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detention: An absent link in a European context“

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To children who suffer alone.

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List of Abbreviations:

ASE: Aide sociale à l'enfance

CAT: Convention against Torture

CoE: Council of Europe

CPT: Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment

CRC: Convention on the Rights of the Child

ECHR: European Convention on Human Rights

ECtHR: European Court of Human Rights

EEG: Easter European Group

ESC: European Social Charter

EU: European Union

ICCPR: International Covenant on Civil and Political Rights

IOM: International Organization for Migration

IRPP: Irish Refugee Protection Programme

MSF: Medecins sans Frontiere

NGO: Non-governmental Organisation

OQTF: Obligation de quitter le territoire français

PTSD: Post Traumatic Stress Disorder

UDHR: Universal Declaration of Human Rights

UK: United Kingdom

UMC: Unaccompanied Migrant Children

UN: United Nations

UNESCO: United Nations Educational Scientific and Cultural Organization

UNHCR: United Nations High Commissioner for Refugees

UNHRC: United Nations Human Rights Council

WEOG: Western European and others Group

1. Introduction

*"According to archaeologists, almost all the people on the Earth are migrants, as humanity originated in Africa about 200,000 years ago and then spread all over the world – to Europe, Asia, Australia and the Americas. ... Nowadays there are about 200 million migrants in the world, and the problems and opportunities related to migration are fiercely debated by politicians and ordinary people all over the globe. ... We could name the 21st century 'the age of migrants'."*¹

Boris Altner, journalist

1.1. General Overview

Amid the rise in numbers of migrants and refugees arriving in Europe throughout the last decade, several response strategies have been developed in an attempt to manage the situation. The New Pact on Migration and Asylum² was one of the most comprehensive response plans formulated to guide the European Union's response. Nevertheless, there have been, and continue to be, many and significant concerns about the welfare of migrants within those emerging strategies, primarily pointing out that the safety, protection, and human rights of those people were not being prioritized.³ One such

¹ Council of Europe and Collectif, Title Compass - Manual for Human Rights Education with Young People, Hungary, Council of Europe, 2015, p. 534.

² European Commission, New Pact on Migration Asylum, setting out a fairer, more European approach, 2020, https://ec.europa.eu/home-affairs/news20200923/new-pact-migration-asylum-setting-out-fairer-more-european-approach_en (accessed on 25 January 2021)

³ Amnesty International Report 2016/17, The State of the World's Human Rights, London, Amnesty International Ltd, 2017.
<https://www.amnesty.org/download/Documents/POL1048002017ENGLISH.PDF>, p. 40. (accessed on 25 January 2021)

example is the ongoing employment of detention by European countries as a tool of migration management. That practice also includes the detention of accompanied and unaccompanied children, with the reasons for detention often being related to their or their families' immigration status.⁴

Immigration detention of UMC in Europe is not a form of punishment for a crime, although it does constitute of deprivation of liberty, it is an administrative procedure related to immigration policies.⁵ In fact, some countries tend to justify the use of detention as a tool of protection of children. Nevertheless, detention can actually facilitate dangers such as human trafficking.⁶ Recent examples to show the extent of the use of the use of immigration detention in European countries are Greece, where in December 2020, it was found that almost 2000 asylum applicants were detained. Italy had 450 people in its pre-removal centres by the end of November 2020. Around that same time in 2020, and for different immigration administrative reasons, Malta had 1080 detainees, Cyprus had 169, out of which 54 were held at police stations because of lack of places. Hungary had 122, Belgium had 267 while Sweden had 376 people, and in Austria, 12 UMC were being detained in 2020 waiting for removal.⁷

As immigration policies differ from one country to the other, there are immigration detention reasons that fit under EU law, which include: while verifying identities, while assessing an asylum application and there is a risk of the person absconding, pending approval for entering the territory or removal from it and when there is a threat to national security and/or public order⁸.

⁴ UNICEF Working Paper, Alternatives to Immigration Detention of Children, UNICEF, 2019. [https://www.unicef.org/media/58351/file/Alternatives%20to%20Immigration%20Detention%20of%20Children%20\(ENG\).pdf](https://www.unicef.org/media/58351/file/Alternatives%20to%20Immigration%20Detention%20of%20Children%20(ENG).pdf), p. 2.

⁵ Avid, "What is immigration detention?", 2020, <http://www.aviddetention.org.uk/immigration-detention/what-immigration-detention> (accessed on 13 December 2020)

⁶ Manfred Nowak, The United Nations Global Study on Children deprived of Liberty, 2019, p.481, <https://omnibook.com/view/e0623280-5656-42f8-9edf-5872f8f08562/page/1> (accessed on 12 January 2021)

⁷ European Union Agency for Fundamental Human Rights (FRA), "Migration: Key Fundamental Rights Concerns", 2020, p.21-24, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2021-migration-bulletin_en.pdf (accessed on 12 March 2021)

⁸ European Union Agency for Fundamental Rights, "European legal and policy framework on immigration detention of children", 2017, p.41, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-immigration-detention-children_en.pdf (accessed on 12 March 2021)

All EU member states have ratified the Convention on the Rights of the Child, which condemns the unlawful or arbitrary deprivation of liberty of children.⁹ According to the Convention, detaining children should be a measure of last resort and a short period of time. Article 37 (B) states:

“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”.

However, this Article is not specifically devoted to migrant children but to all children including those who committed criminal offenses. In 2012 the CRC committee adopted higher protection standards in the case of immigrant children:

“The detention of a child because of their or their parent’s migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child. In this light, States should expeditiously and completely cease the detention of children on the basis of their immigration status”¹⁰.

Unfortunately, this has not stopped the practice of detention of children, often in poor and unsafe conditions. A number of studies and reports have been written to highlight the negative effects detention has on children, which can include (but are not limited to) educational difficulties.¹¹

⁹ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) General Assembly resolution 44/25, Article 37 (b)

¹⁰ UN Committee on the Rights of the Child (CRC), Committee on the Rights of the Child, Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration , 2012, Para. 78 and 79, <https://www.refworld.org/docid/51efb6fa4.html> (accessed on 5 May 2021)

¹¹ Gabriela Gonzalez-Martinez, Immigrant Detention Family Study: Examining the Educational Outcomes for Children of Detained Immigrants. Master Thesis, University of California, 2019, p. 13, <https://uaccess.univie.ac.at/login?url=https://www-proquest-com.uaccess.univie.ac.at/dissertations->

Furthermore, there are various alternatives to the detention of migrant children, which include shifting the focus to the child's well-being through case management that uses members of the community who can offer their expertise, such as social workers, sponsors, and foster families.¹²

Another major problem with unaccompanied migrant children in Europe is that they have vanished at an alarming rate over the last few years in, accounting for the fact that a lot of them go undocumented.¹³ There is a multitude of reasons why unaccompanied migrant children (UMC) can go missing, among the most common of which is them disappearing out of their own volition as a part of a plan to reunite with family members, or moving on to another country that was their intended destination all along. It may also be a spontaneous reaction to the refusal of an asylum application, or to bad living conditions, born of a hope of finding better conditions elsewhere. In more tragic cases, it may be that children become victims of trafficking, forced labor or sexual exploitation, or other forms of criminal activity.¹⁴ Therefore – unlike with the issue of detention – the ambiguity that accompanies the present problem of migrant children going missing complicates the formulation of a sound strategy with the potential to eradicate the problem entirely. But can one be related to the other? While focusing on unaccompanied migrant children in Europe, I will assess in this thesis the links between the detention of migrant and refugee children and their disappearance.

theses/immigrant-detention-family-study-examining/docview/2271927007/se-2?accountid=14682, (accessed on 2 February 2021).

¹² Analysis of the Steering Committee for Human Rights (CDDH), Legal and practical aspects of effective alternatives to detention in the context of migration, Council of Europe, 2017. <https://rm.coe.int/legal-and-practical-aspects-of-effective-alternatives-to-detention-in-/16808f699f>, p. 100.

¹³ Helena Merriman, “Why are 10,000 migrant children missing in Europe?”, BBC World Service, 2016. (accessed on 26 January 2021).

¹⁴ European Migration Network, Missing Unaccompanied Minors in the EU Member States, Norway and the United Kingdom, Brussels, European Migration Network, 2020, p. 2.

1.2. Aims, Research Question & Hypothesis

The aim of this thesis is to highlight how improving the treatment of unaccompanied migrant children, through the implementation of existing human rights-based alternatives to detention, such as those outlined above, may decrease the numbers of children going missing. Therefore, my main research questions guiding my research read as follows:

Is there a link between unaccompanied migrant children being detained in Europe and them disappearing? And if so, is this link an entry point to a constructive solution where both those issues can be reduced?

The hypothesis that can be built upon those research questions is the following:

Improved treatment of unaccompanied migrant children in Europe through already existing human rights-based alternatives to detention can reduce the number of disappearances of UMCs.

This hypothesis is an emphasized fraction of a bigger theoretical framework, which assumes that improved treatment of migrants, based on their best interest and human rights, improves their protection as well as the management of migration as a whole. Although such theory is much broader and thus more difficult to test – and would definitely exceed the frame of this thesis – it is important to highlight this overarching framework as my hypothesis falls under it and may provide argumentative support for it. The regional focus of this analysis is placed on Europe, as it has, to a certain extent, a collective problem and strategy to deal with it – yet one this thesis argues to be flawed, as do many further critics. The thematic focus is on one of the most vulnerable groups of migrants, unaccompanied migrant children. Detention and disappearance are only a select few dangers this group of people faces regularly, and while the frame of this thesis does not allow for *all* problems to be addressed, it highlights a potential link that is, until now, underrepresented in academic discourse, and attempts to find solutions.

The topic of this thesis is not based in the hopes of building a brand-new solution for a problem using a human rights lens but is grounded on an existing phenomenon; immigrant children are being detained. The goal of this research is to find out if the issues of detention and disappearance could be seen as two parts of the same coin which requires a shift of the current approach to solving them.

For example, the government of Malta justified detention for migration reasons as an excuse for the protection of “vulnerable migrants” who might “abscond the island” without the protection provided by detention¹⁵. The Maltese government therefore proposes the existence of a correlation between detention and disappearance, suggesting that detention is used as a tool of protection and *reduces* disappearance numbers. Another observed correlation, however, is that UMCs may disappear precisely *because* they fear detention.¹⁶ This contradicts the first relation, proposing that there may, in fact, be at least a partially causal relationship between the two variables detention and disappearance, supporting instead the idea that the use of detention may cause a rise in numbers of UMCs going missing, directly contradicting the Maltese government’s position, along with many other governments who use the same argument¹⁷. If these results could be further confirmed, they would further weaken the argument in favor of detention as a protective mechanism and instead point towards different solutions being more desirable. This thesis will therefore test the role human rights-based approaches can play if introduced into this equation.

¹⁵ HRW, Boat Ride to Detention, Adult and Child Migrants in Malta, Human Rights Watch, U.S., 2012, p. 33, available at <http://www.hrw.org/sites/default/files/reports/malta0712ForUpload.pdf> (consulted on 3 May 2021).

¹⁶ E.Chaltogiannidou, The Disappearance of unaccompanied migrant children in Europe, the cases of Italy and Ireland. Master Thesis, University of Helsinki, 2018,p.33, <https://repository.gchumanrights.org/bitstream/handle/20.500.11825/818/Chaltogiannidou.pdf?sequence=1&isAllowed=y>, (accessed on 10 May 2021).

¹⁷ European Union Agency for Fundamental Rights, European legal and policy framework on immigration detention of children, Luxembourg, European Union Agency for Fundamental Rights, 2017, p. 14, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-immigration-detention-children_en.pdf (accessed on 5 August 2021)

Firstly, a literature review of the legal framework that applies in European countries, including international and regional conventions, resolutions, directives, policies, guidelines, and legal cases, is conducted. This is then supplemented with a secondary literature review of the psychological aspects related to both the issues at hand, as well as to the general psychological framework that applies to UMCs. The findings in said literature reviews then lead into an analysis of relevant situations in Ireland and France – countries picked specifically for their different approaches to the detention of UMCs. Finally, the results of this comparative study will be combined with the legal and psychological frameworks found in the literature reviews, in order to answer the research questions and evaluate the hypothesis of this thesis.

2. Methodology

To test the aforementioned hypothesis, research based on literature analysis of secondary data will be used. At first glance, the hypothesis presented may seem to best fit a quantitative research method, such as, for instance, statistical analysis to confirm that the number of children detained affects the numbers of children going missing. Nevertheless, a literature-based is preferred in this thesis for a variety of reasons.

Firstly, there is a strong lack of and various gaps in the generated data about UMCs going missing and being detained in Europe. Secondly, this research aims to highlight not the high frequency of detention, but rather its use in its current form. Coming chapters will show that the current use of detention contradicts the human rights principals in Europe, regardless of how extensively it is being used.

Additionally, this thesis aims to highlight that detention is considered a priority option, rather than being used only as an occasionally necessary last resort, and even though statistics already exist to prove this, individual case examples can do so just as well – and do so with a depth and attention to detail that is impossible in the larger frame of statistical analysis. Time constraints and the currently ongoing pandemic are the main causes of limitations to this research, especially affecting the use of primary research. This research

is considered a first step, a first look at a relationship that has not been analyzed in enough detail and which opens up a new perspective to building solutions for grave problems that threaten the well-being of UMCs in Europe.

3. Definitions

“Words matter, for labels impact people’s views and inform policy responses.”

-UNESCO’s People on the Move Handbook, 2008

The concepts presented in this thesis are highly complicated, hence why it is important to begin by breaking them down into sections and identifying and defining the terms and concepts at use in this thesis before studying them. Therefore, this chapter will explain and define those main concepts to form a clear framework for the following research and analysis. This chapter is further essential to this topic specifically because a lack of clear, collectively agreed-upon definitions amongst European countries represents one of the major obstacles to addressing the problems raised in the research question. This chapter serves to counteract some of these ambiguities, providing the reader with a fundamental understanding of terms at use throughout this thesis, so as to guarantee clarity.

