

European Union: Status of Unaccompanied Children Arriving at the EU Borders

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SUMMARY At the core of the Common European Asylum System established by the European Union (EU) is the right to asylum and the prohibition of *refoulement*, as guaranteed by the Charter of Fundamental Rights and the 1951 Geneva Convention Relating to the Status of Refugees and its 1967 Protocol. Both instruments bind EU Member States, which must also comply with the case law of the European Court of Human Rights (ECHR). The ECHR has rendered a number of judgments dealing *inter alia* with detention, status of reception facilities, and lack of legal remedies.

EU Members are required to handle requests submitted by unaccompanied minors in conformity with the principle of the best interests of the child, enshrined in EU asylum legislation and in the Convention on the Rights of the Child, which has been ratified by all EU Member States. Returning an unaccompanied minor to his country of origin where he may face persecution may also give rise to a violation of certain articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms that guarantee the right to life and prohibit exposing an individual to ill treatment or torture by returning that individual to his country of origin.

EU asylum law applies to unaccompanied children from the time they arrive at the EU borders. At that point, minors must be able to apply for international protection. Minors have the right of representation. In limited cases, EU Members may process applications submitted by minors through accelerated border procedures aimed at speedier return of minors to their home countries. These procedures are applied when the minor comes from a safe country of origin, has given false documents, or may be considered a threat to a Member State. However, accelerated procedures do not apply when the minor has been subjected to psychological or sexual abuse, or other forms of violence.

Minors are entitled to remain in the territory of the host state until a final decision is made on their status. Reception centers for minors must be suitable to their needs and be separate from adults. The detention of a minor is allowed only as a last resort. Those who qualify for refugee status are given refugee status, provided that they meet the criteria of the EU asylum legislation. Minors who do not otherwise qualify for refugee status may be granted subsidiary status if they face a real risk of suffering serious harm upon return to their country of origin. A residence permit and travel documents are given to minors who are recognized refugees or accorded subsidiary protection. They also have access to education, health care, and medical care. Unaccompanied minors who are recognized as refugees by national authorities have the right to bring their family members into the host country.

EU asylum law also allows for temporary protection of asylum seekers in the case of a large influx of displaced persons who flee their countries due to armed conflict or endemic violence.

Minors must be given the right to appeal a negative decision on an application for international protection. The return and reintegration of unaccompanied minors to their country of origin may take place provided that it is in the child's best interests. EU Members must ensure that a minor is returned to his family, a guardian, or reception facilities. A number of readmission agreements have also been concluded between the EU and/or Member States and third countries.

The United Kingdom, Ireland, and Denmark have opted out of most of the EU asylum legislation.

I. Introduction

The European Union (EU) is an area of open internal borders, with free movement of persons between the twenty-eight EU Member States and a common set of rules applying to persons at crossing points of the external borders of the EU.¹ A number of factors, including an increased influx of migrants arriving at the borders, harsh conditions in reception facilities in some EU countries, a lack of uniform standards for assessing asylum applications, and vague rules as to which EU Member is responsible for handling asylum applications, have prompted the European Commission to improve the legal regime on asylum with the reform in 2008 of a Common European Asylum System (CEAS) that initially began in 1999. The CEAS guarantees a set of common standards and requires stronger cooperation by EU Members to ensure that asylum seekers are treated fairly and equally wherever they apply. The system is still in the early stages of development and implementation because certain EU directives require phased implementation by Member States, with the earlier implementation of CEAS by mid-2015. EU Members are allowed to adopt or retain more favorable standards as to who qualifies as a person in need of international protection and on reception conditions than those established by the asylum legal regime, as long as such rules and standards are compatible with EU rules.

In addition to the EU rules and case law of the Court of Justice of the European Union, the EU Members, being members of the Council of Europe, are also bound by Council of Europe treaties, the case law of the European Court of Human Rights (ECHR), and other ratified international agreement that may apply, such as the Convention on the Rights of the Child in case of minors.

¹ The United Kingdom, Ireland, and Denmark have opted out of almost all EU instruments on asylum and immigration. Denmark participates in the Schengen Agreement; however, it has the right to decide within six months of a proposal that constitutes a development of the Schengen *acquis* (Schengen existing legislation) whether it will implement the new measure into national law. Protocol No. 22 on the Position of Denmark art. 4, attached to the Treaty on the Functioning of the European Union, Consolidated Version of the Treaty on the Functioning of the European Union, 2012 O.J. (C 326) 47, <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:12012E/TXT>. The Schengen area is composed of the twenty-eight EU Members, except Ireland and the United Kingdom. Bulgaria, Croatia, Romania, and Cyprus, although in the EU, are not yet full-fledged members of Schengen. In addition, four non-EU countries, Iceland, Liechtenstein, Norway, and Switzerland, participate in Schengen. *Schengen Area*, EUROPEAN COMMISSION, HOME AFFAIRS, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/index_en.htm (last updated Apr. 29, 2014).

