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Unaccompanied Asylum-Seeking Children and their  
Situation in the Context of the Best Interests of the  
Child in Italy, Austria, and Germany

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## Abstract

This thesis examines the situation of unaccompanied minors (UAM) in three European countries, Italy, Austria, and Germany, taking into account children's rights, especially the best interest of the child. With the influx of individuals seeking international protection in Europe, many children (those under 18), who are not in the company of their parents or legal guardian, are among them. Despite the ratification of the UN Convention on the Rights of the Child by these countries (Italy, Austria, and Germany) and the existence of regional and domestic laws aimed at safeguarding children's rights and the "best interests of the child," there are still shortcomings in their implementation. Enhancing the implementation becomes crucial when considering the reality of experiences encountered by UAM. As a result, unaccompanied minor children remain unprotected and deprived of a "normal" childhood. The differences between international protection statuses and the right to family reunification are in focus, especially since children need parental care. In some countries, such as Austria and Germany, beneficiaries of subsidiary protection have fewer possibilities to reunite with their families due to long waiting times.

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## Table of Abbreviations

AsylG	Asylgesetz
AufenthG	Aufenthaltsgesetz
CDU	Christian Democratic Union Party – Christlich Demokratische Union Deutschlands
CJEU	Court of Justice of the European Union
CRC	Convention on the Rights of the Child
CSU	Christian Social Union Party in Bavaria – Christlich-Soziale Union in Bayern
BAMF	Bundesamt für Migration und Flüchtlinge
EASO	European Asylum Support Office
ECHR	European Convention of Human Rights
ECJ	European Court of Justice
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
ELENA	European Legal Network on Asylum
EU	European Union
FPÖ	Freedom Party of Austria – Freiheitliche Partei Österreichs
FRA	European Union Agency for Fundamental Rights
FRD	Family Reunification Directive
GC	General Comment
ICCPR	International Covenant on Civil and Political Rights
IOM	International Organization for Migration
NGO	Non-governmental organization
QD	EU Qualification Directive 2011/95/EU
SGB	Sozialgesetzbuch
SPÖ	Social Democratic Party of Austria – Sozialdemokratische Partei Österreichs
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty on European Union
UAM	Unaccompanied Minors
UN	United Nations
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children’s Fund

WHO World Health Organization

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# 1. Introduction

## 1.1 Context and Relevance

The number of people seeking international protection has increased; in Europe, the peak was reached in 2015–2016 with the European migrant crisis, and although the influx has decreased again somewhat, the number increased again more significantly in 2022.<sup>1</sup> Among those protection-seeking people, are many children and adolescents, but not all of them are in the company of their parents, their legal guardians, or an equivalent. These children are away from their home country and fleeing war, violence, or persecution. They are a particularly vulnerable group because they are children and are affected by migration.<sup>2</sup> Children who enter a foreign country alone are called Unaccompanied Minors (UAM). They either left their home without their families or were separated on the journey. The Convention on the Rights of the Child (CRC)<sup>3</sup> defines these children in General Comment (GC) No. 6 (2005), which states, “Unaccompanied children (also called unaccompanied minors) are children, as defined in Art. 1 of the Convention, who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.”<sup>4</sup> As defined in Art. 1 of the CRC, children are “every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.”<sup>5</sup>

As previous research has shown, unaccompanied asylum-seeking children is not a new topic. Scholars and policymakers have reached a consensus that unaccompanied minor refugees are a vulnerable group that deserves close attention.<sup>6</sup> Nevertheless, there is much criticism of the implementation of UAM rights and these children’s realities. Non-governmental organizations

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<sup>1</sup> Eurostat, “Annual Asylum Statistics,” accessed June 4, 2023, <https://ec.europa.eu/eurostat/statistics-explained/index.php?oldid=558844>.

<sup>2</sup> Marta Tomasi, “The European Court of Human Rights and the Best Interests of Unaccompanied Migrant Minors: A Step Towards a More Substantive and Individualized Approach?,” *International law blog*, October 10, 2019, [https://internationallaw.blog/2019/10/10/the-european-court-of-human-rights-and-the-best-interests-of-unaccompanied-migrant-minors-a-step-towards-a-more-substantive-and-individualized-approach/#\\_ftn5](https://internationallaw.blog/2019/10/10/the-european-court-of-human-rights-and-the-best-interests-of-unaccompanied-migrant-minors-a-step-towards-a-more-substantive-and-individualized-approach/#_ftn5).

<sup>3</sup> Convention on the Rights of the Child 1989, (resolution 44/25), opened for signature 20 November 1989, entered into force 2 September 1990.

<sup>4</sup> Committee on the Rights of the Child, “GENERAL COMMENT NO. 6 (2005) - Treatment of Unaccompanied and Separated Children Outside Their Country of Origin CRC/GC/2005/6,” September 1, 2005, 5, <https://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf> para. 7.

<sup>5</sup> UN General Assembly, “Convention on the Rights of the Child,” (Treaty Series, vol. 1577, November 20, 1989)

<sup>6</sup> Margrite Kalverboer et al., “The Best Interests of the Child in Cases of Migration: Assessing and Determining the Best Interests of the Child in Migration Procedures,” *The International Journal of Children’s Rights* 25, no. 1 (June 20, 2017): 114–39, <https://doi.org/10.1163/15718182-02501005>; Anja Radjenovic, “Vulnerability of Unaccompanied and Separated Child Migrants” (European Parliament Research Service, April 2021), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690575/EPRS\\_BRI\(2021\)690575\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690575/EPRS_BRI(2021)690575_EN.pdf).

(NGOs) and intergovernmental organization documents, analyses, and reports show that there are challenges in the implementation of UAM rights. The literature also explores the issue including its psychological impact.<sup>7</sup> This thesis provides additional insight into the challenges. Due to increasing migration, more and more unaccompanied minor refugees are also coming to Europe, so the topic of this work is not of temporary importance. The thesis focuses on the situation of unaccompanied refugees in Europe, namely in Italy, Austria, and Germany. The motivation to write about this topic came from my own experience working with UAM in Austria and hearing and witnessing their stories and problems.

## 1.2 Background

In 2021, the United Nations (UN) estimated that, worldwide, 36.5 million (40–50%) of the forcibly displaced people were children.<sup>8</sup> At the end of 2022, a new high was reached with 43.3 million forcibly displaced children.<sup>9</sup> According to Eurostat, 1.9 million people received international protection in the European Union (EU) from 2015 to 2018.<sup>10</sup> As of 2022, there was a new peak of asylum applications since 2016, and circa 43,000 were unaccompanied children (the highest number since 2015).<sup>11</sup> The COVID-19 situation can be considered an explanation for fewer asylum seekers. Nevertheless, when examining the number of asylum applicants in 2022, there was not only an increase in comparison to the previous year but also a general increase in comparison to the three previous years.<sup>12</sup> (Another reason for a higher number of refugees in 2022 was also the refugee movement from Ukraine). In 2021, 70% of all children seeking international protection in Europe were registered in only four countries, including Germany (42% – 73,245 children asylum applications) and Austria (7% – 11,460 children asylum applications). Approximately 71% – 17,200 children who arrived in Europe were UAM

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<sup>7</sup> Annelen Höltermann et al., “Psychische Belastung bei unbegleiteten und begleiteten Flüchtlingen im Kindes- und Jugendalter in Deutschland,” *Zeitschrift für Kinder- und Jugendpsychiatrie und Psychotherapie* 50, no. 5 (September 2022): 369–81, <https://doi.org/10.1024/1422-4917/a000855>; Christina Kien et al., “Prevalence of Mental Disorders in Young Refugees and Asylum Seekers in European Countries: A Systematic Review,” *European Child & Adolescent Psychiatry* 28, no. 10 (October 2019): 1295–1310, <https://doi.org/10.1007/s00787-018-1215-z>.

<sup>8</sup> United Nations, “A Record 37 Million Children Displaced Worldwide: UNICEF,” UN News. Global perspective Human stories, June 17, 2022, <https://news.un.org/en/story/2022/06/1120642>.

<sup>9</sup> UNHCR, “Refugee Data Finder,” June 14, 2023, <https://www.unhcr.org/refugee-statistics/>.

<sup>10</sup> FRA European Union Agency for Fundamental Rights, *Integration of Young Refugees in the EU: Good Practices and Challenges* (Luxembourg: Publications Office of the European Union, 2019), 9.

<sup>11</sup> EUAA’s Situational Awareness Unit (SAU), “Latest Asylum Trends - Annual Overview 2022,” euaa European Union Agency for Asylum, accessed June 27, 2023, <https://euaa.europa.eu/latest-asylum-trends-annual-overview-2022>.

<sup>12</sup> European Commission, “Statistics on Migration to Europe,” May 2023, [https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life/statistics-migration-europe\\_en](https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life/statistics-migration-europe_en).

and most UAM applications were filed in Austria (5,600) and Germany (3,300). Overall, most of the children who arrived in Europe were boys. In 2021, 41% of asylum-seeking children were girls, but only 6% of UAM were girls (with the majority coming from Somalia).<sup>13</sup> In Europe, in 2021, there were the most asylum applications by UAM since 2017; although this is an increase, UAM remain 4% of all asylum seekers. Two thirds of UAM were 16 to 17 years old, and 9% were younger than 14.<sup>14</sup> Regarding the country of origin of asylum-seeking children, in 2021, most of them came from Afghanistan (54%) and the Syrian Arab Republic (19%), with the highest numbers from these countries since 2016, followed by Somalia, Pakistan, and Bangladesh.<sup>15</sup>

Different organizations have recognized various deficiencies in safeguarding the well-being of these children even if different laws intended to protect the UAM exist on international and regional levels.<sup>16</sup> However, there is no specific European legislation only for UAM, yet there are provisions on UAM in directives as in the Asylum Procedures Directive. This has caused the Member States to adopt national models, which differ from each other. For example, when it comes to the guardian for the UAM, in some countries, this is a voluntary job; in other countries, it is a public office; and in some, it does not exist.<sup>17</sup> Even if EU law provides guardianship arrangements for UAM, the reality often looks different. In a report from 2022, Director Michael O’Flaherty from the European Union Agency for Fundamental Rights (FRA) said that “EU and international standards guarantee unequivocal support for unaccompanied children. Yet, the gap between theory and practice leaves many of these vulnerable children without the guardian they need. EU countries should make guardianship systems more effective to ensure all children enjoy the support, services, and protection which they are entitled to.”<sup>18</sup> It is often apparent that asylum procedures are not designed for children. It could be said that they are primarily geared toward the interests of the state rather than those of children or even adults.

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<sup>13</sup> UNHCR, UNICEF and IOM, “Refugee and Migrant Children in Europe Accompanied, Unaccompanied and Separated,” July 21, 2022, 1-5; European Union Agency for Asylum, “5.6.1 Data on Unaccompanied Minors,” accessed May 31, 2023, <https://euaa.europa.eu/asylum-report-2022/561-data-unaccompanied-minors#>.

<sup>14</sup> European Union Agency for Asylum, “5.6.1 Data on Unaccompanied Minors.”

<sup>15</sup> UNHCR, UNICEF and IOM, “Refugee and Migrant Children in Europe Accompanied, Unaccompanied and Separated,” 5.

<sup>16</sup> Anja Radjenovic, “Vulnerability of Unaccompanied and Separated Child Migrants” 2.

<sup>17</sup> Osservatorio Minori Stranieri Non Accompagnati in Italia, “Terzo Rapporto OSSERVATORIO NAZIONALE SUI MINORI STRANIERI NON ACCOMPAGNATI IN ITALIA 2022” (Centro Studi di Politica Internazionale, 2022), 20.

<sup>18</sup> FRA European Union Agency for Fundamental Rights, “Effective Guardianship Is Key to Better Protect Unaccompanied Children,” February 15, 2022, <https://fra.europa.eu/en/news/2022/effective-guardianship-key-better-protect-unaccompanied-children>.

There are also different barriers in the process such as the admissibility procedure when there are problems because of factors such as irregular movement from a “first country of asylum” or the possibility of seeking protection in a “safe third country” through which they passed.<sup>19</sup>

After fleeing their home country and facing different obstacles during their journey, they have the desire for stability when arriving in the host country. UAM want to integrate and learn the language and hope to gain asylum, which would also facilitate reunification with their family.<sup>20</sup> Nevertheless, UAM often faces the risk that after their arrival in Europe, their problems will not end, facing different hurdles.<sup>21</sup> The separation from their families and home, along with the uncertainty, can affect the already insecure situation of UAM, harming their psychological and physical health.<sup>22</sup> Many live in a limbo of uncertainty, waiting for asylum or another international protection, which in turn means different rights in many countries, as with subsidiary protection. This insecurity about their future becomes even more insecure when they get closer to the age of 18. These children also struggle between the state norms and practices of asylum, which are often exclusionary and oppressive, as well as inclusive child welfare.<sup>23</sup> The CRC declares that the best interests of the child, which is outlined in Art. 3(1) is to be a primary consideration in all the actions that concern children.<sup>24</sup> However, this is not always the case for UAM.<sup>25</sup>

The arrival of migrant and refugee children in Europe remains substantial, imposing a significant burden on asylum systems and compelling governments to fulfill their obligations to uphold migrant and refugee children rights and provide essential services. Right-wing movements and populist parties have stoked fear of refugees and influenced increasingly restrictive asylum

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<sup>19</sup> Ciara Smyth, “Migration, Refugees, and Children’s Rights,” in *International Human Rights of Children*, ed. Ursula Kilkelly and Ton Liefwaard, International Human Rights (Singapore: Springer Singapore, 2019), 432–33, [https://doi.org/10.1007/978-981-10-4184-6\\_13](https://doi.org/10.1007/978-981-10-4184-6_13).

<sup>20</sup> Annika Lasarzik, “Minderjährige Flüchtlinge. Vormund Gesucht,” *Zeit Online*, April 15, 2015, <https://www.zeit.de/hamburg/stadtleben/2015-04/minderjaehrige-fluechtlinge-hamburg/komplettansicht>.

<sup>21</sup> Radjenovic, “Vulnerability of Unaccompanied and Separated Child Migrants.”

<sup>22</sup> Anja Radjenovic, “Family Reunification Rights of Refugees and Beneficiaries of Subsidiary Protection” (European Parliament, February 14, 2020), [https://www.europarl.europa.eu/thinktank/en/document/EPRS\\_BRI\(2020\)646176](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2020)646176).

<sup>23</sup> Ayse Dursun and Birgit Sauer, “The Asylum–Child Welfare Paradox: Unaccompanied Minors in Austria,” *Humanities and Social Sciences Communications* 8, no. 1 (September 7, 2021): 1, <https://doi.org/10.1057/s41599-021-00886-8>.

<sup>24</sup> Convention on the Rights of the Child (1989).

<sup>25</sup> Barbara Gornik, Mateja Sedmak, and Birgit Sauer, “Introduction - Unaccompanied Minor Migrants in Europe: Between Compassion and Repression,” in *Unaccompanied Children in European Migration and Asylum Practices: In Whose Best Interests?*, ed. Mateja Sedmak, Birgit Sauer, and Barbara Gornik (New York: Routledge, 2017), 8.

policies. UAM are often represented as “anchor children” who are supposedly used by their parents to be able to follow them later on.<sup>26</sup> With the refugee influx in 2015, most countries in the EU decided to provide more subsidiary protection to establish some form of control over this unprecedented flow of people. Following this, there was little chance of reunification of families in some Member States because the national laws were restricting, making reunification more difficult.<sup>27</sup> Refugees often feel that their rights are second-class rights and are in the shadow of national laws and national interests.<sup>28</sup> Nevertheless, it should be remembered that “refugee children are children first and foremost, and as children, they need special attention.”<sup>29</sup>

### 1.3 Aim of the Research

The aim of this thesis is to examine the situation of unaccompanied refugees in Italy, Austria, and Germany, taking into account the rights of children, in particular the best interests of the child, through the relevant laws, their implementation, and compliance. To what extent are the laws regarding UAM and the best interests of the child respected and implemented in the three countries analyzed? It will be assessed whether the criticism of the insufficient implementation of the CRC, in particular the best interest of the child in the case of UAM, is accurate. To narrow the objective, a primary focus is on the differences between international protection statuses and what this means for UAM as well as the debate surrounding the issue of family reunification in light of the importance of children needing their parents. By focusing on these three European countries, this paper focuses on what the actual situation of UAM in these countries looks like, particularly during the time of arrival, asylum procedure, until the decision.

### 1.4 Methodology

The situation of UAM in Italy, Austria, and Germany is analyzed from a comprehensive children’s rights perspective within the legal framework and the policies of the three European countries examined. Not only national laws but also international and regional laws (i.e., the European Convention of Human Rights [ECHR] and the EU asylum law as well as those concerning children and UAM) are considered. Through comparing the three countries, this qualitative research was conducted in an interdisciplinary way, including law and regulations, cases,

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<sup>26</sup> Dursun and Sauer, “The Asylum–Child Welfare Paradox,” 2.

<sup>27</sup> Radjenovic, “Family Reunification Rights of Refugees and Beneficiaries of Subsidiary Protection,” 1.

<sup>28</sup> World Vision, “People Look at You as a Second-Class Citizen Because You Are a Refugee,” March 7, 2016, <https://www.wvi.org/article/‘people-look-you-second-class-citizen-because-you-are-refugee’>.

<sup>29</sup> UNHCR, “Refugee Children: Guidelines on Protection and Care”, 1994, 5, <https://www.refworld.org/docid/3ae6b3470.html>.

and policy aspects, integrated with social and psychological aspects of how this affects these children.

This thesis first provides an overview of international protection statutes and provisions, explaining the international and regional legal bases as well as the legal bases of the countries examined in each case. The CRC and particularly the best interest are then explained with a focus on UAM. Introducing the rights of the child before providing an overview of the UAM situation in the respective countries allows readers to gain insight into the legal framework and principles governing the treatment of these children. This approach provides a contextual understanding of how these rights are put into practice. By examining the legal basis and implementation of the CRC, one can assess the extent to which the rights of UAM are being preserved. This facilitates an analysis of whether the best interests of the child principle is being applied in policies, procedures, and practices concerning UAM. Through this approach, the reader can evaluate how effectively each country is addressing the specific needs of UAM. After the comparison of the actual situation in Italy, Austria, and Germany, some examples of political statements are given. Before coming to the conclusion, some case law examples are presented. First, case laws from the ECtHR were chosen as examples of the Court's use of the CRC in cases regarding UAM. The other court cases are from the Court Of Justice of the European Union and national courts on the topic of family reunification, mostly regarding the long waiting time before the possibility of applying for it. This analysis helps to identify existing challenges or areas requiring improvement in the protection and care provided to these children. Moreover, it emphasizes the significance of respecting and promoting the rights of UAM, laying the groundwork for further discussions of reforms and changes.

## 1.5 Material

This paper is based on an examination, critical literature analysis, and study of secondary sources, adequate academic papers, media information, and webpages from governments, intergovernmental organizations, and NGOs. Additionally, primary sources like official documents, policy documents, case law, and reports, as well as the legal frameworks of the analyzed states and the EU are used. Relevant case laws are also going to be used to provide a comprehensive understanding of the topic. During the research, when looking for the right documents, articles, and case law to use in this paper, the snowball system played a major role. This means that starting from the initial identification of a small number of relevant sources on

the topic, one encounters a multitude of relevant and potential additional sources. This pattern can be used again with the new sources as well.