3.1. Children

Primarily, the group of people in focus are the unaccompanied migrant children arriving in European countries. Who are they? Above all else, they are children. The construct of childhood is not an abstract one, since it is universally experienced by everyone. Nailing down a precise definition, however, is difficult, as it is almost impossible to agree on one specific set of characteristics that make a child, given that there are cultural, social, legal

and psychological components that vary across different parts of the world.¹⁸ The most common determination of childhood, though, is age. According to the CRC, a child is “every human being below the age of eighteen years”¹⁹, relying on a legal age set by each state. Although this provides only a generic legal definition, it will be adopted as this thesis’ primary definition for childhood, in order to guarantee cohesion of the analysis ahead.

Nevertheless, there is another important characteristic that is essential for this analysis, and it is this which explains the necessity for children to receive special attention and protection - their vulnerability. A child’s vulnerability comes from their immaturity and dependency on other people.²⁰ A child’s vulnerability is what necessitates them to have a family, a community, and a state that offers a protective framework for them. The vulnerability of a child is also what puts children in danger and is therefore the reason why international guidelines exist to inform states and communities to provide the necessary safeguarding. Therefore, this thesis will respect the provided legal framework of age but will refer to “child vulnerability” as the leading defining aspect to consider.

¹⁸ David Tolfree, Child and Adolescent Development Module, action for the Rights of Children (ARC), 2004, p.6, <https://www.unhcr.org/protection/children/3bb81bad4/action-rights-children-arc-foundations-child-adolescent-development.html>, (accessed on 10 May 2021).

¹⁹ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), Part I, Article 1.

²⁰ David Tolfree, 2004, p.8.

3.2. Migrants or Refugees?

The United Nations High Commissioner for Refugees (UNHCR) defines refugees as “people who have fled war, violence, conflict or persecution and have crossed an international border to find safety in another country.”²¹ The International Organization for Migration (IOM) defines a migrant as “a person who moves away from his or her place of usual residence [...] for a variety of reasons.”²² Although the use of both terms is very common and often one is used to cover the other, it is very important to draw a strong distinction between the two. Refugee status is clearly defined under international law, and entitles those that carry it to specific protection²³, while the term migrant carries more flexible meaning, with no internationally agreed-upon definition.²⁴ Refugees are defined firstly by their current, desperate circumstance, as they are not protected by their country of origin, and secondly by their entitlement to international protection, by law provided in the 1951 Convention for Refugees²⁵, which will be further examined in a later chapter. Nevertheless, both migrants and refugees require special care and access to their rights. In this thesis, the focus is not put specifically on the reasons for which people leave their countries of origin, nor whether they are seeking urgent protection or simply looking for a better life, but rather on their situation after arriving in Europe. Therefore, the term migrant will be used as an umbrella term in this thesis, while still recognizing and analyzing the protection refugees are entitled to whenever necessary.

²¹ UNHCR, What is a refugee?, 2020-2021, <https://www.unhcr.org/what-is-a-refugee.html> (accessed 10 May 2021).

²² IOM, Who is a migrant?, 2021, <https://www.iom.int/who-is-a-migrant> (accessed 10 May 2021).

²³ UNHCR, 'Refugees' and 'Migrants' - Frequently Asked Questions (FAQs), 2018, p.1, <https://www.refworld.org/docid/56e81c0d4.html> (accessed 10 May 2021).

²⁴ UNHCR, 2018, p.2

²⁵ UNHCR, Convention and Protocol Relating to the Status of Refugees, December 2010, p.2, <https://www.unhcr.org/3b66c2aa10> (accessed on 12 March 2021).

3.3. Accompanied, Separated, Unaccompanied

Being unaccompanied automatically removes the first and most essential protective layer from a child's life - their family. Unaccompanied children in this framework are children who have been separated from their parents or other adult relatives who were legally and factually caring and taking responsibility for them, and are left with no adult responsible for them.²⁶ Separated children on the other hand, are still accompanied by adult relatives - so they are not completely alone - but are separated from their parents or initial care-taker.²⁷

At a first glance, it is important to make the distinction between these three categories of children - the third being accompanied children, who are with their parents or care-takers - because it is often assumed that the need for care is differently urgent among these groups. While this is true to some extent, it should not be an automatic assumption. While unaccompanied children are at higher risk of being targeted and exploited by human traffickers, especially due to the fact they are physically alone and vulnerable, they are usually the group of migrants that receive the most care and assistance upon arrival. Yet other children, who may be with their parents or other adults may be mistakenly thought to be taken care of, when in fact being physically accompanied is not the only factor that defines care²⁸. This leads to separated or accompanied children being at risk of having their needs overlooked and their situations not assessed with as much urgency and detail. Therefore, while this thesis places its focus on the vulnerability of children, which is automatically assumed for unaccompanied migrant children, it should not be overlooked in other migrant children. It should not be presumed that other children do not need to be thoroughly examined simply for the fact that they are physically accompanied by one or

²⁶ Committee on the Rights of the Child, General Comment n°6, Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, CRC/GC/2005/6, 2005, p.5, <https://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf> (accessed on 18 January 2021).

²⁷ Committee on the Rights of the Child, 2005, p.5.

²⁸ American Academy of Child and Adolescent Psychiatry, "Facts for Families, Children's and Adolescent's Mental Health" US Dept. of Health and Human Services.

more adults. They may be stuck with abusive parents, relatives or other adults, which can be difficult to confirm, especially in cases with lack of documentation.

While this thesis aims to highlight the importance of assessing the situation of *every* child, it will limit the focus to unaccompanied migrant children, as this research and thesis would become simply too broad if the focus was put on all migrant children. Yet despite her specific focus on unaccompanied migrant children, the author emphasizes that no assumptions should be made about the well-being of separated or accompanied children simply for the presence of an adult, and that every migrant child's situation should therefore be assessed vigorously.

3.4. Detention of Unaccompanied Migrant Children (UMC)

Detention is the “restriction on freedom of movement through confinement”²⁹, and is often used as an umbrella term to cover all forms of deprivation of liberty in both criminal and administrative contexts.³⁰ While punitive detention of children is something to be monitored with the best interest of the child in mind, it will not be closely studied in this thesis, as that would be drifting too far from the topic at hand. Additionally, as chapter 2 of the legal literature review will show, migration and asylum-seeking are not crimes and therefore not punishable, hence why this thesis will address administrative detention in the context of migration. Administrative detention is commonly used so that other procedures can be completed in the meantime — those different procedures will be observed in more depth in the following chapter that focuses on detention.

Nevertheless, the main problem with defining immigration detention is that it is often coated with softer terms that do not reflect the reality around it, for example the position and argument of the Maltase government. The non-criminality of migration automatically negates the use of prisons to “hold” UMC, yet prisons continue to be prisons despite carrying a different label. A child being held in a facility with prison-like restrictions and no freedom of movement is factually detained, regardless of the terminology states come up with to obscure that reality. Therefore, to identify and define detention, this thesis will respect and include, but also look beyond the international, regional and national legal frameworks, and include in its definition also the factual conditions UMC are put under.

²⁹ A.Meyer, A.Witkamp and A.Pécoud, *People on the Move*, Handbook of selected terms and concepts, United Nations Educational, Scientific and Cultural Organization (UNESCO), The Hague Process Foundation, 2008, p.25, <https://unesdoc.unesco.org/ark:/48223/pf0000163621> (accessed on 10 May 2021)

³⁰ Manfred Nowak, 2019, p.64.

3.5. Going Missing

The conundrum of UMC disappearing is almost as broad and difficult to address as the problem of people going missing in general, mainly due to the large variety of reasons why UMC may disappear. It is unfortunately not possible to determine *all* causes, yet some patterns have been identified³¹ by different actors in the field. This thesis will go into more details concerning those patterns in the following section. But first, it is important to clarify what the terms “disappeared” UMC or UMC “going missing” express in this thesis. The first distinction is drawn between absconding and getting abducted or trafficked by human traffickers. The thesis will focus on UMC who leave by their own volition and are not taken against their will. In the context of a legal EU definition, absconding is when someone leaves a territory where they are legally supposed to be present with an objective of avoiding asylum procedures.³²

Nevertheless, and as mentioned earlier, there is a great focus on the vulnerability of children in this thesis. Therefore, when addressing the paradigm of absconding, it is not viewed as a fully independent, mature and well-thought plan, and it still includes a child travelling alone, at risk of being exploited, trafficked and abused. Therefore, although the research is conducted around children who decide to leave themselves, it is still important to realize that this does not rule out human trafficking or exploitation, and this does not equate to a mature, safe plan of movement. The person making the decision to disappear is still a child, with no primary care-taker, undertaking the risk of travelling alone, or of resorting to child traffickers.

³¹ European Migration Network, Approaches to Unaccompanied Minors Following Status Determination in the EU plus Norway, European Commission, 2018, p.48, http://emn.ie/files/p_201808090907072018_emn_sythesis_unaccompanied_minors_09.08.2018.pdf (accessed on May 12 2021)

³² European Commission, Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), Brussels, 2016, article 2(10), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0465> (accessed on May 12 2021)

3.6. Best interest of the Child:

The concept of the best interest of the child is a complicated one to explore, but in the context of this thesis, it is helpful to follow the concept of applying the best interest of a child according to the UNHCR guidelines for the protection and care of refugee children³³, that talks about two main ways to apply the rule of the best interest of the child, the first is through policy making on local, regional and international levels, in legal budgetary and administrative fields, that requires analysis about how different actions and decisions can affect children. The second is concerning individual children, that requires looking closely at specific cases to assess what might be in the best interest of a certain child according to his specific needs and situation.³⁴

³³ UNHCR, “Refugee Children: Guidelines on Protection and Care”, Geneva, 1994.

³⁴ UNHCR, 1994, p.6.

4. Deep Dive

“No one puts their children in a boat unless the water is safer than the land”³⁵

-Warsan Shire

This section of the introduction will dive deeper into some of the different issues at hand, and examine different perspectives in doing so - first the point of view of UMC, in order to understand their stories, beginning with their leaving their countries of origin, to their journeys alone and to their destination. The issue is then examined from the point of view of European states dealing with the so-called “migrant and refugee crisis”.

4.1. The Children’s Perspective

4.1.1. Why are they leaving?

“My eyes are wide open at night. If I fall asleep, I see the faces of my dear friends. I see the images of that day and countless students lying in their own blood. I want to return to school to see my teachers and my friends.” These are the words of Amena Rezaye, an 18-year-old student who witnessed an attack on her high school in Kabul, Afghanistan, in May 2021.³⁶ The majority of unaccompanied migrant children in Europe come from Afghanistan³⁷, where two of every five children can’t reach full mental and physical

³⁵ UNSW Sydney, ‘What is occurring in the seas north and west of Australia? We have no way of knowing’, 2021, <https://www.kaldorcentre.unsw.edu.au/news/what-occurring-seas-north-and-west-australia-we-have-no-way-knowing>

³⁶ F.Aryan, A father’s regret; a sister’s determination; a student’s dream; and a principal’s iron will, UNICEF, 2021, <https://www.unicef.org/afghanistan/stories/fathers-regret-sisters-determination-students-dream-and-principals-iron-will> (accessed on August 2 2021)

³⁷ Save the Children, Over 200,000 Lone Child Migrants Left to Uncertain Fates in Europe, Save the Children, Brussels, 2020, <https://www.savethechildren.net/news/over-200000-lone-child-migrants-left-uncertain-fates-europe> (accessed on August 2 2021)

development³⁸, and children are commonly facing sexual and domestic abuse and violence³⁹. It has already been clarified that this thesis will use the term migrant as an umbrella term, encompassing different forms of and reasons for migration. Nevertheless, to understand the value of a human rights-based migration plan for UMC, it is important to repeatedly highlight the realities they are trying to escape, rather than simply, and in isolation, considering them migrants on European territories, so as to humanize them and to remember why asylum-seeking rights exist in the first place.

Furthermore, to understand migration, it is helpful to differentiate between voluntary and forced migration, and between pull and push factors. Pull factors are often associated with voluntary migration, mainly economically and career-driven. Push factors are associated with forced migration⁴⁰ due to mostly socio-political conditions, such as the ones Amena has survived. Furthermore, a lot of cases fall into the grey area between forced and voluntary migration, the definition of which is derived from decisions influenced by both push and pull factors, taken by families or individuals simply looking for better lives, while trying to avoid human rights violations in their countries. Consequently, when UMC arrive in Europe, their stories can differ quite drastically, but they all share the vulnerability of childhood, and the dangers of travelling alone. All this begs the question: why are they alone?

³⁸ UNICEF, The situation of children and women in Afghanistan, Facts and figures, <https://www.unicef.org/afghanistan/situation-children-and-women-afghanistan> (accessed on August 2 2021)

³⁹ UNICEF, Child protection, Protecting Afghanistan's most vulnerable children, <https://www.unicef.org/afghanistan/child-protection> (accessed on August 2 2021)

⁴⁰ P.Brander, L. De Witte, N.Ghanea, R.Gomes, E.Keen, A.Nikitina, J.Pinkeviciute, COMPASS, Manuel for human rights education with young people, Council of Europe, 2020, online Chapter 5, <https://www.coe.int/en/web/compass/migration> (accessed on February 6 2021).