The CEAS is based on the Geneva Convention Relating to the Status of Refugees of 1951, as amended by the New York Protocol of January 1967 Relating to the Status of Refugees.² The CEAS affirms the principle of *non-refoulement*, enshrined in article 33 of the Geneva Convention, under which states are prohibited from returning refugees or asylum seekers back to countries where they face persecution due to race, religion, nationality, membership in a particular social group, or political opinion.³

Article 18 of the Charter of Fundamental Rights of the European Union guarantees a right to asylum based on the Geneva Convention, and article 19 contains a ban on returning a person to a country where he/she has a well-founded fear of being persecuted or faces a real risk of being tortured or subjected to inhuman or degrading treatment.⁴

The EU agency Frontex was created in 2004 to support the EU members in managing their external borders, for which they are primarily responsible.⁵ Frontex also cooperates with the EU Members in joint operations at land, air, and sea borders. The EU also assists the EU Members in handling asylum requests through the European Refugee Fund⁶ and the European Asylum Support Office.⁷

II. Unaccompanied Minors

Under EU asylum legislation, an “unaccompanied minor” is a third-country national or a stateless person under eighteen years of age,

who arrives on the territory of the Member State unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a

² Geneva Convention Related to the Status of Refugees, No. 2545, July 28, 1951, 189 U.N.T.S. 137, 150, https://treaties.un.org/pages/ViewDetailsII.aspx?&src=TREATY&mtdsg_no=V~2&chapter=5&Temp=mtdsg2&lang=en; Protocol Relating to the Status of Refugees, New York, Jan. 31, 1967, 606 U.N.T.S. 267, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&lang=en.

³ The *non-refoulement* principle is incorporated into EU primary law in article 78, which provides for a Common European Asylum System of the Treaty on the Functioning of the European Union. Consolidated Version of the Treaty on the Functioning of the European Union [TFEU], art. 78, 2012 O.J. (C 326) 1, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT>.

⁴ Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326) 391, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN>.

⁵ Council Regulation (EC) No. 2007/2004 of 26 October 2004 Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 2004 O.J. (L 349) 1, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32004R2007>, as amended by Regulation (EU) No. 1168/2011 of the European Parliament and of the Council of 25 October 2011 Amending Council Regulation (EC) No. 2007/2004, 2011 O.J. (L 304) 1, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32011R1168>.

⁶ Decision No. 573/2007/EC of the European Parliament and of the Council of 23 May 2007 Establishing the European Refugee Fund for the Period 2008 to 2013 as Part of the General Programme ‘Solidarity and Management of Migration Flows’ and Repealing Council Decision 2004/904/EC, 2007 O.J. (L 144) 1, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007D0573&rid=4>.

⁷ Press Release, European Commission, Memo/11/415, Frequently Asked Questions: The European Asylum Support Office (EASO) (June 17, 2011), http://europa.eu/rapid/press-release_MEMO-11-415_en.htm?locale=fr.

minor who is left unaccompanied after he or she has entered the territory of the Member States.⁸

The EU asylum legal regime views unaccompanied minors as a particularly vulnerable group of asylum seekers. EU Members, in applying EU law, must take into consideration the best interests of children, in accordance with the Charter of Fundamental Rights of the European Union⁹ and the 1989 United Nations Convention on the Rights of the Child.¹⁰ The same principle is also reaffirmed in all legal instruments dealing with asylum.

EU Members are required to annually collect data for those minors who apply for asylum.¹¹ In 2013, approximately 12,690 unaccompanied minors entered the EU without authorization and submitted asylum applications.¹² This reflects an increase over 2008, when, according to the European Migration Network, 11,292 minors applied for asylum in twenty-two EU Member States.¹³ At that time, the majority of asylum seekers came from Afghanistan, Iraq, and some African states.¹⁴

On June 26, 2014, due to a large influx of unaccompanied minors attempting to enter the EU without authorization, the European Commission adopted a proposal to again amend EC Regulation No. 343/2003, the Dublin Regulation,¹⁵ which had recently been revised in 2013.¹⁶

⁸ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (recast), art. 2(l), 2011 O.J. (L 337) 9, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:337:0009:0026:EN:PDF>.

⁹ Charter of Fundamental Rights of the European Union, *supra* note 4, art. 24(2).

¹⁰ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, http://www.ohchr.org/en/professional_interest/pages/crc.aspx.

¹¹ Regulation (EC) No. 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community Statistics on Migration and International Protection and Repealing Council Regulation (EEC) No. 311/76 on the Compilation of Statistics on Foreign Workers, art. 4, 2007 (L 199) 23, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007R0862&qid=1407173432668&from=EN>.

¹² Press Release, European Commission, Clearer EU Rules for Unaccompanied Minors Seeking International Protection (June 26, 2014), http://europa.eu/rapid/press-release_IP-14-723_en.htm.

¹³ European Migration Network, *Policies on Reception, Return and Integration Arrangements for, and Numbers, of, Unaccompanied Minors – an EU Comparative Study* 8 (May 2010), http://emn.ie/files/p_20100716105712_unaccompanied%20minors%20synthesis%20report.pdf (most recent comprehensive data available).

¹⁴ *Id.* at 8.

¹⁵ Council Regulation (EC) No. 343/2003 of 18 February 2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National, 2003 O.J. (L 50) 1, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003R0343&from=EN>.

¹⁶ Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-country National or Stateless Person (recast), 2013 O.J. (L 180) 31, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0031:0059:EN:PDF>.

