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**Staying safe while fleeing: Unaccompanied minors'
vulnerability to human trafficking in Europe and what
protection measures have the states of Italy and the UK
taken to ensure their protection from it?**

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Abstract:

The thesis will look at the increasing danger of human trafficking that unaccompanied minors face on their journey to Europe, the relevant legal framework established to combat this issue, and the available protection mechanisms for unaccompanied minors from falling victim to trafficking in two European countries- Italy and the UK. The two aforementioned practices are respectively the successful guardianship system under Zampa's law in Italy and the establishment of a national referral mechanism in the UK. They have been implemented on the basis of the legal obligations both countries have under UN and Council of Europe conventions applicable to this field, as well as the EU Anti-Trafficking Directive from 2011. They will be found to play a crucial role in the provision of further support to access asylum, education, housing and other services, as well as in identification of potential victims of trafficking. In this way it is argued that unaccompanied minors would be less likely to be subjected to trafficking in human beings.

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Staying safe while fleeing: Unaccompanied minors' vulnerability to human trafficking in Europe and what protection measures have the states of Italy and the UK taken to ensure their protection from it?

INTRODUCTION

This thesis will look at the phenomenon of trafficking of unaccompanied minors, the legal framework which provides their protection, and a couple of successfully implemented practices in Europe that have been the result of specific legal obligations that arise from the aforementioned legal framework. The first chapter will look at the general situation of trafficking of unaccompanied minors in Europe as the circumstances within which trafficking of unaccompanied minors occur may differ from other trafficking scenarios. More specifically, it will look into the recent statistics of how many unaccompanied minors there are across Europe, what their profile is, and the main countries where they usually apply for asylum and international protection. Afterwards, the two main scenarios in which unaccompanied minors may fall victim to trafficking will be considered- during the reception process once they arrive in a particular country, and during the smuggling procedures that many unaccompanied minors make use of in order to reach a particular country.

The second chapter of the thesis will consider the legal framework of tackling trafficking of unaccompanied minors. More specifically, it will consider legal conventions under the UN system, the Council of Europe, and a directive of the European Union. Firstly, it will look into the supplementary protocols of the UN Convention against Transnational Organized Crime- The Protocol against the smuggling of migrants by land, sea, and air, and The Protocol to prevent, suppress and punish trafficking in persons, especially women and children. A key takeaway from both of the Optional Protocol is the need to ensure an approach to tackling human trafficking beyond mere criminalization of the crime. Secondly, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (Sex Trafficking Protocol) will highlight a convention aiming to tackle a specific issue of trafficking, and namely the growing problem of sex trafficking of children. Thirdly, The Council of Europe Convention on Action against Trafficking in Human Beings will point at an approach focused on provision of assistance to victims of trafficking as a way of ensuring the latter are protected. Lastly, the EU Anti-Trafficking Directive from 2011 speaks about finding a durable solution for each child which is based on an individual assessment of the best interests of the child, and appointment of a legal guardian, among other ones.

Based on the legal obligations on states following the aforementioned conventions and legal documents, Italy and the UK have implemented successful practices in the field of protection of unaccompanied minors from falling victim to trafficking. They will be the subject of study in the final third chapter of this thesis. For instance, Italy's Zampa law revolves around the practice of appointment of volunteer guardians which are responsible for assisting and representing the child in matters such as asylum claims, education, housing, interpretation, court proceedings, etc. This is crucial because it

provides unaccompanied minors with an additional comfort and protection that could decrease the likelihood of them becoming victimized by trafficking. Furthermore, the UK has also initiated a successful practice that ensures unaccompanied minors' protection- a national referral mechanism. It constitutes a framework for identifying and referring potential victims of modern slavery (which includes human trafficking, slavery, servitude, and forced and compulsory labour), and making sure they enjoy appropriate support services. Lastly, the need for further cross-border collaboration will be discussed as a way to strengthen the measures taken against trafficking in human beings in Europe.

CHAPTER 1: THE PHENOMENON OF TRAFFICKING OF UNACCOMPANIED MINORS

The first chapter will look generally at the phenomenon of trafficking of unaccompanied minors. It will start by defining the criminal offence of trafficking in human beings and the nature of unaccompanied minors. Afterwards it will go on to analyze how unaccompanied minors can become victims of trafficking by looking at different scenarios, such as the one of reception centers, and the one during the smuggling process. More specifically, the definition of this crime will be looked into, the recent statistics of this phenomenon, and how unaccompanied minors may fall victim to trafficking during their escape journey.

1.1 What is human trafficking?

According to the EU Directive 2011/36/EU (2011)¹, human trafficking constitutes ‘the recruitment, transportation, transfer, harboring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation’. The activities that victims of trafficking are usually involved in include forced labor, commercial sexual acts, begging, slavery or practices similar to slavery, servitude, the exploitation of criminal activities, or the removal of organs. For this reason, it is one of the foremost human rights violations nowadays. Under the aforementioned EU’s definition, an incident is considered ‘trafficking’ if it meets three criteria, including process, means, and purpose, or what is done, how it is done, and why it is done. To put this into context, an example of a situation that can be considered human trafficking is the case of an individual that is recruited into prostitution using deception for the purpose of sexual exploitation².