4.1.2. Why are they alone?

“Reza Mohammadi lost his parents [...] What he does remember is that it was raining: Thick mud clung to his shoes and weighted down his 7-year-old legs,”⁴¹ Reza lost his family during his migration journey and ended up in a youth home in Germany. Some migrant children arrive alone in Europe, having already started their journey alone, for reasons such as fleeing from recruitment as child soldiers in their country of origin. Sometimes they are sent off with human smugglers by their families who cannot afford the costs of transporting the entire family, and sometimes they are orphaned, losing their parents in wars and conflict at home.⁴² Some children are alone in the hopes of unification with their families, as members of the same families can be found dispersed across Europe.⁴³

4.1.3. Why Europe?

Considering both pull and push factors for migration, Europe is a very popular destination for migration. For migrants leaving countries in Africa and the Middle East, European countries are the safest and closest regions, especially considering crossings between Turkey and Greece, for example. But more importantly, European countries have regional laws and policies that are in place to protect and help refugees and asylum seekers build new lives.⁴⁴

⁴¹ K.Bennhold, Migrant Children, Arriving Alone and Frightened, The New York Times, 2015, <https://www.nytimes.com/2015/10/29/world/europe/in-waves-of-migrants-children-arrive-alone-and-settle-in-uneasily.html> (accessed on November 12 2020).

⁴² K.Bennhold, 2015

⁴³ M.Klaassen, G.Dimitropoulou, E.Desmet, F.Boreil, Family Reunification for Refugee and Migrant Children: Standards and promising practices, Council of Europe, 2020, p.9, <https://rm.coe.int/family-reunification-for-refugee-and-migrant-children-standards-and-pr/16809e8320> (accessed on November 12 2020)

⁴⁴ L.Kaplow, Why are Migrants Surging into Europe Now?, national public radio (npr), 2015, <https://www.npr.org/sections/parallels/2015/09/02/436905795/why-are-migrants-surging-into-europe-now?t=1627987286577> (accessed on November 12 2020)

4.2. From the European perspective:

4.2.1. *A humanitarian crisis that got politicized*

When explaining the general Principles of Human Rights fact-finding, Dr. Nowak talks about the importance of basing findings on “both sides” of Human Rights violations; “If one hears the testimony of a victim, one should also speak to [...] the government authority responsible for the alleged human rights violation”.⁴⁵ That is why, it is important to look at the issues at hand from the perspective of European countries that are managing migration, to better understand their priorities and their humanitarian and political goals.

In 2015, the European Union was entered through different channels by more than one million people, and by 2020, the EU had almost half a million applications for asylum. Nevertheless, those numbers are not so high compared to around 80 million displaced people in the world.⁴⁶ Furthermore, from a theoretical rational perspective, the EU having its capacities, its Human Rights based legislations and a population of around 500 million, it seemed like managing sea and land arrivals that didn’t even reach 40 thousand people per month between 2016 and 2019⁴⁷ would be very doable. But in reality, the responsibility was divided unequally upon European countries, which resulted in a lot of mismanagement that migrants suffer from until today. Some reactions included border closures, and harsh push backs of migrants across European

⁴⁵ M.Nowak, K.Januszewski, T.Hofstätter, All Human Rights for All, Vienna Manual on Human Rights, Neuer Wissenschaftlicher Verlag, Wien-Graz, 2012, p.649.

⁴⁶ Danish Refugee Council (DRC), “What was the so-called ‘European Refugee Crisis’?”, 2021, https://drc.ngo/our-work/resources/faq-on-refugees/what-was-the-so-called-european-refugee-crisis/?gclid=CjwKCAjw64eJBhAGEiwABr9o2EQsQFDzbLhmdkGMOeNGEE3HNX6hzOVmaSti1k_8p25395qthTvtMBoCPLUQAvD_BwE (accessed on 12 November 2020)

⁴⁷ Danish Refugee Council (DRC), “Europe’s ‘refugee crisis’ calls for a focus on rights and solidarity”, 2020, <https://drc.ngo/it-matters/feature-stories/2020/9/eu-s-asylum-and-migration-pact/> (accessed on 12 November 2020)

borders, leaving countries like Greece having overcrowded camps that do not provide the necessary care UMC have.

Soon enough the politicization of the refugee humanitarian crisis begun, it can be described through the two following features:

- Alter motives:

In Germany in 2017 a far-right group won seats in the German Parliament for the first time in 60 years, with its co-leader “vowing to fight an invasion of foreigners”⁴⁸

This shows that Human Rights are topped with other political priorities, even in the cases of urgent humanitarian crisis, even in the continent that holds supposedly holds human rights so far up its agenda. That is just one example of how far right parties in Europe have used the refugee by fueling the hate against migrants and therefore winning more power and elections, at the expense of migrants and refugees often seeking protection in Europe.

-Weaponizing migration:

Within 2 days in May 2021, around 8000 people, the largest number of daily arrivals registered in Spain, arrived on Spanish territory, from Morocco. Additionally, a video surfaced of a Moroccan guard opening the gates and allowing that to happen.⁴⁹ That is one of many examples of the weaponizing of migration, in that case due to a medical admission in Spain of an opposing figure to Morocco⁵⁰. This is an example that shows how people that could be in danger and in need can be used as just a political tool between states.

⁴⁸ Nicole Einbinder, “How the Far Right Has Reshaped the Refugee Debate in Europe”, Frontline, 2018, <https://www.pbs.org/wgbh/frontline/article/how-the-far-right-has-reshaped-the-refugee-debate-in-europe/> (accessed on 15 July 2021)

⁴⁹ Kelly M.Greenhill, “Morocco ‘weaponized’ migration to punish Spain. That’s more common than you think.” The Washington Post, 2021, <https://www.washingtonpost.com/politics/2021/06/01/morocco-weaponized-migration-punish-spain-thats-more-common-than-you-think/> (accessed on 15 July 2021)

⁵⁰ Ibid.

This shows that migration is subject to abuse by different important players, and therefore migrants and their well-being and human rights are sometimes pushed under political motives, which is especially dangerous for more vulnerable groups of migrants such as UMC.

Nevertheless, Europe still has many strong pillars that protect migrants, the most important one is the legal tool that will be examined in the next chapter. Additionally, chapter 7 of the thesis will analyze two different approaches to migration of two different European countries, that show the diversity of ways different countries in Europe are dealing with migration.

5. The Legal Framework

When it comes to the human rights of vulnerable groups of people, such as UMC, it is important to understand, that those “privileged rights” are built on the principles of equality and non-discrimination, and they are meant to guide into practically applicable equality⁵¹. This makes them so important – they play an essential role in guaranteeing that those groups of people, such as children, or UMC in this case, have access to human rights that are universal.⁵² That is empowering to UMC, as it gives them recognition as human beings with the international human rights framework, rather than just declaring them children with extra needs. This section will have a deep look at the most important international legal tool for children, and it will then focus on the pathway international bodies have drawn through reports and comments that are directly essential for the

It is important to recognize the constructive binding basis present in the region, that protects the rights of UMC as well as the positive ongoing developments that prioritize

⁵¹ M.Nowak, K.Januszewski, T.Hofstätter, 2012, p.420.

⁵² Council of Europe Portal, Manual for Human Rights Education with Young People, 2020, <https://www.coe.int/en/web/compass/children> (accessed on 4 May 2021)

their best interest. Therefore, this chapter will first lay out the International and Regional legal instruments that provide protection as well as limitations to the rights of UMA. It will further look at the most recent developments of the political aspect in the region and finally will analyze the position of the strongest human rights legal instrument in Europe, the ECtHR, by highlighting its most important decisions concerning the issues at hand.

5.1. The International Level

It is important to understand that the “privileged rights” of vulnerable groups of people – such as UMC in this case – are built on the principles of equality and non-discrimination, are meant to guide towards practically applicable equality⁵³, and therefore play an essential role in guaranteeing that those groups of people have access to human rights that are universal.⁵⁴ This empowers UMC, as it gives them recognition as human beings through international human rights, rather than just children with special needs.

5.1.1. The Convention on the Rights of the Child (CRC)

“The CRC is not just a legal treaty, it is a moral statement and a practical guide to the welfare of children.”⁵⁵

The United States of America and Somalia are the only United Nations Member States that have not ratified the Convention on the Rights of the Child. The convention was the fastest of all human rights treaties of the UN to be ratified.⁵⁶ It is the first international instrument to target specifically the rights of children and portray them as persons who have rights as well as responsibilities.⁵⁷ All treaty member states have a responsibility towards the international community to act accordingly with the standards of the CRC. There are four main principles that form the pillars of the CRC:

⁵³ M.Nowak, K.Januszewski, T.Hofstätter, All Human Rights for All, Vienna Manual on Human Rights, Neuer Wissenschaftlicher Verlag, Wien-Graz, 2012, p.420.

⁵⁴ Council of Europe Portal, Manual for Human Rights Education with Young People, 2020, <https://www.coe.int/en/web/compass/children> (accessed on 4 May 2021)

⁵⁵ The United Nations High Commissioner for Refugees (UNHCR), Refugee Children, Guideline on Protection and Care 1994, p.9.

⁵⁶ Youth Advocate Program International (YAP International), the History of the CRC, <http://yapi.org/youth-wellbeing/united-nations-convention-on-the-rights-of-the-child-crc/> (accessed on 4 May 2021)

⁵⁷ Council of Europe Portal, 2020

- The first one is found in Article 2 of the convention – the principle of non-discrimination. In this article, the convention prohibits the discrimination of children on any grounds, stating some and then ending with the term “other status”⁵⁸, which is very positive since it is inclusive of children of all backgrounds and all states they might be located in, therefore also applying to UMC.
- The second core principle is found in Article 3 and is probably the most important for the topic of this thesis – the principle of the best interest of the child. It states that “in all actions concerning children [...] the best interests of the child shall be a primary consideration.”⁵⁹ Additionally, states must ensure the “protection and care” for children’s wellbeing⁶⁰. Further discussion about what constitutes care for a child and their well-being will be included in the psychological section of this literature review.
- The third principle, the principle of the right to life, survival, and development⁶¹, is found in Article 6. Development does not mean only the child’s physical, but also their emotional, social, and mental development.⁶² Since the purpose of this principle is to ensure and protect that development, this automatically means states are prohibited from acting in ways that obstruct it.
- Article 12, finally, contains the principle of respecting the views of the child. This principle establishes that children have the right to express their views, which need to be heard and taken into consideration.⁶³ This includes those UMC who try to voice their opinions concerning their treatment in Europe.

⁵⁸ Convention on the Rights of the Child (CRC), (adopted 20 November 1989, entered into force 2 September 1990) Article 2.

⁵⁹ CRC, Article 3, paragraph 1

⁶⁰ CRC, Article 3, paragraph 2

⁶¹ CRC, Article 6

⁶² Kid Sense Child Development Corporation, What is Child Development?, 2021, <https://childdevelopment.com.au/areas-of-concern/what-is-child-development/> (accessed on 4 May 2021)

⁶³ CRC, Article 12

With those underlying principles in mind, all articles in the convention apply to UMC and their protection. Article 22 of the convention addresses the protection of refugee children specifically. The article places a responsibility on states to provide “appropriate protection and humanitarian assistance”⁶⁴, and moreover asserts that this protection shall be provided not only according to the convention itself, but to all other human rights or humanitarian instruments that are binding in the state. At a first glance, it is obvious that all those requirements are given within a framework of sovereignty; “in accordance with applicable domestic law and procedures” and “States Parties shall provide, as they consider appropriate”⁶⁵. Nevertheless, in cases of controversy between domestic laws and procedures and human rights standards, one of the underlying principles of the convention can be referred to, the principle of the best interest of the child, so whatever decisions have to be made, this consideration should take priority. Nevertheless, since the concept of the best interest of the child is a very complicated one, the final chapter will discuss the best ways to assess the best interest of UMC.

Although the convention does not explicitly address the issue of UMC going missing, it does touch upon the risks they face when they are alone – risks that could violate their rights, specifically mentioned in Articles 34, 35 and 36, which address exploitation of children and the responsibility of states to protect them from it. The above three articles focus on sexual exploitation, sale and trafficking of children, and all other forms of exploitation.⁶⁶ Missing UMC are children who are not known to be under the protection of any legal entity. Already being unaccompanied, they fall under one of the principles mentioned above, namely that concerning the right to life survival and development, as missing UMC are at risk of death. Additionally, the convention touches upon the protection against abuses and violence, human trafficking and exploitation, which are further risks UMC commonly face.

⁶⁴ CRC, Article 22, paragraph 1.

⁶⁵ CRC, Article 22, paragraph 1, paragraph 2.

⁶⁶ CRC, Article 34, Article 35, Article 36.

Concerning detention as such, the convention offers insight in Article 37, which is a very important tool, even though it does not address migration detention specifically. Firstly, it prohibits subjecting children to “torture or other cruel, unhuman or degrading treatment or punishment”⁶⁷. Secondly, it prohibits “arbitrary or unlawful detention”, which is to be measured according to national law as well as international and regional legislation, such as the CRC. Additionally, cases of child imprisonment should only be used as a last resort and last the shortest possible time.⁶⁸ Article 39 is highly important for UMC since it adds an essential task to the responsibility of states – the “physical and psychological recovery and social reintegration” of child victims of “neglect, exploitation, abuse”⁶⁹, which UMC are at high risk of. Therefore, through the CRC, states have a responsibility to refrain from the abovementioned treatment of children, and additionally have a responsibility to protect those children and ensure their recovery in case they fall victim to those treatments.⁷⁰

Nevertheless, it is important to note that, since the CRC is aimed at protecting children generally, Article 37 is likely meant to address juvenile offenders, and yet even in those cases, detention should only be a last resort. Nevertheless, Article 39 is a better reference point to analyze UMC, since they are child victims before anything else, and not the juvenile offenders that Article 37 describes⁷¹. Consequently, UMC should be treated according to Article 39.

Although the CRC is the most dedicated international tool for children, it is not the only one that can be used to protect their rights. Article 37 of the CRC, for example, is an advanced combination of Article 3 of the Universal Declaration of Human Rights

⁶⁷ CRC, Article 37, paragraph (a).

⁶⁸ CRC, Article 37, paragraph (b).

⁶⁹ CRC, Article 39.

⁷⁰ Ibid.