## 1.6 Limitations

The thesis is centered on the UAM situation in Europe, with a focus on three European countries, Italy, Austria, and Germany. The three countries differ in terms of size and economic and political situations but also have similarities. Austria and Germany have similar cultural backgrounds, very similar mentalities, the same language, similar prosperity, and average income of the population. Italy and Germany, in turn, belong to the founding members of the European Economic Community (the pioneer of the EU), similar in size and population, and economic strength. Austria, however, is much smaller compared to the other two countries. All three countries have a functioning democracy with a multi-party system, which in all three countries has seen an increase in right-wing conservative and right-wing populist parties in recent years. The first country in which the situation of UAM is analyzed is Italy. This country is one of Europe's border countries, and it is also playing an important role in the refugee situation. Many refugees, especially those arriving from Africa, are coming to Europe over the Mediterranean Sea; their first contact with European land occurs in Italy, even if often it is not the final destination. Refugees often see especially Germany, but also Austria, as the destination country where they want to go. Austria also lies on the route when refugees come from East Europe. Another reason for the selection of these countries is the situation of the UAM and the political handling thereof of it in each country. Germany and Austria, in particular, but also Italy, are countries that have received more asylum applications, also from UAM, than other European states.

Nevertheless, it was sometimes difficult to find the same information for all three analyzed countries; therefore, even though the goal was to find the same information for all three, this was not always possible. In general, it was easier to find more information regarding UAM in Austria suitable for this work.

Due to the required limitation of the scope of the thesis, it was not possible to go further into detail in all aspects, but nevertheless, it was important to include as many different aspects as possible in order to get an all-encompassing insight into the topic. To make this research more precise, the focus was not only placed on three countries, but a time limit was also set. Because

the wave of refugees was a crucial moment in which the countries had to cope with more refugees, the period from 2015 until the present (June 2023) is analyzed. Another limitation is that in this thesis, Ukrainians are not considered because they are receiving another form of protection, which is the temporary protective directive, without going through the normal asylum protection.<sup>30</sup>

## 2. Different Forms of Protection Statuses - Refugee Status Versus Subsidiary Protection

### 2.1 International Protection Legal Framework

Prior to focusing on the rights of the child and analyzing the UAM situation, it is important to understand the different forms of international protection. This chapter therefore focuses on the legal dimension of international protection forms. Before concentrating on and explaining the definitions of refugee status and subsidiary protection, it is also essential to understand who is called a refugee. A refugee is someone who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of [their] nationality and is unable or, owing to such fear, is unwilling to avail [themselves] of the protection of that country; or who, not having a nationality and being outside the country of [their] former habitual residence, is unable or, owing to such fear, is unwilling to return to it“ (Art. 1(A)(2) Refugee Convention). Therefore, it is important to distinguish a refugee from a migrant. Even if there is no formal legal definition, a migrant commonly refers to any person who for various reasons moves or has moved from his or her place of residence within a country or to another state voluntarily or not.<sup>31</sup>

An asylum seeker is a person requesting international protection who fled his or her home country due to persecution and grave human rights violations; an asylum seeker has applied for international protection and has not yet received a final decision on his or her application. This person cannot be returned to his or her country of origin until his or her application has been

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<sup>30</sup> European Commission, “Temporary Protection,” Migration and Home Affairs, accessed May 17, 2023, [https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/temporary-protection\\_en](https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/temporary-protection_en).

<sup>31</sup> IOM - International Organization for Migration, “Who Is a Migrant?,” accessed June 14, 2023, <https://www.iom.int/who-migrant-0>.

examined.<sup>32</sup> Depending on the outcome of the assessment of the claim for international protection, the person in question is or is not granted one of the different protection statuses. If a person wishes to apply for asylum, he or she cannot be denied access to the asylum process. As Art. 14.1 of the Universal Declaration of Human Rights (UDHR) declares, “everyone has the right to seek and to enjoy in other countries asylum from prosecution.” This is also guaranteed in Art. 18 of the EU Charter of Fundamental Rights. The European Union declares in Art. 78 of the Treaty on the Functioning of the European Union (TFEU) that “the Union shall develop a common policy on asylum, subsidiary protection, and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of nonrefoulement.” The common European asylum system establishes a baseline for dealing with asylum seekers and applications.<sup>33</sup> The Dublin Regulation, established “the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.”<sup>34</sup> (Because this work focuses mainly on the situation after the countries have established jurisdiction, this regulation is not discussed further).

EU law provides international protection through two distinct statuses, namely refugee status and subsidiary protection. The Qualification Directive 2011/95/EU (QD) lays down the shared qualification criteria for people who need international protection. These standards are set out; however, the member states are “free to introduce or keep more favorable rules.”<sup>35</sup> Refugee status was established through the 1951 Convention Relating to the Status of Refugees (Refugee Convention) and its Protocol (1967), also found in Art. 2(e) and Art. 13 of the QD.<sup>36</sup> Subsidiary protection, on the other hand, which was introduced through the QD, is “an additional form of

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<sup>32</sup> United Nations High Commissioner for Refugees, “Master Glossary of Terms,” accessed June 20, 2023, <https://www.unhcr.org/glossary/#a>.

<sup>33</sup> European Council - Council of the European Union, “EU Migration and Asylum Policy,” accessed May 20, 2023, <https://www.consilium.europa.eu/en/policies/eu-migration-policy/#work>.

<sup>34</sup> “Dublin III Regulation,” Regulation (EU) No 604/2013 (2013).

<sup>35</sup> European Union, “Refugees and Stateless Persons — Common Standards for Qualification,” (Directive 2011/95/EU 2018), <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:4314891>.

<sup>36</sup> Radjenovic, “Family Reunification Rights of Refugees and Beneficiaries of Subsidiary Protection,” 2; European Union: Council of the European Union, 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), (20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0095..>

international protection that is complementary to refugee status.”<sup>37</sup> It is granted to a person from a third country or a stateless person at risk of suffering serious harm (e.g., the death penalty, torture, inhuman treatment, or violence in situations of armed conflict) in their country of origin. However, a person only gains subsidiary protection status “if the requirements for refugee status are not satisfied.”<sup>38</sup> But nevertheless, this person cannot return to his or her country of origin because of reasonable motives (Art. 2 and 15 of the EU Qualification directive 2011/95/EU). Art. 15b of the QD, explaining one serious harm as “torture or inhuman or degrading treatment or punishment,” correlates essentially to Art. 3 ECHR and ECtHR case law serves, therefore, as a valuable guide.<sup>39</sup>

In the QD, Art. 24 regulates the residence permits. Those with refugee status receive at least a three-year residence permit (which can be extendable), and people who receive subsidiary protection are given a residence permit of at least a year (with the possibility of an extension for a permit of at least two years).<sup>40</sup> Subsidiary protection is considered more temporary than refugee status. Another difference between the protections is the access to social assistance, and again, a person with subsidiary protection is in an unfavorable position in some Member States. Refugees are entitled to necessary social assistance, but beneficiaries of subsidiary protection can be limited to core assistance.<sup>41</sup> Through the EU directive (2013/32/EU) on common procedures for granting and withdrawing international protection (Asylum Procedures Directive), the EU has taken a leading role in the last years (specific) by defining minimum standards for international protection procedures that are more detailed than the UNHCR handbook.<sup>42</sup> With these kinds of protection, a person obtains an internationally recognized status, which also implies that this person cannot be sent back to their country of origin and gains residency and some form of socioeconomic rights.<sup>43</sup>

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<sup>37</sup> European Union Agency for Asylum, “Subsidiary Protection,” accessed June 30, 2023, <https://euaa.europa.eu/easo-practical-guide-qualification-international-protection/subsidiary-protection>.

<sup>38</sup> European Union Agency for Asylum, “Subsidiary Protection.”

<sup>39</sup> European Union Agency for Asylum, “Torture or Inhuman or Degrading Treatment or Punishment,” Article 15(b) QD, accessed July 5, 2023, <https://euaa.europa.eu/easo-practical-guide-qualification-international-protection/article-15b-qd>.

<sup>40</sup> European Union: Council of the European Union, 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), 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0095>.

<sup>41</sup> Radjenovic, “Family Reunification Rights of Refugees and Beneficiaries of Subsidiary Protection,” 2.

<sup>42</sup> Smyth, “Migration, Refugees, and Children’s Rights,” 433.

<sup>43</sup> Smyth, “Migration, Refugees, and Children’s Rights,” 426.

The ECHR does not provide for a specific right to asylum or international protection. However, the ECtHR can still examine whether the removal or treatment of aliens violates ECHR rights. The principle of non-refoulement is a fundamental safeguard enshrined in international human rights, refugee, humanitarian, and customary law, providing essential protection.<sup>44</sup> This means that this concept is, in most cases, of a treaty nature.<sup>45</sup> The principle of non-refoulement, as laid down in Art. 33(1) of the Refugee Convention prohibits states from expelling or returning a refugee (in the sense of Art.1A (2) Refugee Convention) to a country where their life or freedom would be threatened. A refoulement prohibition has also been developed in the case law on Art. 3 of the ECHR. This article regulates the prohibition of torture and inhuman or degrading treatment or punishment. The ECtHR developed on these prohibitions (if a person who is turned away is put at risk of torture or inhuman treatment) and on Art. 33 (1) Refugee Convention, a prohibition on refoulement.<sup>46</sup> The first cases were *Soering v UK* and *Cruz Varas et al. v Sweden*; with the *Soering* judgment, this prohibition of refoulement was confirmed, and cases like *Cruz Varas* clarified this principle.<sup>47</sup>

Ensuring asylum seekers' right to a fair and efficient asylum procedure is essential, and the ECtHR has underlined the significance of interpretation to guarantee access to such procedures. Thus, when having the intent to seek asylum, it is important that this person gains access to the asylum procedure, which includes legal remedies of halting deportation during the process.<sup>48</sup> ECHR Protocol 4 Art. 4 addresses collective expulsion. As underlined in the case *Hirsi Jamaa and Others v. Italy*, the core purpose of this article "is to prevent States being able to remove certain aliens without examining their personal circumstances and, consequently, without

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<sup>44</sup> United Nations Human Rights Office of the High Commissioner, "The Principle of Non-Refoulement under International Human Rights Law," accessed July 4, 2023, <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>.

<sup>45</sup> Sir Elihu Lauterpacht and Daniel Bethlehem, "The Scope and Content of the Principle of Non-Refoulement: Opinion," in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, ed. Erika Feller, Volker Türk, and Frances Nicholson, 1st ed. (Cambridge University Press, 2003), 90, <https://doi.org/10.1017/CBO9780511493973>.

<sup>46</sup> European Commission, "Non-Refoulement," Migration and Home Affairs, accessed June 14, 2023, [https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/non-refoulement\\_en](https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/non-refoulement_en).

<sup>47</sup> Case *Soering v. United Kingdom*, Application No. 14038/88, Judgment (ECtHR July 7, 1989); Case of *Cruz Varas and Others v. Sweden* (Application no. 15576/89) (ECtHR March 20, 1991).

<sup>48</sup> FRA European Union Agency for Fundamental Rights, "Fundamental Rights of Refugees, Asylum Applicants and Migrants at the European Borders," March 27, 2020, <https://fra.europa.eu/en/publication/2020/fundamental-rights-refugees-asylum-applicants-and-migrants-european-borders#publication-tab-4>; *M.S.S. v. Belgium and Greece [GC]*, No. No. 30696/09 (ECtHR January 21, 2011); *M.A. and Others v. Lithuania*, No. No. 59793/17 (ECtHR December 11, 2018).

enabling them to put forward their arguments against the measure taken by the relevant authority.”<sup>49</sup>

## 2.2 International Protection in the Three Analyzed Countries

As EU Member States, the three countries that are being in the focus of this thesis are taking into account the rules and laws of the EU and also the international law binding upon them. However, there are some differences in the national norms on international protection.

In Italy, the right to asylum is guaranteed by Art. 10(3) of the Constitution, which states that “a foreigner who is prevented in his country from effectively exercising the democratic freedoms guaranteed by the Italian Constitution has the right of asylum in the territory of the Republic, according to the conditions established by law.” Depending on the personal situation of the asylum applicant, refugee status or subsidiary protection may be granted.<sup>50</sup> International protection in Italy is examined and granted by the Territorial Commission for the Recognition of International Protection. If the Commission does not grant one of the statuses but rather a negative decision, the Commission can recognize an additional form of protection, the so-called special protection, if the individual’s life is at risk when returning to his or her home country. By having one of the three protection statutes, a person is entitled to a residence permit (includes the possibility to work, study, and receive medical care) of five years for refugee status and subsidiary protection and two for special protection, with the possibility for all to apply for a renewal.<sup>51</sup> Family reunification is also possible for all three types of protection because it is possible for those with a residence permit valid for not less than a year.<sup>52</sup>

In Austria, the government offers two types of international protection, namely asylum (refugee status) and subsidiary protection. When a person’s asylum claim is accepted, he or she is entitled to asylum or rather recognized as refugee. Under this form of international protection, a residence permit is issued for three years, after which it can be converted into a permanent right of residence. On the other hand, subsidiary protection is granted for those whose “asylum has

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<sup>49</sup> *Hirsi Jamaa and Others v. Italy* [GC], No. Application no. 27765/09 (ECtHR February 23, 2012) para. 177.

<sup>50</sup> Ministero dell’Interno, “Protezione Internazionale,” accessed June 15, 2023, <https://www.interno.gov.it/it/temi/immigrazione-e-asilo/protezione-internazionale>.

<sup>51</sup> UNHCR, “Hai Bisogno Di Protezione?,” accessed June 15, 2023, <https://www.unhcr.org/it/wp-content/uploads/sites/97/2022/06/italiano.pdf>.

<sup>52</sup> Patronato INAS CISL, “Ricongiungimento Familiare,” December 21, 2018, <https://www.inas.it/ricongiungimento-familiare/>.

been rejected on the basis that there are insufficient grounds to believe they will be persecuted, but whose life or integrity are nevertheless threatened in their country of origin.”<sup>53</sup> Although those in this circumstance are not eligible for asylum, they are given temporary protection from deportation. Subsidiary protection and the included residence permit are granted for one year and it can be renewed, at which point they are granted for two years.<sup>54</sup> Beneficiaries of subsidiary protection can apply for family reunification only after three years.<sup>55</sup>

In Germany, the Federal Office for Migration and Refugees (BAMF – Bundesamt für Migration und Flüchtlinge) is the responsible office for examining the asylum application. This happens on the basis of the right to asylum guaranteed under Art. 16a of the Basic Law, the German Asylum Act (AsylG), and the Act on the Residence (AufenthG).<sup>56</sup> The BAMF decides whether one of the four forms of protection applies. Besides the right to asylum, there are three forms of protection, namely refugee protection, subsidiary protection, or a ban on deportation (when the other three cannot be applied).<sup>57</sup> The difference between refugee protection and entitlement to asylum consists basically only in the different reasons why a person needs protection. Whereas refugee protection is more extensive because it includes persecution by non-state actors, those entitled to asylum are persecuted on political grounds. The legal basis and consequences are the same. These are, among others, a residence permit for three years and the right to family reunification.<sup>58</sup> Meanwhile, subsidiary protection is given when the other two forms of protection, asylum and refugee protection, cannot be granted. Germany gives beneficiaries of subsidiary protection one year of residence permit but no entitlement to privileged family

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<sup>53</sup> Oesterreich.gv.at, “Allgemeines Zum Asyl,” February 1, 2023, [https://www.oesterreich.gv.at/themen/leben\\_in\\_oesterreich/asyl/Seite.3210001.html](https://www.oesterreich.gv.at/themen/leben_in_oesterreich/asyl/Seite.3210001.html).

<sup>54</sup> Oesterreich.gv.at, “Allgemeines Zum Asyl.”

<sup>55</sup> Oesterreich.gv.at.

<sup>56</sup> Bundesministerium für Innern und für Heimat, “Asyl- Und Flüchtlingspolitik in Deutschland,” accessed June 15, 2023, [https://www.bmi.bund.de/DE/themen/migration/asyl-fluechtlingsschutz/asyl-fluechtlingsschutz/asyl-fluechtlingsschutz-politik-artikel.html;jsessionid=9E1C6D239CFA786C1F6448FAB3ABBF40.1\\_cid287#doc9392670bodyText5](https://www.bmi.bund.de/DE/themen/migration/asyl-fluechtlingsschutz/asyl-fluechtlingsschutz/asyl-fluechtlingsschutz-politik-artikel.html;jsessionid=9E1C6D239CFA786C1F6448FAB3ABBF40.1_cid287#doc9392670bodyText5); “Asylgesetz (AsylG)” (1992), [https://www.gesetze-im-internet.de/asylvfg\\_1992/BJNR111260992.html](https://www.gesetze-im-internet.de/asylvfg_1992/BJNR111260992.html); “Gesetz Über Den Aufenthalt, Die Erwerbstätigkeit Und Die Integration von Ausländern Im Bundesgebiet 1)(Aufenthaltsgesetz - AufenthG)” (2004); “Grundgesetz Für Die Bundesrepublik Deutschland” (1949) Art. 16a.

<sup>57</sup> Bundesministerium für Innern und für Heimat, “Asyl- Und Flüchtlingspolitik in Deutschland.”

<sup>58</sup> Federal Office for Migration and Refugees, “Refugee Protection,” November 28, 2018, <https://www.bamf.de/EN/Themen/AsylFluechtlingsschutz/AblaufAsylverfahrens/Schutzformen/Fluechtlingsschutz/fluechtlingsschutz-node.html>; Federal Office for Migration and Refugees, “Entitlement to Asylum,” June 22, 2023, <https://www.bamf.de/EN/Themen/AsylFluechtlingsschutz/AblaufAsylverfahrens/Schutzformen/Asylberechtigung/asylberechtigung-node.html>.

reunification.<sup>59</sup> In 2018, there was emitted a new regulation on family reunification for those with subsidiary protection. Each month this allows up to 1,000 selected applicants who are members of the nuclear family to come to Germany.<sup>60</sup>

Comparing the three countries and their laws of protection reveals that Austria and Germany are quite similar. Meanwhile, Italy has some differences because refugee status and subsidiary protection are equal.

### 3. Children's Rights Framework

#### 3.1 Best Interest of the Child

In this chapter, an overview of the CRC, in general, is provided, as well as its implementation at both regional and national levels. The primary focus will be on the principle of the best interest of the child. The latter is also going to be elucidated in the context of international protection related to the rights of UAM. Additionally, CRC principles that are particularly relevant to the situation of UAM will be discussed. This examination of the children's rights framework is the basis for the subsequent comparison of the UAM situation in Italy, Austria, and Germany.

