229/03 (ECtHR, 29 January 2008) para 63.

\(^{9^2}\) \textit{Saadi v the United Kingdom} App no 13229/03 (ECtHR, 29 January 2008) para 67.

\(^{9^3}\) \textit{Saadi v the United Kingdom} App no 13229/03 (ECtHR, 29 January 2008) para 67.
The notion of arbitrariness had been defined for the first time by the ECtHR in the above mentioned case in the context of immigration detention and in the light of Article 5 (1) (f) of the ECHR. Under paragraph 74 of the Saadi judgment, the ECtHR stated that:

“To avoid being branded as arbitrary […] (the) detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate […]; and the length of the detention should not exceed that reasonably required for the purpose pursued”.

Important to note is that under Article 5 (1) (f) of the ECHR, and differently from subparagraphs (b), (c) and (d), a ‘lawful’ detention does not have to be a measure of last resort, namely it does not have to be necessary. A similar approach has been taken by the ECtHR also with regard to Article 5 (1) (a) of the ECHR. The ECtHR in the mentioned sentence, citing other relevant judgments such as Chahal or Amuur, justifies this stance with the fact that:

“States enjoy an undeniable sovereign right to control alien’s entry and residence in their territory […] (whereas) it is a necessary adjunct to this right that States are permitted to detain would-be immigrants who have applied for permission to enter, whether by way of asylum or not”.

In the Saadi case, this reasoning led the ECtHR to state that the selection of an applicant “on the basis that his case was suited for fast-track processing” was not violating his right to liberty. As better explained by the Court:

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96 Saadi v the United Kingdom App no 13229/03 (ECtHR, 29 January 2008) para 71.

97 Saadi v the United Kingdom App no 13229/03 (ECtHR, 29 January 2008) para 64.

98 Saadi v the United Kingdom App no 13229/03 (ECtHR, 29 January 2008) para 74.
“Given the difficult administrative problems with which the United Kingdom was confronted during the period in question, with an escalating flow of huge numbers of asylum-seekers […] it was not incompatible with Article 5 (1) (f) of the Convention to detain the applicant for seven days in suitable conditions to enable his claim to asylum to be processed speedily […].”

In short, in the context of migration detention under Article 5 (1) (f) of the ECHR, as far as the detention is in keeping with the purpose of Article 5 (1) of the ECHR and as far as it is conform to national law measures, the detention does not have to be justified “for example to prevent his committing an offence or fleeing”. On the other hand it is also true, that Article 5 of the ECHR is the only disposition in the ECHR which contains a direct reference to national law and allows the ECtHR to judge the necessity and proportionality of detention measures in the case those requirements are part of the national law itself.

Either way, when it comes to the detention of minors, the necessity of such detention is the primary condition for its lawfulness. In other words, as I am going to better explain in the following chapter, the detention of children shall be a measure of last resort (Article 37 (b) CRC). In this context, the ECtHR played a significant role in the assessing of this principle. However, when it comes to other categories of vulnerable persons, international conventions and case-law did not as of yet find a common line on the opportunity or inopportunity of their detention.

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99 Saadi v the United Kingdom App no 13229/03 (ECtHR, 29 January 2008) para 80.
3.2 EU law: The scope of the EU Charta and the scope of guaranteed rights under Article 52 of the EU Charta

As I explained in the second chapter, under EU law the right to liberty (and security) of a person is enshrined under Article 6 of the EU Charta.

The 2000 EU Charta has become part of the binding EU law only in 2007 through its reference under Article (1) (1) (2) of the TEU. To note is that the EU Charta, even if it is part of the primary EU law, is not directly contained in the TEU.\(^{103}\) Indeed, after the 2004 failure of creating one European Constitution, in 2007 the EU Member States decided to leave out from the Treaty of Lisbon any specific constitutional reference, such as the use of a constitutional terminology or any references to a common hymn, a common flag or…a common Constitution.\(^ {104}\) The EU Charta addresses primary institutions and bodies of the Union which have to “respect the rights, observe the principles and promote the application” of the EU Charta (Article 51 (1) of the EU Charta). Next to the Union itself, EU Member States have to respect, observe and promote the rights and principles enshrined in the EU Charta whenever they implement EU law (first part of Article 51 (1) of the EU Charta).

By now it should be clear enough that rights (and freedoms) might be limited. Article 52 (1) of the EU Charta, lying down the scope of guaranteed rights, provides the general rules for the lawful limitation of the rights and freedoms contained in it. Therefore, limitations of rights or freedoms contained in the EU Charta are subjected to the principle of proportionality and “may be made only if they are necessary and genuinely meet objectives of general interest […] or the need to protect the rights and freedoms of others” (second part of Article 52 (1) of the EU Charta). Important to note is that differently from the approach taken by the ECtHR, under EU law the principle of proportionality and therefore the necessity of the detention applied also in the context of immigration detention. I will explain this point in the following sub-chapters.

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3.2.1 The deprivation of liberty in the light of Article 52 of the EU Charter and Article 5 of the ECHR

From the combination of Article 52 (1) and Article 6 of the EU Charter, Member States may deprive a person of his or her liberty whenever this limitation is provided for by law and respects the essence of the right or freedom in question. This means, *inter alia*, limitations must be subjected to the principle of proportionality. However, whenever the EU Charter contains rights corresponding to rights enshrined in the ECHR, the meaning and scope of the one contained in the EU Charter shall be the same as the one laid down by the ECHR (Article 52 (3) of the EU Charter). To this end, Article 5 of the ECHR is utilised by the ECJ as a *minimum threshold of protection* to read and interpret the right to liberty and freedom enshrined under Article 6 of the EU Charter.

The ECJ also affirmed, in line with the previous law cases of ECJ (but also in line with the ECtHR), that the aim of the safeguards enshrined under Article 5 of the ECHR and Article 6 of the EU Charta is the protection of the person from any arbitrary measure of detention. In particular, in the light of the ECJ, protecting individuals from an arbitrary form of detentions means also protecting individuals from any “element of bad faith or deception on the part of the authorities”.

After having examined the general provisions related to any deprivation of liberty, as enshrined in Article 5 of the ECHR and Articles 6 and 52 of the EU Charta and as interpreted by the ECtHR and the ECJ, in the following *sub*-chapters I will specifically examine the provisions related to the immigration detention.

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105 Clearly, it is not excluded, that the EU law may provide a more extensive protection (Article 52 (3) of the EU Charter).
109 See also chapter two.
3.2.2 The EU Asylum Acquis and the detention of migrants as extrema ratio

Generally, under EU secondary law, the sole reason that a person seeks for international protection, is not enough to allow his or her detention.\(^{110}\) This position is in line with the UN 1951 UN Convention relating to the Status of Refugees, which under Article 31 (1), proclaims that:

“The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened […] enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence”\(^{111}\)

Article 8 (2) of the Reception Condition Directive allows Member States to detain applicants seeking international protection in case of necessity and after an individual assessment, whenever other less coercive alternative measures cannot be applied effectively and one of the grounds set forth in paragraph 3 is satisfied. As examples of “less coercive measures”, the Directive mentions the “regular reporting to the authorities, the deposit of financial guarantee, or an obligation to stay at an assigned place” (Article 8 (4) of the Reception Condition Directive). However, as stated by De Bruycker and Tsourdi, “there is not always a common understanding about what alternatives to detention are”.\(^{112}\) Indeed, as of yet, there are no common legal definitions of “alternative to detentions”\(^ {113}\)

\(^{110}\) Article 8 (1) of the Directive 2013/33/EU is recalling the definition of applicant given by the Directive 2013/32/EU. See also Article 28 (1) of the Regulation (EU) No. 604/2013 (Dublin III Regulation).
\(^{111}\) Article 31 (1) of the UN 1951 UN Convention relating to the Status of Refugees.
The concept of detention as extrema ratio applies also to third-country nationals illegally staying on the territory of the EU Member State (Article 15 (1) of the Return Directive). Therefore, Member States may use detention “in order to prepare the return and/or carry out the removal process” and only when it is not possible to effectively apply “other sufficient but less coercive measures” (Article 15 (1) of the Return Directive). The use of detention measures answers in particular to the need of the State to avoid any risk of absconding or whenever the person is intentionally avoiding or hampering the preparation of his or her return or removal-process (Article 15 (1) of the Return Directive).

These directives have been implemented through Article 28 (2) of the Dublin III Regulation. This Article allows Member States to detain third-country nationals or stateless persons in case of “significant risk of absconding […] in order to secure transfer procedures […] on the basis of an individual assessment and only in so far as detention is proportional and other less coercive measures cannot be applied effectively” (Article 28 (2) of the Dublin III Regulation).

Reading these provisions, one can see that detention should be a last resort measure, not only with regard to children as specifically required in Article 37 (b) of the CRC and explicitly provided under Article 11 (2) of the Reception Condition Directive and Article 17 (1) of the Return Directive, but also whenever adults are involved. Nevertheless, as already mentioned, the case law of the ECtHR shows that EU Member States as yet have not been asked to prove the necessity of the detention of (adult) applicants, but only its conformity with the rule of law in the light of Article 5 (1) (f) of the ECHR.114 Only when the requirements of necessity and proportionality are covered by national law the ECtHR may judge, through Article 5 of the ECHR, if the detention has been used as an extrema ratio measure or not.115

114 Among others, Chahal v The United Kingdom App no 22414/93 (ECtHR, 15 November 1996) para 112; Čonka v Belgium App no 51564/99 (ECtHR, 5 February 2002) para 38; Muskhadziyeva and others v Belgium App no 41442/07 (ECtHR, 19 January 2010) para 74; Khlaifia and others v Italy App no 16483/12 (ECtHR, 15 December 2016) para 90.
3.2.2.1 Grounds for detention

Since the detention of applicants should be used by Member States only as *extrema ratio* and since Member States should always try to resort to less coercive (but still effective) measures, Member States are allowed to detain applicants only whenever one of the grounds listed under Article 8 (3) of the Reception Conditions Directive is fulfilled. Grounds which have to be laid down in national law (second part of Article 8 (3) of the Reception Conditions Directive).