Moreover, one can find victims across the whole globe. Due to the illegal nature of this activity, as well as the lack of empirical studies in this field, data are exceedingly difficult to obtain. This results in a limited possibility to ascertain the exact number of trafficking victims and makes it difficult to identify the factors that affect trafficking. Official statistics says that when it comes to the EU, every year more than 7,000 victims of human trafficking are registered³. However, it is estimated that approximately hundreds of thousands of victims are trafficked annually within the EU, even though as already mentioned precise numbers are impossible to obtain. In 2022, 10,093 victims of human trafficking were recorded by the EU, constituting a 41% increase from 2021. This rise may be explained by the improvement of victim detection, partly a result of various awareness campaigns across the EU aimed at preventing trafficking among those fleeing the military conflict in Ukraine. In 2021, women and girls suffered the largest victimization from human trafficking in the EU, accounting for 63% of the total

¹ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims (2011).

² Tallmadge and Gitter, 2018, p 3.

³ European Parliament, 2023. Available from: <https://www.europarl.europa.eu/topics/en/article/20230921STO05705/human-trafficking-the-eu-s-fight-against-exploitation>, Accessed on 27/04/2024.

human trafficking victims. Children represented 15% of the victims, a decrease from the previous year. Most child victims were female, making up 75 % of the total number. Nationals of EU Member States made up 37% of the registered victims, a significant drop from 2021. Approximately 25% of all registered victims were citizens of the country where they were found, which reflects a 19 % decrease compared to the previous year. For the first time, the number of victims trafficked for labor exploitation (3,990) became very close to those trafficked for sexual exploitation (4,014), each marking approximately 41 % of the total. Trafficking for other purposes, such as criminal activities, forced begging, and organ removal, accounted for 1,699 victims (18%). The number of suspected traffickers decreased by 16% to 8,064, and the number of successful convictions of traffickers decreased by nearly 17% to 2,097 in 2022 compared to 2021.

1.2 UNACCOMPANIED MINORS AND HUMAN TRAFFICKING

Europol issued an early warning following the invasion of Ukraine by Russia on February 24th 2022 due to the large number of Ukrainian refugees aiming to reach EU countries to seek protection⁴. Most of the refugees fleeing the war are women, children, and other vulnerable people. During such crises, many opportunistic criminal networks try to take advantage of this situation to make further profits and expand their criminal businesses, including trafficking⁵. Unaccompanied minors (UAM) are particularly vulnerable to human trafficking⁶. An unaccompanied minor is a minor ‘who arrives on the territory of an EU Member unaccompanied by the adult responsible for them by law or by the practice of the EU Member State concerned, and for as long as they are not effectively taken into the care of such a person, or who is left unaccompanied after they have entered the territory of the EU Member State’ (Directive 2011/95/EU). Every year, thousands of minors flee dangerous situations in their home countries, arriving alone at the borders of the European Union, seeking a safer life through international protection safeguards. In 2022, EU Member States received 881,200 first-time applications for international protection, with 39,520 submitted by unaccompanied minors⁷. This marked the highest number of such asylum applications since 2015 and constituted a 45% increase when compared to the 23,255 applications lodged in 2021⁸. Even though the proportion of UAMs among all asylum applicants remained steady at around four percent, the rise in their absolute numbers points to an overall increase in asylum applications rather than a specific surge of UAMs. This increase was to a big extent caused by

⁴ Europol, 2022. Available from:

https://www.europol.europa.eu/cms/sites/default/files/documents/Early_Warning_Notification_War_in_Ukraine_%E2%80%9393_refugees_arriving_to_the_EU_from_Ukraine_at_risk_of_exploitation_as_part_of_THB.pdf, Accessed on 27/04/2024.

⁵ Europol, 2022. Available from:

https://www.europol.europa.eu/cms/sites/default/files/documents/Early_Warning_Notification_War_in_Ukraine_%E2%80%9393_refugees_arriving_to_the_EU_from_Ukraine_at_risk_of_exploitation_as_part_of_THB.pdf, Accessed on 28/04/2024.

⁶ IOM, 2022. Available from: <https://www.iom.int/news/iom-warns-increased-risk-trafficking-persons-people-fleeing-ukraine>, Accessed on 28/04/2024.

⁷ Eurostat, 2023. Available from: <https://ec.europa.eu/eurostat/web/products-eurostat-news/w/ddn-20230323-2>

⁸ Euro-Med Monitor. 2023. Available from: <https://reliefweb.int/report/austria/happiness-love-and-understanding-protection-unaccompanied-minors-27-eu-member-states-enar>, Accessed on 28/04/2024.

a higher number of unaccompanied minors from Afghanistan following the Taliban's takeover of the country in August 2021 and the Ukrainian war that started in February 2022⁹.