⁷¹ K.Touzenis, “International Migration Law, N.15, Human Rights of Migrant Children”, International Organization for Migration (IOM) , Geneva, 2008,p.33, <https://www.corteidh.or.cr/sitios/Observaciones/11/Anexo1.pdf> (accessed on 12 May 2021)

(UDHR) – which grants the right to liberty and security⁷² - Article 16 of the Convention against Torture (CAT)⁷³, and Articles 9 and 10 of the International Covenant on Civil and Political Rights (ICCPR)⁷⁴, which add the prohibition of arbitrary detention to Art. 3 of the UDHR. This is important because, although the CRC is consistent enough, it is important to show that multiple bases exist to support the rights of UMC.

The Committee on the Rights of the Child is a body of experts responsible for monitoring the implementation of the Convention of the Rights of the Child and its optional protocols.⁷⁵ This committee publishes general comments to interpret thematic human rights violations, such as its General Comment No.6 about the “treatment of unaccompanied and separated children outside their country of origin”.⁷⁶ General Comment No.6 is particularly important here, as, despite having been published in 2005, it still applies to the challenges of UMC in Europe.

Amongst the most important points the general comment makes are the following:

- Legal obligations: The comment is very important as it states that, firstly, the obligations of the state parties under the CRC are applicable in their entire territory, and there shall be no “exclusive zones” in the states. Secondly, that the obligations apply to all branches of government, including, for example, border police. Thirdly, and with its reference to General Comment No.5 (CRC/C/GC/2003/5, paras 18-23) and the 1969 “Vienna Convention on the Law of Treaties”, it confirms that states

⁷² Universal Declaration of Human Rights (UDHR) (adopted 10 December 1948) Article 3.

⁷³ Convention against torture (CAT) (adopted 10 December 1984, came into force 26 June 1987) Article 16.

⁷⁴ International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) Articles 9 and 10.

⁷⁵ UNHCR, “Human Rights Bodies, CRC, Introduction”, 2021, <https://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIntro.aspx> (accessed on 14 July 2021)

⁷⁶ Committee on the Rights of the Child, “General Comment No.6, Treatment of unaccompanied and separated children outside their country of origin”, 2005 <https://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf> (accessed on 12 May 2021)

must prioritize the convention and its content to their own domestic legislation should they diverge.⁷⁷

- Special protection and care for UMC: The Comment also looks at the four abovementioned principles of the CRC in light of the situation of UMC. With the principle of non-discrimination in place, children cannot be treated as a collective group that is discriminated against. The best interest of a child should be decided according to important factors like the background of UMC, which includes culture and special needs arising from their vulnerability, therefore confirming that access to the territory of states for the child is a prerequisite of that decision.⁷⁸ When addressing the principle of the right to life, survival and development, the Comment states that: ‘there is often a link between trafficking and the situation of separated and unaccompanied children’.⁷⁹ Although such a statement can be interpreted in many ways, it was made in the context of states’ responsibility to protect UMC and the vulnerability of UMC.
- The two issues of disappearance and detention of UMC: Concerning the problem of UMC going missing, the Comment includes measures that states are to take that may protect missing UMC. Those measures include identifying UMC, regularly checking on them, all while being sensitive to the age, gender, and language of those children.⁸⁰ Additionally, the Comment focuses on the importance of having an efficient system to collect data on UMC in order to better develop policies that protect the rights of those children.⁸¹ Such a system would also be very helpful to keep track of UMC who go missing. As for detention, first and foremost, the Comment states that, as a general rule, in accordance with the CRC and especially

⁷⁷ Committee on the Rights of the Child, 2005, p.6.

⁷⁸ Committee on the Rights of the Child, 2005, p.8.

⁷⁹ Committee on the Rights of the Child, 2005, p.9.

⁸⁰ Committee on the Rights of the Child, 2005, p.15.

⁸¹ Committee on the Rights of the Child, 2005, p.25.

with the principle of the best interest of the child, UMC should not be detained.⁸² Furthermore, detention may not be used because children are unaccompanied, and/or for any reason related to their migration status.⁸³ When detention is “exceptionally” used, the comment addresses the necessary conditions, firstly demanding an approach of care rather than detention in which UMC are deprived of liberty, but avoid being isolated without access to their basic rights, which include but are not limited to cultural rights.⁸⁴

Another important General Comment of the Committee on the Rights of the Child is General Comment No.14, adopted in 2013, on the right of the child to have his or her best interests taken as a primary consideration.⁸⁵ This General Comment begins with a legal analysis of the principles of the CRC, for instance defining the term “in all actions” included in the convention, concerning all actions and decisions made for children. This is essential regarding the issue of disappearance because the comment asserts that “inaction or failure to take action are also “actions”⁸⁶, and the failure to protect and prevent the disappearance of UMC therefore contradicts the legal principle of the convention. The comment addresses the complicated concept of the best interest of a child, stating that the best way to assess this is on a case-by-case basis of different children, and deciding what is best for each child personally, or, in case decisions have to be made concerning groups of children, they should be made according to the circumstances of that group.⁸⁷ Although this interpretation of the best interest of the child may be viewed as too ambiguous, the committee points out the positive flexibility in this formulation, leading to adaptability to different situations and development with

⁸² Committee on the Rights of the Child, 2005, p.17.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Committee on the Rights of the Child, “General Comment No.14 (2013) on the right of the child to have his or her best interest taken as a primary consideration(art.3, para.1)”, 2013 https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf (accessed on 12 May 2021)

⁸⁶ Committee on the Rights of the Child, 2013,p.7.

⁸⁷ Committee on the Rights of the Child, 2013,p.9.

new knowledge about children.⁸⁸ Furthermore, the comment goes into the procedure of assessing and determining the best interest of the child. Assessing these requires studying the circumstantial elements of the child, by forming a list of elements that could be set by states to guide them in making decisions about the best interest of a child, of which all elements would be checked, with potential to add to them depending on the situation. Therefore, studying the child's specific situation, and then determining their best interest, is the formal process to follow.⁸⁹ Those elements, according to the Comment, include the child's view, their identity, their environment and family and whatever relation they have to those, in order to maintain them, their care, protection and safety, their vulnerability, and their rights to health and education.⁹⁰

5.1.2. Working Group on Arbitrary Detention

To focus in particular on detention, the United Nations' Human Rights Council (UNHRC)'s Working Group on Arbitrary Detention has generally dealt with and addressed the issue of migration detention of children. The Working Group is an investigative unit of the UNHRC that deals with cases of deprivation of liberty and sends urgent appeals to the countries in question.⁹¹ In a report published in 2020, the Working Group takes upon itself to remind states that generally, migration detention should only be used in exceptions as a last resort⁹², and that children should not be detained at all, appealing to states to release them immediately.⁹³ Moreover, in the same report, the Working Group addresses the important topic of the use of modern technologies as alternatives to detention. The report first acknowledges the positive

⁸⁸ Ibid.

⁸⁹ Committee on the Rights of the Child, 2013,p.12.

⁹⁰ Committee on the Rights of the Child, 2013,p.13-p.17.

⁹¹ United Nations Human Rights Office of the High Commissioner, Working Group on Arbitrary Detention,2021, <https://www.ohchr.org/en/issues/detention/pages/wgadindex.aspx> (accessed on May 4 2021)

⁹² Working Group on Arbitrary Detention, "Arbitrary Detention", UNHRC, 2020, article 23, p.38, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/190/76/PDF/G2019076.pdf?OpenElement> (accessed on May 4 2021)

⁹³ Working Group on Arbitrary Detention, 2020, article 24, p.38.

impact of new technologies like “electronic monitoring devices and telephone and Internet reporting”⁹⁴, and how those can help minimize the costs of physical detention, which is both financially beneficial to detaining states, and to those detained, as it would help them avoid the violation of their rights. Furthermore, the Working Group calls for the use of those technologies only while making sure that their implementation and practice is not discriminative, for example by limiting their availability to people with certain (for example economic) backgrounds. Secondly, the Working Group appeals to states to ensure that the use of technology is compatible with their domestic legal framework, to avoid arbitrary use. Finally, with a view to the future use of such technologies, the Working Group calls upon the Human Rights Council to conduct studies and provide proper guidance for the use of such technologies as alternatives to detention.⁹⁵

5.1.3. *Global Compact for Safe, Orderly and Regular Migration*

The Global Compact for Safe, Orderly and Regular Migration is the first intergovernmental agreement to manage migration⁹⁶, and it was adopted by the UN General Assembly in December 2018.⁹⁷ This Resolution is highly important for this thesis, insofar as it deals with the issue of missing migrant children in a dedicated section, Objective 8 of the Resolution, entitled: “Save lives and establish coordinated

⁹⁴ Working Group on Arbitrary Detention, 2020, articles 56 to 60, p.27.

⁹⁵ Ibid.

⁹⁶ E.Chaltogiannidou, 2018, p.23.

⁹⁷ United Nations General Assembly, Resolution 73/195, “Global Compact for Safe, Orderly and Regular Migration”, 19 December 2018, p.1.
https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/73/195 (accessed on June 16 2021)

international efforts on missing migrants.”⁹⁸ This Objective aims at generating international cooperation to save refugees through rescue missions, the development of joint procedures for such missions, by enhancing “reception and assistance capacities,”⁹⁹ and calls states parties to “review the impacts of migration-related policies and laws” that could affect the risk of migrants going missing. This point, although not directly aimed at preventing detention, is very essential, as detention is considered a “migration-related policy”. Moreover, the Objective also focuses on the important procedures concerning deceased migrants, but this thesis takes a preventive perspective of UMC going missing and therefore does not concern itself with the handling of worst-case scenarios of their death. Although there is no specific mention of detention in this specific Objective, the Resolution discusses detention later on, when it addresses the issue of human trafficking and countermeasures to it. Some of the points raised in that Section call upon states to consider the vulnerability of children who are at risk of being trafficked, and to facilitate “safe reporting without fear of detention” for them.¹⁰⁰

⁹⁸ United Nations General Assembly, 2018, p.17.

⁹⁹ Ibid.

¹⁰⁰ United Nations General Assembly, 2018, p.19.

5.2. The European Union

The European Union today has a multitude of policies and resolutions centered around human rights and children, which this section will look at closely. But this was not always the case, as the initial purpose of the EU was unity of the economic market (for various reasons).¹⁰¹ Therefore, even while children were a point of focus historically, it was commonly for child-related economic and political initiatives.¹⁰² But this has changed over the years, to the point where the European Union now boasts a comprehensive set of legal foundations regarding children. This section will summarize the most relevant, binding tools of the EU today concerning the protection and treatment of UMC.

5.2.1. *The EU Charter of Fundamental Rights*

Among basic rights for children such as education¹⁰³, prohibition of child labor¹⁰⁴, and being discriminated against¹⁰⁵, the Article of this Charter most relevant to this thesis is Art. 24, which covers three important points – the right of children to receive “protection and care as is necessary for their well-being”, children’s right to express themselves (according to their age and maturity), and a third, which maintains that the best interest of children is to be the priority when taking action related to children.¹⁰⁶

¹⁰¹ N.Scheucher, “The Best Interests of the Child-Migrant Minors in detention: A common EU Approach and Facing Legal Challenges”. Master Thesis, Uppsala University, 2013, p.50.
<https://repository.gchumanrights.org/handle/20.500.11825/642> (accessed on April 20 2021)

¹⁰² European Union Agency for Fundamental Rights and Council of Europe, “Handbook on European law relating to the rights of the child”, Luxembourg, Publications Office of the European Union 2015, p.20, https://www.echr.coe.int/Documents/Handbook_rights_child_ENG.PDF (accessed on 12 June 2021)

¹⁰³ European Union, Charter of Fundamental Rights of the European Union, 2012, OJ 2012 C 326, article 14, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT> (accessed on April 20 2021)

¹⁰⁴ European Union, 2012, article 32.

¹⁰⁵ European Union, 2012, article 21.

¹⁰⁶ European Union, 2012, article 24.

5.2.2. *Directive 2013/33/EU of the European Parliament and of the Council*

This Directive is highly relevant to this thesis, firstly because it provides protection for minors and unaccompanied minors through the following¹⁰⁷:

- Dedicated services of rehabilitation for the mental health of minors who have been through harmful experiences, such as exploitation, neglect, abuse, et cetera
- For unaccompanied minors, placement in child-suitable environments from their arrival until and in case they have to leave, such as with foster families or in special children-friendly centers
- Training for people working with unaccompanied minors in accordance with their needs

Secondly, it provides the following grounds for detention of children¹⁰⁸:

- During the process of verifying the identity of the applicant
- During the assessment of their application for protection
- During the decision-making process concerning the right to entry
- If the applicant is subject to a return or removal procedures
- If maintaining public order and security depends on it

¹⁰⁷ Directive 2013/33/EU of the European Parliament and of the Council, 2013, articles 23 and 24, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0033> (accessed on May 12 2021)

¹⁰⁸ Directive 2013/33/EU of the European Parliament and of the Council, 2013, article 8.

The Directive lays out further essential points regarding the detention of minors and unaccompanied minors¹⁰⁹:

- Minors may only be detained as a last resort and only when no other alternative can be applied, it shall be for the shortest possible period of time, and there shall be continuous efforts made to place the minors in suitable accommodation.
- The best interest of the child is to be the priority.
- Unaccompanied minors may only be detained in “exceptional circumstances”, a wording that is slightly stronger than “as a last resort”. Minors are further never to be detained in prisons, and, if detained, they should be released as soon as possible.
- There are additional conditions, such as separation of children of different sexes in detention, and the availability of leisure activities for children, but the Directive also sets grounds to deviate from such conditions in “duly justified cases”¹¹⁰.