The mentioned Article enumerates a list of five grounds, which can however be subjected to a wide interpretation. Consequently, there is a wide room for national implementation.  

Under Article 8 (3) (a) applicants may be detained for identification purposes. Applicants may be detained whenever the detention is necessary to determine the elements of the application or the applicant’s right to enter the territory (Article 8 (3) (b) (c) of the Reception Conditions Directive). Applicants may be detained whenever they are subjected to return procedures under Directive 2008/115/EC; when determining the State responsible for the examination of their application or when they constitute a danger for the national security or public order (Article 8 (3) (d) (f) and (e) of the Reception Conditions Directive). In this last case the foreigner is seen as a “possible threat of being a potential enemy”, which allows the State to exercise its power to avoid any disturbance of the public order through detention and return measures.  

The length of detention shall directly coincide with the ground for said detention, which shall then be implemented in the national law (Articles 9 (1) and 8 (3) (2) of the Reception Conditions Directive).

It remains to say, with regards to the ground set forth in Article 8 (3) (d) of the Reception Conditions Directive, that return decisions can be taken from EU Member

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States insofar as these decisions do not violate the principle of non-refoulement (Article 5 of the Return Directive). This principle is enshrined under Article 33 (1) of the 1951 Convention relating to the status of the refugee. The aim of the disposition is to ensure that refugees are not expelled or returned to territories where their “life or freedom would be threatened on account of (their) race, religion, nationality, membership of a particular social group or political opinion”.\(^{118}\)

3.2.2.2 Shared guarantees for detained adults and unaccompanied minors

A ‘lawful’ detention requires certain guarantees. One can distinguish between general guarantees, enjoyed by both adults and minors and provisions specifically designed for unaccompanied minors. In this sub-chapter I will list the general guarantees, leaving the analysis of the others in the chapter dedicated to the detention of unaccompanied minors. These general guarantees are:

- “Detention of applicants shall be ordered in writing by judicial or administrative authorities” and the detention order shall contain the reasons in fact and in law justifying the adoption of the order (Article 9 (1) (2) of the Reception Conditions Directive). Also, national procedures for challenging the order and the possibility to request free legal assistance and representation are communicated to the applicant in writing and in a language the applicant knows or presumably knows (Article 9 (4) of the Reception Conditions Directive). However, and differently from adults, unaccompanied minors are represented independently from their will or their request (Article 24 (1) of the Reception Conditions Directive);

- When administrative authorities order the detention, it shall be provided by Member States also a “speedy judicial review of the lawfulness of detention to be conducted ex officio and/or at the request of the applicant” (Article 9 (3) of the Reception Conditions Directive). “Ex officio and or at the request of the applicant concerned” shall also be the revision of the detention order by judicial authorities. Those revisions shall be disposed at “reasonable intervals of time” (Article 9 (5) of the Reception Conditions Directive).

\(^{118}\) Article 33 (1) of the 1951 Convention relating to the status of the refugee.
The right to appeal is granted under Article 26 of the Reception Conditions Directive “within the procedures laid down in national law”. Only the last instance has to be granted by a judicial authority (Article 26 (1) of the Reception Conditions Directive).
CHAPTER 4
DETENTION OF UNACCOMPANIED MIGRANT MINORS:
THE UN CONVENTION ON THE RIGHTS OF THE CHILD AND OTHER
SOURCES OF LAW
4.1 A lawful detention

“As human rights law is evolving, an increasing gap is emerging between EU law and the way international human rights law is interpreted”. 119

The European Agency for Fundamental Rights (2017)

In 2017, the European Commission affirmed that Member States might resort to the detention of migrant minors, whenever this measure “is strictly necessary to ensure the execution of a final return decision and as long as the Member State is not able to ensure less (but still effective) coercive measures”. 120

The next year, the European Parliament (EP) openly discouraged, among other things, the detention of all children and of families with children for immigration purposes. 121

The EP suggested that their accommodation should be in “non-custodial, community-based placements” 122 and called the Commission to “enact infringement procedures against Member States in instances of protracted and systematic immigration detention of children and their families”. 123 Moreover, referring in particular to unaccompanied children, it calls Member States to host them in “separate facilities from adults in order to avoid any risk of violence and sexual abuse”. 124 Last but not least, the EP, probably following the ECtHR jurisprudence, reminded that “all children, irrespective of their migration or refugee status, are first and foremost entitled to all the rights enshrined in (the UN Convention on the Rights of the Child)”. 125

In the following sub-chapters, I will illustrate the legal framework related to immigration detention of unaccompanied minors under international and EU law. In particular, I will focus on the grounds allowing the detention, the safeguards and the conditions ensuring that these deprivations of liberty are not arbitrary. Whereas, in the context of immigration detention of minors, a deprivation of liberty is not arbitrary and therefore lawful whenever it does, *i.e.*, not violate the right of the child to security, to protection and care, to education, to healthcare, to recreation and leisure and to family life.126 But above all, when it was seen as necessary and other alternative measures were not available.

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126 See Articles 9, 10, 20, 22, 24, 28, 31 of the CRC; Articles 14, 24, 35 of the EU Charter; see also para 38 of the UN Rules for the protection of Juveniles Deprived of their liberty, para 38.
4.2 The UN Convention on the rights of the child

Before illustrating the sources of law specifically related to immigration detention of unaccompanied minors under Council of Europe and EU law, I will briefly focus on the UN Convention on the rights of the child, normally referred to as CRC, and the best interests of the child under Article 3 of the CRC.

Under international law, unaccompanied children are entitled to different forms of protections ensured in “provisions of international law on human rights, refugee law and humanitarian law”.127 Next to the classical legal sources of international law, there are numerous instruments of soft law.128 For example, in the GA Resolution No. 55/79 of the 22nd February 2001, the UN GA explicitly called the States Parties “to protect all human rights of migrant children (and) in particular unaccompanied children”.129 Also the general comments of the Committee on the Rights of the Child made important contributions to the implementation of the soft law instruments related to unaccompanied minors. Especially the General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin (2005) and the General Comment No. 14 on the rights of the child to have his or her best interests taken as a primary consideration (2013).130

But the most important document on children’s rights (and consequently on unaccompanied children) existing at international level is the 1989 UN Convention on the Rights of the child,131 which is the most ratified of all the UN Human Rights

130 See also Andrea Crescenzi, “I minori non accompagnati nel diritto internazionale”, in Andrea Anzaldi e Tatiana Guarnier (eds), Viaggio nel mondo dei minori stranieri non accompagnati: un’analisi giuridico fattuale (Edizioni Fondazione Basso 2014) p 10.
treaties.\textsuperscript{132} Due to its importance and almost world-wide ratification (only the USA and Somalia did not ratify the CRC), today “any decision regarding minors must be based upon protection of the rights of the child as set by the 1989 Convention”.\textsuperscript{133}

The EU, due to its legal nature (the EU is not a State), can not be a party of the CRC. Nevertheless, since all its individual Member States have ratified the Convention, the EU still has to follow its content, whenever it falls into the competence of the Union.\textsuperscript{134}

\subsection*{4.2.1 Guiding principles and the best interests of the child}

The CRC has to be understood through its guiding principles, which are playing two different roles. On one hand they highlight some of the most important and fundamental rights each child should be able to enjoy. On the other hand, they can be used as a guideline to interpret other rights and principles contained in the Convention or any other matter in which children are involved.

The guiding principles of the CRC are:

- The principle of non-discrimination under Article 2 of the CRC;
- The principle of the best interests of the child under Article 3 of the CRC;
- The right to life, survival and development under Article 6 of the CRC;
- The right to participate, which has to be understood as the right of the child to have his or her view respected, under Article 12 CRC.\textsuperscript{135}

In my personal opinion however, since “in all actions concerning children […] the best interests of the child shall be a primary consideration” (Article 3 (1) of the CRC), the principle enshrined in Article 3 should not be compared to the other guiding principles. Indeed, the principle of non-discrimination, the right to life, survival and development and the right to participate, should be read in the light of the best interests of the

\textsuperscript{132} Andrea Crescenzi, “Unaccompanied Minors in International Law”, in Ralf Rosskopf (eds), \textit{Unaccompanied minors in International, European and National law} (BMW 2016) p 29.  
\textsuperscript{133} Andrea Crescenzi, “Unaccompanied Minors in International Law”, in Ralf Rosskopf (eds), \textit{Unaccompanied minors in International, European and National law} (BMW 2016) p 30.  
child. In this sense, also the UN Committee on the Rights of the Child in the General Comment No. 14, stated that:

“The concept of the child’s best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child […] (however) there is no hierarchy of rights in the Convention; all the rights provided for therein are in the ‘child’s best interests’ and no right could be compromised by a negative interpretation of the child’s best interests”.