In 2022, most UAMs lodged asylum applications in Austria (13,275), Germany (7,275) and the Netherlands (4,205), followed at some distance by Belgium, Bulgaria, and Greece¹⁰. In 2021, Austria received the largest number of applications from UAMs (5,600), followed by Germany (3,300) and Bulgaria (3,200)¹¹. Greece, Belgium, Romania, Italy, Switzerland, and Slovenia also saw significant numbers of these applications, however to a lesser extent¹². Apart from Greece, these countries saw an increase in applications from UAMs compared to the previous two years or more. Notably, Austria, Belgium, and Switzerland recorded their highest numbers of UAM applicants since the 2015-2016 refugee crisis, while substantial figures could be observed in Bulgaria, Romania, and Slovenia as well. Even though the overall proportion of UAMs in EU countries was relatively low, there were considerable variations at the individual country level. In 2022, some countries saw the highest percentages of asylum applications lodged by UAMs compared to all first-time asylum applications in Bulgaria (17%), followed by Austria, Belgium and the Netherlands (12%), and Hungary (11%)¹³. These proportions indicate that a high number of UAMs arrived in EU countries through the Balkan routes. The data on unaccompanied minors in the EU in 2022 shows that 93% of UAM applicants were male, while only 7% were female. Girls constituted a minority when it comes to applicants from all nationalities but were somewhat more represented among children from Somalia, making up 26% of the total. On the contrary, there were no girls among UAM applicants from Egypt, Morocco, or Pakistan. Furthermore, when it comes to age, 70 % of the applicants were between 16 and 17-year-old, 23 % were aged 14-15 years old, and seven percent were younger than 14 years old¹⁴. Most of the asylum applicants across all EU Member States were aged between 18 and 34 years old¹⁵.

The statistical information provided thus far exclusively pertains to unaccompanied asylum-seeking minors (UAM) who have formally applied for asylum within the EU. However, there is an indication that a significant number of UAMs remain outside the asylum systems. Gathering statistical data on this cohort is challenging and comparing it proves even more difficult due to the lack of systematic data collection at the EU level¹⁶. One of the limited sources for such data comes from the Annual Policy Reports of the European Migration Network (EMN), wherein National Contact Points from each Member State and Norway (excluding Denmark) attempt to compile such information.

⁹ Eurostat, 2023. Available from: <https://ec.europa.eu/eurostat/web/products-eurostat-news/w/ddn-20230323-2>, Accessed on 01/05/2024.

¹⁰ Ibid.

¹¹ Ibid.

¹² European Union Agency for Asylum, 2022. Available from: <https://euaa.europa.eu/latest-asylum-trends-annual-overview-2022>. Accessed on 01/05/2024.

¹³ Ibid.

¹⁴ Eurostat, 2023. Available from: <https://ec.europa.eu/eurostat/web/products-eurostat-news/w/ddn-20230323-2>, Accessed on 05/05/2024.

¹⁵ Ibid.

¹⁶ O'Donnell and Kanics, 2016, p. 73.

1.3 UAM'S PERILOUS JOURNEYS

Unaccompanied minors are increasingly undertaking dangerous journeys from their home countries without their parents or family members, to escape persecution, war, violence, or poverty. Their vulnerability to criminal groups of traffickers is displayed due to the lack of protection of a parent or a caregiver. The 2015 European Commission report points at the heightened vulnerability of unaccompanied minors, who are susceptible to human trafficking as they fit into two out of six identified risk categories. The first category comprises those children affected by war, crisis, or natural disasters, while the second one is composed of children involved in migration initiatives planned by their families¹⁷. Children located in areas currently suffering or those that have already suffered humanitarian disasters are highly vulnerable. A significant number of unaccompanied child asylum seekers in Europe arrive from conflict countries and regions, such as Syria, Afghanistan and Somalia. These children may have lost their families and are on their journey vulnerable to exploitation. In the dataset of the 2015 EU Commission's report¹⁸ four child trafficking cases (Algeria, Sierra Leone, and Uganda) are connected to children who have experienced victimization due to war, a natural disaster or another humanitarian crisis. Illegal adoption may also occur in the aftermath of a crisis, even though no evidence of this was found in the aforementioned research study. Child victims of war, crisis and natural disasters mainly come from countries located outside of Europe that are also experiencing major conflicts and disasters, as well as relatively insufficient and ineffective shelter and protection of children. Children are likely to be without family or any other family members (in the study sample two cases). In addition, they often suffer from trauma or other severe psychological problems (two cases of this can be observed in the sample)¹⁹.

Furthermore, lacking parental or guardian guidance, these minors are compelled to make significant decisions independently, without being able to rely on any support networks. When it comes to children subject of a migration project orchestrated by their family, they usually have a strong family background. Furthermore, they are sent away intentionally with the hope that their child will enjoy a better future in Europe. However, in most cases parents do not think about the dangers their children may face once they arrive in Europe. In addition, sometimes the family even explicitly or implicitly expects the child to provide them with financial support once they are settled in Europe. Parents' financial resources are often a considerable part of the migratory project, which is why it is expected that the child will also contribute to their financial situation at home. Organized criminal networks take advantage of the hopes and dreams of such families. In some cases, families are actually already aware that their child will be involved in some illegal activity after their arrival in Europe, hence making them complicit in these illegal activities, in other cases they are not aware of such a possibility²⁰.

¹⁷ Dimitrova et al., 2015. p. 11. Available from: <file:///C:/Users/user/Downloads/study%20on%20high-risk%20groups%20for%20trafficking%20in%20human-DR0215412ENN-2.pdf>, Accessed on 07/05/2024.

¹⁸ Dimitrova et al., 2015. p. 72. Available from: <file:///C:/Users/user/Downloads/study%20on%20high-risk%20groups%20for%20trafficking%20in%20human-DR0215412ENN-2.pdf>, Accessed on 07/05/2024.

¹⁹ Dimitrova et al., 2015. p. 73. Available from: <file:///C:/Users/user/Downloads/study%20on%20high-risk%20groups%20for%20trafficking%20in%20human-DR0215412ENN-2.pdf>, Accessed on 08/05/2024.

²⁰ Ibid.