The Dublin Regulation establishes which EU Member Country is responsible for handling each asylum application, based on specified criteria. The new proposal has more explicit rules for child asylum applicants.¹⁷

A. Arrival at the Border: First-Instance Procedures

The EU territory can be accessed by air, land, or sea. EU law on asylum becomes applicable when an individual arrives at any of these borders, including territorial waters¹⁸ and transit zones.¹⁹

Unaccompanied children arriving at the border are subject to checks by border guards who are required to pay special attention to minors, whether accompanied or unaccompanied, and subject them to the same checks on entry and exit as adults.²⁰ Upon arrival at the border, minors must have access to asylum procedures and EU Members are required to make it possible for them to apply for international protection, either on their own if they have the legal capacity to do so pursuant to national law, or through a representative. Authorities designated by the EU Members have the right to file an application on behalf of an unaccompanied minor if, based on an

¹⁷ *Proposal for a Regulation of the European Parliament and of the Council Amending Regulation (EU) No. 604/2013 as regards Determining the Member State Responsible for Examining the Application for International Protection of Unaccompanied Minors with No Family Member, Sibling or Relative Legally Present in the Member State*, COM (2014) 382 final (June 26, 2014), http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/asylum/examination-of-applicants/docs/commission_proposal_to_amend_the_dublin_regulation_en.pdf.

¹⁸ This report does not address the issues arising from sea and rescue operations or push-back operations, which involve individuals in boats seeking to enter the territorial waters of the EU Members. The maritime national authorities often engage in rescue operations for vessels in distress or push them back in other countries. In addition to international law of the sea agreements applicable in such cases, the EU members are also bound by the *non-refoulement* principle in rescue operations. The European Court of Human Rights (ECHR) has held that individuals in boats may fall within the jurisdiction of a Member State of the Council of Europe, when that Member State exercises control over them on the high seas. A case on point is *Hirsi Jamaa and Others v. Italy*, in which the Italian Coast Guard intercepted a boat with two hundred people on the high seas, but within Malta's search and rescue area. Based on a bilateral agreement between Italy and Libya the migrants were returned to Libya without having an opportunity to apply for asylum. The Court found against Italy for returning them to Libya and exposing them to ill and degrading treatment in Libya. In addition Libya did not provide adequate guarantees that these people would not be sent back to their countries of origin in Somalia and Eritrea. The ECHR reaffirmed that the fact that the applicants did not ask for asylum or mention the dangers they faced in Libya due to the lack of an asylum process did not free Italy from its obligations under article 3 of the European Convention on Human Rights and Fundamental Freedoms. EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, HANDBOOK ON EUROPEAN LAW RELATING TO ASYLUM, BORDERS AND IMMIGRATION 38 (2014), http://fra.europa.eu/sites/default/files/handbook-law-asylum-migration-borders-2nded_en.pdf. See also EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, FUNDAMENTAL RIGHTS AT EUROPE'S SOUTHERN SEA BORDERS § 2.2 (2013), http://fra.europa.eu/sites/default/files/fundamental-rights-europes-southern-sea-borders-jul-13_en.pdf.

¹⁹ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (recast) art. 3, para. 1, 2013 O.J. (L 180) 60, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0032&rid=1>.

²⁰ Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006, Establishing a Community Code on the Rules Governing the Movement of Persons Across Borders (Schengen Borders Code), Annex VII, art. 6, 2006 O.J. (L 105) 1, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:105:0001:0032:EN:PDF>.

assessment of his/her case, such authorities deem that the minor may qualify for international protection.²¹

EU Members may adopt domestic legislation instituting procedures on the admissibility of applications made at the border or in transit zones and/or the substance of such applications.²² However, in the case of applicants who are in need of special procedural guarantees, and hence in need of adequate support because they have been subjected to rape, torture, or other forms of psychological, physical, or sexual violence, EU Members are obliged not to use accelerated border procedures to handle their asylum requests, where it is difficult to provide needed support.²³ Nonetheless, EU Members may apply such accelerated border procedures aimed at speedier return of minors to their home countries to applications submitted by minors in certain cases, for instance when the minor comes from a safe country of origin, has given false documents, or may be considered a threat to a Member State.²⁴

When reaching the borders, the fingerprints of each unaccompanied minor are taken and stored in the fingerprint database established by the Eurodac Regulation.²⁵ EU members are required to take measures to ensure that an unaccompanied minor is informed that he/she will be represented in his/her language and assisted in order to ensure that the minor benefits from the rights accorded by Directive 2012/32/EU.²⁶ Pursuant to that Directive, if the minor is to be interviewed, the representative must be given the chance to explain to the minor any possible consequences of the interview, provide assistance to prepare the minor for the interview, and also be allowed to be present at the interview. National law determines when a minor must be given a personal interview.²⁷

Minors, upon request, may receive legal and procedural information free of charge during the first-instance procedures as well as on appeal. A minor has the right to remain in the Member State until the determining authority has made a decision at the first instance on whether he/she qualifies for international protection.²⁸

²¹ Directive 2013/32/EU, *supra* note 19, art. 7.