The child’s best interests is then a “threefold concept: a substantive right; a fundamental interpretative legal principle and a rule of procedure”. Next to being a self-executing right under Article 3 (1) of the CRC and an interpretative tool, the best interests of child becomes a rule of procedure in every choice, action or plan which directly or indirectly affects children. The assessment and determination of the best interests of the child demands procedural guarantees and justifications showing that “the right has been explicitly taken into account”. This means on one hand, that States parties have to demonstrate in each individual case concerning a child or a group of children, their “decision-making process” and why they have chosen that specific process instead of others. On the other hand, it means that the child’s voice must be heard in all the procedures concerning him or her, where

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136 A different lecture of Article 3 CRC is expressed, i.a., in UNICEF, The Convention on the rights of the child – Guiding principles (2004). For UNICEF, “the best interest of the child” contained in Article 3 of the CRC, is a guiding principle as much as Articles 1, 2, 6 and 12 of the CRC. In UNHCR, Guidelines on Determining the Best Interests of the Child, (2008), the UNHCR classifies “the best interest of a child” as general principle on a par with the principle of non-discrimination (Article 2 of the CRC), the right to life, survival and development (Article 6 of the CRC) and the right to express their own views freely (Article 12 of the CRC).

137 UN Committee on the Rights of the Child, General Comment No. 14 on the right of the child to has his or her best interests taken as a primary consideration (2013) para 4.


139 UN Committee on the Rights of the Child, General Comment No. 14 on the right of the child to has his or her best interests taken as a primary consideration (2013) para 6 sub para c.

140 UN Committee on the Rights of the Child, General Comment No. 14 on the right of the child to has his or her best interests taken as a primary consideration (2013) para 6 sub para c.
this ‘hearing’ represents a concrete guarantee of the respect of his or her best interests.\footnote{Joëlle Long, “Il principio dei best interests e la tutela dei minori” (2019) in Francesco Buffa e Maria Giuliana Civinini (eds) La Corte di Strasburgo (Key 2019), available on <http://hdl.handle.net/2318/1700472> p 414.}


### 4.2.2 The best interests of detained children

“No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time”.\footnote{Article 37 (b) of the CRC}

Article 37 (b) of the CRC allows for the detention of children. However, in the light of Article 3 (1) of the CRC, it can be hard to understand how any deprivation of liberty can correspond with the best interest of the child, even if it is intended “as a measure
of last resort” (second part of Article 37 (b) of the CRC). Besides, it is even harder to justify the detention of children when it is justified only by immigration grounds and not by a violation of criminal law. In this respect, the UN Working Group on Arbitrary Detention, the UN Committee on The Rights of the Child and the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment highly criticize and deem to be against international human rights law already the “deprivation of liberty of children alleged, accused or recognised as having infringed penal law”.

The same opinion is shared by Muntarbhorn, who says “the best interests of the child (is) axiomatic to avoid detaining children in immigration detention”.

On the other hand, the best interests of a child are not always “a paramount consideration”, as is enshrined for example in Article 21 of the CRC concerning adoption. As a matter of fact, Article 3 (1) of the CRC describes the best interests of a child as “a primary consideration” and that actually means, the best interests of the child can conflict with other rights or interests, and when this happens, a balance of interests has to be found. As expressed from the UN Committee on the Rights of the Child in its General Comment No. 14:

“Potential conflicts between the best interests of a child […] and those of a group of children or children in general have to be resolved on a case-by-case basis […]. The same must be done if the rights of other persons are in conflict with the child’s best interests […]. If harmonization is not possible, authorities and decision-makers will have to […] (bear) in mind that the right of the child to have his or her best interests taken as a primary consideration means that the

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146 In fact, “International human rights law strongly discourages (already) deprivation of liberty of children alleged, accused or recognised as having infringed penal law […] Immigration detention of children is contrary to international human rights law, in the opinion of the UN Working Group on Arbitrary Detention, the UN Committee on The Rights of the Child and the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. FRA, European legal and policy framework on immigration detention of children” (FRA 2017) p 33.
child's interests have high priority and not just one of several considerations […]".148

So, even if the principle contained in Article 3 (1) of the CRC (mirrored also under Article 24 (2) of the EU Charter) has “high priority”149 in any decision concerning children, it is not excluded that in specific cases other legitimate interests or rights might “outweigh the best interests of the child”.150 Nevertheless, in any procedure in which children’s interests have to be balanced with other interests, the ECtHR clarified that priority must be given to the vulnerability of the child, even if this child is an irregular migrant.151

To note is that the best interests of the child are not explicitly mentioned in the ECHR. This can be explained because the ECHR was not designed for children in particular but also because at the time of its promulgation the principle of the best interests of the child was still not properly defined under international law.152

In the years the ECtHR applied the principle of the best interests on the base of the “human rights-based approach” helped on one side by the general approval of the State Parties and on the other side thanks to the CRC itself.153 Indeed, in the light of the ECtHR, the ECHR must be interpreted according to the various principles of international law and of human rights law.154 However, according to Vandenhole and Ryngaert, as yet the best interests of the child is used by the ECtHR “as a trump

148 UN Committee on the Rights of the Child, General Comment No. 14 on the right of the child to has his or her best interests taken as a primary consideration (2013) para 39.
149 UN Committee on the Rights of the Child, General Comment No. 14 on the right of the child to has his or her best interests taken as a primary consideration (2013) para 39.
Despite the efforts made by the Court to define this concept, above all in the context of migration, the best interests of the child “may be invoked to justify basically whatever decision is reached”.

4.2.3 Other children’s rights affected by the detention

It is clear that States Parties of the CRC should ensure in any situation concerning minors the rights set forth in the Convention, which are partially mirrored also in Article 24 of the EU Charter (children’s rights to protection and care). States shall apply and interpret these rights without discrimination of any kind, bearing in mind that each child has the right to life, survival and development and his or her opinion must be heard and taken into consideration, as established by the CRC.

When a child is held in detention, its particular and delicate situation calls for several other rights and safeguards to be granted and respected. When a child is held in detention and he or she is an unaccompanied minor, the situation is even more complicated. The situation is even more complicated, not only because these children are “tre volte indifesi, perché minori, stranieri e inermi”, but also because the State has to fulfil the role of the absent guardian.

After all, “a child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State” (Article 20 (1) of the CRC). In other words, host States should ensure to these children their right to be protected, placing them “in suitable institutions for the care of children and respecting their ethnicity, religion, cultural and linguistic background”

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(Article 20 (3) of the CRC). Host States should in particular “take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee […], whether unaccompanied or accompanied […], receive appropriate protection and humanitarian assistance […]” (Article 22 of the CRC).
4.3 EU law on immigration detention of unaccompanied children

The right to liberty and security and therefore the prohibition of arbitrary detention is regulated by numerous different legal sources at International, Council of Europe law and EU law. The main provisions applicable to adults and children have already been explained in the chapter dedicated to the definition of detention. The most important rights protecting children and detained children under international law have been explained in the previous sub-chapter.

In this sub-chapter I will list EU law sources regulating the immigration detention of minors and unaccompanied minors. With the term “immigration detention” I always refer specifically to all situations in which third-country national minors (and unaccompanied minors) are deprived of their liberty, namely are detained on migration or asylum grounds. Situations in which minors are detained for criminal offences are not part of this paper.

4.3.1 Reception Conditions Directive (2013/33/EU) and Return Directive (2008/115/EC)

The EU legal framework related to immigration detention of minors and unaccompanied minors pays notable attention to the principle of the best interests of the child, the right of the child to development and the right to respect for family life, as enshrined both in the CRC and the EU Charter.

Under EU law, the immigration detention of minors and unaccompanied minors is regulated by Directive 2008/115/EC and Directive 2013/33/EU. The first directive lies down the “common standards and procedures in Member States for returning illegally staying third-country nationals”; the second one the “standards for the reception of applicants for international protection (recast)”. Both directives are part

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of the EU Asylum Acquis, the whole of rules, procedures and conditions regulating the Common European Asylum System (CEAS).\footnote{The EU Asylum Acquis or Common European Asylum System (CEAS), refers to the European legal framework concerning Refugee. It has been developed from the EU Member States in order to share common standards, values and procedures within the different countries. EC, “Common European Asylum System” (08 June 2019) <ec.europa.eu/home-affairs/what-we-do/policies/asylum_en> accessed 08 June 2019.}

The two directives are in line with Article 37 (b) of the CRC, therefore the detention of minors shall be used only as a measure of last resort and for the shortest period of time (Article 17 (1) of the Return Directive; Article 11 (2) of the Reception Conditions Directive). Both directives mention the best interests of the child/minor as a “primary consideration” (Article 17 (5) of the Return Directive; Article 11 (2) (3) of the Reception Conditions Directive).

Minors and unaccompanied minors are included into the category of vulnerable persons (Article 3 (9) of the Return Directive; Article 21 of the Reception Conditions Directive). The vulnerability of unaccompanied minors is underlined in both directives. As such, unaccompanied minors shall be accommodated in “institutions” specifically designed for their needs (Article 17 (4) of the Return Directive) and they “shall never be detained in prison accommodation” (second part of Article 11 (3) of the Reception Conditions Directive).

4.3.2 The detention of vulnerable persons and of applicants with special reception needs under Article 11 of the Reception Conditions Directive

Despite the essence of the dispositions concerning the detention of unaccompanied minors (and generally minors) being similar in both directives, the Reception Conditions Directive is more accurate and more attentive to the “detention of vulnerable persons and of applicants with special reception needs” (Article 11 of the Reception Conditions Directive). Therefore, under the Reception Conditions Directive, unaccompanied minors shall be detained “only in exceptional circumstances (and) all efforts shall be made to release (them) as soon as possible” (Article 11 (3) (1) of the Reception Conditions Directive). As mentioned above, they shall never be
detained in prison accommodation and they shall be “accommodated separately from adults” (Article 11 (3) (4) of the Reception Conditions Directive).