The United Nations High Commissioner for Refugees (UNHCR) has stated that asylum applications are lodged by unaccompanied minors across the whole globe- when it comes to the EU tens of thousands of unaccompanied minors have entered since 2015, which forms part of an unprecedented increase in irregular migration to the EU. In addition, similar trends can be observed in the US as well²¹. Irregular migration by unaccompanied minors creates a lot of challenges for states, including how to receive, house, and process the asylum claims of such minors who are especially prone to experiencing human rights violations and exploitation at all stages of the migration process²².

There are two main individual characteristics that are most widely recognized as determinants of vulnerability- history of physical, psychological and/or sexual abuse, and a low awareness of risks²³. When it comes to the 'family abuse' characteristic, the majority of trafficked children have a prior abuse history, and the incidence of former abuse is particularly prevalent among unaccompanied migrant children, making it the most commonly cited individual risk factor. Moreover, 98 % of trafficked children have been abused in the past²⁴. The country reports of France, Greece, and Spain in particular emphasize the link between domestic violence and abuse in the home country and the decision to migrate. Importantly, while abuse is primarily understood to center on direct harm inflicted upon the child, its mere presence within the family dynamic, such as abuse directed towards other members of the family, can be equally detrimental. This is true in particular because it can result in the child not recognizing abnormal or dangerous situations. Emotional abuse, often demonstrated through neglect and indifference, follows a similar pattern. When it comes to cases of psychological abuse and neglect, there is a high risk of trafficking due to the child's profound need for affection and acknowledgement, which he or she may lack at home. This vulnerability is often exploited in cases of child trafficking, where perpetrators may use tactics such as posing as a 'fake boyfriend' or 'lover boy' to exploit the victim's longing for connection and affection. Furthermore, it is crucial to emphasize the strong association between a history of abuse and the development of emotional and post-traumatic stress disorders. The trauma inflicted upon children can render them more vulnerable to various risks. Children, who have experienced abuse, frequently experience an emotional trauma as well, which can impair their perception of risks and subsequently increase the likelihood of engagement in risky behaviors. Therefore, it can be argued there could be a causal relationship between abuse, emotional and traumatic disorders, risky behaviors, and susceptibility to trafficking. The Irish report also concludes that victims of domestic violence can find themselves not only physically abused, but also in isolation, intimidation, and without access to any financial or emotional support needed to leave the abusive situation. Consequently, this puts them at a high risk of exploitation, also known as 'multiple traumatization', as described by the Croatian report in this study²⁵.

The second individual characteristic that contributes to the vulnerability of children towards trafficking is low awareness of risks. According to a significant number of reports conducted on a local level, very

²¹ Europol and Interpol, 2016.

²² Bustamante, 2009. p.29.

²³ Dimitrova et al., 2015. Available from: <file:///C:/Users/user/Downloads/study%20on%20high-risk%20groups%20for%20trafficking%20in%20human-DR0215412ENN-2.pdf>, Accessed on 08/05/2024.

²⁴ Ibid.

²⁵ Ibid.

often children who have been trafficked recognize their situation only when it is too late. Especially in cases when children experience a strong attachment to their perpetrator (a parent or a false partner) they may deny their exploitation. Moreover, risk awareness is generally lower for younger people with limited skills and experience²⁶. In addition, in situations of children with limited cognitive skills or mental disabilities, awareness is also very limited. They are also one of the most vulnerable groups to trafficking because they are unable to judge a situation, to estimate risks and to protect themselves. Similarly to age, attachment to the perpetrator is also evident in those cases of children with low awareness risks. The role that awareness on the trafficking phenomenon plays has been recognized by practitioners at the local level as an important preventive factor. The Greek and Spanish country reports particularly link awareness-raising to the socioeconomic context, and further put an emphasize on the need for information and education on the topic of trafficking among deprived, disadvantaged, and marginalized groups, who may not have adequate general education and resources to identify the dangers at an early stage. Nevertheless, some reports (the German, Irish, Austrian, and Finnish ones) are rather skeptical about whether sufficient knowledge about a trafficking risk can actually make a difference when a child is at risk or they have made a realization that they have been trafficked. For instance, awareness is insufficient in those cases when the child is dependent on their perpetrators²⁷. The German national report shows that even if they are aware they are a victim of trafficking, they often have no chance to escape the pressure, violence, and threats, and are consequently manipulated into trafficking. Therefore, awareness simply does not prevent one from falling victim to trafficking. Secondly, many adolescent children might accept some degree of exploitation upon arrival in the destination country if they would have to remain in their current situation. The reason for this is because their desire to escape poverty and material deprivation may be too strong²⁸. Furthermore, traffickers also intentionally manipulate the children by grooming them as they produce an incorrect image of Europe as a place of endless opportunities, and where they can earn and live a good, carefree life easily (Italian and Austrian country reports). In addition, the media could be playing a role in producing such an image as well. Therefore, in such cases, child victims may find the good economic and social prospects too tempting in the face of poverty, unemployment, war, environmental disasters or gender and ethnic discrimination, even if they are aware to some extent of the risks involved, according to the Slovenian national report²⁹.