²² *Id.* art. 43, para. 1. Paragraph 29 of the preamble clarifies which applicants fall into the category of those who need international protection. It includes applicants who, due to their age, sexual orientation, disability, serious illness, or mental disorder, or because of torture, rape, or other serious forms of psychological, physical, or sexual violence, need international protection. EU Members must identify applicants falling into this group before a decision is made in the first instance. *Id.*, preamble, para. 29.

²³ *Id.* art. 24, para. 3, second indent.

²⁴ *Id.* art. 25, para. 6(b).

²⁵ Regulation No. 603/2013 of the European Parliament and of the Council of 26 June 2013 on the Establishment of 'Eurodac' for the Comparison of Fingerprints for the Effective Application of Regulation (EU) No. 604/2013, 2013 O.J. (L 180) 1, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0001:0030:EN:PDF>.

²⁶ Directive 2013/32/EU, *supra* note 19, art. 25, para. 1(a).

²⁷ *Id.* art. 14.

²⁸ *Id.* art. 9.

The examination procedure at the first instance must be concluded within six months of the filing of an application, but EU Members may extend the time limit to an additional period of nine months under certain circumstances, such as due to a large number of third-country nationals or stateless persons applying for international protection at the same time.²⁹

EU Members have discretion in handling applications involving unaccompanied minors. They may give priority to applications that are well-founded.³⁰ On the other hand, they may apply accelerated border procedures described in article 31(8) of Directive 2013/32/EC if the minor comes from a country that meets the criteria of being a safe country of origin or the applicant may, for serious reasons, be considered a threat to the national security or public order of the EU Member concerned.³¹ Pursuant to article 43 of Directive 2013/32/EC, accelerated border procedures may also apply if the minor has presented false documents and misled the authorities, or has destroyed in bad faith a travel or identity document.³²

B. Assessment of Applications for International Protection Submitted by Minors

The determining authorities, which can be quasi-judicial or administrative bodies depending on the individual Member States, are responsible for initially examining whether the applicant qualifies as a refugee, and if not, whether he/she qualifies for subsidiary protection.³³ The determining authorities must make such decisions after an appropriate examination has taken place. Such authorities must be given access to accurate and recent information as to the overall political and social conditions in the country of origin of applicants.³⁴

Applications for international protection are governed by Directive 2011/95/EU.³⁵ The determining authorities must assess whether the unaccompanied minor who applies for international protection is a refugee within the meaning of article 1(a) of the Geneva Convention or a person eligible for subsidiary protection.

The principle of *non-refoulement* is not absolute. Under certain circumstances, a person, whether formally recognized or not, may be removed from the EU territory, if he/she poses a threat to the security of an EU Member State, or if after the commission of a crime he/she is deemed a threat to the host country.³⁶

²⁹ *Id.* art. 31, para. 3(b).

³⁰ *Id.* art. 25(a) and (b).

³¹ *Id.* art. 25, para. 6(a)(i) & (iii).

³² *Id.* art. 25, para. 6(b).

³³ *Id.* art. 10.

³⁴ *Id.* art. 10, para. 3(b).

³⁵ Directive 2011/95/EU, *supra* note 8 (applicable as of Dec. 21, 2013).

³⁶ *Id.* arts. 17 & 21.

1. Refugee Status

To be granted refugee status, an unaccompanied minor must meet the following criteria:

- The minor must face a well-founded fear of persecution.
- The grounds for persecution must be related to the minor's race, religion, nationality, or membership in a particular social group.
- A causal link must exist between the well-founded fear of persecution on the grounds of one's race, religion, nationality, political opinion, or membership in a particular social group and the acts of persecution.³⁷
- The acts of persecution may take a variety of forms, such as physical or mental violence, including sexual violence, and in the case of a minor may also include acts of a gender-specific or child-specific nature.³⁸

2. Subsidiary Protection Status

In order to grant subsidiary protection status, there must be substantial grounds to believe that an unaccompanied minor who does not otherwise qualify for refugee status would face a real risk of suffering serious harm if returned to his/her country of origin. The qualification for subsidiary protection from a "real risk of suffering serious harm" includes the death penalty or execution, torture or other inhuman or degrading treatment or punishment, or a serious and individualized threat to the minor due to violence in the case of internal armed conflict.³⁹

The applicant must provide information pertaining to his/her age, background, country of origin, relatives, travel documents (if any), and reasons for applying for international protection.⁴⁰ Each application is examined individually.

Unaccompanied minors, after being granted refugee status or subsidiary protection, must be given information about their rights and obligations arising from obtaining a new status. They are assigned a legal guardian and those unaccompanied minors who receive refugee status are given a residence permit valid for three years, which can be renewed.⁴¹ Those accorded subsidiary protection receive a renewable residence permit valid for one year.⁴² Travel documents are also given to both groups. In addition, minors are given access to education under the same conditions as nationals and access to social welfare and health care.⁴³

³⁷ *Id.* art. 9, para. 3.

³⁸ *Id.* art. 9(a) & (c).

³⁹ *Id.* art. 15.

⁴⁰ *Id.* art. 4, para. 2.

⁴¹ *Id.* art. 24, para. 1.

⁴² *Id.* art. 24, para. 2.

⁴³ *Id.* arts. 25, 27, 29–30.