With regards to the detention of minors in general, the Reception Conditions Directive specifies that minors shall be detained only whenever “other less coercive alternative measures cannot be applied effectively” and it shall last for the “shortest period of time” (Article 11 (2) of the Reception Conditions Directive). Differently from the Return Directive, in which unaccompanied minors and family minors are detained for the “shortest appropriate period of time” (Article 17 (1) of the Return Directive), here the EU legislator removed the adjective “appropriate”.

The fact that a minor is held in detention does not mean the State should not provide for him or her “leisure activities, including play and recreational activities” (Article 17 (3) of the Return Directive; Article 11 (2) (3) of the Reception Conditions Directive). Under Article 17 (3) of the Return Directive, the access to education for minors depends on the length of their stay in the detention centre. Article 11 (2) (3) of the Reception Conditions Directive does not specifically mention the access to education for detained minors. However, under Article 14 (1) of the Reception Conditions Directive, the Member States shall grant that minors who are applicants themselves or children of applicants, shall have “access to the educational system under similar conditions as their own nationals”. Noteworthy is that the right to education is not limited to primary education but it also includes secondary education, consequently the sole reason that the minor has reached the age of majority does not exclude him or her from access to the educational system (Article 14 (1) (3) of the Reception Conditions Directive).

Highly to criticise is Article 11 (6) of the Reception Conditions Directive, allowing Member States to derogate, inter alia, the guarantees of leisure activities or the separation between female and male detained, when the unaccompanied or accompanied minor is detained at a border post or in a transit zone (Article 11 (6) of the Reception Conditions Directive).
4.3.3 Special guarantees for detained unaccompanied minors (and minors) and conditions of detention

As I mentioned already several times, unaccompanied minors, whose best interests shall (always) be a primary consideration, shall enjoy specific treatments due to their age and their vulnerability.\(^{162}\) We have already seen in chapter 3 when unaccompanied minors or minors in general may be detained and which are the main rights they should always be able to enjoy, independently of their status and independently of the place in which they are (detention, accommodation centre, transit border…). It remains to mention some other provisions specifically designed for unaccompanied minors (either as vulnerable persons or ‘simply’ because of being children) whenever they are detained. These are:

- Generally unaccompanied minors applying for international protection shall be located “with adult relatives, with a foster family, in accommodation centres with special provisions for minors (or) in other accommodation suitable for minors” (Article 24 (2) of the Reception Conditions Directive). When unaccompanied minors are detained, as already mentioned in chapter three, “they shall never be detained in prison accommodation” (Article 11 (3) (2) of the Reception Conditions Directive). Unaccompanied minors shall be placed separately from adults in “institutions provided with personnel and facilities which take into account the needs of persons of their age” (Article 11 (3) and (4) of the Reception Conditions Directive; Article 17 (4) of the Return Directive);

- Unaccompanied minors, as vulnerable persons, when detained shall regularly monitored and supported. Their health, including their mental health, shall be a primary concern to national authorities (Article 11 (1) of the Reception Conditions Directive; Article 16 (3) of the Return Directive);

- Unaccompanied minors, in particular, may be detained at border or transit zones only whenever one of the six cases enumerated under Article 25 (6) (b) of the Asylum Procedures Directive is satisfied. Therefore, unaccompanied

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\(^{162}\) Article 11 (2) (2) of the Reception Conditions Directive, concerning children in detention, refers to the best interest of the child as prescribed in Article 23 (2) of the same Directive. The second mentioned Article contains a list of factors helpful for the assessment of the best interest of the child in the concrete case. See also Article 17 (5) of the Return Directive.
minors may be detained if they are coming from a safe country of origin or if they have already applied for international protection in another country. The detention is allowed also if the State of arrival reasonably believes the unaccompanied minor may be a danger to the national security or public order or if the unaccompanied minor has been for these reasons expelled under national law (Article 25 (6) (b) (i-ii) of the Asylum Procedures Directive). Also, the reason that a “country which is not a Member State is a safe third country for the applicant” constitutes a ground for detention (Article 25 (6) (b) (v) of the Asylum Procedures Directive). In the end, also the behaviour of the unaccompanied minor, misleading the authorities by bringing false documents or destroying, in bad faith, its own documents, may lead local authorities to hold him or her detained (Article 25 (6) (b) (v-vi) of the Asylum Procedures Directive);

- Unaccompanied minors, in particular, shall be represented and assisted as soon as possible in any procedure concerning them by a representative performing their “duties in accordance with the principle of the best interests of the child” (Article 24 (1) of the Reception Conditions Directive). 

4.3.4 The EU Member State responsible for the unaccompanied minor

To conclude the part dedicated to EU law, the general rule of the EU Member State where an application of international protection was first lodged being responsible, only applies to unaccompanied minors if there are no family members, siblings or other relatives legally present in one of the other EU Member States “provided that it is in the best interests of the minor” (Article 8 (1) and (4) of the Dublin III Regulation). In the case in which only relatives are found, it is also necessary to

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163 See also Article 25 (1) of the Asylum Procedures Directive and Article 6 (2) of the Dublin III Regulation, indeed a representative, in line with Article 12 of the CRC, is needed from the moment of arrival in any procedure concerning the child.

164 As set forth in Article 2 (1), let. g of the Dublin III Regulation, family members are, “insofar as the family already existed in the country of origin […] the spouse of the applicant or his or her unmarried partner in a stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals; the minor children of couples referred to in the first indent or of the applicant, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as defined under national law; when the applicant is a minor and unmarried, the father, mother or another adult responsible for the applicant, whether by law or by the practice of the Member State where the
establish through an individual examination whether these persons can take care of the child or not.¹⁶⁵

¹⁶⁵ Relatives, as laid down in Article 2 (1) (h), are “the applicant’s adult aunt or uncle or grandparent who is present in the territory of a Member State, regardless of whether the applicant was born in or out of wedlock or adopted as defined under national law.”
4.4 From theory to praxis: the case of Mubilanzila Mayeka and Kaniki Mitunga v Belgium

“It is important to bear in mind that the child’s extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant”.166

ECtHR, Mubilanzila Mayeka and Kaniki Mitunga v Belgium

After have described the different law sources concerning immigration detention of unaccompanied migrant minors, I will now analyse the jurisprudence of the ECtHR in relation to this topic. Despite the fact that the ECHR does not expressly refer to the detention of unaccompanied children, the ECtHR “applies a very strict test when examining cases of children detained for immigration-related reasons”167. For this reason, in this chapter I will analyse an interesting case brought to the attention of the ECtHR in 2006. Unfortunately, as yet, there are no cases of migration detention of unaccompanied minors under the jurisprudence of the ECJ.

4.4.1 The facts

This case concerns a five-year old girl from the Democratic Republic of Congo (DRC), who was supposed to be reunited with her mother, who at the time had obtained refugee status in Canada.

The girl was accompanied on her flight from the DRC by her uncle, a Dutch national living in the Netherlands, who was supposed to look after her until the mother was able to collect her. Once they reached Belgium Airport, however, he could not prove parental authority and she did not have any documents. As such she was stopped from continuing to the Netherlands and then detained in a Transit Centre for two months, before being sent back to Congo accompanied by a hostess appointed by the flight company, because her refugee application was denied.

166 Extract from the factsheet ECtHR, Unaccompanied migrant minors in detention (2018) referring to Mubilanzila Mayeka and Kaniki Mitunga v Belgium App no 13178/03 (ECtHR, 12 October 2006) para 55.

Once there, since no one was waiting for her, the girl was being taken care of by a secretary at the National Information Agency of the DRC. In the meantime, the Belgian authorities received a message from the Canadian embassy in The Hague informing that the mother had guaranteed refugee status and indefinite leave to remain in Canada with a work permit that allows her to have her daughter join her. At this point, the girl was accompanied to join her mother in Canada by the secretary who had taken care of her.

To note is, that during her detention, her lawyer lodged an application for her release with the chamber du conseil of the Brussels Court of First Instance, which after a week stated the incompatibility of the detention with Article 3 of the CRC and ordered the immediate release.

4.4.2 The Law

The choose of the case *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* derives from the interesting and significant point, that in the light of the Court, unaccompanied minors can be detained, independently of their age, whenever their detention is lawful.

4.4.2.1 The relation between grounds and conditions of detention

The Court states that, to be lawful, the detention of an unaccompanied minor needs to fall within Article 5 (1) (f) of the ECHR, which allows “the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country of a person against whom action is being taken with a view to expulsion or extradition” (Article 5 (1) (f) of the ECHR). However, even if the ground behind the detention is lawful, account must be taken of the conditions and the facility in which the detention will take place. That is to say, with the words of the Court, “that there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention”\(^\text{168}\).

\(^{168}\) *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* App no 13178/03 (ECtHR, 12 October 2006) para 102.
In the specific case, the minor has been held in a closed centre designed for adults and not for minors. Clearly, such conditions of detention have been considered not adequate for the “extreme vulnerability” of the minor. Above all considering she was not just a minor, but “an unaccompanied foreign minor”.