It is also important to mention the family-related factors that are a key group of risk factors related to trafficking of children. The family's structure and stability, the level of trust and the relationship between parents and children, as well as the material and living conditions of the family, are overwhelmingly recognized by practitioners as the most important determinants of risk and vulnerability and, in turn, of resilience³⁰. Crucially, in cases of households that experience a family breakdown one can observe economic deprivation as well (and vice versa)- such a combination is particularly prominent among many trafficked children. The reason for this is because neglect, abuse,

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

and a lack of parental monitoring can be observed in such a family environment. Unaccompanied minors, especially those that have suffered violent conflicts and war, are especially at risk. The majority of the local-level reports have identified the unstable family conditions as an underlying risk factor. Approximately 25 % of the cases of trafficked children identified some form of disruption of the family structure as an important risk factor and trigger of the recruitment and exploitation. Contrary, having a stable family network and a strong relationship between a parent and a child is a strong preventive factor, which has been recognized in a number of national reports³¹.

1.4 SCENARIOS OF TRAFFICKING

When one speaks about scenarios in which UAMs may become victims of trafficking and other human rights abuses, such can be the reception process during which many UAMs disappear. The European Migration Network stated that more than 11,000 UAMs disappeared from care facilities or following a return decision in each year of 2015 and 2016. However, since this data is based on reports from 13 countries only (Belgium, Bulgaria, Germany, Estonia, Finland, Hungary, Italy, Luxembourg, Latvia, Lithuania, Slovakia, Slovenia, and Portugal) these numbers are already disturbing³². According to other sources, between the years 2014 to 2017, more than 30,000 migrant and refugee children are estimated to have gone missing after their arrival in Europe. The majority disappeared before having filed an asylum application or during the asylum procedure. Moreover, according to Missing Children Europe, up to one in five UAMs disappear from reception centers less than a day after arrival. In addition, migrant children are classified as missing when they disappear from the official reception or accommodation centers where they are registered with authorities. This category includes not only unaccompanied minors but also children who were separated from their families or were traveling with them. The absence of adequate and consistent reporting poses challenges in understanding the extent of this issue, particularly regarding unaccompanied minors missing from initial reception facilities across EU Member States. Improved data collection and sharing mechanisms, as advocated in various studies, would greatly facilitate locating missing migrants. Centralized registration systems play a crucial role, especially for children, reducing the likelihood of their disappearance and aiding in family reunification efforts. Moreover, following the Ukrainian crisis, there have been alarming reports of children vanishing upon arrival in EU nations from Ukraine³³. There are multiple factors that contribute to the disappearance of migrant children. While the concern that many fall victims to trafficking is valid, many also leave voluntarily. The reasons for this include poor reception conditions, a lack of child-friendly information, inefficient family reunification and guardian-appointment procedures, fear of detention or deportation, the desire to join family or friends in another country, their desire to work, and violence and abuse³⁴. However, again, data on how many UAMs actually go missing across Europe is scarce and

³¹ Ibid.

³² Abuselidze, 2021. Available from: <https://dspace.cuni.cz/bitstream/handle/20.500.11956/152744/120393893.pdf?sequence=1&isAllowed=y>, Accessed on 10/05/2024.

³³ Missing Children Europe, no date. Available from: <https://missingchildreneurope.eu/children-in-migration/>, Accessed on 10/05/2024.

³⁴ Slot, 2016. Available from: <https://www.asiloineuropa.it/wp-content/uploads/2017/07/Final-version-thesis-lucia-slot-1-1.pdf>, Accessed on 12/05/2024.

only half of the EU states hold statistics on missing UAMs. Consequently, the whole scale of the trafficking of UAMs issue cannot be known³⁵.

Furthermore, in 2015 only 27.1 % of the missing UAMs were found by the authorities. This number increased significantly in 2018, but remains alarming nonetheless. Approximately 17% were located within a week, and 10% within a month. However, after a month passes without finding the child, the likelihood of locating them diminishes significantly, eventually dwindling to nothing after a year of searching³⁶. Since nobody is aware of their location, this significantly raises the possibility of them to fall victim to trafficking. Moreover, the disappearance of children in migration is often presented as a voluntary decision of the child, therefore a certain degree of neglect can be observed with this issue³⁷. Furthermore, it is often assumed that they are located in a safe country. As a result, this can lead to little or no assessment of why the child went missing, the possibility that child abduction took place, and the exposure of the individual child to various risks, even though there is practically non-existent cross-border collaboration between governments, police, asylum, and child protection agencies on this issue³⁸. The fact that such collaboration practices do not exist diminishes significantly the protection of UAMs, and consequently increases the likelihood they may fall into trafficking. This is why such collaboration, as well as early identification of human trafficking victims or those susceptible to trafficking, is crucial to prevent trafficking from happening.

Another way in which unaccompanied minors can be trafficked is during the smuggling process. The exponential increase in global irregular migration creates opportunities for those who facilitate such movement. According to estimates, roughly 80-90 % of irregular migrants that enter Europe and the US take advantage of the services of people smugglers³⁹. People smuggling is defined as ‘the procurement, in order to obtain, directly or indirectly a financial or other material benefit, of the illegal entry of a person into a state Party of which the person is not a national or a permanent resident’, according to the Protocol against the Smuggling of Migrants by Land, Sea and Air (2004). Europol states that migrant smuggling creates immense profits between three and six billion Euros a year, making it the fastest growing criminal market in Europe⁴⁰. Unaccompanied minors are dependent on people smugglers in particular as they help them with transportation over vast geographical distances, border crossings, and evasion of immigration controls. Due to such dependence and unique vulnerabilities, they are susceptible to situations of human trafficking. As a result, they can easily fall prey to human traffickers who provide false papers and access into a country, but often with detrimental consequences- they

³⁵ European Migration Network, 2020. Available from: https://emn.ie/wp-content/uploads/2020/04/EU_Inform_Unaccompanied_Minors_2020.pdf, Accessed on 15/05/2024.