Additionally, a 2016 proposal for the same Directive adds a new consideration to the definitions – the “risk of absconding”, which is determined with objective reasons found in national laws, which suggest that an applicant might abscond¹¹¹. This addition was made because of the insertion of new grounds for detention into Art. 8. These added grounds are applicants not complying with their legal obligations, resulting in a “risk of absconding of the applicant.”¹¹²

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Proposal for a Directive of the European Parliament and of the Council, laying down standards for the reception of applicants for international protection, 2016, Article 2 (11) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0465> (accessed on May 12 2021).

¹¹² Proposal for a Directive of the European Parliament and of the Council, laying down standards for the reception of applicants for international protection, 2016, Article 8 (c).

5.2.3. *Directive 2011/36/EU of the European Parliament and of the Council*

This directive deals with combatting human trafficking and protecting its victims. Given that all cases of smuggling and a large percentage of cases of child trafficking happen during the process of migration¹¹³, especially when missing UMC are traveling alone and unprotected, this Directive is a very important tool. Amongst the most valuable points on child victims of trafficking are the following:

- If the age of a child victim of trafficking cannot be determined with certainty, the person in question is to be considered a child, so as to be granted access to the support they require. This is important as it prioritizes the person's needs over certainty of age assessment in these cases.¹¹⁴
- The importance of the psycho-social and physical recovery of victims shall be ensured by the responsible governments, with a specific assessment to be made of each and every individual case and the special needs that come with it. Further importance shall be given to the opinions of the child on the matter.¹¹⁵
- All of the above shall be applied to unaccompanied children who are victims of trafficking, without prejudice and with consideration of the special circumstances unaccompanied child victims are in.¹¹⁶

This is important because it requires states not only to refrain from certain treatment of UMC that involves detention, but to recognize UMC as victims of certain violations to their rights, and therefore to provide them with the necessary care.

¹¹³ UNODC, E4J University Module Series: Trafficking in Persons and smuggling of Migrants, Module 12: Children as Smuggled Migrants and Victims of Trafficking, UNODC, 2019, <https://www.unodc.org/e4j/en/tip-and-som/module-12/key-issues/children-on-the-move--smuggling-and-trafficking.html> (accessed on May 12 2021)

¹¹⁴ Directive 2011/36/EU of the European Parliament and of the Council, 2011, Article 13.

¹¹⁵ Directive 2011/36/EU of the European Parliament and of the Council, 2011, Article 14.

¹¹⁶ Directive 2011/36/EU of the European Parliament and of the Council, 2011, Article 16.

5.2.4. *The New Pact on Migration and Asylum of the European Commission*

Among the most relevant developments this new pact has introduced are the following:

Arguably the most important change concerning this thesis that came with the new Pact is found in the amended proposal revising the Asylum Procedures Regulation¹¹⁷. With a view of guaranteeing the best interest of the child, it forbids the application of the border procedure for all unaccompanied children and for accompanied children who are younger than twelve years old, as well as their families.¹¹⁸

This is a positive step regarding the detention of UMC, although it does come with one exception – when a child is considered to be a “danger to national security or public order”.¹¹⁹ The border procedures usually include detention,¹²⁰ making this a very positive development for UMC, but not a positive one for migrant children overall, since it discriminates on the basis of age amongst them. Furthermore, migration-related detention in general is permitted by the Pact with no regard to the priority of alternatives to detention and throughout the asylum procedures which can take months on end.¹²¹ Although this thesis is mainly concerned with UMC, and this pact did introduce a positive change concerning specifically *their* detention, this note on the continued

¹¹⁷ European Commission, 2020.

¹¹⁸ Amended proposal for a regulation of the European Parliament and of the Council for establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, European Commission, 2020, section 3, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52020PC0611> (accessed on 18 August 2021)

¹¹⁹ Ibid.

¹²⁰ Platform for International Cooperation on Undocumented Migrants (PICUM), “More detention, fewer safeguards: How the new EU Pact on Migration and Asylum creates new loopholes to ignore human rights obligations”, 2020, p.4, <https://picum.org/wp-content/uploads/2020/10/More-detention-fewer-safeguards-How-the-new-EU-Pact-on-Migration-and-Asylum-creates-new-loopholes-to-ignore-human-rights-obligations.pdf> (accessed on 18 August 2021)

¹²¹ Platform for International Cooperation on Undocumented Migrants (PICUM), 2020, p.3.

principle and use of detention regarding migrant children overall should not go without mention here.

5.3. The Council of Europe

5.3.1. The European Convention on Human Rights (ECHR)

Unlike what was previously discussed concerning the EU, the Council of Europe did have human rights as a priority since its inception, which was clearly stated in the introduction of the European Convention on Human Rights (ECHR). The ECHR is the most potent human rights legal tool in the region, together with the European Court of Human Rights (ECtHR) to ensure compliance. Therefore, it is essential to highlight the Articles that define and limit the rights of UMC in member states of the Council of Europe and to also examine the interpretations and use of those Articles by the ECtHR. In its first Article, titled “Obligation to Respect Human Rights”, the ECHR indirectly includes UMC in the Convention through its use of the term “everyone”¹²². The most relevant rights to this topic, which provide a protection framework for “everyone”, including children, are found in Article 3, which prohibits “torture, and degrading treatment or punishment”¹²³.

This Article is very important regarding the detention of UMC for migration reasons as such, but also regarding the conditions in which they might be detained. Article 8 guarantees that “everyone has the right for his [...] family life”¹²⁴. This could be used to back up the UMC’s right to family reunification. Article 2 of the first protocol states that “no person shall be denied the right to education”¹²⁵, which can be applied to the many cases of UMC who are detained without proper access to education. Although

¹²² European Convention on Human Rights (ECHR) (entered into force 21 September 1970) Article 1.

¹²³ ECHR, Article 3.

¹²⁴ ECHR, Article 8.

¹²⁵ ECHR, Article 2 of first protocol.

Article 5 is important, as it provides the “right to liberty and security”, Section (f) of the Article formulates grounds for the “lawful arrest or detention” in cases of “unauthorized entry into the country” or “with a view to deportation or extradition” ¹²⁶, without excluding children and minors, but more so allowing the detention of minors for educational purposes.

The Convention provides adequate grounds for the human rights of UMC by including them in Articles outlining basic rights such as education and right to family, liberty, and security. Nevertheless, its shortcoming lies in its providing grounds for detention for migration reasons. However, this is not to be taken as the Convention directly supporting the use of detention of unaccompanied migrant children. Given the time of its drafting and adopting, when there was not a big issue of UMC detention, it is safe to assume that migration detention as articulated in the Convention is intended as an exception rather than the norm.

¹²⁶ ECHR, Article 5 .

5.3.2. *The European Social Charter (ESC)*

43 out of 47 member states of the Council of Europe are parties to the European Social Charter (ESC).¹²⁷ Member states choose provisions in a specified manner to be legally binding. The monitoring body of the ESC is the European Committee of Social Rights, which monitors through the “collective complaints procedure and the reporting system”¹²⁸. The most relevant Article in this charter to the issues at hand is Article 17 of Part II from the Revised ESC of 1996, which ensures that all children generally should have “the care, the assistance, the education [...] they need”, protection “against negligence, violence or exploitation”, and “a free primary and secondary education”¹²⁹. Concerning unaccompanied migrant children, the article provides for their “protection and special aid”, as they are considered “temporarily or definitely deprived of their family’s support”¹³⁰. Concerning the detention of children, Article 17 also requires that “minors should only exceptionally be remanded in custody [...] and should in such cases be separated from adults.”¹³¹

Article 17 of the Charter is the main source of guidance for the topic at hand. Beyond reasserting the social rights of children, education and protection against violence, it takes a step further by directly addressing the issue of detention and lends dedicated support to UMC.

¹²⁷ Council of Europe, “European Social Charter, the Charter in four steps”, 2021, <https://www.coe.int/en/web/european-social-charter/about-the-charter> (accessed on 16 July 2021)

¹²⁸ Ibid.

¹²⁹ Revised European Social Charter (adopted 1996), Article 17 of part II.

¹³⁰ The European Committee of Social Rights, 1996, Children’s Rights Under the European Charter, P. 19, Council of Europe.

¹³¹ The European Committee of Social Rights, 1996, p.5.

5.3.3. Resolutions of the Parliamentary Assembly of the Council of Europe

One of the CoE institutions that has been actively advocating for the rights and protection of UMC for years is the Parliamentary Assembly. Amongst the many resolutions adopted by the Council's Parliamentary Assembly, some are focused specifically on the issues of protection, detention and disappearance of UMC. Resolution No. 2020 (2014)¹³² directly addresses the issue of immigration detention. Firstly, by sharing the position of the Assembly on immigration detention being a "clear and unequivocal child rights violation" that "has severe negative short- and long-term effects on children's physical and mental health."¹³³ Secondly, by calling upon member states to "introduce legislation prohibiting the detention of children for immigration reasons", "refrain from placing unaccompanied or separated children in administrative detention" and "adopt alternatives to detention that meet the best interests of the child."¹³⁴

Another Resolution, No.2136¹³⁵, was adopted in 2016, and discusses "harmonising protection of unaccompanied minors in Europe." This Resolution is important because it brings up the point that "in the majority of member states, there is no legal definition of 'missing children' as a separate category in national legislation", which has had a "major negative impact on investigations, waiting times and levels of alarm."¹³⁶ In the same Resolution, the Assembly's recommendation on alternatives to detention is brought up, under "related issues"¹³⁷, indicating a relation between the two issues of detention and disappearance.

¹³²Parliamentary Assembly, 2014, The alternatives to immigration detention of children, Resolution No. 2020, Council of Europe

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Parliamentary Assembly, 2016, Harmonising the protection of unaccompanied minors in Europe, Resolution No. 2136, Council of Europe

¹³⁶ Ibid

¹³⁷ Ibid

More recently, in 2020, the Assembly adopted two Resolutions – No. 2324¹³⁸ and No.2354¹³⁹. Resolution No.2324 concerns itself with “missing refugee and migrant children in Europe”, focusing on the causes of their disappearance other than criminal activity, including “sub-standard reception conditions” and “fear of detention”, asserting the abovementioned relation between the two issues. Additionally, it calls upon member states to ensure that the “reception conditions and care for child migrants and refugees fulfil basic rights and needs” and that “on no account should children be placed in detention.”¹⁴⁰ Resolution No. 2354 of the Assembly, adopted in December 2020, highlights effective guardianship for UMC. It underlines the importance of paying special attention to the “individual situation, age, maturity, language and culture”¹⁴¹ of migrant children, to support an effective guardianship system. This is especially important as it resonates with the assessment of vulnerability discussed in Chapter 1. Moreover, the Assembly recommends to “create a Europe-wide unified database on unaccompanied and separated migrant children to make sure that they are identified and provided with timely protection”.¹⁴²

The resolutions of the Parliamentary Assembly of the Council of Europe are arguably the strongest source of protection for UMC in its member states. Directly addressing the issues at hand, it clearly states that detention is a violation of children’s rights, negatively affects children, and is directly linked to children going missing. Additionally, it shines a light on very important but currently lacking necessities, such as that for an agreed-upon definition of missing UMC, and that for a regional database of UMC in Europe.

¹³⁸ Parliamentary Assembly, 2020, Missing refugee and migrant children in Europe, Resolution No. 2324, Council of Europe

¹³⁹ Parliamentary Assembly, 2020, Effective guardianship for unaccompanied and separated migrant children, Resolution No. 2354, Council of Europe

¹⁴⁰ Parliamentary Assembly, 2020, Missing refugee and migrant children in Europe, Resolution No. 2324, Council of Europe

¹⁴¹ Parliamentary Assembly, 2020, Effective guardianship for unaccompanied and separated migrant children, Resolution No. 2354, Council of Europe

¹⁴² Ibid.

In the international and EU-specific legal frameworks, there is a much more specific and concentrated focus on detention as compared to the issue of UMC going missing. As for the link between those two issues, there are two connections drawn. The first is that detention is one of the underlying causes for UMC going missing, while the second is that detention may legally be used when there is a risk of going missing, more specifically absconding. The contradiction in these two established relations in the legal frameworks is clear as day, and it highlights that, between the international and regional level, a clear and common understanding and legal practice that encompasses and deals with the detention and disappearance of UMC in a coherent manner is sorely lacking.

6. The Psychological Framework

This section will examine the psychological perspective of the thesis' core topic in two ways. First by examining the perspective of children themselves, and then by reviewing professional psychological literature. The psychology and mental health of children is highly linked to this topic, especially due to its relevance in determining what constitutes the "best interest of the child", which, as evidenced in the former section, is supposed to be the guiding legal principle regarding the treatment of UMC.

6.1. The Children's Perspective

As has been highlighted in the previous chapter, the opinion of children is a valuable asset in any decision-making process that concerns them. With regard to the detention of UMC, this thesis will rely on the 2019 UN Global Study on Children Deprived of Liberty. The study includes a chapter about the "views and perspectives of children deprived of liberty" derived from interviews that were conducted with children deprived of liberty on a global scale.¹⁴³ Although it might seem unfitting to rely on interviews that were not exclusively conducted in Europe, nor specifically with *UMC* deprived of their liberty, it is still important to draw upon the general conclusions of this study, as they were built on the opinions of children who, in different places of the world and under different circumstances, shared comparable experiences with similar effects on them.

This section will highlight examples of such opinions expressed in the study that may be generalized enough to be adapted, as well as the main takeaways of the conclusion the study reached through these interviews. Of the regions in which interviews were conducted, examples will only be drawn from two regions that fit this thesis' regional

¹⁴³ Manfred Nowak, 2019, p.76.

framework: the Eastern European Group (EEG) and the Western European and Others Group (WEOG).