A similar approach has been taken by the ECtHR in the case of Abdullahi Elmi and Aweys Abubakar v Malta. Also in this case the ECtHR stated a violation of Article 5 (1) of the ECHR even if “the detention was closely connected to the ground of detention relied on” due to the delay to proceed with the age assessment (the applicants claimed – correctly – to be minors), the absence of procedural safeguards, the absence to check if a detention was necessary (namely if it was a last resort measure) and the poor conditions of detention.

4.4.2.2 The list of exceptions under Article 5 (1) of the ECHR

An ambivalent point of this judgment is in relation with the list of exceptions under Article 5 (1) of the ECHR.

It is undisputed, that States can “at their discretion” infringe upon the individual’s right to liberty in order to lawfully control their territory. To do so, a State must respect the right to liberty enshrined in Article 5 (1) of the ECHR, whose “list of exceptions to the right to liberty […] is an exhaustive one and only a narrow interpretation of those exceptions is consistent with the aim of that provision”. However, a few paragraphs after proclaiming this sentence, the ECtHR states that the list of grounds directly concerning the detention of children (Article 5 (1) sub par (d) ECHR) “contains a specific, but not exhaustive, example of circumstances in which

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169 Mubilanzila Mayeka and Kaniki Mitunga v Belgium App no 13178/03 (ECtHR, 12 October 2006) para 103.
170 Mubilanzila Mayeka and Kaniki Mitunga v Belgium App no 13178/03 (ECtHR, 12 October 2006) para 103.
171 Abdullahi Elmi and Aweys Abubakar v Malta App nos 25794/13 and 28151/13 (ECtHR, 22 February 2017) para 146.
172 Mubilanzila Mayeka and Kaniki Mitunga v Belgium App no 13178/03 (ECtHR, 12 October 2006) para 96.
173 Mubilanzila Mayeka and Kaniki Mitunga v Belgium App no 13178/03 (ECtHR, 12 October 2006) para 96.
minors might be detained”. Is it not contradictory to proclaim the completeness of the grounds contained in Article 5 (1) of the ECHR for everybody but considering the only ground contained in this Article explicitly referring to a minor a “specific but not exhaustive example of circumstances”?  

4.4.2.3 The conditions of the detention in the light of Article 3 ECHR

The ECtHR analysed the conditions in which the child has been held also in the light of Article 3 of the ECHR. Article 3 of the ECHR concerns the absolute prohibition of torture or inhuman or degrading treatment and it is considered “one of the fundamental values of the democratic societies making up the Council of Europe”. A treatment falls within the scope of Article 3 of the ECHR when it reaches a “minimum level of severity”. The ECtHR therefore evaluates different factors, including the length of the treatment, its side effects and the personal characteristics of the victim. To do this evaluation, the ECtHR in the examined case citing mutatis mutandis the case of Selmouni v France, reminds that:

“ […] the Convention is a ‘living instrument which must be interpreted in the light of present-day conditions’ [and] that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies”.

174 Mubilanzila Mayeka and Kaniki Mitunga v Belgium App no 13178/03 (ECtHR, 12 October 2006) para 100. 
175 Mubilanzila Mayeka and Kaniki Mitunga v Belgium App no 13178/03 (ECtHR, 12 October 2006) para 100. 
176 Mubilanzila Mayeka and Kaniki Mitunga v Belgium App no 13178/03 (ECtHR, 12 October 2006) para 48. 
178 Mubilanzila Mayeka and Kaniki Mitunga v Belgium App no 13178/03 (ECtHR, 12 October 2006) para 48. 
180 Mubilanzila Mayeka and Kaniki Mitunga v Belgium App no 13178/03 (ECtHR, 12 October 2006) para 48.
Following this reasoning, the ECtHR states that the treatment of the child (due to her age, due to the fact that she was unaccompanied, due to the poor condition of the place in which she has been held, which was not designed for children, due to the absence of educational assistance and due to the length of such detention) was not in line with the scope of Article 3 of the ECHR.\(^{181}\) “The fact that the (minor) received legal assistance, had daily telephone contact with her mother or uncle and that staff and residents at the centre did their best for her” has then been considered irrelevant and not sufficient.\(^{182}\) Also the attempt of refoulement (the child was sent back to Congo) violated Article 3 of the ECHR, in this case also the mother’s child has been seen as an indirect victim of such violation.\(^{183}\)

The ECtHR classified the violation of Article 3 of the ECHR as a violation of a positive and not of a negative obligation of the State.\(^{184}\) This means, the State has been punished for its inactivity, for not having an adequate detention building, more than for having detained the child in the first place.\(^{185}\) Moreover, as raised by Pertile, the ECtHR affirmed that the authorities were in a place to avoid the problems connected with such detention from the moment in which the child’s lawyers reported the situation of detention to the Alien Office.\(^{186}\) Also this is a sign for Pertile, that in the light of the

\(^{181}\) *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* App no 13178/03 (ECtHR, 12 October 2006) para 50.

\(^{182}\) *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* App no 13178/03 (ECtHR, 12 October 2006) para 52.


ECtHR the detention of unaccompanied minors is not something to prohibit but is something to regulate in order to have adequate detention structures.\textsuperscript{187}

4.4.2.4 Unaccompanied minors as highly vulnerable members of the society

Besides the criticism just pointed out, the judgment of the ECtHR is also commendable with regard to the specific status of the child. The above mentioned consideration that the minor was not just a minor but an unaccompanied foreign minor played in this case a really important role. In fact, the ECtHR proclaimed that the extreme vulnerability of unaccompanied minors requires proper and adequate treatment, designed for their special needs. The Court also considered this vulnerability prevailing over their legal status. With richness of significance, the Court stated that:

“(The minor’s) position was characterised by her very young age, the fact that she was an illegal immigrant in a foreign land and the fact that she was unaccompanied by her family from whom she had become separated so that she was effectively left to her own devices. She was thus in an extremely vulnerable situation. In view of the absolute nature of the protection afforded by Article 3 of the Convention, it is important to bear in mind that this is the decisive factor and it takes precedence over considerations relating to the second applicant’s status as an illegal immigrant. She therefore indisputably came within the class of highly vulnerable members of society to whom the Belgian State owed a duty to take adequate measures to provide care and protection as part of its positive obligations under Article 3 of the Convention”.\textsuperscript{188}

I find these exact words of extreme importance for this paper. The ECtHR did not only give (finally) an accurate description of what we should understand under the term “unaccompanied minor”, using a more humane definition rather than the static-legal


\textsuperscript{188} Mubilanzila Mayeka and Kaniki Mitunga v Belgium App no 13178/03 (ECtHR, 12 October 2006) para 55.
one generally adopted. Indeed, the ECtHR describes the vulnerability of the applicant referring to the different factors determining it, namely the applicant was (1) of a really young age; (2) she was an illegal immigrant in a foreign land; (3) she was unaccompanied by her family and therefore left to her own devices. But it also gave a humane example of balancing the rights in question, where the extreme vulnerability of an unaccompanied child prevails over his or her status of illegal migrant. 189

As stated by Brandl and Czech with regard to the ECtHR’s jurisprudence, the status of vulnerable persons “does not create any new obligations but reinforces and specifies given duties under the Convention”. 190 Especially when it comes to a possible violation of Article 3 of the ECHR, the condition of vulnerability of the person assumes a decisive role to assess whether that person has been subjected of torture or inhumane and degrading treatment. In other words, this vulnerability “can influence the outcome substantially”. 191

Next to the Mubilanzila case, also in Rahimi v Greece, Muskhadzhiyeva and Others v Belgium and Popov v France the ECtHR valued the vulnerability of the applicants as a decisive factor to consider the condition of detention in which they where held violating Article 3 of the ECHR and whether they were unaccompanied or accompanied minors. 192 So, for example, in Rahimi v Greece, the applicant was an Afghan who has been held in a detention centre in Greece for return purposes and only for two days. However, the fact that the applicant was a fifteen year old

189 See also Abdullahi Elmi and Aweys Abubakar v Malta App nos 25794/13 and 28151/13 (ECtHR, 22 February 2017) para 103.
192 Ulrike Brandl and Philp Czech, “General and Specific Vulnerability of Protection-Seekers in the EU: Is there and Adequate Response to their Needs?”, in Francesca Ippolito and Sara Iglesias Sánchez (eds), Protecting Vulnerable Groups – The European Human Rights Framework (Hart publishing 2015) p 254. See also Rahimi v Greece App no 8687/08 (ECtHR, 5 July 2011); Muskhadzhiyeva and Others v Belgium App no 41442/07 (ECtHR, 19 January 2010); Popov v France App nos 39472/07 and 39474/07 (ECtHR, 19 January 2012).
unaccompanied minor and as such a person in “une situation d’extrême vulnérabilité”, should have been taken into consideration by the authorities which should have paid more attention to such a “situation particulière”.\textsuperscript{193} For this reason and for the poor condition of the detention centre, not considering at all the short length of the detention, the ECtHR affirmed a violation of Article 3 of the ECHR.

\textbf{4.4.2.5 An unnecessary detention in the light of Article 8 of the ECHR}

To conclude the analysis of this case, I would like to explain the logical reasoning that finally led the Court to proclaim the use of a detention measure for a child to be unnecessary.\textsuperscript{194}

As explained before, States are entitled to (lawfully) detain unaccompanied minors as long as they are entitled to control their border. Since the ECtHR is not interested in a crusade against the principles governing the sovereignty of the States, to avoid this impasse, the Court had to play another card. So, the ECtHR proclaimed the lawfulness of this detention measure in the light of a violation of the right to respect for private and family life (Article 8 of the ECHR).