³⁶ Einashe and Homolova, 2021. Available from: <https://www.theguardian.com/global-development/2021/apr/21/nearly-17-child-migrants-a-day-vanished-in-europe-since-2018>, Accessed on 15/05/2024.

³⁷ Missing Children Europe, no date. Available from: <https://missingchildreneurope.eu/children-in-migration/>, Accessed on 15/05/2024.

³⁸ Einashe and Homolova, 2021. Available from: <https://www.theguardian.com/global-development/2021/apr/21/nearly-17-child-migrants-a-day-vanished-in-europe-since-2018>, Accessed on 17/05/2024.

³⁹ Kandel et al., 2014, p. 10.

⁴⁰ Ibid.

might find themselves in debt to the traffickers, leading to a cycle of exploitation and financial obligations⁴¹.

Even though one often cannot talk about smuggling without talking about trafficking due to the high level of violence, coercion, and exploitation prevalent in both types of crimes, it is still difficult to provide a clear differentiation between these two concepts. Nevertheless, they differ in two ways: exploitation constitutes a fundamental element of the various phases of trafficking, while when it comes to people smuggling exploitation is not the foremost characteristic⁴². Secondly, human trafficking does not necessarily involve border crossing, while smuggling's purpose is the facilitation of an illegal entry of a person into a foreign country⁴³. Moreover, when it comes to human trafficking, the individual being trafficked is regarded as a victim, whereas in human smuggling, the country in which immigration laws are violated is considered the victim. In addition, transaction on the part of the migrant is needed for the smuggling services- a person seeking to migrate pays or makes a promise to pay a sum of money to someone who agrees to smuggle them into a country⁴⁴. The individual enabling the movement to happen, known as the smuggler, acts as a facilitator, while the person being moved plays the role of their client or customer. Making a distinction in the types of migrants is crucial as it will determine if a migrant should be viewed as an offender or not. In human trafficking cases, the customer is the recruiter who seeks out the person to be trafficked for the eventual exploiter⁴⁵. The trafficked person is not a customer in this case. The way trafficked individuals and smuggled ones are perceived differs, although both entering a country without valid travel documentation makes them illegal immigrants. Those individuals that have been trafficked are regarded as victims, while smuggled individuals are often labeled as criminals, although international laws tend to be hesitant when it comes to categorizing them as such. Authorities tend to show more sympathy towards trafficked individuals due to their victim status. Conversely, law enforcement agents tend to be harsher and stricter towards smuggled individuals, unless the migrant is seeking asylum. Typically, a smuggled individual violates migration laws and faces deportation upon detection⁴⁶. According to Buckland⁴⁷, since there is lack of understanding of trafficking, many trafficking victims may initially present themselves as illegal migrants upon detection. Consequently, there is an assumption frequently by the authorities that they are smuggled. When this happens, trafficked people are treated the same way as smuggled migrants and are therefore deported when their status has been determined.

Traffickers are not the only ones exposing migrants to abuse and human rights violations, as smugglers have been frequently reported to have been involved in grave human rights abuses, such as rape, physical and mental abuse, food deprivations, abandonment, and death⁴⁸. Since those making use of smuggling services rely entirely on the smugglers to realize their migration objectives while also staying

⁴¹ Derluyn, and Broekaert, 2005, p. 3.

⁴² İçduygu and Toktas, 2002, p. 29.

⁴³ Ibid.

⁴⁴ Ibid

⁴⁵ Iselin and Adams, 2003, p. 5.

⁴⁶ Sarrica, 2005, p. 14

⁴⁷ Buckland, 2009, p.148

⁴⁸ İçduygu and Toktas, 2002, p 31.

aware of the dire consequences in terms of eventual apprehension by immigration or police authorities, the migrants fall into a position of subordination and loss of control of the situation. As a result, the smuggling may easily degenerate into trafficking due to the extent of their desire to migrate and their desperation and vulnerability, which form the backbone of the trafficking business⁴⁹. A typical example of how smuggling can degenerate into trafficking is when smugglers demand large sums for passage, requiring an initial payment before departure and the remainder upon arrival. Upon reaching the destination country, many UAMs confront the daunting pressure to settle their travel debts. Influenced by family obligations and the networks of smugglers, minors feel compelled to repay these debts swiftly and often resort to immediate employment. These vulnerable minors are drawn into exploitative situations due to fractured family structures and the failure of European states to adequately safeguard trafficking victims⁵⁰. Compounded by their irregular immigration status, discrimination, and lack of educational and practical skills, they encounter barriers to accessing mainstream opportunities. Those UAMs outside state-sponsored care arrangements are thrust into a daily struggle for survival, with many ultimately resorting to informal, underground economies⁵¹.

⁴⁹ Ibid.

⁵⁰ Holmes, 2010. Available from:

<https://china.elgaronline.com/edcollchap/edcoll/9781848441590/9781848441590.00011.xml>, Accessed on 18/05/2024.

⁵¹ Ibid.