The following are the words of children in reference to points of the legal section previously reviewed:

- Concerning the standards of detention: “‘The prison was for mixed ages, there were five rooms for twelve people. The food was very bad (examples mentioned were milk mixed with water offered every four or five days, stiff bread, and tomatoes)’ . (M/22/3:WEOG)”¹⁴⁴
- Concerning education and training: “‘If there is a guard and he doesn’t want to stay in school after us “come on, already! Go to your rooms. I want to leave”’. (M/15-17/1:EEG)”¹⁴⁵
- Concerning the right to health: “‘I had pneumonia because I catch colds very easy and my immune system is easily affected and the doctor did not give me any treatment. Our health is at risk, because the conditions of living are very bad, the beds, blankets, sheets are dirty and old.’ (M/15-17/1:EEG)”¹⁴⁶
- Concerning the right to non-discrimination: “‘Treated as a terrorist, and thought I would stay there all my life.’ (M/22/3:WEOG)”¹⁴⁷
- Concerning the right to be heard: “‘If you complained, you were punished. They could lock you or not give food.’ (M/F/18/4:EEG)”¹⁴⁸

¹⁴⁴ Manfred Nowak, 2019, p.88.

¹⁴⁵ Manfred Nowak, 2019, p.89.

¹⁴⁶ Manfred Nowak, 2019, p.90.

¹⁴⁷ Manfred Nowak, 2019, p.93.

¹⁴⁸ Manfred Nowak, 2019, p.94.

- Concerning the prohibition of torture and degrading treatment or punishment:
 “‘One could be beaten when he commits mistakes.’ (M/14-17/1:WEOG)”¹⁴⁹-
 ‘They cut my right to visitations, to the food from here, I have also been put in isolation.’ (M/17/1:EEG)”¹⁵⁰

- Concerning the right to special care for unaccompanied minors:
 “‘Unaccompanied minors should be connected directly to a legal guardian and hosted in a shelter with support services so that they don’t spend even one day in detention. Police stations or prison is not a suitable place for minors.’
 (M/22/3:WEOG)”¹⁵¹

The above examples show that, although children are not necessarily equipped with deep knowledge of their rights and the legal frameworks that apply to them and regulate their treatment, they are still factually able to raise concerns about violations of their rights, simply by sharing their experiences.

Additionally, the conclusion of Chapter 5 in the study highlights the most commonly experienced feelings of children who were interviewed, which include “loneliness, isolation and longing for family [but also] confusion and disempowerment”¹⁵². This is important to know because emotions are thought to be the main driver of decision-making.¹⁵³ Such strong emotions can therefore be linked to the making of drastic decisions, such as that to abscond.

¹⁴⁹ Manfred Nowak, 2019, p.96.

¹⁵⁰ Manfred Nowak, 2019, p.97.

¹⁵¹ Manfred Nowak, 2019, p.103.

¹⁵² Manfred Nowak, 2019, p.111.

¹⁵³ J.S.Lerner, Y.Li, P.Valdesolo, K.Kassam, “Emotions and Decision Making”, Annual Review of Psychology, Harvard University, 2014, p.4, https://scholar.harvard.edu/files/jenniferlerner/files/annual_review_manuscript_june_16_final_final_.pdf (accessed on 19 April 2021)

6.2. The Psychological Perspective

This section will attempt to paint a more detailed picture of who unaccompanied migrant children are, by reviewing issues related to their mental health and psychological state. One of the important aspects that emerge from child migration and displacement are the psychological effects that may arise from their experiences and affect their mental health.

There are several facets to the mental health challenges UMC may face after arriving in Europe, in addition to their experiences in their countries of origin and throughout their journeys. Some of the primary obstacles they face may be challenges with language, education, access to and understanding of the existing platforms for healthcare and other resources, financial concerns, and – regarding the host-country specifically – the political and legal context they are thrust into, as well as potential trust issues regarding the personnel acting on behalf of host governments.¹⁵⁴ The point of trust is especially important in this regard because a relationship of trust with an unaccompanied migrant child and the person in charge of them in this case in Europe, is the most efficient way to prevent UMC from going missing¹⁵⁵. This also shows the fragility of decisions made by UMC when they decide to abscond or run away into extremely dangerous situations, a fate that could be changed through the simple building of trust with the child.

One of several experiences triggering mental health issues among UMC is the decreasing quality of the child-family environment in their home countries, due to various reasons, such as war or civil conflict. Both direct and indirect exposure to war has been found to affect mental health negatively. “Direct and non-direct exposure to

¹⁵⁴ F.Khan, N.Eskander, T.Limbana, Z.Salman, P.A.Siddiqui, S.Hussaini, “Refugee and Migrant Children’s Mental Healthcare: Serving the Voiceless, Invisible, and the Vulnerable Global Citizens”, US National Library of Medicine National Institutes of Health, 2020, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7505673/> (accessed on 5 May, 2021).

¹⁵⁵ Manfred Nowak, 2019, p.513.

war trauma increases the risk of behavioural and emotional problems among pre-school children, which may present as non-specific psychopathology.”¹⁵⁶

The instability of their homes as a result of war may trigger mental health problems like anxiety, PTSD, and other issues in individuals. Wars result in death, economic losses, human suffering, trauma, et cetera – these tragedies are the real drivers of mental health problems in war-torn areas, especially among children. Children affected by war often face further difficulties, such as separation from their families, shortcomings in their basic physiological needs, as well as a sudden and forced relocation as they must leave their homes and communities to survive. The mental instability that results from this may be what pushes families and children to leave their home countries in the first place and seek refuge in a more stable environment.

*The effect of war on children’s mental health is well established. Investigators, mainly from the Middle East and the former Yugoslavia, have recorded high rates of post-traumatic stress disorders and other mental health problems and disorders. For example, after the Gulf war, high rates of post-traumatic stress disorders were recorded in Kuwaiti and Kurdish children. These rates were especially prominent if children had been displaced from their community, such as in the conflicts in Croatia and Bosnia.*¹⁵⁷

Due to the various obstacles and hardships migrants encounter in the migration process, migration becomes so loaded with potential mental health-debilitating experiences, it

¹⁵⁶ A.A.M.Thabet, K.Karim and P. Vostanis, “Trauma exposure in pre-school children in a war zone”, The British Journal of Psychiatry, 2006, p.188, <https://doi.org/10.1192/bjp.188.2.154> , (accessed on 5 May 2021).

¹⁵⁷ A.A.M.Thabet, K.Karim and P. Vostanis, “Emotional problems in Palestinian children living in a war zone: A cross-sectional study”, Lancet, p.359, [https://doi.org/10.1016/S0140-6736\(02\)08709-3](https://doi.org/10.1016/S0140-6736(02)08709-3), (accessed on 5 May 2021).

itself becomes a triggering factor for mental illnesses.¹⁵⁸ Migration, understood as a procedure of people leaving a familiar environment and adapting to a new one, requires decision-making, preparation, and adaptation to local norms. The lives of people that go through this process are thoroughly changed. During this extremely important transitional phase, migrants, and especially UMC, suffer from a severe lack of support system and structure in their lives. An already extremely difficult and often traumatizing period in their lives, in which justified feelings of insecurity are the norm, is often experienced alone, or in the company of strangers.

All people are, in one way or another, affected by the effects of migration, but there are some specific groups – like women, children, elderly, lesbian, gay, bisexual and transgender individuals, et cetera – who are more prone to certain mental health issues during this process than others.¹⁵⁹

Self-esteem, which may be defined as a person's feeling of self-worth or value, is also regularly affected during this transition. A large gap between self-image and the image of the ideal self would result in low self-esteem and thus, during difficult transition periods like migration, this is a common occurrence.¹⁶⁰ Rebuilding self-esteem or preventing it from falling too low is often dependent on strong support systems or a certain structure in life, but, as noted above, these are especially rare in the process of migration.

Detention adds insult to injury in terms of mental health. It negatively affects humans' mental health, but particularly that of children. Children that are held in immigration detention undergo high levels of mental health discomfort on a daily basis. Detained children were found to have developed new physical and mental health problems during

¹⁵⁸ H.G.Virupaksha, A.Kumar and B.P. Nirmala, "Migration and mental health: An interface", *Journal of Natural Science, Biology, and Medicine*, 2014, p5, <https://doi.org/10.4103/0976-9668.136141> (accessed on 5 May 2021)

¹⁵⁹ Ibid.

¹⁶⁰ H.G.Virupaksha, A.Kumar and B.P. Nirmala, 2014,p.233 to p.239.

their detention, which seemed to be related or even directly caused by their experiences during detention.¹⁶¹ Anxiety, Depression, and Post-Traumatic Stress are amongst the problems they face during and after detention.¹⁶²

¹⁶¹ A.Lorek, K.Ehnholt, A.Nesbitt, E.Wey, C.Githinji, E.Rossor and R.Wickramasinghe, “The mental and physical health difficulties of children held within a British immigration detention center: A pilot study.” *Child Abuse & Neglect*, 2009, p. 33, <https://doi.org/10.1016/j.chiabu.2008.10.005> (accessed on 5 May 2021)

¹⁶² Arlin Cunic, reviewed by Steven Gans.MD, “The Psychological Effects of Being in a Detention Center”, verywellmind, 2020, <https://www.verywellmind.com/the-psychological-effects-of-being-in-a-detention-center-5082004> (accessed on 9 May 2021)

7. Analysis through a look at the cases of France and Ireland

7.1. Part 1: France

This chapter will assess the situation of UMC in France, doing so based on reports, national laws, developments in the domestic political landscape, as well as a selection of articles and news stories, whose highlighting is essential to form an understanding of how UMC and their detention are handled in France.

7.1.1. Background

In 2020, Human Rights Watch shared news of the dire conditions UMC are left in by French authorities, citing examples of around 200 UMC in conditions without shelter in Paris, as their age assessment procedures were being processed, while authorities in Marseille were denying care and housing for UMC, and 23 UMC were living in dire conditions while they appealed the rejections of their applications. During all this time, they were not protected from the health dangers of the COVID-19 pandemic.¹⁶³ The article also mentions an important step taken by the European Court of Human Rights (ECtHR), which ordered France to protect a child who was not recognized as a “child in need of protection” and had therefore ended up on the street with no protection.¹⁶⁴

Around 19 UMC were illegally returned in February 2018 on the French-Italian border by French police, who were accused of legal breaches like falsifying the age in UMC’s documents, as they could not legally do so they turn UMC away otherwise.¹⁶⁵ More recently, in February 2021, volunteers at a community kitchen in Italy mentioned that

¹⁶³ Camille Marquis, “European Court Orders France to Protect an Unaccompanied Migrant Child, Migrant Children in France Left in Limbo and at Risk of COVID-19”, Human Rights Watch, 2020, <https://www.hrw.org/news/2020/04/02/european-court-orders-france-protect-unaccompanied-migrant-child> (accessed on August 15 2021)

¹⁶⁴ Ibid.

¹⁶⁵ C.Harlan, J.McAuley, “The French-Italian border reveals the essence of the European clash on migration”, the Washington Post, 2018, https://www.washingtonpost.com/world/europe/the-french-italian-border-reveals-the-essence-of-the-european-clash-on-migration/2018/06/28/1f26dd78-732f-11e8-bda1-18e53a448a14_story.html (accessed on 15 August 2021)

there had been over 60 cases of UMC being pushed back from France in the first three weeks of the month.¹⁶⁶

7.1.2. *Applicable Legal Framework for UMC in France*

Upon the arrival of UMC on French borders they, as everyone else, generally require certain documents to be allowed entry – a valid passport, a visa for entering and staying, or other documents depending on the reason for the stay.¹⁶⁷ When UMC arrive at French borders without the necessary documents, they may be held in what is called “zones d’attente”, (“waiting zones”), where migrants are detained while decisions concerning their entry into France are processed.¹⁶⁸ Each UMC should immediately be assigned an “ad-hoc administrator” to assist them and represent them legally concerning their status and application in France. Another responsibility of the ad-hoc administrator is to assess possible dangers to the safety, health, and morality of the child, and organize further child protection and assistance.¹⁶⁹ Additionally, border officers during this stage have the option of requesting a medical examination to assess the age of the child, but are not permitted to do so themselves, as previously mentioned in the example.¹⁷⁰ The reason why it is permitted for UMC to be detained in the aforementioned cases is that the designated waiting zones are not considered French territories – 10 kilometers away from French borders, people are not considered to be on French territory.¹⁷¹ Practically, the conditions in these detention units are unfit for purpose when it comes to

¹⁶⁶ Human Rights Watch, “France: Police Expelling Migrant Children”, 2021, <https://www.hrw.org/news/2021/05/05/france-police-expelling-migrant-children> (accessed on 15 August 2021)

¹⁶⁷ Code de l’entrée et du séjour des étrangers et du droit d’asile (CESEDA), article L 221-1, https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006070158/LEGISCTA000042770948/#LEGISCTA000042777416 (accessed on 15 August 2021)

¹⁶⁸ French Contact Point for the European Migration Network, “Policies, practices and data on unaccompanied minors” European Migration Network, 2014, p.14, https://ec.europa.eu/home-affairs/sites/default/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/unaccompanied-minors/10a_france_uams_study_english_version_final.pdf (accessed on 15 August 2021)

¹⁶⁹ French Contact Point for the European Migration Network, 2014, p.15.

¹⁷⁰ French Contact Point for the European Migration Network, 2014, p.16.

¹⁷¹ Human Rights Watch, 2021.

unaccompanied migrant children, as by law they should be held in different cells than adults, but in reality, children who are considered adults by border police end up being held in the same rooms as adults they do not know. An example is the case of a seventeen-year-old boy who was held with adult men, in tears and without food.¹⁷²

If a UMC is already in French territory when found by authorities, it becomes a different story. As children do not need residence permits on French territory, they cannot be removed and have access to national child protection, pending an age assessment to confirm that they are indeed children and unaccompanied, after which they can file an asylum application.¹⁷³ The practice of such age assessment procedures can be very unfair for UMC. A report by Médecins Sans Frontières (MSF), published in 2019, on the mistreatment of UMC in France showed that, although UMC should be provided with accommodation during the age assessment process, many UMC are forced to sleep on the street. Assessment interviews were shown to lack the necessary depth, sometimes lasting less than thirty minutes and being conducted without interpreters, and sometimes applications were rejected because the child “clearly looks like an adult.”¹⁷⁴ Such attitudes from the French immigration authorities are described by MSF as “policies designed to dissuade people from migrating [...] making the journeys of minors arriving in France increasingly dangerous.”¹⁷⁵

¹⁷² Ibid.