As set down in the mentioned Article, States can interfere with the exercise of the right for private and family life recognised to everybody, as longs as this interference is “in accordance with the law and is necessary in a democratic society” (Article 8 (2) of the ECHR). Since the minor “was detained under the authorities’ powers to control the entry and residence of aliens on the territory of the Belgian State”, the first requirement was fulfilled.\textsuperscript{195} However, with regard of the second requirement, the Court had to reflect “whether (the detention measure) was justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued”.\textsuperscript{196} It is in this context that

\begin{itemize}
\item \textsuperscript{193} Rahimi v Greece App no 8687/08 (ECtHR, 5 July 2011) para 86.
\item \textsuperscript{195} Mubilanzila Mayeka and Kaniki Mitunga v Belgium App no 13178/03 (ECtHR, 12 October 2006) para 79.
\item \textsuperscript{196} Mubilanzila Mayeka and Kaniki Mitunga v Belgium App no 13178/03 (ECtHR, 12 October 2006) para 80.
\end{itemize}
the detention of the unaccompanied minor (in an adult centre) has finally been considered unnecessary.\textsuperscript{197} In the end, it was also hard for the the ECtHR to see any risk in a five-year old girl to evade the supervision of the Belgian authorities.\textsuperscript{198}

\textbf{4.4.3 From Mubilanzila Mayeka and Kaniki Mitunga v Belgium to Muskhadzhiyeva and Others v Belgium}

The judgment of \textit{Mubilanzila Mayeka and Kaniki Mitunga} plays an important role in the case of \textit{Muskhadzhiyeva and Others v Belgium}, both as a precedent and as a benchmark for the process of distinguishing.\textsuperscript{199} Though there were several dissimilarities between the applicants and the facts of the two cases, the ECtHR expressly used the first case as a benchmark to condemn Belgium (again) for the unnecessary detention in view of their deportation of four irregular minor migrants in the light of Article 3 and 5 of the ECHR. Differently from the first case, in \textit{Muskhadzhiyeva and Others v Belgium} the applicants had been held in a detention centre with their mother.

\textbf{5.2.3.1 Similarities and dissimilarities between the Mubilanzila and the Muskhadzhiyeva cases}

The \textit{Muskhadzhiyeva} case concerns four children, at the time of the event between seven years and seven months old, and their mother. The Russian family from Chechnya origin arrived in Belgium, where it applied for asylum, via Poland. The family had therefore been held in a detention centre (designed for adults only) for more than a month in view of their deportation back to Poland. The applicants, both the

\textsuperscript{197} \textit{Mubilanzila Mayeka and Kaniki Mitunga v Belgium} App no 13178/03 (ECtHR, 12 October 2006) para 83. Worthy of note is also the Court’s remark on the applicant’s young age. The child bears no responsibility for her uncle’s attempts to deceive the Belgian authorities by passing her off as his daughter [...] or the conduct of her mother and family [...]; \textit{Mubilanzila Mayeka and Kaniki Mitunga v Belgium} App no 13178/03 (ECtHR, 12 October 2006) para 84.

\textsuperscript{198} \textit{Mubilanzila Mayeka and Kaniki Mitunga v Belgium} App no 13178/03 (ECtHR, 12 October 2006) para 83.

children and the mother, claimed in particular a violation of Article 3, 5 (1) (f) and 8 of the ECHR. The ECtHR stated a violation of Article 3 and 5 (1) of the ECHR and therefore condemned Belgium, but only for the inadequate condition of the unnecessary detention of the four children and not of the mother. No violation of Article 8 of the ECHR had been founded.

Comparing the two different cases, we can note that:

- The *Mubilanzila* case concerns an unaccompanied migrant minor, a five-year old girl from the DRC, who had been held in a Belgian detention centre designed for adults only, with a view of her deportation back to the DRC. Her mother was at the time of the events waiting for her in Canada.

- The *Muskhadzhiyeva* case concerns four accompanied migrant minors, who also had been held in a Belgian detention centre designed for adults only, with a view of their deportation back to Poland. However, the children had been detained together with their mother.

- In both cases the applicants (the child/children and her/their mother) claimed a violation of Article 3 and 8 of the ECHR. Only in the *Mubilanzila* case did the ECtHR recognise the detention of the child and her deportation violating both applicants’ rights of protection under Article 3 and 8 of the ECHR.200 In the second case, the violation of Article 3 of the ECHR had been found only with regard to the children and not the mother,201 meanwhile the violation of Article 8 of the ECHR had been found manifestly ill-founded.202 To do so, the ECtHR expressly used as a benchmark the *Mubilanzila* case.

- In both cases the ECtHR found a violation of Article 5 (1) of the ECHR with regard to the unnecessary detention of the children.203

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200 *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* App no 13178/03 (ECtHR, 12 October 2006) paras 59, 63, 71.
201 *Muskhadzhiyeva and others v Belgium* App no 41442/07 (ECtHR, 19 January 2010) paras 63, 66.
203 *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* App no 13178/03 (ECtHR, 12 October 2006) para 105 and *Muskhadzhiyeva and others v Belgium* App no 41442/07 (ECtHR, 19 January 2010) para 75.
5.2.3.2 On the alleged violation of Article 3 of the ECHR

According to Vandenhole and Ryngaert, in the judgment of Muskhadzhievya the ECtHR “over-relied” on the Mubilanzila case. In particular, with regard to the children, even if the authors do not disagree with the findings of the ECtHR on the violation of Article 3 and 5 of the ECHR, they do complain about the absence of a clear justification for such a result.

Starting from the violation of Article 3 of the ECHR, the ECtHR explicitly mentions the case of Mubilanzila and the fact that in the first case the child was an unaccompanied migrant minor. However, as stated in para 58 of the judgment:

“[…] cet élément ne suffit pas à exempter les autorités de leur obligation de protéger les enfants et d’adopter des mesures adéquates au titre des obligations positives découlant de l’article 3 de la Convention.”

The situation of extreme vulnerability of the children, unaccompanied or accompanied, shall be the decisive factor for the State to intervene and adopt its positive obligation to protect children in the light of Article 3 of the ECHR. To note is however, that the relationship between the children as right-holders and the State as the duty-holder, sees the parents of the children as ‘intermediary’, which are the primary subjects responsible for the upbringing, development and to secure proper living condition to their children (Article 18 and 27 of the CRC). The State shall intervene whenever parents are not able to fulfil these duties and it shall intervene even

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206 Muskhadzhievya and others v Belgium App no 41442/07 (ECtHR, 19 January 2010) para 58.
more when the State itself “contributed to that inability”. The positive obligation of the State to protect children under Article 3 (2) of the CRC and “the additional protection towards asylum seeking-children” under Article 22 of the CRC, applies indifferently to unaccompanied and accompanied children. Now, as stressed by Vandenhole and Ryngaert, it would have been appreciable to understand why and how the positive obligation of the State to intervene and to protect the children shall apply indifferently to unaccompanied migrant minors (see the Mubilanzila case) and accompanied migrant minors (see the Muskhadzhiyeva case).

In the Muskhadzhiyeva case the parameters required to reach the minimum level of severity in order to state a violation of Article 3 of the ECHR had not been properly argued and justified by the ECtHR. It is then hard to get any general principles to know when, how or if the ECtHR considers the detention of minors acceptable or when inhumane and degrading. For example, why had only in the Mubilanzila judgment the detention of the child been expressly defined as inhumane and degrading? Meanwhile in the Muskhadzhiyeva case the ECtHR ‘simply’ states a violation of Article 3 of the ECHR?

5.2.3.3 On the alleged violation of Article 5 (1) of the ECHR

In the Muskhadzhiyeva case to state the violation of Article 5 (1) of the ECHR with regard of the children, the ECtHR limits itself to expressly citing the Mubilanzila

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judgment. Also in this context, the fact that the children were accompanied is irrelevant to assess the non-necessity of such detention.

The ECtHR did not find any violation of Article 5 (1) of the ECHR with regard to the mother. Indeed, as already explained, under international law the detention in view of deportation of (adult) migrants (Article 5 (1) (f) of the ECHR), as far as it is not arbitrary and in line with the scope of Article 5 (1) (f) of the ECHR, does not have to be justified as a necessary measure.

From this judgment, one could draw the conclusion that States should avoid the detention of migrant children but not of their parents. States should then either detain both children and their parents in detention centres with suitable conditions for the minors, or not detain any of them. In its ruling the ECtHR, to assess the lawfulness of the detention of the mother, did not, however, take into consideration the right to family and to family life, as expressed under Article 8 of the ECHR. As stated by Vandenhole and Ryngaert, “from a children’s rights perspective, this has been a regrettable omission”.

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213 Muskhadziyeva and others v Belgium App no 41442/07 (ECtHR, 19 January 2010) para 73.
214 Muskhadziyeva and others v Belgium App no 41442/07 (ECtHR, 19 January 2010) para 74.
CHAPTER 5
DETENTION OF UNACCOMPANIED MINORS UNDER NATIONAL LAW:
THE AUSTRIAN AND THE ITALIAN LEGAL FRAMEWORKS
In this chapter I will illustrate the sources of law concerning detention of unaccompanied minors under Austrian and then Italian law. I will focus in particular on the new Italian legislation (L 47/17), which represents the first national intervention promulgated by an EU Member State concerning exclusively unaccompanied minors.\textsuperscript{217}

As already mentioned, the Austrian legal framework distinguishes whether the minor is below (\textit{unmündige Minderjährige}) or above (\textit{mündige Minderjährige}) fourteen-years old. Only when foreign minors are under fourteen years old they shall not be detained (Article 76 (1) of the \textit{Fremdenpolizeigesetz} 2005).\textsuperscript{218}

Generally, the detention of non-Austrian citizens (\textit{Schubhaft von Fremden}) is allowed whenever the objective of the detention is not achievable through other milder measures (\textit{gelinderes Mittel}) (Article 76 (1) of the FPG). The use of alternatives to detention should be the normal rule applied to foreign minors above 14 years old, if these measures do not guarantee the objective of the detention, minors may be detained (Article 77 (1) in conjunction with Article 80 (2) of the FPG). However, to note is that foreigners under the age of sixteen shall be held in detention if there are facilities sufficient for their age and development, where their care can be guaranteed (Article 79 (2) of the FPG).