2 CHAPTER 2: TACKLING TRAFFICKING OF UNACCOMPANIED MINORS IN EUROPE- THE LEGAL FRAMEWORK

This chapter will look at the legal framework when it comes to dealing with the phenomenon of trafficking of unaccompanied minors on the European continent. It will do so by looking into various local, national, and international legal instruments that serve as the basis for unaccompanied minors' protection from trafficking. The following legal instruments and mechanisms will be considered: The Protocol against the Smuggling of Migrants by Land, Sea, and Air, and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, both of which supplement the UN Convention against Transnational Organized Crime; the Sex Trafficking Protocol that supplements the Convention on the Rights of the Child; the Convention on Action against Trafficking in Human Beings of the Council of Europe; and the EU Anti-trafficking Directive.

2.1 THE PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND, SEA, AND AIR, AND THE PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN

To begin with, considered a critical step forward in addressing human trafficking and migrant smuggling, both of these Protocols see the solutions to them through criminalization and prevention practices. Even though they have provided effective and consistent guidance to smuggling and trafficking for individual states, there has been criticisms against them as well. In particular, there have been criticisms towards the definitions of 'smuggled migrant' and 'victim of trafficking' within the Protocols, with concerns raised about their conceptual vagueness and failure to acknowledge the often blurred connection between these crimes in reality⁵². This indeterminacy may eventually lead to States Parties identifying irregular migrants as smuggled, even when their actual status is unclear⁵³. This is problematic in particular in cases of people who are given 'smuggled migrant' status, but who have suffered exploitation or abuse identical to trafficking. As a result, the latter may be denied the protection and status of trafficked victims given to trafficked people⁵⁴. Further criticisms have revolved around the Protocols' negligence of substantive rights and protection measures⁵⁵, including many that are crucial for protecting smuggled and trafficked unaccompanied minors effectively. These include, among others, the best interests of the child principle, the right not to be detained⁵⁶, to have legal representation, and against removal. Even though these principles can be found in other international instruments, their effectiveness is compromised by the criminal justice focus of the Protocols. Consequently, the protection needs of the UAMs who have been smuggled or trafficked are not taken into account, and frustrates calls for more protection-orientated responses. This is particularly the case for minors who have been smuggled because they are often framed as complicit participants in smuggling, as illegal immigrants, and as a 'problem' to be solved through deterrence and border protection strategies. Due to the failure of both Protocols to make reasonable distinctions between

⁵²International Council on Human Rights Policy, 2010, p 79.

⁵³ Gallagher, 2002. p 15.

⁵⁴ Ibid.

⁵⁵ Obokata, 2005, p 394.

⁵⁶ Unless such punishment is used as a last resort and for the shortest possible period of time.

smuggled and trafficked persons, the absence of substantive protection provisions, and the fact that unaccompanied minors are particularly vulnerable in the irregular migration process, a coherent, protection-focused approach is necessary. Such an approach should go beyond the smuggled/trafficked dichotomy, and establish a number of rights and protections explicitly applicable to smuggled and trafficked unaccompanied minors equally.

2.2 PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND, SEA, AND AIR

However, when it comes to the Smuggling of Migrants Protocol, it can be observed that such protection of rights is lacking, and that it rather puts an emphasis on criminal justice⁵⁷. Furthermore, it is important to look into this Protocol because as already analyzed previously, many unaccompanied minors, and asylum seekers in general, are likely to fall victim to trafficking while using the services of smugglers⁵⁸. This Protocol establishes an international legal framework that addresses migrant smuggling. It aims to ‘prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants’⁵⁹. As mentioned in the first chapter this Protocol defines migrant smuggling as ‘the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident’. ‘Illegal entry’ is presented as ‘crossing borders without complying with the necessary requirements for legal entry into the receiving State’⁶⁰, and ‘financial or material benefit’ may include any form of ‘non-financial inducement’, such as demanding indecent images from a child⁶¹. The requirement for a financial or material gain prevents criminalization, as per the Protocol, those facilitating or supporting the facilitation of irregular migration for humanitarian motives, such as family members, NGOs, or religious organizations⁶².

The definition in article 3(a) serves as a foundation for the mandatory criminalization provisions in article 6, which require States Parties to criminalize migrant smuggling and related conduct. A person who is involved in the smuggling of an unaccompanied minor will be liable under the basic offence in article 6(1)(a), and offences covering enabling illegal stay and provision of fraudulent travel and identity documents are outlined under article 6(1)(b) and (c). Aggravating circumstances to the offences under article 6, set out in article 6(3)(a) and (b), cover scenarios where smuggled unaccompanied minors face life-threatening or dangerous conditions, or which ‘entail inhuman or degrading treatment, including for exploitation’. The purpose of adding aggravating circumstances is the increase of deterrence where the treatment of smuggled migrants is especially reprehensible, they do not provide any additional protections to smuggled migrants⁶³.

Article 16(1) of the Smuggling of Migrants Protocol ensures preservation and protection of the rights of smuggled migrants under international law. It requires that States parties take ‘all appropriate

⁵⁷ Lelliott, 2017, p 11.

⁵⁸ Derluyn, and Broekaert, 2005, p 26.

⁵⁹ Preamble of the Smuggling of Migrants Protocol.

⁶⁰ Article 3(b) of the Smuggling of Migrants Protocol.

⁶¹ Article 3(a) of the Smuggling of Migrants Protocol

⁶² Lelliott, 2017, p 12.