In 1989, the UN General Assembly resolution 44/25 adopted the Convention on the Rights of the Child (CRC), which is the most rapidly ratified and also the most widely ratified convention on human rights.<sup>61</sup> When a state ratifies such a convention, it is legally binding, which means that these states have to act in accordance with the CRC and fulfill their obligations. The CRC made the world change how children are seen and treated.<sup>62</sup> It has 54 Articles that cover all aspects of a child's life, including civil, political, economic, social, and cultural rights. The CRC committee decided to highlight four articles of the CRC as General Principles. One is the principle of the Best Interest of the Child, Art. 3(1). The other three are Art. 2 on non-discrimination; Art. 6 on the right to life, survival, and development; and Art. 12 on the right to express

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<sup>59</sup> Federal Office for Migration and Refugees, "Subsidiary Protection," November 14, 2019, <https://www.bamf.de/EN/Themen/AsylFluechtlingschutz/AblaufAsylverfahrens/Schutzformen/SubsidiarSchutz/subsidiarschutz-node.html>.

<sup>60</sup> Bundesverwaltungsamt, "Familiennachzug Zu Subsidiär Schutzberechtigten," accessed May, 19, 2023, <https://www.bva.bund.de/SharedDocs/Aufgaben/DE/F/familiennachzug.html>.

<sup>61</sup> The Convention on the Rights of the Child entered into force 02. September 1990.

<sup>62</sup> unicef, "The CRC@30: For Every Child... Every Right," Europe and Central Asia, accessed May 30, 2023, <https://www.unicef.org/eca/crc30-every-child-every-right>.

and be heard.<sup>63</sup> Article 3(1) elucidates that the child’s best interest must be a primary consideration in all cases and actions that concern a child without distinctions, in all actions taken by “public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.”<sup>64</sup> By keeping this article in mind, the decision maker has to evaluate how the rights and interests of the child are directly or indirectly affected.<sup>65</sup> The aim of this principle is that the other rights of the CRC are thoroughly and effectively enjoyed. The child’s best interest principle is also embedded in other articles of the CRC, demonstrating its importance.<sup>66</sup> The committee’s idea was that it should be interpreted in the context depending on the situation. It is important to determine what the issues are and therefore what the relevant rights and interests in question are. In this, one should not neglect the view of the child, and one should evaluate what effect the different decisions have on the child or children and on their best interest.<sup>67</sup>

In 2013, the Committee on the Rights of the Child presented General Comment (GC) No.14 on what is meant by and how to implement the best interest of the child.<sup>68</sup> This non-binding but nonetheless authoritative interpretive tool underscores that the child’s best interest is a threefold concept. It is a substantive right, a fundamental interpretative principle, and a rule of procedure. This means that the best interest must be “taken as primary interest when different interests are being considered”<sup>69</sup> and that this right is implemented in all decisions concerning children. The principle of interpretation states that in cases where a legal provision is open to several interpretations, the one that best serves the best interests of the child should be preferred. Finally, in the decision-making process, the assessment of the possible impact must be included. The States explanation of the decision must also indicate that the best interest principle was considered, meaning that states have to explain how the right was considered.<sup>70</sup> The Committee also provided a guidance list with elements that should be considered when evaluating and

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<sup>63</sup> UN Committee on the Rights of the Child “General Comment No. 5 (2003) General Measures of Implementation of the Convention on the Rights of the Child,” (CRC/GC/2003/5, November 27, 2003) <https://www.refworld.org/docid/4538834f11.html>, para 12.

<sup>64</sup> Convention on the Rights of the Child, Art. 3(1).

<sup>65</sup> UN Committee on the Rights of the Child, “General Comment No. 5 (2003) General Measures of Implementation of the Convention on the Rights of the Child,” para 12.

<sup>66</sup> Noam Peleg, “International Children’s Rights Law: General Principles,” in *International Human Rights of Children*, ed. Ursula Kilkelly and Ton Liefwaard, International Human Rights (Singapore: Springer Singapore, 2019), 141–42, [https://doi.org/10.1007/978-981-10-4184-6\\_5](https://doi.org/10.1007/978-981-10-4184-6_5).

<sup>67</sup> Noam Peleg, “International Children’s Rights Law: General Principles” 142.

<sup>68</sup> Kalverboer et al., “The Best Interests of the Child in Cases of Migration,” 114.

<sup>69</sup> Committee on the Rights of the Child, “General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)\*,” (CRC /C/GC/14, May 29, 2013), <https://www.refworld.org/docid/51a84b5e4.html>. para. 6(a).

<sup>70</sup> Committee on the Rights of the Child para. 6.

determining the best interest. These elements are the child's view; the child's identity; preservation of the family environment and maintaining relations; care, protection, and safety of the child; the child's situation of vulnerability; the right to health; and the right to education. In the assessment of the child's best interest, these elements must be balanced, and not all elements will be relevant in all cases.<sup>71</sup>

## 3.2 The Convention on the Rights of the Child at Regional and National Levels

### 3.2.1 Europe

After the ratification of the CRC in most European countries, many different treaties related to children's rights were adopted by the Council of Europe as the Convention on the Exercise of Children's Rights (1996), which was ratified by only 20 member states (including: Italy, Austria, and Germany).<sup>72</sup> This treaty, nevertheless, had limited impact.

The European Court on Human Rights (ECtHR) is not only important for the implementation of these rights, but children can also complain about violations of their rights.<sup>73</sup> In addition the ECtHR increasingly uses the CRC as a tool of interpretation and recognizes that in cases where children are involved, a consideration of the best interest of the child is necessary and regularly refers to it on different occasions as a substantive right and as a procedural obligation. The ECtHR has built a substantial collection of case law related to the best interest principle and also underscores the necessity of interpreting the ECHR in conformity with the CRC. Nevertheless, the application does not always lead to child-sensitive outcomes. However, it is crucial to emphasize that even regarding the best interest of the child as a procedural obligation represents a significant step, considering that the ECHR does not contain an obligation to take the child's best interest into account.<sup>74</sup> The ECtHR has also gone further than just the requirement of a mere consideration of the best interest principle in some situations; it emphasizes the importance of a high-quality assessment when evaluating the best interest.<sup>75</sup>

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<sup>71</sup> Committee on the Rights of the Child, para. 52–79.

<sup>72</sup> Council of Europe, "European Convention on the Exercise of Children's Rights," European Treaty Series-No. 160 (1996), <https://rm.coe.int/168007cdaf>; Council of Europe, "Chart of Signatures and Ratifications of Treaty 160," Treaty Office, July 2, 2023, <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treaty=160>.

<sup>73</sup> Jaap E. Doek, "The Human Rights of Children: An Introduction," in *International Human Rights of Children*, ed. Ursula Kilkelly and Ton Liefaard, International Human Rights (Singapore: Springer Singapore, 2019), 19.

<sup>74</sup> Milka Sormunen, "Understanding the Best Interests of the Child as a Procedural Obligation: The Example of the European Court of Human Rights," *Human Rights Law Review* 20, no. 4 (December 9, 2020): 747,756, <https://doi.org/10.1093/hrlr/ngaa034>.

<sup>75</sup> Sormunen, 759.

The objective of protecting the rights of the child is established in Art. 3(3) of the Treaty on European Union (TEU), and in the Charter of Fundamental Rights of the European Union, Art. 24 outlines the rights of the child. The EU also has the power to support its member states and coordinate and complement the States' actions in policy areas such as education and youth. Some other relevant EU legal and policy frameworks for children that are not legally binding for the member states are the 2017 European Commission Communication "The Protection of the Children in Migration," the 2018 EU Council Resolution "Youth Strategy for the Period 2019-2027," and the 2013 EU Council Recommendation "Youth Guarantee Scheme." Even if these documents are not binding, they are very relevant. The European Commission also set out an action plan in 2016 that underlines the importance of tailored education.<sup>76</sup> In 2021, the EU published the EU "Strategy on the Rights of the Child" and the "European Child Guarantee" with the respective aims of better protecting and promoting the rights of the child and preventing and combating social exclusion.<sup>77</sup>

### 3.2.2 Italy

In general, children's rights are protected by various regulations. According to Art. 3 of the Italian Constitution, the principle of non-discrimination also applies to children. In Italy the CRC was ratified with law No. 176 from the 27. May 1991. With the approval of Law 451 of December 23, 1997, Italy established comprehensive measures to implement the CRC by establishing adequate tools to develop an effective policy. The law establishes key institutions such as the Parliamentary Commission for Children with the task of guiding and monitoring the implementation of the rights and development of children; the National Observatory for Children, which prepares a "national action plan for the protection of the rights and the development of children and adolescents"; and the National Center for Documentation and Analysis for Children.<sup>78</sup>

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<sup>76</sup> FRA European Union Agency for Fundamental Rights, *Integration of Young Refugees in the EU*, 20.

<sup>77</sup> European Commission, "The EU Strategy on the Rights of the Child and the European Child Guarantee," accessed June 25, 2023, [https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/rights-child/eu-strategy-rights-child-and-european-child-guarantee\\_en](https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/rights-child/eu-strategy-rights-child-and-european-child-guarantee_en).

<sup>78</sup> Centro nazionale di documentazione e analisi per l'infanzia e l'adolescenza, "La Convenzione ONU," accessed May 31, 2023, <https://www.minori.gov.it/it/la-convenzione-onu>; Centro nazionale di documentazione e analisi per l'infanzia e l'adolescenza, "Osservatori Nazionali," accessed May 31, 2023, <https://www.minori.gov.it/it/osservatori-nazionali>.

### 3.2.3 Austria

In 1992, the CRC was ratified in Austria. However, it was not approved by the National Council as a constitutional law. The CRC was part of the legal order, but only at the level of a simple federal law. This changed in 2011.<sup>79</sup> On February 16, 2011, the Federal Constitutional Law on the Rights of Children (“Bundesverfassungsgesetz über die Rechte der Kinder” – [BVG Kinderrechte]) was established. These eight articles also include the best interest of the child. In Art. 1 of the BVG Kinderrechte, the welfare of the child must be a primary consideration and is a binding standard of orientation for private and public institutions. However, there can be restrictions on this right through Art. 7.<sup>80</sup> Nonetheless, the Children’s Rights Network Austria has criticized that not all CRC rights were elevated to constitutional status, that there are still no effective measures to put these rights into practice even if ten years have passed and that there is still no effective monitoring system.<sup>81</sup>

### 3.2.4. Germany

The CRC was ratified in Germany in 1992. To date, even if children are bearers of fundamental rights and in need of protection, this is not stated in the German constitution. The current coalition (since 2021) therefore agreed to enshrine children’s rights in the Basic Law, marking this as an important step after enacting the CRC and making children’s rights more visible. However, this amendment was not realized until now. The CRC Committee underlined in its concluding remarks the importance of enshrining children’s rights in the Basic Law. In 2015, the Ministry for Family Affairs established an independent monitoring body to monitor and advocate for the implementation of children’s rights.<sup>82</sup>

## 3.3 Best Interest of the Child and International Protection

After explaining the meaning of Art. 3 of the CRC and what asylum and subsidiary protection are, this thesis now focuses on how the best interest of the child plays an important role in the decision-making of international protection and its implementation in the context of the asylum process. Goodwin-Gill has also noted that this principle and the CRC have become increasingly

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<sup>79</sup> Netzwerk Kinderrechte Österreich, “Kinderrechte in Der Österreichischen Verfassung,” accessed May 31, 2023, <https://www.kinderhabenrechte.at/kinderrechte-in-der-oesterreichischen-verfassung/>.

<sup>80</sup> “Bundesverfassungsgesetz Über Die Rechte Der Kinder,” BGBl. I Nr. 4/2011, (2011), [https://www.ris.bka.gv.at/Dokumente/ErV/ERV\\_2011\\_1\\_4/ERV\\_2011\\_1\\_4.pdf](https://www.ris.bka.gv.at/Dokumente/ErV/ERV_2011_1_4/ERV_2011_1_4.pdf).

<sup>81</sup> Netzwerk Kinderrechte Österreich, “Kinderrechte in Der Österreichischen Verfassung.”

<sup>82</sup> Bundesministerium für Familie, Senioren, Frauen und Jugend, “Kinderrechte Ins Grundgesetz,” November 15, 2022, <https://www.bmfsfj.de/bmfsfj/themen/kinder-und-jugend/kinderrechte/kinderrechte-ins-grundgesetz-115436>.

important for children who are refugee applicants and that the primary focus in any decision that impacts a child must be on safeguarding their best interests, stating that this is particularly true for unaccompanied children.<sup>83</sup> As previously explained, as laid down in the CRC, when a decision affects a child, the best interest of that child should always be a primary consideration. Additionally, McAdam argues in her book *Complementary Protection in International Refugee Law* that Art. 3 should be considered in international protection. She argues that the principle of the best interest of the child should have always been taken into account when it comes to minor refugees, especially UAM, and yet even if the principle influences the procedures and treatments, this is often overlooked when it comes to the determination of refugee status or other forms of international protection.<sup>84</sup> This happens even if Art. 3 is an “absolute principle of international law” and “highly relevant in determining whether or not a child needs international protection.”<sup>85</sup> The principle of the best interest of the child should therefore be a primary consideration when making decisions related to children, which also includes and affects the application of Art. 1A(2) of the Refugee Convention (1951), by imposing an additional layer of consideration in cases involving children, it may also constitute a complementary ground of protection in its own right.<sup>86</sup> As Pobjoy states, the CRC and Art. 3 are playing an increasingly important role in the decisions of whether a child should be admitted to or removed from a state. He also suggested that the child’s best interest can be seen as an “independent source of international protection.”<sup>87</sup>

The principle of best interest should therefore always be considered in migration procedures in the decision of whether a child should be admitted to the country or sent back. It is also important to consider that children who flee a country are even more vulnerable than other children. Forced migration, stress, and what they have previously confronted affect them, as does the uncertainty about their future.<sup>88</sup> When assessing the best interest of an individual, it is

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<sup>83</sup> Guy S. Goodwin-Gill and Agnès Hurwitz, “Memorandum Reprinted in Minutes of Evidence Taken before the European Union Committee (Sub-Committee E) (10 April 2002) in House of Lords Select Committee on the European Union, ‘Defining Refugee Status and Those in Need of International Protection’” (House of Lords, Session - (2002 2001) Appendix 2 para 10.

<sup>84</sup> Jane McAdam, *Complementary Protection in International Refugee Law*, Oxford Monographs in International Law (Oxford ; New York: Oxford University Press, 2007), 173.

<sup>85</sup> McAdam, 173.

<sup>86</sup> McAdam, 173–74.

<sup>87</sup> Jason M. Pobjoy, “The Best Interests of the Child Principle as an Independent Source of International Protection,” 64 2, no. International and Comparative Law Quarterly (April 2015): 328–29.

<sup>88</sup> Kalverboer et al., “The Best Interests of the Child in Cases of Migration,” 115.

crucial to consider their mental health. Moreover, decisions pertaining to this matter should be made by someone well versed in children's needs and psychology.<sup>89</sup>

In the EU, these standards have shaped policy and have also been implemented into hard law (Reception Conditions Directive, 2013/33/EU). The best interest of the child is also laid down in the Asylum Procedures Directive, as in Art. 17 in the guarantees for unaccompanied children, and also in the Qualification Directive. There are additional different soft law instruments when it comes to the best interest of the child and asylum. These include the UNHCR Best Interest Procedure Guidelines 2021 and the European Asylum Support Office (EASO) Practical Guide on the Best Interests of the Child in Asylum Procedures 2019.<sup>90</sup>

### 3.4 Unaccompanied Minors and Further Children's Rights

A child, even if he or she is a migrant, should first be treated as a child and second as a migrant. This should happen if considering international children's rights.<sup>91</sup> The CRC supports this with Art. 2, which declares that the states should respect and guarantee the rights of the CRC to each child in its jurisdiction without discrimination. Art. 2 prohibits discrimination also of "other status," which was interpreted by the Committee of the Rights of the Child to encompass not only nationality but also protection status.<sup>92</sup> The Committee explains that "non-rights based arguments, such as those relating to immigration control, cannot override best interests considerations."<sup>93</sup> This means that immigration status does not influence the enjoyment of the child's rights and that the CRC is equally relevant for all children.<sup>94</sup> Therefore, children without a valid residence permit are entitled to the same rights as national children..<sup>95</sup> General Comment No. 6 (2005) on the treatment of UAM underlines that "[the] principle of non-discrimination [. . .] prohibits any discrimination on the basis of the status of a child as being unaccompanied or separated, or being a refugee, asylum seeker or migrant."<sup>96</sup>

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<sup>89</sup> Kalverboer et al., 116.

<sup>90</sup> Kommission für den Schutz der Kinderrechte und des Kindeswohls im Asyl- und Fremdenrecht, "Bericht Der Unabhängigen Kommission Für Den Schutz Der Kinderrechte Und Des Kindeswohls Im Asyl- Und Fremdenrecht KURZFASSUNG," July 13, 2021, 9, [https://www.kinderhabenrechte.at/wp-content/uploads/2021/07/Kurzfas-sung\\_Bericht\\_Kindeswohlkommission\\_13Juli2021.pdf](https://www.kinderhabenrechte.at/wp-content/uploads/2021/07/Kurzfas-sung_Bericht_Kindeswohlkommission_13Juli2021.pdf).

<sup>91</sup> Smyth, "Migration, Refugees, and Children's Rights," 422.

<sup>92</sup> Smyth, 422.

<sup>93</sup> Committee on the Rights of the Child, "GENERAL COMMENT NO. 6 (2005) - Treatment of Unaccompanied and Separated Children Outside Their Country of Origin CRC/GC/2005/6" Para. 86.

<sup>94</sup> Smyth, "Migration, Refugees, and Children's Rights," 422-423.

<sup>95</sup> Kalverboer et al., "The Best Interests of the Child in Cases of Migration," 117.

<sup>96</sup> Committee on the Rights of the Child, "GENERAL COMMENT NO. 6 (2005) - Treatment of Unaccompanied and Separated Children Outside Their Country of Origin CRC/GC/2005/6" para. 18.

As previously explained, immigration law also covers children, which makes them entitled to all these rights. Art. 22(1) of the CRC again reaffirms this, stating that “a child who is seeking refugee status or who is considered a refugee [...] shall [...] receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and other international human rights or humanitarian instruments to which the [...] States are Parties.” As stated by the Committee on the Rights of the Child, “asylum-seeking children, including those who are unaccompanied or separated, shall enjoy access to asylum procedures and other complementary mechanisms providing international protection irrespective of their age.”<sup>97</sup> Art. 20(1) of the CRC declares that UAM or children in the company of an adult who is not their legal guardian are entitled to “special protection and assistance provided by the state.” This guardian should not only be experienced in childcare but should especially ensure the best interest of the child, this should be the primary consideration. The guardian should also safeguard that the child’s needs, from psychological to educational needs, are covered. Therefore, the committee announced that this guardian should be independent of the immigration authority. This also means that when a state fails to appoint a guardian to UAM, this could constitute violations of the positive obligations of a state (e.g., *ECtHR Mayeka and Mitunga v Belgium 2006*) relating to the prohibition of inhuman or degrading treatment.<sup>98</sup> After what happened to the unaccompanied minor of the *Mayeka and Mitunga v Belgium 2006* case, being detained in a center for adults without counseling or educational assistance, the importance that UAM should be granted a guardian was introduced, which should safeguard the best interest of the child.<sup>99</sup> When a child is identified as an unaccompanied minor, the child should be instantly referred to child protection services so that his or her needs of care, safety, education, and health can be met.<sup>100</sup>

For the initial assessment process, the Committee on the Rights of the Child has developed guidelines in general comment No. 6 (2005). This guideline entails the prioritized identification of an unaccompanied minor or a child as separated with a safe, respectful, and child-sensitive

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<sup>97</sup> Committee on the Rights of the Child, "GENERAL COMMENT NO. 6 (2005) - Treatment of Unaccompanied and Separated Children Outside Their Country of Origin CRC/GC/2005/6" Para. 66.