Minors who have been granted refugee status or subsidiary protection must be placed either with an adult relative, a foster family, or centers or other places specialized in accommodating minors.⁴⁴

The applicant has the right to appeal in court or before a tribunal a negative decision of the first instance.⁴⁵ If the negative decision is affirmed, the applicant may be returned to his/her country of origin.

C. Accommodations for Unaccompanied Minors

The basic principle underlying the accommodation of minors applying for international protection, as outlined in Directive 2013/33/EU, is that they should be placed in care and reception structures that are suited to their age and maturity, separate from adults. EU Members must also ensure that the reception conditions provide an adequate standard of living and provide the necessary health care, including emergency care. In addition to unaccompanied minors who deserve extra care, EU Members are required to pay particular attention to vulnerable groups, including victims of human trafficking and victims of physical or sexual violence, and assess whether such applicants have special reception needs.⁴⁶

The detention of a minor is allowed only as a last resort and for the least possible time until suitable accommodations are found. Unaccompanied minors can be placed under detention only in exceptional circumstances and they must never be placed in prison facilities. When unaccompanied children are detained they should be placed in facilities separate from adults.⁴⁷ Unaccompanied minors in reception centers must be represented to ensure that they benefit from the rights arising from Directive 2013/33/EU and comply with their obligations. Individuals working with minors in reception centers must have appropriate training to deal with issues concerning minors.⁴⁸

Unaccompanied minors who apply for international protection and are admitted to the territory of a Member State must be placed either with adult relatives (if they are present), in foster homes, or in accommodations centers suitable for minors.⁴⁹ EU Members are required to trace the families of minors with the assistance of international organizations soon after an application for international protection is made. However, if tracing parents could endanger the safety of parents who have remained in the country of origin, then EU Members must proceed to collect information on a confidential basis.⁵⁰

⁴⁴ *Id.* art. 31, para. 3.

⁴⁵ Directive 2013/32/EU, *supra* note 19, art. 46.

⁴⁶ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection (recast) arts. 21 & 22, 2013 O.J. (L 180) 96, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0096:0116:EN:PDF>.

⁴⁷ *Id.* art. 11, paras. 2 & 3.

⁴⁸ *Id.* art. 24, para. 4.

⁴⁹ *Id.* art. 23.

⁵⁰ *Id.* art. 24, para. 3.

D. Family Reunification

Unaccompanied minors who have been recognized as refugees have the right to bring their family members into the host country. Under Council Directive 2003/86/EC on the Right to Family Reunification,⁵¹ EU Members are required to allow the entry and residence of family members of the minor's first-degree relatives in the direct ascending line.⁵² They may also authorize the entry and residence of the minor's legal guardian or any other member of the family when the refugee minor has no relatives in the direct ascending line or when such relatives cannot be traced.⁵³ EU Members have the option of limiting this right to reunification to persons who were family members prior to the entry of the minor seeking asylum in the host country.⁵⁴

E. Temporary Protection in the Case of a Mass Influx of Displaced Persons

Council Directive 2001/55/EC establishes minimum standards for temporary protection to be applied in the case of a large influx of displaced persons from third countries who cannot return to their countries of origin.⁵⁵ The Directive is designed to come into play in grave situations of unrest in a particular country—for instance, when due to armed conflict or endemic violence people are at serious risk of, or have been the victims of, “systematic or generalised violations of their human rights.”⁵⁶

Immediate and temporary protection is given to avoid overburdening the asylum system of countries and to ensure the smooth operation of such systems during a crisis.⁵⁷ The duration of temporary protection is one year with the possibility of extending it to a maximum of one more year.⁵⁸ EU Members are required to provide medical and other support for people with special needs, such as minors or those who have been subjected to rape, torture, or other physical or psychological abuse.⁵⁹ Minors under the age of eighteen must also have access to the education system of the host country.⁶⁰ Persons under temporary protection must have access to apply for asylum at any time.⁶¹ After temporary protection has ended, the national laws on aliens of the

⁵¹ Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification, 2003 O.J. (L 251) 12, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:251:0012:0018:en:PDF>.

⁵² *Id.* art. 10, para. 3(a).

⁵³ *Id.* art. 10, para. 3(b).

⁵⁴ *Id.* art. 9, para. 2.

⁵⁵ Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof, 2001 O.J. (L 212) 12, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001L0055&from=en>.

⁵⁶ *Id.* art. 2(c).

⁵⁷ *Id.* art. 2(a).

⁵⁸ *Id.* art. 4(1).

⁵⁹ *Id.* art. 13(4).

⁶⁰ *Id.* art. 14(1).

⁶¹ *Id.* art. 17(1).

EU Members becomes applicable.⁶² The individual EU Members are responsible for taking measures to ensure the voluntary return of persons.⁶³

III. Procedural Aspects

Under current rules, a minor who applies for international protection in the territory of an EU Member State has his/her application reviewed by the authorities of the Member State in which he/she is located and must remain in the same Member State until the asylum process concludes. Exceptions are permitted when such an arrangement is not in the best interests of the child.⁶⁴

As noted in Part II, above, the European Commission adopted a proposal on June 26, 2014, to amend EC Regulation No. 343/2003, the Dublin Regulation, which establishes that only one EU Member is responsible for handling each asylum application. It also lays down the criteria and ways to determine which Member State of the European Union is responsible for reviewing an application for international protection.⁶⁵ The criteria that are to be applied, in a hierarchical order, are (a) the existence of a family in a Member State; (b) having a visa or residence permit in a Member State; and (c) entry into a Member State, whether illegally or not.⁶⁶ They are designed to prevent the circumstance of one individual abusing the system by filing applications in more than one Member State, and to avoid having people sent from one Member State to another by national authorities.⁶⁷ The Dublin Regulation was recently revised in 2013.⁶⁸ The new 2014 proposal has more explicit rules for child asylum applicants.