¹⁷³ French Contact Point for the European Migration Network, 2014, p.16-17.

¹⁷⁴ Medecins Sans Frontieres (MSF), “France- Unaccompanied minors, symbols of policy of mistreatment”, 2019, <https://www.msf.org/unaccompanied-minors-symbols-policy-mistreatment-france-migration> (accessed on 15 August 2021)

¹⁷⁵ Medecins Sans Frontieres (MSF), “Rejected and traumatized: Unaccompanied minors arriving in France”, 2019, (accessed on 15 August 2021)

7.1.3. *Detention of UMC in France*

According to French law, UMC cannot be detained in France, as they cannot be subjected to removal by the obligation to leave the French territory (Obligation de quitter le territoire français- OQTF)¹⁷⁶ as recognized UMC. Nevertheless, UMC are subject to detention in the designated “waiting zones” if they enter through borders, as discussed above.

Furthermore, reality is often very different from the letter of the law. In a 2015 report published by NGOs that carry out their work in administrative detention centers in France, the realities of detention in France are stated to be amongst the worst.¹⁷⁷ The report underlines that, between 2011 and 2015, France had detained around 236,000 people, of whom 21,436 were children detained in Mayotte, outside the French mainland.¹⁷⁸ Additionally, the report mentions a further 4,378 children who were also detained at Mayotte and illegally associated with adults who had no parental status over them.¹⁷⁹ That is highly important, as those children could have been provided with the right protection and care had they been recognized as separated or unaccompanied children.

A recent example further showcasing the violations of the human rights of UMC in France is a 2020 case law from the European Court of Human Rights – Moustahi v. France. It concerned the detention and treatment of two Comorian children after their unlawful entry into French territory in Mayotte.¹⁸⁰ The two UMC, age three and five,

¹⁷⁶ French Contact Point for the European Migration Network, 2014, p.41.

¹⁷⁷ ASSFAM, Forum réfugiés-Cosi, France terre d’asile, La Cimade and Ordre de Malte France, “Centres et Locaux de rétention administrative”, 2015, http://www.france-terre-asile.org/images/stories/publications/pdf/Rapport_2016_Centres_et_locaux_de_r_tention_administrative.pdf (accessed on 15 August 2021)

¹⁷⁸ ASSFAM, Forum réfugiés-Cosi, France terre d’asile, La Cimade and Ordre de Malte France, 2015, p.7 and 10.

¹⁷⁹ Ibid.

¹⁸⁰ European Court of Human Rights, Moustahi v. France, ECHR 192 (2020), 25 June 2020, p.2.

were placed in administrative detention with adults and associated with one of them arbitrarily.¹⁸¹ The Court then found a violation of Article 3 of the Convention for inhuman and degrading treatment through the conditions the UMC were detained in. Furthermore, the Court found that the association with the adult who was present on the same boat was made for a “speedy removal” of the children and not based on their best interest.¹⁸² It is interesting and scary to consider that this could have been the case for many of the children mentioned in the report of NGOs cited above, as they might have similarly been arbitrarily associated with adults against their best interest as UMC.

A recent development that could have big effects on UMC and their detention in France is the new increase in use of a biometric system to confirm the status of being unaccompanied for UMC.¹⁸³ Since the beginning of 2019, the assessment procedure for age and unaccompanied status have changed in the sense that, before a child can even be evaluated by a professional social worker, they have to appear at a prefecture. The system functions by storing and then cross-sharing and referencing data, including fingerprints, photographs, and identity documents. The system has been criticized for not respecting the right to privacy and the best interest of the child. More importantly, the system does not take into consideration room for error – some children have to use falsified identity documents to be able to cross previous borders before arriving in France, leading them to potentially being registered as adults somewhere despite being children, which in turn could lead to their detention and/or deportation¹⁸⁴. Once again, the French government appears to risk detaining or/and deporting UMC for an easier processing of immigration policies. Moreover, the use of this biometric system was optional prior to 2020, while today departments that do not use it are even faced with financial penalties.¹⁸⁵

¹⁸¹ European Court of Human Rights, 2020,p.1.

¹⁸² Ibid.

¹⁸³ Maïa Courtois, “Fears over biometric system in France for unaccompanied foreign minors”, InfoMigrants, 2021, <https://www.infomigrants.net/en/post/33126/fears-over-biometric-system-in-france-for-unaccompanied-foreign-minors> (accessed on 20 August 2021)

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

7.1.4. *France and the problem of UMC going missing*

A recent example that can show the situation of UMC disappearing in France is the case of Vietnamese children going missing in France into the hands of traffickers.¹⁸⁶ As discussed earlier, children who arrive to French territories are put in waiting zones, in that case it is through the airport in Paris, where Vietnamese children are dropped off by adults pretending to be their parents and then left alone there as a part of the traffickers' plans. If released with a permission to enter France, children are put under the care of the child welfare services, ASE (L'aide sociale à l'enfance) that are supposed to take over once the children are released. One of the discoveries made by Investigate Europe is a large-scale incompetence and disorganization between the different authorities in charge, leaving the children with no care and protection, which is especially dangerous for UMC at risk of being trafficked – such as the Vietnamese children cited in the above case – who usually go missing days or even hours after their arrival in French territories. Additionally, after they go missing, it is in vain if the ASE attempts to contact the local police. When Investigate Europe approached the police about the issue, the answer they received was “no report relating to these facts has been brought to our attention.”¹⁸⁷ In this case, that was pressing enough to be on the radar of EUROPOL.¹⁸⁸ These issues point to the incompetence pointed out by Investigate Europe on the side of the French authorities, as they were not aware of such issues happening at the capital's airport, in turn putting UMC in danger.

¹⁸⁶ Leïla Miñano, “Missing in France: The plight of Vietnamese children who are trafficked into Europe”, Investigative Europe, 2020, <https://www.investigate-europe.eu/en/2020/vietnamese-minors-missing-in-france/> (accessed on 20 August 2021)

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

France does not have a system or set of regulations for dealing with missing migrant children – in fact, only a few countries in Europe do.¹⁸⁹ Additionally, the French police have jurisdiction to assess case by case and decide whether it qualifies as a case of a “missing person”.¹⁹⁰

¹⁸⁹ European Commission, “Missing children in the European Union Mapping, data collection and statistics” Publications Office of the European Union, Luxembourg, 2013, p.74.

¹⁹⁰ European Commission, 2013, p.11.

7.2. Part 2: Ireland

In 2015, Ireland established the Irish Refugee Protection Programme (IRPP), an initiative designed to take in 4000 people in response to the refugee crisis of Europe.¹⁹¹ In 2019, phase II of the Programme was introduced, with the goal of bringing in 2,900 new refugees between 2020 and 2023.¹⁹² Additionally (and under the same Programme), Ireland would take in UMC coming from France's Calais camp¹⁹³. Such efforts served to establish a good image for Ireland regarding their treatment and aid of refugees.

7.2.1. *Background*

Ireland was not as strongly affected by the refugee crisis in Europe as countries like France or Greece, for example. However, it is important to look at Ireland's history concerning migration, to better understand its positions and policies today. In the 2000s, Ireland was considered a destination country for migration, but this changed with an economic decline that began in 2008, as a result of the global financial crisis.¹⁹⁴ Nevertheless, with fewer migrants (including UMC) entering the country after that, there was still a noticeable increase in the number of UMC registered in the Irish care system. The reason behind this is that reforms had been made to the care framework of UMC in Ireland, leading less UMC to go missing, instead remaining under the Irish care

¹⁹¹ Irish Refugee Protection Programme, "Minister McEntee launches Call for Applications for funding under the Asylum, Migration and Integration Fund 2014-2020", Department of Justice, 2020, [http://www.justice.ie/en/JELR/Pages/Irish_Refugee_Protection_Programme_\(IRPP\)](http://www.justice.ie/en/JELR/Pages/Irish_Refugee_Protection_Programme_(IRPP)) (accessed on 12 August 2021)

¹⁹² Ibid.

¹⁹³ Suzanne Lynch, "Process of bringing 200 child migrants from France begins", The Irish Times, 2016, <https://www.irishtimes.com/news/social-affairs/process-of-bringing-200-child-migrants-from-france-begins-1.2899861> (accessed on 12 August 2021)

¹⁹⁴ S. Arnold, M.N. Raghallaigh, "Unaccompanied minors in Ireland: Current Law, Policy and Practice", Social Work and Society, 2017, p.1 https://www.researchgate.net/publication/326271311_Unaccompanied_minors_in_Ireland_Current_Law_Policy_and_Practice (accessed on 12 August 2021)

system.¹⁹⁵ Before said reform, the care system included “stricter age assessments” as well as a “hostel care system”¹⁹⁶ that was discriminating against UMC, as they were placed in hostels with little to no care, while Irish children in similar situations would be placed in better care and with foster families, which lead to more UMC going missing.¹⁹⁷

7.2.2. Applicable Legal Framework for UMC in Ireland

There are two main Irish legal frameworks that UMC care and protection fall under – child- care law and refugee law.¹⁹⁸ The main legal tools that apply within those frameworks are the following¹⁹⁹:

- Section 14 of the International Protection Act 2015, titled: “Unaccompanied child seeking international protection” provides that UMC seeking to apply for international protection are to be referred to the Child and Family Agency (TUSLA) as soon as possible by the immigration officials.²⁰⁰
- Once TUSLA takes over, it has to decide on the right arrangements that are required for each UMC individually, from the Child Care Acts 1991 to 2013, the Child and Family Agency Act 2013, and other applicable legal tools.²⁰¹ Although UMC are not directly targeted in any of these legislations, the abovementioned Section 14 of the International Protection Act 2015 places UMC under the same protection all children have access to in Ireland, which is a very inclusive and non-discriminative policy regarding UMC.

¹⁹⁵E.Chaltogiannidou, 2018, p.65.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ S.Arnold, M.N.Raghallaigh, 2017, p.5.

¹⁹⁹ Ibid.

²⁰⁰ International Protection Act 2015, Oireachtas, section 14, <http://www.irishstatutebook.ie/eli/2015/act/66/enacted/en/print> (accessed on 12 August 2021)

²⁰¹ Ibid.

The most commonly used sections of the Child Care Act in those situations are Sections 4 and 5, which guarantee necessary care and suitable accommodation for the UMC.²⁰²

The practical application of those legislations through the work of TUSLA is what makes the biggest difference. There is some speculation that the legislations in question do not provide that a legal representative has to be appointed for the child, which could be seen as contradicting with the UMC's right to seeking asylum in accordance with Article 18 of the Charter of Fundamental Rights.²⁰³ Nevertheless, the services provided by TUSLA for UMC are considered a best practice example for migrant children, because of their "child-centered interventions."²⁰⁴

On the same day that a child is referred to TUSLA, they are assigned to a social worker who will start the procedure with an initial assessment that will provide the child with certain rights and possibilities, including the following²⁰⁵:

- Possibilities for family reunification or return to country of origin
- Medical and educational assessments
- Psychological, trafficking and abuse assessments with intervention if necessary

Following this assessment, the social worker would work in tandem with the child to develop a care plan, making them feel empowered and giving them a chance to voice what *they* think is the best next step, which might include an immediate application for

²⁰² S.Arnold, M.N.Raghallaigh, 2017, p.5.

²⁰³ Asylum Information Database (AIDA), "Country Report: Ireland", 2020, p.57, https://asylumineurope.org/wp-content/uploads/2021/04/AIDA-IE_2020update.pdf (accessed on 12 August 2021)

²⁰⁴ TUSLA Child and Family Agency, "Separated Children Seeking International Protection, Services Provided", 2021, <https://www.tusla.ie/services/alternative-care/separated-children/> (accessed on 12 August 2021)

²⁰⁵ Ibid.

asylum.²⁰⁶ Children have a right to asylum within this process, but their best interest is thoroughly assessed by professionals who pay are instructed to be respectful and caring in the way they conduct themselves vis-à-vis their assigned children, to make sure that they create a safe environment for them.²⁰⁷ After the interview, children below the age of twelve are immediately placed in the care of foster families; those who are older may be placed in “residential intake units”²⁰⁸ for a short term. As for age assessments, this system tries to avoid unnecessary procedures to verify the children’s claims. Unless there are serious question marks, the child is given the benefit of the doubt. If procedures are needed, they are mainly conducted through a shared analysis of those people taking care of the children, and if a decision cannot be reached, the child is still given the benefit of the doubt. Furthermore, even though the final decision regarding age assessments fall under the jurisdiction of the Irish Department of Justice, the opinions of the responsible social workers are strongly taken into consideration. This could mean some people over the age of eighteen may find their way into the system, but the system and structure prioritises providing the needed support at best capacity.²⁰⁹

²⁰⁶ Louden Richason, “Social Work for separated children seeking asylum in the Republic of Ireland: setting the standard for the child-centred care and protection”, *Child Care in Practice*, 2017, p.402-412, <https://www.tandfonline.com/doi/full/10.1080/13575279.2017.1347143?scroll=top&needAccess=true> (accessed on 12 August 2021)

²⁰⁷ Ibid.

²⁰⁸ TUSLA Child and Family Agency, 2021.

²⁰⁹ Louden Richason, 2017, p.402-412.