<sup>98</sup> Smyth, “Migration, Refugees, and Children’s Rights,” 441.

<sup>99</sup> Council of Europe, “Reforms Made Following the Inhuman Treatment of a Four-Year-Old Girl,” Impact of the European Convention on Human Rights, accessed July 3, 2023, <https://coe.int/en/web/impact-convention-human-rights/-/reforms-made-following-the-inhuman-treatment-of-a-four-year-old-girl>.

<sup>100</sup> UNHCR, “Safe & Sound: What States Can Do to Ensure Respect for the Best Interests of Unaccompanied and Separated Children in Europe,” 33.

age evaluation (which should not only take into account the physical appearance but also psychological maturity), instant registration through an initial interview (in an age-appropriate and gender-sensitive manner) to gather bio-data and establish identity and the relation to accompanying adults (if present and if they are not the parents). The Committee also recommends that the process respect the child's physical integrity and adhere to the principle of the benefit of the doubt. Furthermore, an ongoing recording of additional information such as international protection needs, reasons for being separated or unaccompanied, assessment of particular vulnerabilities, risk of trafficking, and family tracking should be initiated as soon as possible.<sup>101</sup>

To enforce the best interest of the child, it is also important to keep in mind the Right of the Child to Be Heard, Art. 12. This article also applies to refugee-seeking children. States Parties should therefore recognize that “every child is capable of forming his or her own views,” assure children that they can “express those views freely” whenever it affects them, and give the view weight in accordance with age and maturity. Therefore, a child “shall, in particular, be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative.”<sup>102</sup> Additionally, the Committee on the Rights of the Child declared in GC NO. 6 that “in cases where children are involved in asylum procedures or administrative or judicial proceedings, they should, in addition to the appointment of a guardian, be provided with legal representation.”<sup>103</sup> In the case of hearing in the immigration context the reasons why the child is fleeing, the circumstances of the child's home country, where the child's parents are, and the risk of going back are important, giving “due weight” to the child's views. This means that the child's views should be given due weight in correspondence with the child's maturity and age, meaning that these views should be seriously considered.<sup>104</sup> It is also important to keep in mind that:

Children cannot be expected to provide adult-like accounts of their experiences. They may have difficulty articulating their fear for a range of reasons, including trauma, parental instructions, lack of education, fear of State authorities or persons in positions of power, use of ready-made testimony by smugglers, or fear of reprisals. They may be too young or immature to be able to evaluate what information is important or to interpret what they have witnessed or experienced in a manner that is easily understandable to an adult. Some children may omit or distort vital

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<sup>101</sup> Committee on the Rights of the Child, “GENERAL COMMENT NO. 6 (2005) - Treatment of Unaccompanied and Separated Children Outside Their Country of Origin CRC/GC/2005/6,” Para. 31.

<sup>102</sup> Art. 12(2) Convention on the Rights of the Child.

<sup>103</sup> Committee on the Rights of the Child, “GENERAL COMMENT NO. 6 (2005) - Treatment of Unaccompanied and Separated Children Outside Their Country of Origin CRC/GC/2005/6” para. 36.

<sup>104</sup> Smyth, “Migration, Refugees, and Children's Rights,” 435–36.

information or be unable to differentiate the imagined from reality. They also may experience difficulty relating to abstract notions such as time or distance. Thus, what might constitute a lie in the case of an adult may not necessarily be a lie in the case of a child.<sup>105</sup>

When it comes to accommodation, the Committee on the Rights of the Child declared in GC NO. 6, with regard to Art. 27(2) CRC, that states should ensure UAM adequate living standard, including housing.<sup>106</sup> The EU declares in this context in Art. 31 Qualification Directive 2011/95/EU that Member States have to ensure that UAM are placed either with adult relatives, with a foster family, in accommodation centers specialized for minors, or in other accommodation that is suitable for a child or adolescents. In this regard, states also need to consider the view of the child in accordance with the child's age and maturity.<sup>107</sup> When a child has no option to return to his or her country of origin, local integration must be the priority option, founded on obtaining a secure legal status, which encompasses a residence status. In the case of UAM, the host state may include extra measures to address their vulnerable status. The child should receive appropriate long-term care in the community and include the same access to the rights of the CRC without discrimination as national children have, which includes family reunification.<sup>108</sup>

## 4. Family Reunification

### 4.1 International Framework

Family reunification has been a very controversial topic in recent years, especially in the context of various international protection statuses.<sup>109</sup> Parents and family are especially important for minor children. Therefore, this chapter discusses the rights associated with family reunification as well as what the different international protection statutes mean in this context, and the importance of family reunification for UAM.

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<sup>105</sup> UNHCR, "Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees," (HCR/GIP/09/08, December 22, 2009), <https://www.unhcr.org/media/guidelines-international-protection-no-8-child-asylum-claims-under-articles-1-2-and-1-f-1951>. para. 72.

<sup>106</sup> Committee on the Rights of the Child, "GENERAL COMMENT NO. 6 (2005) - Treatment of Unaccompanied and Separated Children Outside Their Country of Origin CRC/GC/2005/6" para. 44.

<sup>107</sup> European Union: Council of the European Union, Directive 2011/95/EU para. 31.

<sup>108</sup> Committee on the Rights of the Child, "GENERAL COMMENT NO. 6 (2005) - Treatment of Unaccompanied and Separated Children Outside Their Country of Origin CRC/GC/2005/6" para. 88-89.

<sup>109</sup> Constantin Dr. Hruschka, "Den Behörden Beine Machen: Das EuGH-Urteil Zur Familien-zusammen-führung von Flüchtlingen," Verfassungsblog - on matters constitutional, April 19, 2018, <https://verfassungsblog.de/den-behoerden-beine-machen-das-eugh-urteil-zur-familienzusammenfuehrung-von-fluechtligen/>.

The convention protects the family and requires the state to take appropriate measures, as in Art. 9 CRC, “that a child shall not be separated from his or her parents against his or her will.” Art. 10 adds that “applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner.” Art. 22(2) CRC declares not only that the child who seeks refugee status needs to be protected and assisted but also that the UAM shall be assisted in finding his or her parents or other family members. Information that is essential for family reunification should be gathered. If it is not possible to find parents or other close relatives, the child “shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason.”<sup>110</sup>

When discussing family reunification, meaning the right to family and private life, examining other international frameworks is important such as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). As Art. 16(3) UDHR defines, “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” The ICCPR (Art. 17) also provides that “no one shall be subjected to arbitrary or unlawful interference with his [...] family” and that everyone “has the right to the protection of the law against such interference or attacks.”

Regarding the fate of UAM, the CRC Committee acknowledged that it is important and necessary to find a durable solution for all children who remain in the host state, regardless of their protection status.<sup>111</sup> The Committee underlined that “efforts to find durable solutions for unaccompanied or separated children should be initiated and implemented without undue delay and, wherever possible, immediately upon the assessment of a child being unaccompanied or separated. Following a rights-based approach, the search for a durable solution commences with analyzing the possibility of family reunification.”<sup>112</sup> Family reunification is one of the durable solutions for a separated child or unaccompanied minor. The child may want to bring close family members to the host state, which would help with local integration. The previously mentioned rights admit a right to family reunification in the host state if there are difficulties in

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<sup>110</sup> Convention on the Rights of the Child Art. 22(2).

<sup>111</sup> Committee on the Rights of the Child, “GENERAL COMMENT NO. 6 (2005) - Treatment of Unaccompanied and Separated Children Outside Their Country of Origin CRC/GC/2005/6” para. 80.

<sup>112</sup> Committee on the Rights of the Child para. 79.

reuniting the family in another country.<sup>113</sup> The CRC Art. 10(1) demands state that “applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner” and “shall entail no adverse consequences for the applicants and for the members of their family.” A lasting and sustainable solution guarantees that the UAM grow into adulthood by upholding their CRC rights in an environment that prioritizes the child’s safety and meets the child’s needs. The durable solution will shape the child's future, and therefore it must be in accordance with the child's best interest.<sup>114</sup>

## 4.2 European Framework

In the ECHR, the right to respect for private and family life is guaranteed under Art. 8. The Court’s jurisprudence has expanded the possibilities for dynamic interpretation of Art. 8, resulting in it encompassing various domains. When it comes to migration, this article has also been used effectively when it comes to securing the entry of the migrant’s family into the host country (e.g., *Sen v. the Netherlands*).<sup>115</sup> Nevertheless, when it comes to cases of family life and immigration, the ECtHR declared that the states’ requirement to allow the entry of relatives depends on the specific circumstances as well as the general interest.<sup>116</sup> When it comes to migration, the Court has also been mostly consistent when declaring the family life for the purpose of Art. 8 to consist of parents and minor children, which is a more restrictive view in comparison to non-migration cases.<sup>117</sup>

In the cases of family reunification of refugees and those beneficiaries of subsidiary protection, Art. 14 ECHR, the prohibition of discrimination, can also be considered necessary. The ECtHR emphasized that this article has to always be addressed together with other articles, complementing other provisions; the guarantee provided by Art. 14 does not have a separate existence

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<sup>113</sup> Smyth, “Migration, Refugees, and Children’s Rights,” 446.

<sup>114</sup> UNHCR, “Safe & Sound: What States Can Do to Ensure Respect for the Best Interests of Unaccompanied and Separated Children in Europe,” 22.

<sup>115</sup> Alan Desmond, “The Private Life of Family Matters: Curtailing Human Rights Protection for Migrants under Article 8 of the ECHR?,” *European Journal of International Law* 29, no. 1 (May 2018): 262, <https://doi.org/10.1093/ejil/chy008>; *Sen v. the Netherlands*, No. Application no. 31465/96 (ECtHR December 21, 2001).

<sup>116</sup> ECtHR, “Guide on Article 8 of the European Convention on Human Rights. Right to Respect for Private and Family Life, Home and Correspondence,” August 31, 2022, [https://www.echr.coe.int/documents/d/echr/Guide\\_Art\\_8\\_ENG](https://www.echr.coe.int/documents/d/echr/Guide_Art_8_ENG) Para. 403.

<sup>117</sup> Desmond, “The Private Life of Family Matters: Curtailing Human Rights Protection for Migrants under Article 8 of the ECHR?,” 266.

on its own.<sup>118</sup> The court clarified, in conjunction with Art. 8, regarding discrimination in the enjoyment of the right to respect for private and family life in different circumstances, among these cases concerning access to children as in the case of family reunification.<sup>119</sup>

To build a new “normal” life, family reunification is important for people who have fled, especially for children. In European law, there are many similar and equal treatments between refugees and people who have received subsidiary protection. Nevertheless, there are differences when it comes to family reunification because holders of subsidiary protection are not enjoying beneficial terms and conditions related to the right to family reunification.<sup>120</sup> The Family Reunification Directive (FRD) defines minimum standards for the Member States according to which non-EU citizens who live legally in an EU country can bring their family to join them. The idea behind this Directive is to preserve the family unit and supports the integration of non-EU nationals. Nevertheless, the FRD specifies some conditions for family reunification. It states that refugees and beneficiaries of subsidiary protection are not equal regarding family reunification as Art. 3(2c) declares, stating that the directive shall not apply when a person resides on the basis of subsidiary protection.<sup>121</sup> Therefore, the FRD is criticized for its limited scope when it comes to family reunification for UAM since those beneficiaries of subsidiary protection are not included.<sup>122</sup> EU law does not explicitly regulate the family reunification right for those with subsidiary protection.<sup>123</sup>

Family reunification is also “recognized as one of the key mechanisms for better integration of migrants and refugees. [...] Evidence shows that the absence of their families makes people more vulnerable to mental health issues and criminality. [...] Equal treatment of refugees and beneficiaries of subsidiary protection would be similarly beneficial.”<sup>124</sup> This problem is also underlined in the information note of the European Council on Refugees and Exiles (ECRE)

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<sup>118</sup> ECtHR, “Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention” (Council of Europe, August 31, 2022), [https://www.echr.coe.int/documents/d/echr/Guide\\_Art\\_14\\_Art\\_1\\_Protocol\\_12\\_ENG](https://www.echr.coe.int/documents/d/echr/Guide_Art_14_Art_1_Protocol_12_ENG) para. 3.

<sup>119</sup> ECtHR, “Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention” para. 203-205.

<sup>120</sup> Radjenovic, “Family Reunification Rights of Refugees and Beneficiaries of Subsidiary Protection,” 1.

<sup>121</sup> Council of the European Union, “Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification” (2003), <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32003L0086>.

<sup>122</sup> House of Lords European Union Committee, “2nd Report of Session 2016–17, Children in Crisis: Unaccompanied Migrant Children in the EU,” 2016, <https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/34/3402.htm> para. 287.

<sup>123</sup> FRA European Union Agency for Fundamental Rights, *Integration of Young Refugees in the EU*, 11.

<sup>124</sup> FRA European Union Agency for Fundamental Rights, 11.

and the European Legal Network on Asylum (ELENA). States must protect the family under international and European law. However, European States are imposing stricter rules on international protection beneficiaries seeking family reunification. This hinders integration and limits legal routes for those seeking protection. Art. 8 of the ECHR restricts States from refusing family reunification when there are significant obstacles to reunification somewhere else and when the best interest of the child is not considered. One of the obstacles is the imposition of waiting periods and income requirements on subsidiary protection holders, creating an arbitrary distinction between them and refugees. Such discrimination is unjustified unless objectively justified. States may not discriminate between groups that are in similar circumstances. In their note, ECRE and ELENA also argue and question that states are giving subsidiary protection to people who are undoubtedly eligible for refugee status. The Court of Justice of the European Union (CJEU) has also affirmed the need to align the treatment of refugees and subsidiary protection beneficiaries, and similar treatment should apply under the Qualification Directive regarding family unity (Art. 23).<sup>125</sup>

#### 4.3 Italy, Austria, and Germany

The Family Reunification Directive, as the European Commission explained, should not be interpreted as requiring the states to deny the right of family reunification for those beneficiaries of subsidiary protection. Some member states, such as Austria and Germany, apply restrictions regarding family reunification for beneficiaries of subsidiary protection. Austria introduced a longer waiting time (three years), and from March 2016 to July 2018, Germany denied family reunification completely. In contrast, Italy applies the same rules to refugees and those with subsidiary protection.<sup>126</sup>

Austrian legislation states that the concept of family is very narrow. Those with protection can bring their minor children and their spouse or registered partner, and parents in the case of UAM until they are 18. Other important family attachment figures are not included. Even if the European Commission encourages allowing other close relatives, it only obliges states to admit

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<sup>125</sup> ECRE - European Council on Refugees and Exiles and ELENA - European Legal Network on Asylum, "Information Note on Family Reunification for Beneficiaries of International Protection in Europe," June 2016, [https://www.ecre.org/wp-content/uploads/2016/07/ECRE-ELENA-Information-Note-on-Family-Reunification-for-Beneficiaries-of-International-Protection-in-Europe\\_June-2016.pdf](https://www.ecre.org/wp-content/uploads/2016/07/ECRE-ELENA-Information-Note-on-Family-Reunification-for-Beneficiaries-of-International-Protection-in-Europe_June-2016.pdf) para. 87-88.

<sup>126</sup> FRA European Union Agency for Fundamental Rights, *Integration of Young Refugees in the EU*, 39.

“the nuclear family.”<sup>127</sup> For those who are granted refugee status in Germany, other members of the narrow family can get asylum, or there can be family reunification, but the application must be submitted within three months. By narrow family, it is meant spouse or registered partner, minor unmarried children, parents or legal guardians of unmarried minors as well as unmarried siblings of minors. When looking at those beneficiaries of subsidiary protection, these narrow family members can also apply for family reunification, but every month there is a limited contingent of 1000 persons.<sup>128</sup> In Italy, family reunification includes the spouse, minor children, dependent adult children (due to their health state), dependent parents or parents over 65 if no other child can support them, and parents in general for UAM.<sup>129</sup>

Already in 2009, the UNHCR representative for Germany and Austria, Michael Lindenbauer, declared that it was important for UAM to expedite procedures for the reunification of the families and consider the best interest of the child. Lindenbauer claimed that the periods of separation and their negative consequences should be minimized, advocating for the right to family reunification, which should also be granted to beneficiaries of subsidiary protection.<sup>130</sup> The problem of family reunification and subsidiary protection was also a focus of Frances Nicholson’s paper along with why beneficiaries of this protection should also benefit from it in the same ways as refugees. One of Nicholson’s points is the state’s obligation regarding the child’s best interest. Such restriction in family reunification has damaging effects on children beneficiaries of subsidiary protection and is therefore not consistent with the state’s obligation to prioritize the best interest of the child.<sup>131</sup> Also, the commissioner for Human Rights of the Council of Europe, Dunja Mijatović, invites countries to give equal treatment and rules for beneficiaries of subsidiary protection that refugees have, and abolish the three-year waiting time before beneficiaries of subsidiary protection can apply for family reunification. Mijatović also recommends removing barriers to long-term stay, particularly for those with subsidiary

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<sup>127</sup> UNHCR Österreich, “HOFFEN AUF EIN WIEDERSEHEN,” 2016, [https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/Familienzusammenfuehrung\\_ONLINE.pdf](https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/Familienzusammenfuehrung_ONLINE.pdf), 8.

<sup>128</sup> Bundesamt für Migration und Flüchtlinge, “Familienasyl Und Familiennachzug,” November 14, 2019, <https://www.bamf.de/DE/Themen/AsylFluechtlingssschutz/FamilienasylFamiliennachzug/familienasylfamiliennachzug-node.html>.

<sup>129</sup> Istituto Nazionale Previdenza Sociale, “Ricongiungimento Familiare - Scheda,” n.d., <https://servizi2.inps.it/docallegati/Informazioni/lavoratorimigranti/tuteleprestazioni/prestazioniafavore dellafamiglia/Documents/Ricongiungimento%20familiare.pdf>.

<sup>130</sup> Das Portal der Kinder- und Jugendhilfe, “UN-Flüchtlingskommissariat: Vorrang Des Kindeswohls Gehört Auch Ins Asylrecht,” November 19, 2009, <https://jugendhilfeportal.de/artikel/un-fluechtlingskommissariat-vorrang-des-kindeswohls-gehört-auch-ins-asylrecht>.

<sup>131</sup> Nicholson Frances, “The ‘Essential Right’ to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification,” 149-151.

protection, reducing the residency requirement for citizenship and eliminating naturalization process delays.<sup>132</sup> Even if this comment was written in the report about Austria, because Germany has similar rules, it might also be a suggestion for German authorities.