The Commission was prompted to amend the rules of the 2013 Dublin Regulation due to a large influx of unaccompanied children entering the EU. In addition, the Commission complied with the 2013 decision of the European Court of Justice, in which it held that the Member State responsible for reviewing an asylum applications filed in more than one Member State by an unaccompanied minor is the State where the minor is located and has filed an application. For this to apply, there must be no member of the minor's family legally present in another Member State.⁶⁹

⁶² *Id.* art. 20.

⁶³ *Id.* art. 21(1).

⁶⁴ See Press Release, European Commission, *supra* note 12.

⁶⁵ Council Regulation (EC) No. 343/2003 of 18 February 2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National, 2003 O.J. (L 50) 1, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:050:0001:0010:EN:PDF>.

⁶⁶ Press Release, European Commission, Clearer Rules, *supra* note 12.

⁶⁷ COM (2014) 382 final, *supra* note 17.

⁶⁸ Regulation (EU) No. 604/2013, *supra* note 16.

⁶⁹ Press Release No. 71/13, Court of Justice of the European Union, Case C-648/11 MA, BT, DA v. Secretary of State for the Home Department (June 6, 2013), <http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-06/cp130071en.pdf>.

The proposal's more explicit rules, as far as minors are concerned, provide that

- when a minor has applied for international protection in several EU Member States, including in the Member State where the minor currently resides, then that Member State will be responsible for handling the application;
- when a minor is present in a Member State but has not filed an application for protection there, then that Member State must give the minor the chance to apply there;
- if a minor decides to apply, then the minor must remain within the Member State responsible for reviewing the case; and
- if the minor decides not to file an application in the Member State where he/she is located, the Member State in which the minor has recently applied for asylum is responsible for handling the case, unless this is not in the best interests of the child.⁷⁰

IV. Return of Unaccompanied Minors

A. Directive 2008/115/EC on Returns

The return of unaccompanied minors to their country of origin is governed by Directive 2008/115/EC, which established common procedures and standards to be applied when returning third-country nationals who have stayed in an EU Member Country illegally.⁷¹

EU Members implementing this Directive must take due account of the best interests of the child, family life, the individual's health condition, and the *non-refoulement* principle.⁷² The Directive provides that prior to issuing a return decision for an unaccompanied minor, assistance must be provided by appropriate bodies other than those in charge of enforcing a return. The principle of the best interests of the child must be taken into account. Another significant guarantee designed to ensure the safe return of a child to his/her country is that national authorities must be certain that the child will return to a family, guardian, or adequate reception facilities in the country of origin.⁷³ The Directive also requires EU Members to adopt legislation to provide the right to appeal a decision to be returned.⁷⁴

As noted above, EU Members may detain minors, including those awaiting removal, only as a measure of last resort and only for the least amount of time. Minors should be accommodated in appropriate facilities and have access to fun activities and to education, based on their detention time.⁷⁵

⁷⁰ *Id.*

⁷¹ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals, 2008 O.J. (L 348) 98, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0098:0107:EN:PDF>.

⁷² *Id.* art. 5.

⁷³ *Id.* art. 10, paras. 1 & 2.

⁷⁴ *Id.* art. 13, para. 1.

⁷⁵ *Id.* art. 17.

Third-country nationals, including minors, can either return voluntarily or be forcibly removed. The forced return of minors is envisioned in the Directive, but in practice, some countries abstain from doing so, such as Estonia, Latvia, and Malta. In Belgium removals of minors intercepted at the border, mainly at the Brussels airport, are possible but rare. Of the thirty-five unaccompanied minors intercepted in Belgium in 2008, only two were returned.⁷⁶

B. Readmission Agreements

There are a number of readmission agreements between the Member States and the EU that become operational when a return decision has been issued by national authorities.⁷⁷ These agreements set forth the reciprocal obligations of the parties involved to take back their own nationals or third-country nationals who transit through their respective territories.⁷⁸ In general, readmission agreements do not include specific provisions on minors, but a few do, including the agreements between Spain and Morocco and Spain and Senegal. In addition, Greece has ratified a bilateral agreement with Albania for the protection of minors in the case of trafficking that also includes obligations to ensure that minors are returned to Albania in a safe manner in compliance with the best interests of the child.⁷⁹

V. Policy Considerations

The European Commission's Action Plan on Unaccompanied Minors (2010–2014)⁸⁰ identified several challenges arising from the influx of minors at its borders, including a lack of comparable data, assessment of the age of minors, disappearance of minors from reception facilities, and tracing a minor's family in his/her country of origin. The Commission acknowledged that action was critical, particularly in the areas of prevention, reception, and the return to and reintegration of minors in their country of origin, in order to provide a comprehensive response to unaccompanied minors arriving at its borders.⁸¹ The Commission took the view that prevention is the first step to address this issue effectively, with a focus on differentiating between those seeking asylum from those entering the EU illegally to find work, and identifying victims of trafficking.⁸²

In an effort to eradicate the root causes of migration of minors and to also create an environment in the country of origin that encourages them to stay and not seek refuge in other countries, the

⁷⁶ European Migration Network, *supra* note 13, at 114.