\textsuperscript{218} Bundesgesetz über die Ausübung der Fremdenpolizei, die Ausstellung von Dokumenten für Fremde und die Erteilung von Einreisetitel (\textit{Fremdenpolizeigesetz} 2005 – FPG), as follows FPG.
Although the grounds for migration detention are the same for both adults and minors, the length of time is different. *Mündige Minderjährige* generally must not be detained for over three months (Article 80 (2) of the FPG), unless their application for asylum or international protection has been denied, in which case they may be held in detention until return measures become effective (Article 80 (5) of the FPG). The length of the detention may then not exceed ten months, this period of time is however subject to be extended, as foreseen under Article 80 (5) of the FPG.

The legal framework concerning the grounds for detention of foreigners (and therefore unaccompanied minors) has significantly changed when Austria had to implement the Asylum Procedures Directive and the Return Conditions Directive. Not all the EU grounds contained in the two directives have been adopted.\(^{219}\) Therefore, under Austrian law, foreigners may be detained:

- If it is necessary to the proceedings for international protection, to ensure their return in case of denial of their application. This measure applies only when it is proportional to the scope or if the stay of the foreigner constitutes a danger for public order, security or there is a flight-risk (Article 76 (2) (1) of the FPG). To verify if the measure is proportional, any possible criminal behaviour has to be taken into consideration (Article 76 (2) of the FPG). Meanwhile a flight risk (*Fluchtgefahr*) exists when specific circumstances justify the assumption that the foreigner may try to elude the proceedings or the expulsion or considerably impede the expulsion (Article 76 (3) of the FPG);
- If return or expulsion proceedings are necessary, whenever the detention measure is proportional and there is a flight-risk (Article 76 (2) (2) of the FPG);
- According to Article 28 (1) (2) of the Dublin III Regulation, “when there is a significant risk of absconding […] to secure transfer procedures […], on the basis of an individual assessment and only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively” (Article 28 (2) of the Dublin III Regulation). This provision can be applied only if the fact that the person is subjected to the Dublin III Regulation is not the only reason allowing this detention (Article 28 (1) of the Dublin III Regulation).

\(^{219}\) See also GDP, *Austria Immigration Detention Profile* (GDP 2017).
Foreigners at first reception centres located at airports, may be detained, as long as entry has not been granted, to ensure their possible expulsion, either in said first reception centre or specific locations at border control areas. However, “er darf jederzeit ausreisen”, he (or she) can leave at any time (the Country) (Article 32 (1) of the AsylG).220 Moreover, third-country nationals against whom a return decision has been taken and whose deportation is no longer suspended, may be detained until their departure, in a specific quarter provided by the government (Article 57 (1) of the FPG). The question is, whether these measures are affecting the freedom of movement or the right to liberty, that is to say, are these specific places de facto detention?

220 AsylG refers to the Bundesgesetz über die Gewährung von Asyl (Asylgesetz 2005).
5.2 *Trattentimento* of unaccompanied minors in Italy

In the last years Italy has paid increasing attention to unaccompanied minors. The most recent intervention was in 2017 through a parliamentarian law titled “Disposizioni in materia di misure di protezione dei minori stranieri non accompagnati” (L 47/17), already mentioned as *Legge Zampa*. These dispositions modify the pre-existing legislation concerning foreign minors contained, *inter alia*, in the “Testo Unico sull’immigrazione” (decreto legislativo 25 luglio 1998, n. 286) and in the “Attuazione della direttiva 2013/33/EU recante norme relative all’accoglienza dei richiedenti protezione internazionale, nonché della direttiva 2013/32/EU, recante procedure comuni ai fini del riconoscimento e della revoca dello status di protezione internazionale” (decreto legislativo 18 agosto 2015, n. 142).

As stated by Stefania Giova, the L 47/17 should be celebrated as an expression of the principle contained in Article 2 of the Italian Constitution, which collocates the individual’s freedom as the most important value of the Italian legal system. Worthy of note are in particular, as I am going to better explain in the following sub-chapters, the introduction of the “divieto assoluto di respingimento alla frontiera” of unaccompanied minors and the “divieto (relativo) di espulsione” of unaccompanied minors.

However, the L 47/17 might also be subjected to some criticisms. First, subjected to this law are unaccompanied (migrant) minors but it has not been specified which is the

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222 As follows, *TU immigrazione*.

223 As follows, dlgs 142/15.


minority age to take into consideration. Even if in Italy the majority age is reached at eighteen years of age (Article 2 of the Codice Civile), a general rule establishes that the capacity to act ("capacità di agire") of a physical person depends on the law of its country of origin.\(^{226}\) Secondly, there are doubts concerning the economical possibility of the Italian State to effectively realize the law’s provisions.\(^{227}\) Indeed, explained Cukani, the L 47/17 is mostly based on the “solidarietà fraterna” between citizens and not on the “solidarietà pubblica o paternalistica” between the State itself and the citizens (for example, the legal guardians of the unaccompanied minors must be on a volunteer basis and therefore they can not even demand back the reimbursement of the expenses).\(^{228}\) Even if the public and the fraternal solidarity shall be two sides of a coin, the second one can not completely replace the first one.\(^{229}\)

To give a thorough explanation, since I mentioned the Italian Constitution, I should also refer to two other important dispositions contained in it, which reinforce the legal framework related to unaccompanied minors.\(^{230}\) In particular, Article 10 of the Costituzione provides the mandatory conformation of the Italian legal system with the generally accepted disposition of international law; Article 31 (2) of the Costituzione grants protection to children and young people, without distinguishing whether they are Italian, European or third-national citizens.\(^{231}\)

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\(^{229}\) As follows, I refer to the Italian Constitution as Costituzione.

\(^{230}\) See also Stefania Giova, I minori stranieri non accompagnati dopo la legge n. 47 del 2017, in Luisa Corazza, Michele Della Morte, Stefania Giova (eds), Fenomeni migratori ed effettività dei diritti (Edizioni Scientifiche Italiane 2018) p 101.
5.2.1 Detention or ‘administrative holding’ of migrants?

In Italy, in the context of migration detention, the only infrastructures formally classifiable as “detention centre”, or where at least the term “to hold” is specifically used, are the permanent centres for return purposes (CPR). In fact, as stated by the Italian Director of Immigration Service Vittorio Pisani, during the 1585th Meeting 62nd Session of Committee against Torture:

“Ital trattenimento nei centri finalizzati al rimpatrio è innanzitutto un trattenimento amministrativo e non si tratta di una forma di detenzione ma di una forma di trattenimento amministrativo temporaneo […].”

That is to say, holding migrants in permanent centres for return purposes is, above all, an administrative holding and it is not a form of detention but a form of temporary administrative holding. This can be explained by the fact, that the Italian legislator translates the word “detention” with “trattenimento”, which means “to hold” but not necessary “to detain”. As result from this translation, as stated by the GDP in the 2018 Italy Immigration Detention Profile:

“People are held in a place and they cannot go out (but) ironically the fact that is not defined as detention makes the condition and the accessibility to rights worse than in prison”.

However, as I already explained in the previous chapters, in the light of the ECtHR, substance must prevail over form, especially when the right to liberty is at stake. For this reason, it is of little importance whether the national law classifies a centre as “reception facility” instead of as a “detention centre”, if de facto someone has been deprived of his or her liberty. The Italian law’s uncertainty has not been invisible to the ECtHR judgment and in 2017 Italy has therefore been condemned. In the opinion of the ECtHR, problematic is the lack of precision of the dispositions concerning

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233 See also chapter 2.1.
migration detention. For the ECtHR, this “legislative ambiguity has given rise to numerous situations of de facto deprivation of liberty”. 235

Nevertheless, the Italian legislator also did something worthy of note and it prohibited at least the detention of unaccompanied minors in permanent centres for return purposes (Article 19 (4) of the dlgs 142/15).

5.2.2 The reception of unaccompanied minors in Italy

An important part of the L 47/17 is dedicated to the reception (“accoglienza”) of unaccompanied minors. The dispositions contained in the new law integrate the previous legal framework.

Before analysing the Italian reception procedures for unaccompanied minors, it is important to note, that in line with Article 3 of the CRC the best interests of the child, which evaluation should be done through the minor’s hearing, assumes priority character in every measures concerning his or her reception (Article 18 (1) of the dlgs 142/15). Corollary of the principle of the best interests of the child is the right of the minors to be heard and to participate through their representative in any procedure in which they are involved. To this end, the presence of a mediatore culturale shall be ensured (Article 15 of the L 47/17).