Family reunification has become a controversial issue, especially in the context of different international protection statuses. The UN Convention on the Rights of the Child and international frameworks emphasize the importance of protecting the family. European law guarantees the right to respect private and family life. Nevertheless, Austria and Germany have restrictions on family reunification for beneficiaries of subsidiary protection status. Italy, on the other side, does not differentiate between protection statuses. The three-year waiting period (in Austria and Germany) is particularly stressful for children because children need parental care. Given the importance of parental presence for children, a reduction in the three-year waiting period is urgently needed. Experts and human rights advocates have stressed the importance of prioritizing the best interests of unaccompanied minors and granting them the right to family reunification. They call for equal treatment of international protection statuses and the removal of obstacles to family reunification.

## 5. Comparison between Italy, Austria, and Germany

### 5.1 Overview

The previous chapters explained the legal framework; this chapter focuses on the implementation and the actual situation of UAM, especially during the asylum process, but also the time afterward, by examining data, procedures, and facts starting from a more general situation in Europe and discussing each analyzed country.

The EU has been active in the context of integration and inclusion as part of its migration and asylum policy and has provided different action plans for it. As the “Action Plan on Integration and Inclusion 2021-2027” which emphasizes the need for targeted safety and support measures ensuring the best interest of the child, particularly for UAM.<sup>133</sup> The EU also made an “action

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<sup>132</sup> Dunja Mijatović, “Report Following Her Visit to Austria from 13 to 17 December 2021,” Commissioner for Human Rights of the Council of Europe (Strasbourg, May 12, 2022), 4.

<sup>133</sup> European Commission, “Action Plan on the Integration and Inclusion,” Migration and Home Affairs, accessed June 3, 2023, [https://home-affairs.ec.europa.eu/policies/migration-and-asylum/legal-migration-and-integration/integration/action-plan-integration-and-inclusion\\_en](https://home-affairs.ec.europa.eu/policies/migration-and-asylum/legal-migration-and-integration/integration/action-plan-integration-and-inclusion_en); European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions -

plan on unaccompanied minors (2010-14)” based on the best interest of the child principle to promote a common approach to the challenge.<sup>134</sup> Yet, even if in theory there are different rights that protect the UAM and recommendations for a durable solution, in practice, there are still many deficits. Many UAM are allowed to remain in the country with some form of protection until they reach the age of 18, leaving them in a sort of legal limbo. After they turn 18, there is the problematic praxis of returning them (after years far away from their home country, they are also strangers there, which means further problems), or they become eligible for a return, which can constitute a problem for a successful development into adulthood if the reintegration plan was made without the child or is not individually tailored.<sup>135</sup>

In 2019, the FRA highlighted the problem in Europe of delays and challenges of integrating young refugees, whom they said are at risk of becoming a “lost generation.” O’Flaherty underlines that while there are serious challenges, “these challenges are not insurmountable. Diverse examples highlight how smart and thoughtful policy decisions can go a long way towards overcoming obstacles. Policymakers at both national and EU level need to embrace such strategies to allow this generation become full members of our society.”<sup>136</sup> For their report, the FRA did fieldwork research in different countries including Italy, Austria, and Germany included. One of the findings is that the asylum procedures took longer than the time limits EU law established. Particularly when the applicant is a child, efforts should be made to minimize the factors that lead to prolonged proceedings, especially when those factors fall within the authority’s jurisdiction. The FRA also recommends that when an applicant has good opportunities to obtain some sort of protection, he or she can begin the integration process during the protection procedure.<sup>137</sup> Even if the Directive 2013/32/EU sets clear timelines for the asylum procedure, issues regarding excessively long asylum procedures typically arise in European countries, which then leads to people in a limbo of waiting during which they do not have the possibility of doing something.<sup>138</sup> When it comes to applications made by UAM, the countries (Italy, Austria, and

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Action Plan on Integration and Inclusion 2021-2027,” November 24, 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0758&qid=1632299185798>.

<sup>134</sup> European Commission, “Communication from the Commission to the European Parliament and the Council - Action Plan on Unaccompanied Minors (2010 – 2014) SEC(2010)534,” May 6, 2010, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52010DC0213>.

<sup>135</sup> UNHCR, “Safe & Sound: What States Can Do to Ensure Respect for the Best Interests of Unaccompanied and Separated Children in Europe,” 49.

<sup>136</sup> FRA European Union Agency for Fundamental Rights, “Young Migrants: Is Europe Creating a Lost Generation?,” November 19, 2019, <https://fra.europa.eu/en/news/2019/young-migrants-europe-creating-lost-generation>.

<sup>137</sup> FRA European Union Agency for Fundamental Rights, *Integration of Young Refugees in the EU*, 11.

<sup>138</sup> FRA European Union Agency for Fundamental Rights, 26.

Germany) approach it differently. In Italy, their applications are processed as a priority, which differs from how they are handled in Austria and Germany, where their handling can take longer than for adults because of, among other reasons, the amount of time it takes to find a legal guardian or because of the age assessment procedure.<sup>139</sup>

A significant difference between children and adolescent refugee seekers and European national children is the higher chances of psychological disorders for the former, including posttraumatic stress, depression, anxiety disorders, and emotional and behavioral problems.<sup>140</sup> The World Health Organization (WHO) has reported that refugees experience higher rates of mental health issues such as anxiety, posttraumatic stress, and depression, compared to the general population. This heightened vulnerability can be attributed to the cumulative impact of their experiences before, during, and after their flight from their home countries. Furthermore, upon arrival in their destination country, refugees may face various challenges that can further exacerbate their mental well-being. These challenges include living in a state of legal uncertainty, inadequate reception conditions, detainment, rejection of asylum claims, fear of being sent back, separation from their families, isolation, and difficulties with integration. All these factors contribute to the overall impact on the mental health of refugee applicants as well as the deficiency of social integration, prolonged asylum procedures, and frequent relocations.<sup>141</sup> Where access to education would help, though.

### *Education*

A major problem young refugees face is that they do not always have the opportunity to attend school. Art. 14 (2) of Directive 2013/33/EU requires that asylum-seeking children be included in education within three months after applying for international protection. Art. 14 (1) of this directive requests the states to grant access to school to all minors who are seeking protection and to do so under similar conditions to those experienced by national children. This article also asks the Member States not to withdraw secondary education on the sole ground of a child turning 18. Art. 27 of the QD declares that minors who received international protection shall have access to school under the same conditions as nationals. The FRA's research found that school accessibility to compulsory schooling is generally granted, but access to post-

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<sup>139</sup> FRA European Union Agency for Fundamental Rights, *Integration of Young Refugees in the EU*, 32.

<sup>140</sup> Kien et al., "Prevalence of Mental Disorders in Young Refugees and Asylum Seekers in European Countries," 1304.

<sup>141</sup> FRA European Union Agency for Fundamental Rights, *Integration of Young Refugees in the EU*, 79-13.

compulsory education may exist only in theory, particularly for students who have arrived after the age of compulsory schooling. Another difficulty is administrative problems such as finding a place in a school, transfers of accommodation, and other barriers, which then result in months or years until a child is finally enrolled in school, which can lead to a problem when the child is no longer at the age for compulsory school. The FRA's approach to supporting these children is to integrate them into the regular education system at an early age, but the education system should also consider strengthened measures to ensure integration. Member States should also facilitate access to post-compulsory education. However, schooling in the reception center should be temporary.<sup>142</sup>

Even if in theory children with international protection should have access to mainstream compulsory education, in practice, this does not always occur. In some German States, a child cannot enroll in a public school if it does not meet additional requirements. In Italy, there are examples where children can start school in reception centers; however, this is detrimental to their integration possibilities. Another criticism of Italy when it comes to education is that in Germany and Austria, there are formal preparatory and language classes. In Italy, even if language classes are offered, they are less formal, so children start school with a lack of language, and there are no formal preparatory programs to facilitate enrolment into school. The duration of these classes is criticized in all three countries for being too short and insufficient or because the knowledge learned in the preparatory classes is not sufficient for some subjects.<sup>143</sup> Despite the fact that children have the right to attend public schools, various practical or logistical obstacles can prevent them from doing so. In Italy, public schools often refuse to take children who need to attend compulsory education because of their language deficit, which leads to a waiting time until these children are 16 and are then placed in adult education facilities.<sup>144</sup>

### *Housing and Social Assistance*

Especially during the period from 2015 to 2016 when the number of refugees increased rapidly, the reception centers were overcrowded, and the states had insufficient capacities to accommodate all the applicants. In Germany and Austria, sometimes 10 to 12 people had to share a room, including both adults and children. This has led to a lack of attention, especially towards those who are more vulnerable; risks of violence; lack of privacy; social isolation; and inadequate

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<sup>142</sup> FRA European Union Agency for Fundamental Rights, *Integration of Young Refugees in the EU*, 14.

<sup>143</sup> FRA European Union Agency for Fundamental Rights, 88–91.

<sup>144</sup> FRA European Union Agency for Fundamental Rights, 96.

hygiene. Not having a space where a person can retreat, a loud environment, and having people around can interfere in personal matters and are only further burdens for an already difficult situation. Inadequate hygiene leads to dermatologic diseases, such as bed bugs and scabies. During its research in 2015–2016, the FRA discovered that lack of hygiene was a problem in all reception facilities.<sup>145</sup> The more people are crowded together, the less attention is paid to the weaker ones – in this case, to the children – and thus the best interest of the child can be neglected. It is proven that factors like location and housing type influence and facilitate social inclusion and integration. Housing and integration experts in Austria have stated that the best solution for the integration of beneficiaries of international protection would be housing that allows regular and normal contact with locals in everyday life. Additionally, creating a bond with volunteers, mentors, or guardians has an important value, which consequently helps with learning the language and integrating into the country. This can also be facilitated if the protection status holder lives with nationals of the host state. These types of housing or host families already exist in Germany and Austria.<sup>146</sup>

Regarding social welfare, under EU law, refugees have the same rights as nationals. However, when it comes to beneficiaries of subsidiary protection, Member States are allowed to pay only core benefits. Of Italy, Austria, and Germany, Austria is the only state that differentiates between protection statuses.<sup>147</sup> Generally, social assistance for refugees is a problematic topic and is highly discussed in political agendas. Refugees are often seen as a heavy burden on public funds. Austria has therefore reduced, among others, social welfare for beneficiaries of subsidiary protection by giving only core benefits and differentiating between different protection holders. However, research shows that even if these are additional costs for the state, in the long term, refugees can also be social and economic gain. International human rights law obliges all people, including asylum seekers, to have an adequate standard of living.<sup>148</sup>

### 5.1.1 Italy

#### *Data*

As previously mentioned, Italy is one of the first countries where refugees and migrants arrive in Europe. The route through the Mediterranean Sea, especially from Libya and Tunis to Italy,

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<sup>145</sup> FRA European Union Agency for Fundamental Rights, *Integration of Young Refugees in the EU*, 47–48.

<sup>146</sup> FRA European Union Agency for Fundamental Rights, 56-57.

<sup>147</sup> FRA European Union Agency for Fundamental Rights, 13.

<sup>148</sup> FRA European Union Agency for Fundamental Rights, 63-64.

is one of the main migration itineraries toward the EU. In 2022, more than 105,100 refugees were registered in Italy, which is the highest number since 2017. In the first three months of 2023, 36,100 refugees arrived in Italy, 7,200 of whom were children.<sup>149</sup> From January to the end of April 2023, 4,300 children and adolescents arrived without a parent or another guardian adult. At the end of March 2023, there were approximately 19,600 UAM in the Italian reception system.<sup>150</sup> Many of these children are facing this dangerous journey alone, without their parents or other adult members of their family. Of the children who arrived in Italy in 2021, a year with a higher number of UAM compared to the previous year, 76% (10,053), most of them came from Tunisia, Egypt, Côte d'Ivoire, and Bangladesh.<sup>151</sup> The report of the UNHCR, UNICEF, and

from 2021 shows that in comparison to other countries where refugees first arrive, Italy has the highest number of children and, within this group, the highest number of UAM or separated children. Most of these UAM (95%) are between the ages of 15 and 17 years.<sup>152</sup> In 2022, 17.5% UAM were between the age of 7 and 14.<sup>153</sup> Comparing this number to those of other countries such as Greece, Bulgaria, and Malta, Italy has the highest percentage of the UAM between the ages of 15 and 17 years.<sup>154</sup>

### *Facts*

UAM are protected through various legislations including mainly the Consolidated Act on Immigration (Legislative Decree No. 286/1998) and its implementing regulation (Presidential Decree No. 394/1999). Since 2017, Italy has also been the only European country to have the so-called “legge Zampa,” Law 7 April 2017, No. 47, which is specifically aimed at UAM. With this legislation, Italy introduced significant changes to the existing legislation, aiming to strengthen the protection tool. The legge Zampa also introduces the absolute prohibition of rejection of UAM at the border, giving them a residence permit that is valid until the age of

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<sup>149</sup> unicef, “Rifugiati e Migranti in Europa,” accessed May 11, 2023, <https://www.unicef.it/emergenze/rifugiati-migranti-europa/>.

<sup>150</sup> unicef, “Migranti: Nel Primo Trimestre Supportati Nel Nostro Paese 4.000 Minorenni e Giovani, 2.500 Solo a Lampedusa,” May 5, 2023, <https://www.unicef.it/media/migranti-nel-primi-trimestre-supportati-nel-nostro-paese-4-000-minorenni/>.

<sup>151</sup> UNHCR, UNICEF and IOM, “Refugee and Migrant Children in Europe Accompanied, Unaccompanied and Separated,” 1.

<sup>152</sup> UNHCR, UNICEF and IOM, “Refugee and Migrant Children in Europe Accompanied, Unaccompanied and Separated,” July 21, 2022, 1-3.

<sup>153</sup> Integrazionemigranti.gov.it Vivere e Lavorare in Italia “Minori Stranieri Non Accompagnati,” accessed June 1, 2023, <https://integrazionemigranti.gov.it/it-it/Dettaglio-approfondimento/id/38/Minori-stranieri-non-accompagnati>.

<sup>154</sup> UNHCR, UNICEF and IOM, “Refugee and Migrant Children in Europe Accompanied, Unaccompanied and Separated,” July 21, 2022, 1-3.

18.<sup>155</sup> In 2018, in its reply to the list of issues from the Committee of the CRC, Italy declared that through Law No. 47/2017, they recognize UAM as having the same rights as national or EU children when it comes to child protection.<sup>156</sup> Italy has a system that guarantees access to the fulfillment of compulsory school (children between 6 and 16 years of age must go to school) and the right to education until the child turns 18, irrespective of their protection status. This means refugees have the same rights to education as Italian nationals.<sup>157</sup> This right is supported by the “Guidelines for the Right to Study of Minors Outside the Family of Origin” signed in 2017 by the Minister of education and the National Guarantor of Childhood and Adolescence, which states, “to guarantee the right to study of this type of pupil, it is necessary to allow enrollment and placement in school at any time of the year, even after the deadline.”<sup>158</sup> However, in reality, this is not always implemented.

Lampedusa, “the border to Europe,” which is often the first entry to Italy, is one of the areas which is extremely overcrowded, and the prolonged time until UAM are transferred to suitable places has a high negative impact on them. Raffaella Milano, director of Italy-Europe programs at Save the Children, says, “It is necessary to speed up transfer procedures, ensuring that unaccompanied minors are granted all the fundamental rights enshrined in the legge Zampa, starting with an immediate reception worthy of the name, health care and the appointment of a guardian.”<sup>159</sup> The Law 7 (legge Zampa) states that UAM should not remain longer than 30 days in the first reception and then be transferred to a secondary reception facility, where the children’s individual needs can be taken care of. Legge Zampa also states that UAM cannot stay in hotspot areas.<sup>160</sup> The problem is that there are not enough accommodations, which leads to fewer opportunities to get into the first reception facilities and more UAM staying longer in hotspot areas or even at disembarkation areas. Save the Children has criticized this situation,

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<sup>155</sup> [Integrazionemigranti.gov.it Vivere e Lavorare in Italia, “Minori Stranieri Non Accompagnati.”](https://www.integrazionemigranti.gov.it/Vivere_e_Lavorare_in_Italia_Minori_Stranieri_Non_Accompagnati)

<sup>156</sup> Committee on the Rights of the Child, “List of Issues in Relation to the Combined Fifth and Sixth Periodic Reports of Italy - Replies of Italy to the List of Issues,” October 31, 2018, <https://docstore.ohchr.org/Self-Services/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsunkTiY%2FvDoW-jbtX8Nu6M%2Bw7DkLCIoRh7QbaxBsLUgAM%2BbkfaP-OEbyn3NRGVMaaNCQliPl6rw43%2FcAJJ1ZQzJ5RLZSSQgNLAqDyZCTXFsRN-kimX1ASC7h8y3V4fpCK1U3A%3D%3D> para. 15.

<sup>157</sup> UNHCR, “Education,” Help Italy, accessed July 3, 2023, <https://help.unhcr.org/italy/services/education/>.

<sup>158</sup> Ministero dell’istruzione e del Merito, “Minori Stranieri Non Accompagnati,” accessed June 1, 2023, <https://miur.gov.it/minori-stranieri-non-accompagnati>.

<sup>159</sup> Save the Children, “Migranti: Oltre 200.000 Minori Stranieri Non Accompagnati Arrivati Negli Ultimi 5 Anni in Europa per Chiedere Asilo Lasciati a Destini Incerti, Molti Dei Quali Senza Sicurezza e Protezione. Oltre 2.000 i Minori Soli Sbarcati Nel 2020 in Italia,” September 2, 2020, <https://www.savethechildren.it/press/migranti-oltre-200000-minori-stranieri-non-accompagnati-arrivati-negli-ultimi-5-anni-europa>.

<sup>160</sup> Save the Children, “Nascosti in Piena Vista. Minori Migranti in Viaggio (Attraverso) Verso l’Europa,” January 2023, 7, <https://s3.savethechildren.it/public/files/uploads/pubblicazioni/nascosti-piena-vista-frontiera-sud.pdf>.

emphasizing that many UAM stay longer than 30 days in the first accommodations, which leads not only to management problems but also to growing anxiety and frustration for the children as they are stuck in the same place for months. These children see this time as lost. Months pass in which they cannot go to school, talk to a guardian, or get the needed documents to work (when they are older than 16), so some UAM look for a way out and leave the reception centers, making themselves “invisible” to the state.<sup>161</sup>

The last years showed that UAM are a regular presence in Europe, yet in Italy, the number of first accommodation centers has decreased.<sup>162</sup> The situation of UAM requires special attention. Not only are they alone in a new country without knowing the language, but they are also without the support and help of their family. Therefore, education plays an important role in the UAM’s inclusion in society. School should be a place where all children are the same and have the same educational opportunities. Nevertheless, the reality is showing that in Italy, UAM face a higher risk of educational poverty compared to national children.<sup>163</sup>

In the CRC Committee’s concluding observation from February 2019 on the periodic reports of Italy, it recommends that the state “strengthen its efforts to ensure the principle of best interest [...] in particular in relation to unaccompanied or separated children” and give it due weight as the primary consideration when UAM arrive in the state.<sup>164</sup> However, the Committee is concerned about “shortcomings in emergency, first- and second-level reception centers for unaccompanied children concerning the age assessment procedure, the lack of adequate information and social activities for children, the length of stay of children in emergency or first-level reception centers, and delays in the appointment of guardians” as well as the “lack of permanent and suitable resettlement options for refugees, particularly children and their families.”<sup>165</sup> Therefore, the Committee urges Italy to establish appropriate reception and protection mechanisms for UAM through adequate reception capacities to implement a uniform method of age determination that respects the rights of the child and that should be used only in cases of serious doubt. The Committee suggests that cases with UAM should be processed in a positive,

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<sup>161</sup> Save the Children, “Nascosti in Piena Vista. Minori Migranti in Viaggio (Attraverso) Verso l’Europa,” 64–65.