⁷⁷ *Return and Readmission, Common Rules for Managing the Return of Irregular Migrants*, EUROPEAN COMMISSION, HOME AFFAIRS, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/immigration/return-readmission/index_en.htm (last updated Aug. 13, 2013).

⁷⁸ *Id.*

⁷⁹ European Migration Network, *supra* note 13, at 26.

⁸⁰ *Communication from the Commission to the European Parliament and the Council, Action Plan on Unaccompanied Minors (2010–2014)*, COM (2010) 213 final (June 5, 2010), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0213:FIN:EN:PDF>.

⁸¹ *Id.*

⁸² *Id.* at 6.

Commission urged the EU Members to include the migration of unaccompanied minors in development cooperation programs to reduce poverty, and to boost education, labor standards, and democratic institutions in the countries of origin. The Commission also recognized the importance of involving the countries of origin and transit in tackling this issue, and suggested that the media can play a critical role in the countries of origin by dispelling myths about life in Europe.⁸³

In order to assist the countries of origin, the Commission recommended that various programs be incorporated into the EU external cooperation instruments, such as the European Development Fund and the Thematic Programme for Cooperation with Third Countries in the Areas of Migration and Asylum.⁸⁴ It also recommended that the EU and its Member States include child protection issues in dialogues with third countries, and assess the option of concluding agreements with third countries that deal with unaccompanied minors and foster cooperation on prevention, family tracing, return, and reintegration.⁸⁵ In addition, the Commission recommended that EU Members and the EU should continue assisting third countries to develop legislation and administrative measures that will assist in identifying minors who may want to flee their countries or those who are victims of human trafficking.⁸⁶

With respect to reception measures and procedural guarantees, the Commission emphasized that these should apply when a minor is found at the external borders of the EU, until the minor is granted asylum or is returned to his/her country of origin. The Commission recommended that minors should be kept separate from adults to ensure that they do not become prey to human traffickers.⁸⁷

VI. Financial Instruments

A number of EU financial programs provide assistance to EU Members in dealing with asylum procedures and the reintegration or return of minors to their country of origin:

- The Framework Programme on Solidarity and Management of Migration Flows provided for the allocation of €5.866 million (about US\$7.594 million) for the period 2007–2013. From these funds, €1.184 million was foreseen for asylum, €759 million for the Return Fund, €1.771 million for integration of third-country nationals, and €2.152 million for external border management.⁸⁸

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 7.

⁸⁶ *Id.* at 8.

⁸⁷ *Id.* at 8.

⁸⁸ *Communication from the Commission to the Council and the European Parliament Establishing a Framework Programme on Solidarity and Management of Migration Flows for the Period 2007-2013*, COM (2005) 123 final, at 11, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0123&rid=1>.

- Under the European Refugee Fund, EU Members received a fixed amount of €300,000 (about US\$388,239) from the Fund's annual allocation for the period 2008–2013 for activities that qualify to receive assistance; for Member States that joined the EU in 2004, the amount was raised to €500,000. The remainder is divided between the Member States depending on the number of persons who applied for international protection in the preceding three years.⁸⁹ In addition, they received an amount of €4,000 for each refugee, including unaccompanied minors.⁹⁰
- The European Fund for the Integration of Third-Country Nationals provides for the integration of minors who reside legally in the EU.⁹¹
- The EU provides assistance to the EU Members to return illegal migrants to their country of origin through the European Return Fund (ERF). During the period of 2008–2013, the ERF provided more than €600 million (about US\$802 million). The ERF covers specific expenditures connected with the return of unaccompanied minors, such as the cost of travel and food for returnees, information on return, family reunification in the country of origin, and other matters. The ERF can also be used to implement the Returns Directive.⁹²

The assistance provided by the EU to littoral states, such as Greece, Italy and Malta, who receive the majority of illegal migrants due to their geographical proximity to the sea and the Dublin regulation, is minimal compared to the amount spent. For instance, in 2013, Greece spent €63 million (about US\$81,384,975) to prevent illegal migrants and only €3 million of that amount was provided by Frontex. Italy, which spends close to €9 million (about US\$12 million) monthly on its search-and-rescue operations, has repeatedly requested more funds, but to no avail.⁹³

VII. Court Cases

Even though there is no right to asylum as such under the European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention on Human Rights), which binds all EU Members, the European Court of Human Rights has dealt with a large number of cases involving asylum seekers whose human rights have been violated—for example, for maltreatment while being kept in detention centers or in reception facilities. The Court has also examined whether national authorities, by sending back individuals seeking asylum, put those asylum seekers at risk of being tortured or subjected to inhuman or degrading treatment or punishment, which is contrary to article 3 of the Convention on Human Rights. In such cases,

⁸⁹ Decision No. 573/2007/EC, *supra* note 6, art. 13, paras. 1–2.