7.2.3. *Immigration Detention in Ireland and the Detention of UMC*

There is a clear legal prohibition of detaining migrant children in Ireland, under two main legislations: Section 5 (4a) of the 1999 Immigration Act²¹⁰, and Section 20 (6) of the International Protection Act 2015, which instates a clear prohibition of detention of a “person who has not attained the age of 18 years.”²¹¹ This prohibition, it should be noted, only applies unless there are strong grounds to assume that a child is older than eighteen years, adulthood is confirmed through the age assessment procedure, or the child refuses to take part in an age assessment procedure. Nevertheless, given the above discussion concerning age-assessments, this does not present a threat to the well-being of UMC, and, in practice, UMC are not detained in Ireland.²¹² However, even though migrant children, including UMC, are protected from detention, immigration detention still has some issues in Ireland. In fact, if Ireland does detain immigrants, they are held in prisons, as there are no dedicated immigration detention centers. In its 2020 report to Ireland, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) raised concerns after its visit to Ireland about detaining migrants, who are not suspects of criminal offences, together with prisoners, noting the threat of possible abuse or bullying from other prisoners.²¹³

²¹⁰ Immigration Act, 1999, section 5 (4a), <http://www.irishstatutebook.ie/eli/1999/act/22/section/5/enacted/en/html#sec5> (accessed on 12 August 2021).

²¹¹ International Protection Act 2015, section 20 (6).

²¹² AIDA, 2020, p..87.

²¹³ Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Council of Europe, 2020,p.17, <https://rm.coe.int/1680a078cf> (accessed on 12 August 2021).

7.2.4. *The Protection framework of UMC concerning the problem of going missing:*

As seen in the background of the situation in Ireland, the care system provided before and after the mid 2000s made a difference in the numbers of UMC going missing. Therefore, the ameliorated care system introduced in Ireland brought proved to be preventive towards the problem if UMC going missing. Moreover, Ireland has established systems that both prevent and follow up on cases of UMC going missing:

- The Risk-Assessment initiative:

The Irish Police Force (An Garda Síochána) and the Health Service Executive in Ireland, signed a Joint Protocol in 2009 about missing children to set their specific respective roles in regards to children going missing from the care of State²¹⁴. It is through that protocol that the “Absence Management Plan” that a social worker is to follow in case a child goes missing. Another important Joint Protocol was signed between TUSLA and An Garda Síochána in 2015, that goes beyond the specific issue of children going missing, to cover issues of abuse, including “neglect, emotional abuse, physical abuse and sexual abuse”²¹⁵ That is the first important point that classifies as a preventive tool. Through that joint protocol, the person in charge from either of the parties- that signed the protocol- notifies the other party in case of danger of abuse.²¹⁶ The next step is shared work on the case, of a social worker who takes the role of preventing the reoccurrence of the abuse, and a Garda that investigates the abuse. Besides the fact that both those protocols are applicable for UMC in Ireland, the 2015 Protocol has a section for the “Protection of Children at Risk who Migrate to Ireland”²¹⁷

²¹⁴ E.Chaltogiannidou, 2018, p.69.

²¹⁵ E.Chaltogiannidou, 2018, p.70.

²¹⁶ Ibid.

²¹⁷ Joint Working Protocol for An Garda Síochána/ Tusla - Family and Child Agency Liaison, 2015, p. 29, https://www.tusla.ie/uploads/content/CF_Joint_Protocol.pdf (accessed on 12 August 2021)

that prioritises the cases of UMC and therefore upon arrival of a UMC the notification procedure of the protocol takes place and an protection action plan is built. ²¹⁸

7.3. Analysis:

When looking at both the cases of France and Ireland, firstly it is important to note that the objective is not to glorify a system in one country and slam the one in the other. There should be a clear distinction between how France has been affected by the refugee crisis and it is much more than what Ireland needed to manage, as a part of the inequal division of responsibility between European countries dealing with the crisis. As mentioned earlier Ireland did response to this issue by voluntarily taking in refugees, including UMC from France. With that clarified, this analysis will start by looking at the situation of each of the two countries in the context of the legal-psychological literature review set above.

France generally showcases national law that in some parts complies with the international-legal framework, for example with the right for UMC to apply for child-care with a law that protects them from being expelled from the country. Nevertheless, that is met with a legal shortcoming with the “non-territorial zones in France” where UMC can be detained by law, while their situations are assessed. As for the French legal framework when it comes to the issue of UMC going missing, until now there is no clear system in place to prevent protect and follow up on that issue, but that is rarely the case in Europe overall. The practice and on the ground situation is what is worrying in France, as violations to many international and regional rights of UMC are found, and the general treatment of UMC definitely doesn’t seem to be based on the rule of the best interest and care of the child.

²¹⁸ E.Chaltogiannidou, 2018, p.71.

In the case of Ireland, there are definitely issues present around the topic of immigration detention, but they do not concern UMC directly. Irish law that prohibits the detention of UMC is certainly a very important element that puts Irish law in close compliance with human rights principles. Nevertheless, that same national law provides exceptions to that same prohibition, giving certain grounds for detaining UMC. Still, the actual detention is never taking place. That shows that the legal aspect alone is not enough to create and maintain a safe environment for UMC. In Ireland it is a general undertone that accompanies all decisions and practical actions concerning UMC, it is a genuine prioritization of the best interest of UMC and their human rights. That is reflected through the system in place in Ireland for children who are at risk of or who are missing, that explicitly includes UMC, and that definitely proves to be effective.

8. Thesis conclusion:

The aim of this thesis led by its research questions, was never to highlight the issues at hand in the purpose of shaming or holding states accountable. The main purpose has been to understand the current issues of detention and disappearance thoroughly, by looking at them from different perspectives, and observing their realities through the cases of two European countries, with a final goal of finding out if and how those issues are related. The motive for the thesis, has been a hope that there are realistic efficient ways to give unaccompanied migrant children the care and protection they deserve and are entitled to in Europe, all while maintaining an efficient system of immigration that are essential in European countries.

8.1. Findings and answers to the research questions:

8.1.1. Findings:

-Definitions: Regarding definitions of essential terms and concepts, there is a lack of agreed upon definitions on the regional and international level, for example concerning a definition of migrants, or of a missing person or of the best interest of the child and so on. The importance of definitions is within the jurisdictions that accompany them, such as all the protection people are entitled to when their status is assessed as *refugees*.

It is recommended that at least within regional framework of the EU or the Council of Europe, definitions of essential terms are introduced for better protection of UMC and easier management of immigration. As an example, an introduction of a unified definition of an Unaccompanied Migrant Child and the special treatment they are entitled to in Europe.

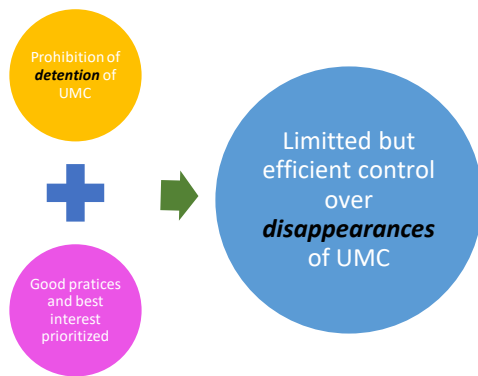
-Through the legal perspective, there is a well-established clear stand against the detention of unaccompanied migrant children universally and in Europe, stating many times that it is not in the best interest of the child. Furthermore, immigration detention itself is often provided for as a last resort and not a norm. What is missing though is a legally binding prohibition of the detention of UMC that doesn't leave too much room for deviation from such a prohibition, in other words that gives very limited to no

grounds for the use of immigration detention. Additionally, there is not enough legal content directly addressing the issue of UMC going missing. Although the legal system touches upon the dangers UMC face when they go missing, there is no clear provisions as to how states should act to prevent and protect and follow up on UMC going missing.

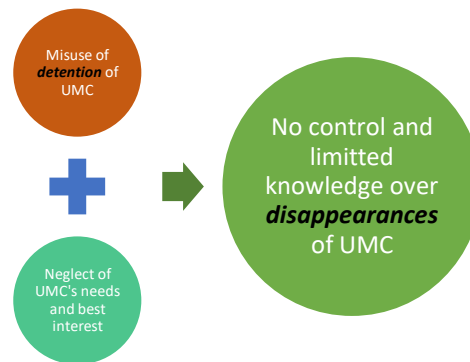
-The psychological perspective offers a thorough observation of what UMC go through under different circumstances in their migration journeys, including detention and its effect on mental health. Moreover, mental health issues such as anxiety, PTSD and Trauma that were caused by the situation UMC would be in their country of origin such as war and conflict were also found in UMC during and after their detention. It is deeply worrying that UMC come to Europe seeking protection and care, and they are then placed in detention, that causes the same mental health effects they escaped in the first place. Another important focus on the psychological part was that of the trust. Much more importance should be given to building trust with UMC at their arrival as it can actually save UMC from going missing.

-The analysis chapter shows that there is a negative link between the detention of UMC and their disappearance in Ireland, in the sense that the non-use of detention as an immigration policy tool towards UMC belongs to the same system that uses preventive and management tools that control the disappearances of UMC. While in France, the misuse of detention as an immigration management tool towards UMC is associated with the same system that has no control, surveillance or preventive over the issue of UMC going missing. Additionally, the legal aspect is not enough to form a system that is compliant with the international and European human rights principles, an integrated child-friendly attitude is just as essential if not more. Figure 1 presents a clearer picture of that conclusion.

Figure 1



Case of Ireland.



Case of France.

8.1.2. Research questions:

Research questions: *Is there a link between unaccompanied migrant children being detained in Europe and them disappearing? And if so, is this link an entry point to a constructive solution where both those issues can be reduced?*

This research has not found an independent direct link of cause and effect between the detention of UMC and their disappearance. Nevertheless, it has found a link between the two issues when other factors are also a part of the system.

In other words, the prohibition of detention alone is not enough to affect the issue of UMC disappearing. Nevertheless, a human rights-based system that includes the prohibition of detention does place effect on the issue of disappearances.

The link can be an entry point to a constructive solution where both issues are reduced in the following manner: When the system is based on human rights principles and the prioritization of the best interest of the child, it's reflected, first legally, by a prohibition of detention of UMC, amongst other legal reforms. Second in practice, it's reflected through work between different actors from different disciplines (i.e. law enforcement,

social worker etc.) that includes the opinion of the child and that results in more control the disappearance of UMC.

8.2. Recommendations:

The main recommendations that can come out of this thesis are the following:

-States are recommended to include children more actively and allow them to express their opinions and participate in formulating policies and opinions. Children have the right, in accordance with international law as seen in chapter 5, to express their opinion and ideas. Furthermore, as seen in the example of the Irish legal system, the inclusion of children in assessing their care plan can be very helpful not only in making sure that the best interest of the child is built upon their own input, but it also empowers the children, gives them the chance to build back their self-esteem that they are prone to lose through their journeys as seen in the psychological chapter and gives them the possibility to build trust, which is, as seen in the psychological chapter, essential to avoid the disappearance of those children.

-States are recommended to work in better coordination amongst each other since a lot of the issues related to migration in Europe that were touched upon in this thesis, including the unfair distribution of responsibility amongst states, the missing systems to prevent UMC from going missing and to help the ones who are missing, would work much better through coordination.

-States and rightful authorities are recommended to make human rights-based use of new tools such as technologies. In other words, to use new technologies to track missing

UMC and explore crimes of child trafficking, instead of introducing technology in a way that could harm UMC such as the use of the new biometric systems in France²¹⁹.

-States are recommended to stop politicizing the issue of migration and using the lives of vulnerable human beings for alter motives.

-States are recommended to introduce very thorough human rights training to all personnel working with UMC, especially border police who are mostly the first representatives of the states that UMC encounter at borders. Additional training on how to deal with UMC, especially from a psychological point of view is also recommended.

²¹⁹ Chapter 7.

9. **Bibliography**

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ABSTRACT GERMAN:

Diese Arbeit ist eine Literaturstudie zu zwei wichtigen Themen, welche unbegleitete Migrantenkinder bei ihrer Ankunft, während ihrer Reise und ihres Aufenthalts in Europa betreffen: die Inhaftierung von Kindern bei der Einwanderung und das Risiko des Verschwindens.

Das Ziel der Arbeit ist es beide Themen aus verschiedenen Perspektiven und auf regionaler europäischer Ebene zu untersuchen. Weiter sollen die rechtlichen und psychologischen Rahmenbedingungen erörtert, und ein möglicher Zusammenhang zwischen beiden Themen untersucht werden. Beiden Themen - Abschiebehäft und das Verschwinden von unbegleiteten Migrantenkindern - fehlt es an quantitativer und qualitativer Forschung in Europa, weshalb mögliche Verbindungen zwischen beiden nur sehr selten gezogen werden. Diese Arbeit untersucht daher beide Themen einerseits getrennt voneinander, sowie in Bezug zueinander.

Durch eine vergleichende Analyse der beiden Themen in Frankreich und Irland soll in dieser Arbeit ein möglicher Zusammenhang wissenschaftlich untersucht werden. Sie kommt zu dem Ergebnis, dass das viel umfassendere irische Betreuungssystem in der Tat zu deutlich positiveren Ergebnissen führt, so dass weniger unbegleitete Migrantenkinder verschwinden.

ABSTRACT ENGLISH:

This thesis conducts a literature study on two major issues concerning unaccompanied migrant children upon their arrivals, throughout their journeys and stays in Europe – immigration detention of children, and the risk of going missing. The aim of the thesis is both to study these issues from different perspectives, on a regional European level, including insight into the legal and psychological frameworks at play, and to examine a possible link between both issues. Both issues – immigration detention and the disappearances of unaccompanied migrant children – lack quantitative and qualitative research in Europe, and possible links between both are drawn even more scarcely. This thesis therefore examines both issues, separately, and in relation to each other. Through a comparative analysis of both issues in France and Ireland, this thesis aims to examine scientifically a possible link and finds that Ireland's much more thorough care system does indeed produce significantly more positive results, leading to fewer unaccompanied migrant children disappearing.