<sup>162</sup> Save the Children, 6–7.

<sup>163</sup> Con i Bambini impresa sociale, “La Condizione Dei Minori Stranieri Non Accompagnati in Italia,” Osservatorio, June 8, 2021, <https://www.conibambini.org/osservatorio/la-condizione-dei-minori-stranieri-non-accompagnati-in-italia/>.

<sup>164</sup> Committee on the Rights of the Child, “Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Italy \*,” (CRC/C/ITA/CO/5-6 February 28, 2019) para. 16.

<sup>165</sup> Committee on the Rights of the Child para. 33.

humane, and quick way so to find a durable solution. The Committee has also reminded Italy that the best interests of the child shall always be considered as a primary consideration when it comes to children in situations of migration. The committee also urges strengthening “measures to provide inclusive and equitable quality education to migrant children, and to facilitate access to lifelong learning opportunities, including by strengthening the capacities of education systems and by facilitating non-discriminatory access.”<sup>166</sup>

To summarize, Italy has enacted laws, such as the Zampa Law, to protect UAM and provide them with child protection rights equivalent to national or EU children. However, challenges persist in implementing these laws, with issues including overcrowding, delays in transfers, and inadequate reception conditions. The CRC Committee has also called for improvements, emphasizing the importance of, among others, appointments of guardians and inclusive education for migrant children, and Italy is urged to prioritize the best interests of UAM and improve its reception and protection mechanisms. The gap between requirements and reality grows to an extent as the number of refugees increases.

### 5.1.2 Austria

#### *Data*

Like other European countries, Austria also had to cope with a drastic rise in asylum applications in 2015.<sup>167</sup> In 2020, 1,467 UAM arrived in Austria, with the majority coming from Afghanistan and Syria, and 381 (almost one-quarter) were admitted to the asylum procedure.<sup>168</sup> In 2022, there were even more asylum applications than in 2015, also with the highest proportion of asylum-seeking children in the EU.<sup>169</sup> In 2022, in comparison to the previous year, the number of UAM more than doubled with 13,276 applications (in 2015, there were 8,277, and in 2021, 5,605). Most of the UAM who applied for asylum in Austria in 2022 were between the ages of 14 and 18; only 290 were under the age of 14.<sup>170</sup>

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<sup>166</sup> Committee on the Rights of the Child, “Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Italy \*,” para. 34-36.

<sup>167</sup> Dursun and Sauer, “The Asylum–Child Welfare Paradox,” 3.

<sup>168</sup> Kommission für den Schutz der Kinderrechte und des Kindeswohls im Asyl- und Fremdenrecht, “Bericht Der Unabhängigen Kommission Für Den Schutz Der Kinderrechte Und Des Kindeswohls Im Asyl- Und Fremdenrecht KURZFASSUNG,” 5.

<sup>169</sup> Kurier, “Österreich Hat Die Meisten Asylsuchenden Kinder in Der EU,” *Kurier*, June 8, 2023, <https://kurier.at/politik/inland/oesterreich-hat-die-meisten-asylsuchenden-kinder-in-der-eu/402479075>.

<sup>170</sup> Martin Mohr, “Anzahl Der Unbegleiteten Minderjährigen Asylbewerber (UMA) in Österreich von 2013 Bis 2023,” Statista, accessed May 15, 2023, <https://de.statista.com/statistik/daten/studie/466967/umfrage/unbegleitete-minderjaehrige-asylbewerber-in-oesterreich/>.

### *Facts*

When unaccompanied minor refugees arrive in Austria, they are put in one of the two initial reception centers. Most of them are brought to Traiskirchen, which is known to be overcrowded and not child friendly.<sup>171</sup> Because the number of asylum seekers is growing, in 2022, there was a lack of about 5,000 accommodations. The UNCHR criticized the use of tents as a solution, due to the low temperatures.<sup>172</sup>

When looking at the admission procedure, when these children do not have credible documents proving their age and that they are underage, the Federal Office for Immigration and Asylum or the Federal Administrative Court can order an age evaluation. It often depends on the official assigned whether the asylum applicant must undergo this test.<sup>173</sup> After an unaccompanied child arrives in the country, the first step is the admission procedure, where it is determined whether another European country is already responsible for the applicant for asylum. Often for this and the eventual age evaluation, much time passes during which a child cannot go to school, is not cared for, and is not placed in child-appropriate accommodations. If the admission procedure is decided positively, each child is assigned a person who has custody. However, there are always cases where a child waits for a positive admission procedure for years because the child is already registered in another country.<sup>174</sup> During the time in the initial reception center, some of these children in Traiskirchen were cared for by asylum-seeking women also living there who sometimes did not even speak the same language. This underlines the problem of shortcomings in the Austrian system of guardianship for UAM.<sup>175</sup>

The first inquiry after entering the country is decisive of whether the person is admitted to the asylum procedure. Most of the interrogations are done by police officers, and not only are the children often on their own, but the overwhelming questions and the setting put children under greater tension and frighten them. These inquiries are examples of misrepresentations of the best interest as they are often not child friendly. The answers given in this inquiry are also being

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<sup>171</sup> Dursun and Sauer, “The Asylum–Child Welfare Paradox,” 5.

<sup>172</sup> Kurier, “Österreich Hat Die Meisten Asylsuchenden Kinder in Der EU.”

<sup>173</sup> Dursun and Sauer, “The Asylum–Child Welfare Paradox,” 5.

<sup>174</sup> Diakonie, “Österreichs Umgang Mit Unbegleiteten Minderjährigen Flüchtlingen,” Diakonie, June 21, 2021, <https://www.diakonie.at/news-stories/story/oesterreichs-umgang-mit-unbegleiteten-minderjaehrigen-fluechtlingen>.

<sup>175</sup> Mijatović, “Report Following Her Visit to Austria from 13 to 17 December 2021” para 16-17.

used in the later asylum process. Therefore, if the children's answers are inaccurate, it can be a disadvantage later.<sup>176</sup> After the admittance approval of the application for asylum, the children are removed from the reception center and should be brought to accommodations that are especially for UAM and receive primary care.<sup>177</sup> These children are spread across Austria into childcare facilities, where the children's situation improves. Yet, these accommodations are financed within the Basic Welfare Support, which is the framework for asylum seekers, and not the Child and Youth Welfare Service, which is for the national children.<sup>178</sup> Not all of the UAM get to be in a childcare facility; some of these children are brought to accommodations for adults, where the personnel are not socio-pedagogically trained.<sup>179</sup>

In contrast to the first inquiry, the first interview for the asylum application is an important and decisive one. The interview can take hours (5 to 6 hours is not atypical), which is long for everyone, but for children, it can be even more stressful because this interview is something in which they put a great deal of hope and they are scared and insecure. The officials of the Federal Office for Immigration and Asylum (Bundesamt für Fremdenwesen und Asyl), who conduct the interview are often not trained to work with children and in many cases use the same questions that they would use with adults, including the questions about being married or work experience (which could be acceptable for a 16-year-old but strange for a 10-year-old child).<sup>180</sup>

Dursun and Sauer conducted different interviews with UAM in Austria and with experts. They emphasize that the long procedure for asylum is demoralizing and it is a psychological stress for the UAM. Waiting is, especially for young people, a burden. These children are in a period of their life when they are trying to find their way in their future life, and waiting years in a status of uncertainty is demoralizing and is even more difficult for them than for adults. Some of the UAM are admitted to the asylum procedure but have to wait a long period for their first interview, sometimes even for years, and/or have to wait months to a year to know about their asylum decision.<sup>181</sup> It is criticized that Austrian authorities give more importance to determining the age of the minor as well as the UAM motives and not taking into account the needs of the child.<sup>182</sup> These children have not only been away from home and therefore away from their

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<sup>176</sup> Diakonie, "Österreichs Umgang Mit Unbegleiteten Minderjährigen Flüchtlingen."

<sup>177</sup> Diakonie.

<sup>178</sup> Dursun and Sauer, "The Asylum-Child Welfare Paradox," 6.

<sup>179</sup> Diakonie, "Österreichs Umgang Mit Unbegleiteten Minderjährigen Flüchtlingen."

<sup>180</sup> Diakonie.

<sup>181</sup> Dursun and Sauer, "The Asylum-Child Welfare Paradox," 5-6.

<sup>182</sup> Dursun and Sauer, "The Asylum-Child Welfare Paradox," 6.

parents already for a long time already, but after they arrive in Austria, it can take months and in some cases even years before Child and Youth Welfare finally takes custody.<sup>183</sup>

The long waiting times and long periods of separation from their families as well as the worrying about family left behind who may live in a war zone means another great psychological burden for the already mentally affected children. The non-response from decision-makers places additional stress on the UAM. All that shows that the situation that UAM are experiencing in Austria is characterized by a system that neglects children's necessities and prospects.<sup>184</sup> Children often spend too much time in initial reception centers, which deprives them of essential needs that should be a priority for children. Apart from the overcrowded reception centers, there is a lack of important infrastructure and resources that should primarily benefit children, including childcare, education, and also recreational activities.<sup>185</sup> When the waiting time in these first centers becomes longer, these children do not have the opportunity to learn the new language and fall behind with their education which in addition to all the other restrictions limits future plans and prospects.<sup>186</sup>

Many children and adolescents are receiving subsidiary protection. However, this makes family reunification very difficult because beneficiaries of subsidiary protection can only apply for reunification after three years and many UAM become adults during this waiting time.<sup>187</sup> Three years is a long time for children to be separated from their parents, and this time is often added to time already away from them during the journey towards Europe as well as the time inside Austria before they even receive subsidiary protection. If this waiting time is not completed before the unaccompanied minor turns 18, family reunification – in this case, reunification of the children with their parents – is not legally possible because only minors can be joined by their parents.<sup>188</sup> The Red Cross estimates that family reunification for UAM is therefore impossible in many cases. “Since children and adolescents under the age of 18 are particularly dependent on family support, this regulation is contrary to the obligation to take the best interests of the child into account, as enshrined in the constitution and the UN Convention on the Rights of the Child.”<sup>189</sup> When the asylum process takes so long and UAM reach the age of 18,

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<sup>183</sup> Diakonie, “Österreichs Umgang Mit Unbegleiteten Minderjährigen Flüchtlingen.”

<sup>184</sup> Dursun and Sauer, “The Asylum–Child Welfare Paradox,” 6.

<sup>185</sup> Dursun and Sauer, “The Asylum–Child Welfare Paradox,” 6.

<sup>186</sup> Diakonie, “Österreichs Umgang Mit Unbegleiteten Minderjährigen Flüchtlingen.”

<sup>187</sup> Dursun and Sauer, “The Asylum–Child Welfare Paradox,” 5.

<sup>188</sup> Diakonie, “Österreichs Umgang Mit Unbegleiteten Minderjährigen Flüchtlingen.”

<sup>189</sup> UNHCR Österreich, “HOFFEN AUF EIN WIEDERSEHEN,” 12.

not only is family reunification impossible, but if their case is also decided negatively, their world collapses again after time spent building a new life in the host country.<sup>190</sup>

As the Austria Child Welfare Commission (an independent commission to evaluate the consideration of children's rights and the best interests of the child in all asylum and alien law) underlines, Austria is built on human rights, with specific obligations toward children that arise not only from the CRC but also from European and national rights. These declare that children are recognized to have rights on their own without distinction of their status. It is also important to remember that a child's development is a process of the interaction of biological, psychological, and social factors, which in the case of refugees require comprehensive protection and prevention measures.<sup>191</sup> The Austria Supreme Court pronounced for the first time in 2005 that the best interest of the child in connection with the custody of UAM cannot be limited to the child's basic needs.<sup>192</sup> Even though children's rights are constitutionally secured in Austria, they are not consistently observed in their realization. For example, Art. 2(2) of the BVG Kinderrechte states the child "[...] shall be entitled to the special protection and support of the state"; the best interests of the child are also often disregarded in reality, even though Austria guarantees this in Art. 1 BVG Kinderrechte. Irmgard Griss, head of the Austrian child welfare commission, argues that children's rights are largely disregarded in asylum law.<sup>193</sup> Griss says that "children's rights are secured in the constitution, but in current law, they are becoming thinner and thinner. At the bottom, with the children themselves, little comes through."<sup>194</sup>

In their concluding observation on the periodic reports of Austria, the CRC Committee criticized that unaccompanied minor refugees aged 14 years and above do not obtain the same level of support as its national children. The daily care fee is also lower compared to Austrian children, resulting in larger groups, reduced quality of care, and insufficient monitoring by child and youth welfare services in these institutions.<sup>195</sup> The difference in treatment between UAM

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<sup>190</sup> Diakonie, "Österreichs Umgang Mit Unbegleiteten Minderjährigen Flüchtlingen."

<sup>191</sup> Kommission für den Schutz der Kinderrechte und des Kindeswohls im Asyl- und Fremdenrecht, "Bericht Der Unabhängigen Kommission Für Den Schutz Der Kinderrechte Und Des Kindeswohls Im Asyl- Und Fremdenrecht KURZFASSUNG," 6.

<sup>192</sup> Kommission für den Schutz der Kinderrechte und des Kindeswohls im Asyl- und Fremdenrecht, "Bericht Der Unabhängigen Kommission Für Den Schutz Der Kinderrechte Und Des Kindeswohls Im Asyl- Und Fremdenrecht KURZFASSUNG," 27.

<sup>193</sup> Die Presse, "Griss Zu Asylverfahren: 'Kinder Werden Kaum Berücksichtigt,'" *Die Presse*, April 12, 2021, <https://www.diepresse.com/5964446/griss-zu-asylverfahren-kinder-werden-kaum-beruecksichtigt>.

<sup>194</sup> "Griss Zu Asylverfahren: 'Kinder Werden Kaum Berücksichtigt.'"

<sup>195</sup> Committee on the Rights of the Child, "Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Austria \*," (CRC/C/AUT/CO/5-6, March 6, 2020) para. 28.

and Austrian children who do not live with their families (like those living with foster families or in institutional care) is the daily rate care facilities receive for them. The daily rate for UAM is a maximum of €95 per child; for nationals, the average rate is €170. This leads to difficulties in covering the costs of care facilities and is one of the reasons there are too few accommodations and UAM must be accommodated in facilities that are unsuitable for children.<sup>196</sup>

The CRC Committee praised the measures taken to establish and provide specialized reception institutions and that some states are implementing child protection safeguards in their institutions. However, there are still various points of severe concern. When an unaccompanied minor or separated child over 14 years of age arrives in the country or at the border, child welfare and protection authorities are directly called; these children do not receive a legal guardian before they are assigned to the state's reception facilities and because of age determination, the transfer can take some time. When it comes to the age assessment procedure, the Committee declared that it does not always respect the dignity and the best interest of the child.<sup>197</sup> Therefore, with reference to GC No. 6, the Committee wants Austria to ensure that child welfare and protection authorities are involved from the first moment an unaccompanied minor is found and that the child is also immediately assigned a guardian. When it comes to age assessment, the procedure should happen in the least invasive way possible in compliance with the legal principle of the protection of legitimate expectations.<sup>198</sup> Dunja Mijatović, the Commissioner for Human Rights of the Council of Europe, underlines in her report that there are shortcomings in the Austrian system of guardianship for UAM and expressed concerns about the obstacles to family reunification and urges for faster procedures for UAM.<sup>199</sup>

The treatment of unaccompanied refugee minors in Austria raises concerns about their well-being and protection. Initial reception centers are overcrowded and unsuitable for children, and due to various delays, children are left without adequate care or accommodation. The initial asylum hearing is often intimidating for children, and issues can impact their subsequent asylum process. Unaccompanied minors are placed in facilities that do not meet child protection

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<sup>196</sup> Amnesty International, "Warum Unbegleitete Geflüchtete Kinder in Österreich dringend besseren Schutz brauchen," Accessed June 6, 2023, <https://www.amnesty.at/themen/unbegleitete-gefluechtete-kinder-in-oesterreich/warum-unbegleitete-gefluechtete-kinder-in-oesterreich-dringend-besseren-schutz-brauchen/>.

<sup>197</sup> Committee on the Rights of the Child, "Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Austria \*" para. 39.

<sup>198</sup> Committee on the Rights of the Child para. 40.

<sup>199</sup> Mijatović, "Report Following Her Visit to Austria from 13 to 17 December 2021," 4.

standards, and the long duration of the asylum process causes psychological stress for unaccompanied minors. Family reunification is also a continuing problem due to the long waiting periods for subsidiary protection. Although Austria has obligations toward children's rights, including those under the CRC, implementing these rights often falls short. Comprehensive protection (e.g., child-friendly questioning and accommodations) and prevention measures are required to support the development and well-being of vulnerable UAM.

### 5.1.3 Germany

#### *Data*

The peak of UAM in Germany was in 2015 (with 59,581 UAM); however, in 2022, the number increased again to 20,283 UAM.<sup>200</sup> In mid-February 2023, there were 28,276 UAM under the jurisdiction of the youth welfare authorities.<sup>201</sup>

Looking at the statistical data from the year 2021 about UAM and the asylum applications and decisions, it can be seen that most asylum applications (first applications) were from Somalia, (223 with 68 decisions: of which 18 received refugee protection and 13 subsidiary protection, 0 got asylum); Afghanistan, (1,449 with 378 decisions: of which 0 received asylum, 57 refugee protection, 49 subsidiary protection, and 150 deportation ban); and Syria, (925 with 528 decisions: of which 2 asylum protection, 13 refugee protection and 494 received subsidiary protection). There was a total of 3,249 asylum applications in 2021, with only 1,320 being decided.<sup>202</sup> From 2018 to 2022, more than 15,000 asylum applications of UAM were first rejected; later, the German court granted them protection.<sup>203</sup>

#### *Facts*

When a refugee under the age of 18 without a parent arrives in Germany, the Youth Welfare Office (*Jugendamt*) takes custody. In Germany, UAM are supervised under the rules of the Child and youth welfare law (Kinder- und Jugendhilferechtes - Sozialgesetzbuch [SGB] VIII),

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<sup>200</sup> Mediendienst Integration "Unbegleitete Minderjährige Flüchtlinge," accessed April 15, 2023, <https://mediendienst-integration.de/migration/flucht-asyl/minderjaehrige.html>.

<sup>201</sup> Institut für Sozialpädagogische Forschung Mainz gGmbH (ism), "Servicestelle junge Geflüchtete - Integration durch Teilhabe und Chancengleichheit" (Institut für Sozialpädagogische Forschung Mainz gGmbH (ism), February 14, 2023), 2, <https://b-umf.de/src/wp-content/uploads/2023/02/uma-meldungen-14022023.pdf>.