⁹⁰ *Id.* art. 13, para. 3.

⁹¹ Council Decision 2007/435/EC of 25 June 2007 Establishing the European Fund for the Integration of Third-country Nationals for the Period 2007 to 2013 as Part of the General Programme 'Solidarity and Management of Migration Flows,' 2007 O.J. (L 168) 18, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007D0435&rid=2>. See also discussion of Returns Directive, *supra* Part IV(A).

⁹² European Migration Network, *supra* note 13, at 27.

⁹³ *Europe's Huddled Masses: Rich Countries Must Take on More of the Migration Burden*, THE ECONOMIST (Aug. 16, 2014), <http://www.economist.com/news/leaders/21612152-rich-countries-must-take-more-migration-burden-europes-huddled-masses>.

national authorities can be found guilty for violating the human rights of the asylum seekers. This particular issue was dealt with favorably for the asylum seekers in the case of *Hirsi Jamaa and Others v. Italy*, cited above, which involved collective expulsion from the high seas.⁹⁴

Another illustrative case, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, involved the two-month detention at a Brussels airport transit center intended for adults of a five-year-old traveling unaccompanied to join her mother, who had obtained refugee status in Canada. No one was assigned to represent or counsel the child. The ECHR found a violation of article 3, which prohibits inhuman and degrading treatment under the European Convention on Human Rights and Fundamental Freedoms. The Court took into account the fact that the child was in great distress because of her very tender age, that she was alone in a foreign land, and that the Belgian authorities ignored their obligation to take care of her, and determined that any measures taken by Belgian authorities were inadequate.⁹⁵

The case of *M.S.S. v. Belgium and Greece* involved living conditions in reception centers in Greece. An Afghan national entered the EU through Greece and then went to Belgium where he applied for asylum. On the basis of the Dublin Regulation he was sent back to Greece as the first country of entry into the EU, where he was kept in detention in a small room with twenty other detainees with limited access to restroom facilities. The Grand Chamber of the ECHR in 2011 found that Greece violated article 3 of the European Convention on Human Rights and also violated article 13 of the Convention on the right to an effective remedy because of the flaws of the asylum procedures in Greece. In addition it found that Belgium violated article 3 because the applicant's transfer to Greece exposed him to harsh living conditions and to risks associated with the asylum procedure in Greece.⁹⁶

The case of *Conka v. Belgium*⁹⁷ involved four applicants, a couple and their two minor children of Roma origin who had fled their country of origin, Slovakia, because of violence and threats directed at them by skinheads. The police in Slovakia refused to intervene. Their subsequent application for asylum in Belgium was declared inadmissible by the Minister of the Interior of Belgium for lack of sufficient evidence to qualify as refugees based on the Geneva Convention. The family was ordered to leave the country within five days. Before the ECHR, the applicants asserted a violation of Protocol 4, article 4, of the Convention on Human Rights, which prohibits the collective expulsion of aliens.⁹⁸ The ECHR reviewed the applicable domestic law, including

⁹⁴ HANDBOOK ON EUROPEAN LAW RELATING TO ASYLUM, BORDERS AND IMMIGRATION, *supra* note 18, at 38 (discussing *Hirsi Jamaa and Others v. Italy*, App. No. 27765/09 (ECHR Feb. 23, 2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109231>). See also case discussion, *supra* note 18.

⁹⁵ Case of *Mubilanzila Mayeka & Kaniki Mitunga v. Belgium*, App. No. 13178/03 (ECHR Oct. 12, 2006), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-77447>.

⁹⁶ Grand Chamber Decision, Case of *M.S.S. v. Belgium and Greece*, App. No. 30696/09 (ECHR Jan. 21, 2011), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103050>.

⁹⁷ Case of *Čonka v. Belgium*, App. No. 51564/99 (ECHR final judgment, May 5, 2002), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60026>.

⁹⁸ Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms Other Than Those Already Included in the Convention and in the First Protocol Thereto, as amended by Protocol No. 11, art. 4, <http://conventions.coe.int/Treaty/en/Treaties/Html/046.htm>.

a “Note providing general guidance on overall policy in immigration matters” approved by the Government in the aftermath of a large number of asylum seekers from Slovakia. The Note contained the following statement:

A plan for collective repatriation is currently under review, both to send a signal to the Slovakian authorities and to deport this large number of illegal immigrants whose presence can no longer be tolerated.⁹⁹

The ECHR reaffirmed the definition of collective expulsion as including any measure that orders aliens as a group to leave a country, with the exception of those cases where a measure is taken based on “reasonable and objective examination of the particular case of each individual alien of the group.”¹⁰⁰ The Court noted that authorities had announced that deportations would take place and had given instructions to that effect, that the orders to leave the country had similar language, and that the applicants were deprived of the opportunity to contact a lawyer.¹⁰¹ Based on these grounds, the ECHR found a violation of article 4, Protocol 4, which prohibits collective expulsions.¹⁰²

⁹⁹ *Id.* para. 31.

¹⁰⁰ *Id.* para. 59.

¹⁰¹ *Id.* art. 62.

¹⁰² *Id.* para. 63.