5.2.2.1 Primary safeguard measures

The first concrete safeguard foreseen for unaccompanied minors once they have reached Italian soil, is the immediate communication of their arrival by the authority of public security to the Procuratore della Repubblica at the juvenile court and to the juvenile court itself. This communication has to be made in order to begin without any delay the procedures of protection and in order to appoint a guardian (Article 19 (5) of the dlgs 142/15). To this end, any juvenile courts shall have a list of volunteer guardians, including also selected and prepared private citizens, willing to take care of the minors Article 11 of the L 47/17).

235 Khlaifia and Others v Italy App no 16483/12 (ECtHR, 15 december 2016) para 106.
One second significant safeguard, introduced by the L 47/17, is the absolute prohibition to reject unaccompanied minors at borders (Article 2 of the L 47/17). This is different from the past, when unaccompanied minors could have been stopped at borders to prevent their entrance in Italian territory. However, even before this change in law, once unaccompanied minors were found within the Italian territory, whether they had legally or illegally entered, they could not be expelled.236

Expulsion of unaccompanied minors may still be ordered by the juvenile court, on the demand of the questore, for public order or security reasons and insofar as it does not cause any grave consequence for the minor (Article 31 (4) as modified by the L 47/17 and Article 13 (1) of the TU immigrazione). However, the expulsion of vulnerable persons or of people in violation of the principle of non-refoulement is generally prohibited (Article 19 (1) (1.1) of the TU immigrazione).

5.2.2.2 First accommodation of unaccompanied minors

With regard to the accommodation of unaccompanied minors, as mentioned previously, they shall not be held or received respectively in permanent centres for return purposes or in governmental centres of first reception.

Due to first aid situations or immediate protection, unaccompanied minors may be accommodated for a maximum of thirty days in governmental first-reception facilities designed solely for them. This first accommodation (“primissima accoglienza”) shall only be for the time necessary for their identification and possible age assessment, which shall be done within ten days and it shall not exceed thirty days in any way (Article 19 (1) (4) of the dlgs 142/15).237

During this accommodation one sole interview with a child psychologist is provided and where needed also with the help of a mediatore culturale. This sole interview is provided to ascertain the personal situation of the minor, the reasons behind his or her

237 Presidenza del Consiglio dei Ministri, Conferenza Unificata del 10 luglio 2014 (n 77/CU). See also, for instance, SPRAR, Formazione di base per la gestione dei servizi di accoglienza integrata dello Sprar – Percorsi e strumenti per l’accoglienza integrata dei msna (2017).
departure and his or her future expectations. The interview is also relevant in order to choose the structure in which the minor will find accommodation and possibly in order to start his or her family research (Article 19 (1) (2-bis) (7-bis) of the dlgs 142/15).

5.2.2.3 Second level of reception for unaccompanied minors

Once these primary procedures are done, the second step of the whole welcoming procedure ("secondo livello di accoglienza") consists of the placement of the unaccompanied minor in the “Sistema di protezione per richiedenti asilo, rifugiati e minori stranieri non accompagnati”. 238 Nowadays this system of reception has been renamed into “Sistema di protezione internazionale e per minori stranieri non accompagnati”. 239 The gathering of unaccompanied minors in this system of protection does not take into consideration the legal status of the minor. Therefore, it is irrelevant if the minor has already been granted or has only requested a title of international protection. 240

When specific structures for unaccompanied minors are not available, the assistance and the reception of the minor is temporarily provided by the public authority of the Comune in which the minor is located. Otherwise, when there are consistent and close arrivals of unaccompanied minors, they can be received in temporary reception structures. These temporary structures have to be requested by the prefetto and minors shall only stay in them for the shortest amount of time necessary. Only unaccompanied minors over 14 years old can be placed in these structures (Article 19 (3) (3-bis) of the dlgs 142/15).

If local authorities find family members of the minor, capable of taking care of him or her, this solution shall be preferred to any others. The search for family members is conducted in the superior interest of the minor, after his or her approval and only if there are no risks to the minor itself or to his or her family (Article 6 (2) of the L 47/17).

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238 Referred to Article 1-sexies of the decreto legge 30 dicembre 1989, n 416, converted with modification into law through the Legge 28 febbraio 1990, n 39.
239 Article 12 (4) of the decreto legge 4 ottobre 2018, n 113 (“Decreto Salvini”).
240 This decision has been taken from the Government in accordance with the Regioni and the Enti locali in 2014 (Presidenza del Consiglio dei Ministri, Conferenza Unificata del 10 luglio 2014, n 77/CU).
Also the foster care system should be preferred to the placement of the minor in institutions, even if those institutions are specifically designed for unaccompanied minors. To this end, in any Italian juvenile courts a list of voluntary guardians willing to take under their legal protection one or more unaccompanied minors should be created, dependent on whether they are a single child or they have siblings (Article 11 of the L 47/17). As yet the law has still not been adequately implemented by the Italian Government, however, notable is that after twelve months from the entry into force of the law, four-thousands Italian citizens already offered themselves as voluntary guardians.  

Conclusion

Under International and EU law the detention of unaccompanied minors, and generally of minors is considered an *extrema ratio*. This means, not only that the detention of minors has to respect the rule of law, has to be for the shortest period of time possible and has to be taken in the best interests of the child. It means especially that the detention has to be a last resort measure applicable only when there are no alternatives to detention available.

An important contribution for the condemnation of the detention of unaccompanied minors came from the ECtHR. However, the ECtHR limited itself to condemn immigration detention of unaccompanied minors indirectly through, for example, inadequate conditions of detention or through the violation of the right to family. Important to note is also the different treatment reserved by the ECtHR to (immigration) detention of minors, independently of if they are accompanied or unaccompanied by their parents or other legal guardians, and adults. Indeed, in light of the ECtHR, the (immigration) detention of adults does not have to be a necessary measure. Which in other words means, the interest of the State to protect its borders prevails (within certain limits) to the right to liberty of adult migrants. Another approach has been taken by the EU legislator, indeed under Article 52 (1) of the EU Charta the right to liberty is subjected to the principle of proportionality and restrictions “may be made only if they are necessary and genuinely meet objectives of general interest […] or the need to protect the rights and freedoms of others” (second part of Article 52 (1) of the EU Charta).

The most important contribution to children’s rights and therefore to immigration detention of unaccompanied minors, has been made by the CRC, which has been ratified by all EU Member States. However, if International and (at least in this context) EU law tend to provide only the main principles or the external framework regulating the matter, it is up to the States to implement and apply these principles. This leads to issues like the absence of a clear definition of what alternatives to detention should be or most important, the absence of what detention measures really are.

These problems are connected with the lack of a full harmonization of EU law within EU Member States. On a bigger scale also with the lack of harmonization of
international law within State Parties, though there are some differences since international law is not a necessary integral part of the internal law of the States. The absence of harmonization and the absence of one common and official legal language (at least within the EU) makes it easier for each EU Member States to implement and apply EU law differently from State to State. For this reason, what is considered detention under EU law (but also under international law) is not necessarily considered detention under Austrian or Italian law. What is considered “child” under international law, is defined as “minor” under EU and Italian law but not necessarily under Austrian law, which differentiates between “mündiger” and “unmündiger” minor. Just to mention some of the terminology issues I examined in this paper.

Sometimes the ECtHR and the ECJ intervene to solve this legislative chaos. Indeed, independently of the legal words adopted by national law, the substance must always prevail on the matter. At the end of the day, it is of little importance if the National legislator does not explicitly use the term “detention” if a person has been de facto detained. However, it would be preferable to solve this problem at the roots, instead of waiting until damage has been done.

The States’ attempts to hide the real nature of detention centres and consequently the attempts to avoid the stricter guarantees these detention measures would require is certainly condemnable. There is no doubt that a State is entitled to protect its borders and to control its migratory flows. There is also no doubt that this right should never, without cause, suppress the right to liberty of any person or that people should never pay for the inefficiency of States’ migration policies.

A major harmonization of EU Member States’ legal systems would certainly help solve this problem. Providing, for example, more general legal definitions under EU law would reduce the States room for interpretation when implementing EU directives or when applying EU regulations. It would not only design the external boundaries of EU law but it would also clarify the substance of EU law.

Concerning detention of unaccompanied migrant minors, it is true that minors generally are granted a wider protection compared to adult migrants. Even if their detention is allowed both under Council of Europe and EU law, the jurisprudence of the ECtHR applies a stricter control on the conditions and guarantees of their detention. This strict control, however, has not been applied by the ECtHR with regard
to adult migrants. In this second case, the right to liberty looses out against the right of a sovereign State to decide which people and how these people may enter into the territory of said State. I certainly find the effort made by the ECtHR to ‘desperately’ protect unaccompanied minors, by ruling (indirectly) against their detention, laudable. It would still be preferable to have a more equal treatment of adults and minors. Why should immigration detention of adults not satisfy the principle of necessity? On this aspect EU law is more commendable, as I mentioned above.

EU law accepts ‘on paper’ immigration detention of minors, but the EP does not recommend it. Consequently, within EU Member States, detention of unaccompanied minors might by lawful (Austria) and might not be so (Italy). Would it not be easier to follow ‘common sense’ (or just the best interests of the child) and outlaw it? In this case, a solution would be to describe and to implement real alternative measures to detention. Also in this case the lack of harmonization within EU Member States’ legal systems is to blame.
Abstract

In this thesis I will analyse the International, EU and National legal frameworks on detention, specifically of unaccompanied minors. I will take a closer look at the differences between the Austrian and Italian legal framework, and their application of international law or implementation of EU law. To this end I will examine several relevant cases and take into consideration the main sources of law on this topic to see how the EU, Italy and Austria apply in particular the rights contained within the CRC.

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