<sup>202</sup> Bundesamt für Migration und Flüchtlinge Referat Statistik, "Statistische Daten Zu Unbegl. Minderj. Kinder (< 18 Jahre) Hier: Anträge Und Entscheidungen Im Zeitraum 01.01.2021 - 31.12.2021," December 31, 2021, <https://b-umf.de/src/wp-content/uploads/2022/06/2021-umf.pdf>.

<sup>203</sup> tagesschau.de, "Bundesregierung Will Familiennachzug Erleichtern," *tagesschau.de* October 26, 2022, <https://www.tagesschau.de/inland/innenpolitik/bundesregierung-kinder-fluechtlinge-familie-nachzug-101.html>.

and most of them live in youth care facilities.<sup>204</sup> UAM are therefore accommodated, cared for, and looked after in the same way as other children.<sup>205</sup> When these children become adults, there is still the possibility that they can be supervised until the age of 27.<sup>206</sup> The report submitted by Germany to the CRC committee declared that “all foreign and non-foreign children receive equal treatment in Book VIII of the Social Code (section 6 of Book VIII of the Social Code) as a matter of principle so that, for example, unaccompanied minor foreigners are entitled to the same protection and support as German minors in the case of child and youth welfare benefits. The Federal Government promotes its federal programs to prepare and support equal access to child daycare for children with migration and refugee backgrounds.”<sup>207</sup>

An important step in UAM matters in Germany was the withdrawal of the reservation to the CRC with regard to refugees. Until 2010, aliens’ law (Ausländerrecht) was given precedence over the CRC. This was an important change for non-German children because since then, the CRC has also been fully applicable to them.<sup>208</sup> The UNHCR found it necessary to incorporate in the asylum right the priority consideration of the interest of the child because a change in dealing with refugee children was necessary.<sup>209</sup> This important step means that from that point on, the CRC and therefore also the best interest of the child have had priority in the asylum law. This therefore also has a great influence on the situation of the UAM because the child’s welfare has unrestricted priority. Many changes were made in the asylum laws to make the situation of minors better. However, many NGOs and charities believe that more changes could be made and that action needs to be taken to implement the CRC, especially regarding asylum arrangements.

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<sup>204</sup> Höltermann et al., “Psychische Belastung bei unbegleiteten und begleiteten Flüchtlingen im Kindes- und Jugendalter in Deutschland,” 370.

<sup>205</sup> Julian Tangemann and Paula Hoffmeyer-Zlotnik, “Unbegleitete Minderjährige in Deutschland,” Bundesamt für Migration und Flüchtlinge. European Migration Network Germany, May 23, 2018, <https://www.bamf.de/SharedDocs/Anlagen/DE/EMN/Studien/wp80-unbegleitete-minderjaehrige.html>.

<sup>206</sup> “Unbegleitete Minderjährige Flüchtlinge.”

<sup>207</sup> Committee on the Rights of the Child, “Combined Fifth and Sixth Periodic Reports Submitted by Germany under Article 44 of the Convention, Due in 2019 \*,” (CRC/C/DEU/5-6 November 13, 2020), <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsrVrBGd0Fukf%2FA-kab12UC%2FY%2FaCbBFDpzetgOrrdcClk80quOpjhrZtQmZXrejyVA%2BWyczFdoOs8cAhe8Id-BcRWlvozPcfH2BUv%2Bo9gZtECU> para. 206.

<sup>208</sup> Save the Children, “Verankerung Der Kinderrechte Im Völkerrecht,” accessed May 31, 2023, 9, [https://www.savethechildren.de/fileadmin/user\\_upload/Downloads\\_Dokumente/Berichte\\_Studien/2018/StC\\_Verankerung\\_der\\_Kinderrechte\\_im\\_Voelkerrecht.pdf](https://www.savethechildren.de/fileadmin/user_upload/Downloads_Dokumente/Berichte_Studien/2018/StC_Verankerung_der_Kinderrechte_im_Voelkerrecht.pdf).

<sup>209</sup> Das Portal der Kinder- und Jugendhilfe, “UN-Flüchtlingskommissariat: Vorrang Des Kindeswohls Gehört Auch Ins Asylrecht.”

Throughout their asylum application, UAM receive special attention, including care that is mostly unrelated to their residency status, and undergo a modified asylum process.<sup>210</sup> After entering Germany, the UAM goes through various stages of custody. From the provisional one, which is just for a short period, to the regular one, in which the placement and situation of the minor are clarified through a process known as a clearing procedure, which helps determine the need for youth welfare. Additionally, a guardian is appointed to ensure proper care and representation. In a subsequent step, UAM are provided with accommodation and care tailored to their specific needs, placing them in residential homes or group settings designed for minors, as well as in specialized facilities catering to UAM. Each child has the right to attend school. Even if access to education for refugees is organized differently in each German state, they offer preparatory and transitional classes.<sup>211</sup>

Many UAM in Germany live in the country without a residency permit and only with a toleration (*Duldung*), which means a temporary suspension of deportation. However, this means that even if they cannot be deported, they are obliged to leave the country. Because this toleration can be revoked at any time, these children live in a situation of fear of being deported at any point. This happens rarely because in most cases, UAM are tolerated until the age of 18, on the basis of Section 58 (1a) of the Residence Act.<sup>212</sup> Problematic is also the lengthy process time for UAM asylum seekers; on average, it takes eight months to process the cases. When minors request asylum, most of them are 15 years of age.<sup>213</sup> A UNICEF study from 2017 showed that many children spend months or even years in refugee shelters, sometimes under inadequate hygienic conditions, in small spaces where some private space is difficult to obtain. These places are unsafe and unsuitable for children. Integration is also made more difficult because in some places in Germany, access to schools is limited. The study also showed that different treatment is emerging depending on where the unaccompanied minor comes from.<sup>214</sup>

The general situation of UAM in Germany has changed for the better in the last years, not only because of the change of German law (i.e., that the CRC concerns UAM) but also due to

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<sup>210</sup> UNO Flüchtlingshilfe Deutschland für den UNHCR, “Unbegleitete Minderjährige Flüchtlinge - Auf Hilfe Angewiesen,” accessed June 24, 2023, <https://www.uno-fluechtlingshilfe.de/hilfe-weltweit/fluechtlingschutz/fluechtlingskinder/unbegleitete-minderjaehrige-in-deutschland>.

<sup>211</sup> Tangermann and Hoffmeyer-Zlotnik, “Unbegleitete Minderjährige in Deutschland.”

<sup>212</sup> Anieke Becker and Sarah Spitzer, “Unbegleitete Minderjährige Flüchtlinge (UMF),” Diakonie Deutschland, February 5, 2018, <https://www.diakonie.de/wissen-kompakt/unbegleitete-minderjaehrige-fluechtlinge-umf>.

<sup>213</sup> tagesschau.de, “Bundesregierung will Familiennachzug erleichtern.”

<sup>214</sup> unicef, “Kindheit Im Wartezustand,” March 21, 2017, <https://www.unicef.de/informieren/aktuelles/presse/-/studie-fluechtlingskinder-in-deutschland/276662>.

European directives. However, there are still differences between UAM and German children. UAM are still disadvantaged; they do not receive enough support, including when it comes to a supplementary guardian. This could be a professional lawyer helping the UAM with their asylum procedure. However, counseling is often taken over by a guardian who does not have a suitable background and knowledge. Additionally, UAM who are only tolerated (*Duldung*), only receive benefits under the Asylum Seekers Benefits Act. This means that not all UAM receive benefits under the Child and Youth Welfare Act.<sup>215</sup> Sebastian Ludwig, refugee expert at Diakonie Germany, has criticized the situation of UAM in Germany, saying that even if UAM are entitled to custody by the youth welfare office, this is not always realized. He underlines that UAM are still not regarded as children in need of protection in Germany. To have similar opportunities to other children who receive care from their families, UAM should at least receive socio-educational support.<sup>216</sup>

In the CRC Committee's October 2022 concluding observation on Germany's periodic reports, they presented positive and negative aspects regarding protection measures for asylum seekers, refugees, and migrant children. Establishing legal procedures for age assessment, appointing specialized commissioners for asylum hearings of UAM, and ensuring access to education for these children were welcomed measures. However, there are several points that Germany should improve and have been criticized.<sup>217</sup> These include the inconsistent application of age determination measures across the states with the use of medical examinations for age determination when a child's age is uncertain; the prolonged stays of some asylum-seeking and refugee children in reception centers and accommodation facilities that are not child-friendly, resulting in limited access to education; the limited access to schools in initial reception centers; and reports of turning away UAM at the border, and treating UAM as accompanied if adults (not their parents or guardians) were traveling with them.<sup>218</sup>

The situation of UAM in Germany has seen improvements but still faces challenges regarding the best interest of the child, as with the first accommodations that are not suitable for children. While efforts have been made to provide care and support, disparities exist compared to German

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<sup>215</sup> Becker and Spitzer, "Unbegleitete Minderjährige Flüchtlinge (UMF)."

<sup>216</sup> Diakonie Deutschland, "Unbegleitete minderjährige Flüchtlinge," Infoportal, accessed June 24, 2023, <https://www.diakonie.de/unbegleitete-minderjaehrige-fluechtlinge>.

<sup>217</sup> Committee on the Rights of the Child, "Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Germany\*," (CRC/C/DEU/CO/5-6, October 13, 2022) para. 39.

<sup>218</sup> Committee on the Rights of the Child para. 39.

children. Since every federal state has different funds for refugees and the school system is different depending on the federal state, this already leads to problems in implementation. Germany has received both positive feedback and criticism from the CRC Committee. Continued efforts are necessary to ensure the rights and well-being of UAM in Germany.

#### 5.1.4 Concluding Considerations on Italy, Austria, Germany

Summarizing, in the three countries, Italy, Austria, and Germany, it is evident that despite various laws to protect UAM, there are still many problems with implementation. It is important for the UAM in conjunction with the CRC that they are received in a child-friendly manner. There are many rights that protect UAM, but in practice, the living situation is seen as problematic. In all three countries, there are long asylum procedures, challenges and delays in integration, and overcrowded facilities, and thus are not child friendly. There is an (in)visible reality of UAM in Europe.<sup>219</sup> It is a “childhood in waiting” with long periods spent in reception centers unsuitable for children. In these centers, playing and studying are not really possible, and the problem of not having enough education possibilities in these centers makes integration even more difficult. Children who have already experienced so much before coming to the host state want and need to return to normalcy as quickly as possible.<sup>220</sup> With all the international, European, and national laws and rules, the reality often looks different. There are shortcomings in identifying and caring for migrant children. Additionally, age assessment is frequently misused to prevent children from accessing protective mechanisms.<sup>221</sup> Italy prioritizes UAM applications compared to the other two countries, which should be implemented in other countries as well. It is important that these countries take into account the problem of psychological disorders that many UAM also face due to the insecurity in which they live. As far as education is concerned, implementation is problematic here as well. Language classes should be introduced immediately, and when considering compulsory education, it should also be considered that these children may have lost a few years of school education due to war and flight. Family reunification is a problem in all three countries, even if the laws are different and Italy has actually simplified it, it remains a point of criticism when looking at the implementation of the best interest of the child. In conclusion, in the UAM situation in general, the best interest of the

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<sup>219</sup> José Noronha, *Rodrigues*, “*Refugees and Migrant Children in Europe*.” In *The Rights of Unaccompanied Minors*, edited by Yvonne Vissing and Sofia Leitão (Springer, 2021): 89. <https://doi.org/10.1007/978-3-030-75594-2>.

<sup>220</sup> unicef, “Kindheit Im Wartezustand.”

<sup>221</sup> House of Lords European Union Committee, “2nd Report of Session 2016–17, Children in Crisis: Unaccompanied Migrant Children in the EU.”

child should always be kept in mind and strengthened, that these children should get the same support as the local children, and it is also important that the three countries see and respect them as children.

## 5.2 Political insights

Following the description of the situation of UAM in the different countries, in this part of the thesis, some examples of political statements and explanations are given to better understand the situation, chosen to give some insight into the political discussion between different politicians of different parties, on refugees and UAM. The political swing to the right and the spread of populism in Europe have increased due to the influx of refugees, which can be seen as a catalyst and trigger for this political situation, as this reflects part of the popular opinion against refugees.<sup>222</sup> The belief and suspicion that families send their children to Europe so they can act as “anchors” for them is still widespread.<sup>223</sup> It is believed that denying family reunification to children may be a protection against parents sending their “anchor children” to Europe to settle before the rest of the family follows.

### 5.2.1 Italy

Between 2015 and 2023, five different prime ministers determined Italy’s policy. In 2015, the Partito Democratico (Democratic Party) ruled followed by independent prime ministers, and, since 2022, Fratelli d’Italia (Brothers of Italy), a right-wing conservative party. These changes are also reflected in refugee policy. In 2019, more than a year after the proclamation of the Legge Zampa, it still lacked implementing some parts of its decrees. And with the government that came after, when Salvini (Lega Nord – Northern League, a right-wing party) was minister for the interior, a new decree was publicized on security and immigration.<sup>224</sup> This decree provided for a tightening of deportation, reception, and integration procedures for migrants. It also followed an insecure time for many UAM who were near the age of majority and insecure about not being able to finish their process of reception, regularization, and integration. The Zampa Law declared that accompanying measures toward the age of majority could be extended until

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<sup>222</sup> Welt, “Forscher Sehen Migration Nicht Als Ursache Für Rechtsruck in Europa,” *DIE WELT*, November 6, 2018, <https://www.welt.de/politik/deutschland/article183378302/Studie-Migration-Populismus-sieht-Fluechtlinge-nicht-als-Ursache-fuer-Rechtsruck-in-Europa.html>.

<sup>223</sup> House of Lords European Union Committee, “2nd Report of Session 2016–17, Children in Crisis: Unaccompanied Migrant Children in the EU” para. 62.

<sup>224</sup> DECRETO-LEGGE 4 Ottobre 2018, n. 113 Decreto Immigrazione e Sicurezza Pubblica, <https://www.normativa.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:2018;113>.

the age of 21 for those who needed longer support. This was, however, dropped with the security decree, which put many UAM at risk of not being able to stay in Italy unless they obtained an international protection permit. Without international protection, after the age of 18, they change from being protected as minors to a foreigner who is subject to restrictive legislation.<sup>225</sup> In 2020, with the following government, an amendment to the Salvini security decree was approved. A new decree, which is called the Immigration Decree. It reinstated the humanitarian residence permit called “special protection,” which was abolished in 2018 (introducing a residence permit of 1 year instead of 2 but for certain special cases).<sup>226</sup>

### 5.2.2 Austria

In summer 2021, the former chancellor Sebastian Kurz wanted more people to be deported, which he said after young Afghans raped and killed a teenager. Deporting was also a highly discussed theme after three well-integrated schoolchildren from Armenia and Georgia were deported.<sup>227</sup> Underlining the discussion, Manfred Nowak, an internationally recognized Austrian human rights expert, in an interview when asked about his opinion on Austria and the deportation of well-integrated school children, emphasizes that all decisions concerning children must be made in the best interest of the child. Meaning that even in the situation of possible deportation, this must always be considered, and if it is not in the best interest of the child, then it must not happen.<sup>228</sup> After the deportation of these children, in spring 2021, the Federal Ministry of Justice established a commission on the topic of asylum and right of abode proceedings in conjunction with the best interest of the child.<sup>229</sup> The child welfare commission under the chairwoman Irmgard Griss, former president of the Supreme Court, concluded that there is a lack of clear guidelines. The commission observed that UAM in particular frequently face uncertain outcomes, as in a lottery of fate. The commission emphasizes that the best interests of the child must be a primary consideration in deportations, a goal that regrettably is rarely achieved.<sup>230</sup>

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<sup>225</sup> Federica Crociani, “Minori Stranieri Non Accompagnati. Dalla Legge Zampa al Decreto Salvini,” *mentinfuga*, January 17, 2019, <https://www.mentinfuga.com/minori-stranieri-non-accompagnati-dalla-legge-zampa-al-decreto-salvini/>.

<sup>226</sup> Annalisa Camilli, “Come Cambiano i Decreti Salvini Sull’immigrazione,” *Internazionale*, October 6, 2020, <https://www.internazionale.it/notizie/annalisa-camilli/2020/10/06/modifiche-decreti-sicurezza-salvini>.

<sup>227</sup> Cathrin Kahlweit, “Schicksalslotterie,” *Sueddeutsche.De*, July 17, 2021.

<sup>228</sup> Wolfgang Machreich, “Manfred Nowak: „Kinderrechte Sind Viel Zu Wenig Im Blick“,” *Die Furche*, February 24, 2021, <https://www.furche.at/politik/manfred-nowak-kinderrechte-sind-viel-zu-wenig-im-blick-4791914>.

<sup>229</sup> Bundesministerium, “Kindeswohlkommission,” accessed June 1, 2023, <https://www.bmj.gv.at/service/publikationen/Kindeswohlkommission.html>.

<sup>230</sup> Kahlweit, “Schicksalslotterie.”

At the end of 2021, the national council spoke in favor of improving the protection and legal status of UAM. Most of the members expressed their endorsement for rapid custody of UAM and emphasized the importance of prioritizing the best interests of the child during the asylum process. The Social Democratic Party of Austria (SPÖ) wanted better protection and care for UAM, addressing the disappearance and that UAM who arrive in Austria need to be transferred to the responsibility of child and youth welfare service from day one, which is not currently happening. On the other side, Christian Lausch from the Freedom Party of Austria (FPÖ), a right-wing populist party, had no sympathy for the initiative because many adults claim and pretend to be minors, and he argued for help but only for “real children” up to 14 years of age.<sup>231</sup>

### 5.2.3 Germany

Following the large number of refugees coming to Europe in 2015, mainly from Syria, in 2016, more and more Syrians “only” received subsidiary protection instead of asylum. This is notable because in 2015, Syrian refugees almost exclusively received refugee protection. One of the reasons behind the giving of subsidiary protection is that the person is not individually prosecuted in his or her home country. Still, there are other motives for why people flee, such as, in the cases of Syrians, the war, and, therefore, subsidiary protection applies to most of them. There was even a brief announcement in November 2015, which was soon after withdrawn by Interior Minister Thomas de Maizière (Christian Democratic Union Party [CDU]), that all Syrians should only receive subsidiary protection.<sup>232</sup> The question of what would happen to Germany if all the people applying for asylum also asked for family reunification arose. The problem with family reunification is that often there are no concrete numbers but rather only speculations on how many would ask for family reunification and how many family members would want to come. However, the reality has shown that only a fraction of refugees apply for family reunification. After 2015, the fear of too many asylum applications through family reunification in Germany was still there, and the grand coalition launched Asylum Package II to significantly reduce the number of refugees. The German government strongly restricted the right to family reunification for those with subsidiary protection by suspending it for two years. In particular,

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<sup>231</sup> Parlament Österreich, “Parlamentskorrespondenz Nr. 1117 Vom 14.10.2021 Nationalrat Setzt Sich Für Schutz von Unbegleiteten Minderjährigen Flüchtlingen Ein,” October 14, 2021, [https://www.parlament.gv.at/aktuelles/pk/jahr\\_2021/pk1117](https://www.parlament.gv.at/aktuelles/pk/jahr_2021/pk1117).

<sup>232</sup> Eckart Lohse, “Immer Mehr Syrer Erhalten Nur Subsidiären Schutz,” *Frankfurter Allgemeine*, May 18, 2016, <https://www.faz.net/aktuell/politik/fluechtlingskrise/eingeschraenkte-rechte-immer-mehr-syrer-erhalten-nur-subsidiaeren-schutz-14240290.html>.

the Christian Social Union Party in Bavaria (CSU) celebrated this new plan as a breakthrough to significantly reduce refugees in Germany.<sup>233</sup> A general restriction of family reunification for all protections was not legally possible because of the EU family reunification directive. In 2018, a new regulation on family reunification for those with subsidiary protection meant that a certain number of applicants could enter Germany.<sup>234</sup>

There was a change in the policy with the new coalition in 2021, which wanted to shape a new beginning in migration and integration policy that, as stated in the coalition agreement, does justice to a modern immigration country. The idea is that migration should be something normal. One of the ideas that the new coalition wanted to change was the expansion of family reunification. These changes could also be seen as a signal to other European countries.<sup>235</sup> In autumn 2022, after different cases of the European Court of Justice (ECJ) about family reunification, the German government responded to the Court's pressure. Family reunification processes will be completed more quickly, and there is a demand for faster asylum applications. The idea behind this is that Germany wants to make it easier for children and adolescents to be reunited with their families. Because the processing of asylum applications took too long, the Foreign Office instructed that suspended family reunifications should be prioritized whenever possible. Another change is the establishment of a separate unit for family reunification set up by the Federal Office for Foreign Affairs. The ECJ criticized the practice of family reunification by German authorities when it comes to UAM who became adults during the procedure. Clara Bünger, the Left Party's spokeswoman on refugee policy, welcomed these steps. Nevertheless, she stated that significant damage has already been done due to years of denial by the government; children have been unlawfully separated from their parents for years. She called for some form of compensation or reparation for the human rights violation these people have suffered.<sup>236</sup>

Even though these are only brief insights and examples of political explanations and actions that shed light on the treatment of refugees, particularly UAM, it emphasizes the complexity and changes in refugee policies and political opinions depending on the political parties in Italy,

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<sup>233</sup> Julia Becker, "Riesiger Streit, Mickrige Fallzahlen," *tagesschau.de*, February 8, 2016, <https://www.tagesschau.de/inland/familiennachzug-zahlen-101.html>.

<sup>234</sup> As explained in chapter 2.2, p. 14

<sup>235</sup> Neda Noraie-Kia and Anna Schwarz, "Asyl- Und Migrationspolitik Der Ampelkoalition: Neustart Für Deutschland, Hoffnung Für Europa," HEINRICH-BÖLL-STIFTUNG, December 13, 2021, <https://www.boell.de/de/2021/12/13/asyl-und-migrationspolitik-der-ampelkoalition>.

<sup>236</sup> *tagesschau.de*, "Bundesregierung Will Familiennachzug Erleichtern."

Austria, and Germany over the years, highlighting the influence of political changes. In Italy, the political changes and the different party directions, especially the right-wing shift, have had a noticeable impact on refugee policies and integration procedures for migrants. Looking at Austria, it is evident that the government has failed to consistently prioritize the best interests of the child, particularly lacking clear guidelines, especially for UAM, and that here as well, different political parties represent different political opinions. Looking at Germany, the political changes after the significant influx of refugees in 2015, aiming to initially reduce the numbers of refugees and later with a change in government, shaping a more inclusive immigration policy. These different facts provide insights into the political dynamics influencing refugee policies and the challenges faced by minorities. It highlights the consequences of political changes. It is, however, noted that politicians often do not provide explicit reasons for their actions, making it difficult to understand the motivations behind certain measures.

### 5.3 Concluding Considerations

Summarizing, this chapter provided an overview of the treatment of UAM in Italy, Austria, and Germany, focusing on the challenges of implementing refugee policies and children rights. It highlights the discrepancies between the legal protections afforded to UAM and the practical realities they face in reception centers and integration processes.

The best interests of the child must be consistently prioritized in all three countries. This chapter emphasized the importance of recognizing unaccompanied refugee minors as children and prioritizing their rights and well-being. In reality, however, despite various rights and recommendations, various challenges remain. Integration hurdles such as school integration, especially for children beyond school age, lengthy asylum procedures, inadequate facilities, and psychological consequences are widespread. Nevertheless, the three countries show the will to protect these children, as evidenced by the adoption of a specific law (*legge Zampa*) in Italy. The text encourages further reflection on how to bridge the gap between the legal framework and its implementation to create a more inclusive and child-friendly environment for unaccompanied minors. In addition, the analysis has provided insights into the political dynamics that influence refugee policy. It shows the impact of policy changes on the treatment of refugees, particularly unaccompanied minors.

## 6. Examples From Case Law

To illustrate how the practices and rights of European countries are not always correct, especially when it comes to family reunification, this chapter explains a few court cases that should lead and influence other European countries to make changes. Yet the aim is to use them as examples to underline the problems of UAM, without doing a complete analysis of the case laws on the matter. Nevertheless, as shown in this chapter, cases on the same topic can also be decided differently in different states. This underlines the differences between states but also on the interpretation of rights at the national and regional levels. Especially the long waiting period for beneficiaries of subsidiary protection, particularly for UAM, will be clarified again from a judicial perspective.

Both the ECtHR and the ECJ have consistently emphasized the necessity of considering the best interests of the child in a reasoned and balanced way in all decisions that impact children, even if indirectly. These courts often make explicit references to the CRC and the guidelines provided by the Committee on the Rights of the Child. The ECtHR applies the best interests of the child as a crucial criterion when assessing interferences with Art. 8 ECHR.<sup>237</sup> In the *Case Darboe and Camara v Italy* from 2022, a case from before the new Italian Law 47/7, two boys declaring to be minors, were brought into an overcrowded adult reception center after three months. Only one of these two continued the trial and explained that he never received the information on how to initiate the procedure of international protection, and no request was lodged. Later, a medical examination to determine age was conducted without the boy's consent, and he was not informed of the manner and nature of the examination. This test determined that the boy was 18 years old. The applicant also declared that he was interviewed but without the assistance of an interpreter. The ECtHR found different violations such as of Art. 8(1) "because the authorities did not act with the diligence necessary to protect the applicant as an unaccompanied minor seeking international protection; in fact, the presumption of minority was not respected, given the transfer to an adult reception center" and Art. 3 concerning inhuman or degrading treatment because of the overcrowded conditions of the center and difficulty in getting medical and psychological assistance.<sup>238</sup> In *Rahimi v. Greece 2011* and *H.A. and Others*

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<sup>237</sup> Kommission für den Schutz der Kinderrechte und des Kindeswohls im Asyl- und Fremdenrecht, "Bericht Der Unabhängigen Kommission Für Den Schutz Der Kinderrechte Und Des Kindeswohls Im Asyl- Und Fremdenrecht KURZFASSUNG" para. 81.

<sup>238</sup> Osservatorio Minori Stranieri Non Accompagnati in Italia, "Terzo Rapporto OSSERVATORIO NAZIONALE SUI MINORI STRANIERI NON ACCOMPAGNATI IN ITALIA 2022," 30.

*v. Greece 2019*, the ECtHR also reaffirmed that the vulnerability of unaccompanied migrant children should not be seen on the same level as their refugee status but should rather be a primary consideration, relying on the principle of best interest.<sup>239</sup>

A judgment from the ECtHR against Denmark should now change the statement that a three-year period for family reunification is acceptable. The case that should influence other European countries when it comes to long waiting times for family reunification applications is the case *M.A. v Denmark from 2021*. The ECtHR ruled that waiting three years before applying for family reunification violates Art. 8 ECHR. Like other European countries, Denmark with this three-year waiting time for one type of humanitarian status, tried to reduce the number of refugees after 2015. Many other European countries such as Austria have imposed this three-year waiting time. These countries now need to adapt their legislation. Additionally, the EU directive on family reunification consents to a period of up to three years. The ruling of the Strasbourg Court, however, underlines that this is too long, “especially because the time for the flight, asylum case processing, and family reunification process will all serve to further lengthen the waiting period. This new court ruling importantly underlines that all refugees have a right to family reunification, whether they are granted protection status, humanitarian status or convention status.”<sup>240</sup> The court accepts that the European countries want to limit the number of refugees that arrive in their country. But, they have to find a balance between the interest of the state and the right to family.<sup>241</sup>

Another case law on family reunification that should influence EU Member States is the Court of Justice of the European Union (CJEU) judgment in *A and S v. Staatssecretaris van Veiligheid en Justitie, C-550/16, 12 April 2018*.<sup>242</sup> The case was about a minor who applied for asylum but was over 18 when the decision was made, and therefore the parent’s application for family reunification was rejected. The outcome of this case was that even if an applicant reaches the age of 18 during the process, the applicant must be regarded as a minor in the process of family reunification after the positive asylum application.<sup>243</sup>

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<sup>239</sup> Marta Tomasi, “The European Court of Human Rights and the Best Interest of Unaccompanied Migrant Minors: A Step Towards a More Substantive and Individualized Approach?”

<sup>240</sup> Michala Clante Bendixen, “Denmark: European Court of Human Rights Says Three-Year Rule Violates Refugees’ Right to Family Life,” European Website on Integration, July 9, 2021, [https://ec.europa.eu/migrant-integration/news/denmark-european-court-human-rights-says-three-year-rule-violates-refugees-right-family-life\\_en](https://ec.europa.eu/migrant-integration/news/denmark-european-court-human-rights-says-three-year-rule-violates-refugees-right-family-life_en).

<sup>241</sup> Bendixen.

<sup>242</sup> FRA European Union Agency for Fundamental Rights, *Integration of Young Refugees in the EU*, 11.

<sup>243</sup> *A and S v Staatssecretaris van Veiligheid en Justitie*. Case C-550/16. (Court of Justice of the European Union (Second Chamber) April 12, 2018).

National courts have also ruled differently in cases of family reunification, and the long waiting times have been decided in different ways on the subject of family reunification and the statutory waiting period for it, as the two following cases show. In 2018, the Austrian constitutional court declared in case *E 4248/2017* that the three-year waiting period for beneficiaries of subsidiary protection for family reunification is not unconstitutional.<sup>244</sup> Because this protection status has more of a provisional nature, it justifies the more extended waiting period for those with asylum protection. The court declared that the long waiting time does not violate the right to respect private and family life or unequal treatment of aliens with different protection statuses. The case was about a Syrian UAM with subsidiary protection whose family wanted to apply for family reunification before the three-year waiting time. The family's complaint was especially about the fact that there was no exception for UAM or weighing circumstances of individual cases, and they also complained about the unequal treatment of beneficiaries of different protections. The court stated that subsidiary protection has more of a provisional nature because it takes into account that the situation in the home country can improve more quickly than in cases where the person receives asylum. The court also did not see an unconstitutional unequal treatment between aliens of different protection statuses.<sup>245</sup> Conversely, in the Swedish case *MIG 2018:20* from November 2018, the Migration Court of Appeal of Sweden declared that the denial of family reunification for beneficiaries of subsidiary protection violates human rights. However, the Court ruled that it "was not a proportionate interference with the right to family life, when balancing the family's interest and the country's interest in reducing the number of arrivals of refugees" but that the "delay in family reunification would be contrary with the best interest of the child."<sup>246</sup>

After a brief review of these cases, which were used as examples to illustrate the situation of unaccompanied minors and family reunification, it becomes clear how, on the one hand, national courts in different countries sometimes rule differently on the same issue. What is interesting about the two cases, the Austrian and the Swedish, is that they were both decided in the same year and yet led to different results. The case before the ECtHR, which declared the three-

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<sup>244</sup> E 4248/2017 (VfGH October 10, 2018).

<sup>245</sup> Verfassungsgerichtshof Österreich, "Subsidiär Schutzberechtigte: Wartefrist Für Familiennachzug Ist Nicht Verfassungswidrig," October 25, 2018, [https://www.vfgh.gov.at/medien/Subsidiar\\_Schutzberechtigte\\_\\_Wartefrist\\_fuer\\_Familie.de.php](https://www.vfgh.gov.at/medien/Subsidiar_Schutzberechtigte__Wartefrist_fuer_Familie.de.php).

<sup>246</sup> ECRE - European Council on Refugees and Exiles, "Sweden: Suspension of Family Reunification Breaches Family Unity and Best Interests of the Child\*," November 16, 2018, <https://ecre.org/sweden-suspension-of-family-reunification-breaches-family-unity-and-best-interests-of-the-child/>.

year waiting period to be a violation, will hopefully lead to a change in national legislation and a change in national policy. The cases also show that the vulnerability of unaccompanied minors and the best interests of the child now play an important role in decisions, but still not always.

## 7. Conclusion and Recommendations

After discussing the legal framework, the current situation of unaccompanied minor refugees, and some examples of policy statements and case law, this concluding chapter summarizes the results of the analysis of the situation of unaccompanied minor refugees in Italy, Austria, and Germany with a focus on children's rights, especially the best interests of the child and makes recommendations.

The importance of the Convention on the Rights of the Child cannot be overstated, with the best interests of the child being the primary consideration in all actions concerning children. However, even if the best interest should be considered in the procedures and treatments of refugee children, especially UAM, it is still often generally overlooked.<sup>247</sup> Even though more and more laws and recommendations are being enforced at the regional and national levels in the three analyzed countries, the most significant challenge lies in the implementation of these rights by states. There is a substantial gap between the intended normative position and the often harsh reality.<sup>248</sup>

In analyzing the situation of UAM in the three countries, it becomes clear that there are significant problems with the application of UAM rights. Therefore, the criticism of the insufficient implementation of the CRC, in particular the best interest of the child in the case of UAM, can be said that it is appropriate. To change the situation, it is essential to reinforce the importance of prioritizing the best interests of UAM and upholding their rights. It is necessary for countries to protect UAM when they arrive in a new country to reduce the difficulties of integrating and starting a new life. The asylum application process in the three countries too often becomes a lengthy one leading to a sense of insecurity and a state of limbo for the individuals involved, among other psychological problems. UAM should receive the same opportunities as national

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<sup>247</sup> McAdam, *Complementary Protection in International Refugee Law*, 173.

<sup>248</sup> Smyth, "Migration, Refugees, and Children's Rights," 494.

children, for this to happen, it is important that the competent authorities keep an eye on their presence and target government funding and assistance efforts.

Not only are there differences between what rights UAM are entitled to and what the reality in Italy, Austria, and Germany reveals, but there are also differences between the countries themselves regarding UAM rights, especially regarding different forms of protection. One difference is that even though Italy grants different types of international protection, the rights that come with them are the same. This also means that there are no significant differences in family reunification between different holders of protection status. Family reunification is almost impossible for UAM in Germany and Austria who receive subsidiary protection because there are differences between the various protection statuses. But, this does not mean that the realization of family reunification goes smoothly and quickly in Italy. Even if family, particularly for the younger UAM, is important, taking into consideration the best interest of the child, and even after the ECtHR declared the long waits a violation of Art. 8 ECHR, states struggle with changes that would benefit UAM and the implementation of their rights. It is understandably that EU Member States have tried to find ways to limit the influx of refugees as they have done by granting more subsidiary protection and the associated norm that family reunification is almost impossible, as in Germany and Austria. In any case, there need to be differences between adults and UAM based on the understanding that children need their parents.

The ECtHR has noted that “while the best interests of the child cannot be a ‘trump card’ which requires the admission of all children who would be better off living in a Contracting State,” it also stated that “the domestic courts must place the best interests of the child at the heart of their considerations and attach crucial weight to it.”<sup>249</sup> When domestic authorities fail to conduct a “thorough balancing of the interests at issue” that places the best interests of the child “sufficiently at the center of the balancing and its reasoning,” the ECtHR has held that there has been a violation of Art. 8 of the ECHR.<sup>250</sup>

Looking at the recommendation from the committee of the CRC, the preservation of the family environment and maintaining relations was one of the elements that should be considered when

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<sup>249</sup> Case of El Ghatet v. Switzerland (Application no. 56971/10) (ECtHR November 8, 2016) para. 46.

<sup>250</sup> Case of El Ghatet v. Switzerland (Application no. 56971/10) para. 46-52; Frances, “The ‘Essential Right’ to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification,” 152.

assessing the child's best interest. This also means that when it comes to family reunification, the best interest of the child and therefore family unity should play an important role.<sup>251</sup> Thus, states should make it possible for all types of international protection to have the possibility of family reunification, at least for children and adolescents. On this subject, Italy already has this possibility without differentiating between different protection statutes.

Another important element that should be considered when assessing the child's best interest is the right to education. As seen in the previous chapters, in the three analyzed countries, UAM often have fewer opportunities to enjoy this right, especially if they are over the age of compulsory education. When it comes to the housing problem, the FRA's opinion is that the EU Member States should prepare better and design "housing policies by taking into account how housing may affect education, [...], and other aspects of life. [...] promote social inclusion, avoid segregation."<sup>252</sup> States "should support unaccompanied children in their transition to adulthood" and "ensure that the integration of unaccompanied children remains a priority."<sup>253</sup>

Often the interests of the state and the political leaders (or the political interest to keep or win votes) are more important than the situation of the UAM. The fear of too many refugees leads to the fact that protection rights and the welfare of children in the mentioned states are neglected, and instead, the respective political focus has a greater weight. In addition, there is also a lack of trained personnel for the initial interview, the age assessment, and thus the child-friendly conduct of the procedure. The ideas and prerequisites that all three countries have would be positive, but the implementation has become worse rather than better since 2015, although states could learn from the last years and implement changes. The flow of refugees, and thus also of unaccompanied minors, has also increased extremely since last year, and unfortunately, the countries cannot cope with it and are overwhelmed.

It is unlikely that the number of refugees will decrease in the future, leading to a continued influx of unaccompanied refugees seeking protection in safe countries. Therefore, countries and politicians must continue to address the refugee issue and put into practice the existing legislation. At both the European and national levels (in relation to the three countries studied), it is

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<sup>251</sup> Committee on the Rights of the Child, "General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)\*" para. 66.

<sup>252</sup> FRA European Union Agency for Fundamental Rights, *Integration of Young Refugees in the EU*, 61.

<sup>253</sup> FRA European Union Agency for Fundamental Rights, 61.

critical for countries to strengthen the enforcement of children's rights and prioritize the interests of UAM in their laws and practices. The creation of a binding European law dealing exclusively with UAM, their rights, and the standards to be met by countries is highly desirable. There is a need to develop better policies on child migration and treatment in these countries. From the moment an unaccompanied minor arrives in a state, he or she should be treated according to the CRC. The measures need to be effective and concrete, and decisions should consider that each child is different and that each child's development and experiences are individual. All children and young people deserve the same rights, the same care, and the same opportunities for the future. Refugee children have already experienced much suffering in their young years. There is a pressing need for more effective and efficient mechanisms to ensure the practical realization of the implementation and respect of children's rights. It is crucial for states to bridge the gap between theory and practice, providing timely and appropriate support to safeguard well-being and mental health. As stated at the beginning of this thesis, it is important for everyone to remember that a child is still a child without differentiating, even if that child is an unaccompanied minor, and transpose that into practice. It is especially important for the states and authorities to remember the vulnerability of UAM.

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