⁶³ UNODC, 2018, p 18.

measures, including legislation if necessary, to preserve and protect the rights of persons who have been the object of conduct set forth in article 6 of this Protocol'. Articles 16(2)-(4) put several obligations on States parties to assist the migrants in such situations. These provisions aim to do standard-setting for officials who deal with smuggled migrants and to deter conduct on the part of offenders that involves danger or degradation to the migrants'⁶⁴. Article 16(2) obliges States parties to take appropriate measures to protect smuggled migrants from violence, where such violence is a result of their being smuggled migrants. This would include situations where migrants are endangered by modes of transportation, or exploitation, during the smuggling process⁶⁵. There is little guidance as to the content or requirements of 'appropriate measures'; as such, it is difficult to gauge precisely the ambit of article 16(2), or at what point a breach of the obligation would occur. Article 16(3) calls on States parties to afford appropriate assistance to smuggled migrants whose lives or safety are endangered. The Legislative Guides, which assist domestic implementation of the Protocols by States parties, state that article 16(3) imposes a new 'obligation' on States to provide 'basic assistance', although it explicitly precludes the existence of a corresponding right⁶⁶. As with article 16(2), the method of implementation is at the discretion of States parties. The Model Law against the Smuggling of Migrants, which also assists domestic implementation, suggests a number of measures may stem from the article 16(3) obligation, including provision of urgent medical care, access to food and shelter, and protection of physical security⁶⁷.

Article 16(4) is the only provision making a reference to children in the Smuggling of Migrants Protocol. However, it does not include specific rights of children, but it is only mandating that States parties consider their special needs. What these 'special needs' constitute, or how they are to be accounted for, is not covered in this Protocol or other background material⁶⁸. The Basic Training Manual on Investigating and Prosecuting the Smuggling of Migrants offers some limited guidance, recommending that, at a minimum, minors should be promptly taken away from any possible dangers; kept away from any suspects; examined by a medical professional for both health and potential evidential purposes; provided with fresh clothing or a nappy change if needed, given food and drinks, and if they are old enough, given a pencil and paper so they can occupy themselves; and lastly they need to be attended to by trained officers⁶⁹. A further important protection for smuggled migrants, including UAMs, is the non-criminalization principle under the Protocol. Article 5 of the Protocol stipulates that migrants should not be subjected to criminal prosecution under this Protocol for being the object of the criminal actions described in Article 6. This shows that it is the smuggling activities that is the focus of criminalization, not migration itself⁷⁰. However, States Parties may still take action against smuggled migrants for other offences such as illegal entry or illegal stay⁷¹. The Smuggling of Migrants Protocol

⁶⁴ UNODC, 2005. p. 364.

⁶⁵ Gallagher and David. p.562.

⁶⁶ UNODC, 2005. p. 365.

⁶⁷ UNODC, 2010. p. 66.

⁶⁸ UNODC, 2005. p. 363.

⁶⁹ UNODC, 2010. p. 8.

⁷⁰ UNODC, 2005. p. 347.

⁷¹ Protocol Against the Smuggling of Migrants by Land, Sea, and Air. Art. 3

does not prevent States Parties from expelling smuggled migrants⁷². Article 18 of the Protocol specifies provisions for the return of smuggled migrants, emphasizing that States Parties must accept their return and that they need to take appropriate measures to ensure the return process is conducted orderly and with respect for the safety and dignity of the individual. This reflects the principle that States are not under a requirement to allow alien citizens to remain on their territory unless they are protected by international laws, particularly by the principle of non-refoulement⁷³.

2.3 PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN (PALERMO PROTOCOL)

When it comes to the protection given to UAMs in the Palermo Protocol it can be seen that it provides UAMs with a more tailored protection from trafficking in human beings. Protection and assistance for victims of trafficking can be found under Article 2. Various provisions throughout the Protocol serve this aim, including measures connected to material assistance and accommodation in Article 6. As a general principle, relevant provisions should be enshrined in a child-sensitive manner due to their lack of agency and vulnerabilities⁷⁴. The special rights and needs of children should be particularly considered⁷⁵. In comparison to the Smuggling of Migrants Protocol, one can see an acknowledgement of the situation of children in the Trafficking in Persons Protocol and its supplementary materials⁷⁶. Under Article 6(3) States parties are required to consider implementing measures to provide for the social, psychological and physical recovery of victims of trafficking in persons, and Article 6(5) requires that States parties 'endeavour to provide for the physical safety of victims of trafficking'⁷⁷. None of the provisions are framed in mandatory language. When applying articles 6(3) and (5), States parties should take into account the special needs of children⁷⁸, which may include appropriate housing, education, and care⁷⁹. The Legislative Guides note the urgency to appoint a specially trained guardian for child victims until an appropriate solution for protection has been identified and implemented and, in cases where the age of a victim of trafficking is uncertain, the victim should be treated as a child until their age is verified⁸⁰.

The OHCHR Guidelines state that specialized policies and programs need to be implemented for child protection purposes, as well as procedures for rapid identification of trafficking victims⁸¹. There is no obligation for victim identification in the Trafficking in Persons Protocol, even though it is implicitly a precursor to cooperation as required by Part III of the Protocol⁸². Victims who have been identified,

⁷² Gallagher and David. p. 10.

⁷³ Lelliott, 2017, p.12; the non-refoulement principle says that states should not send a person back to a country if they are likely to suffer torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm

⁷⁴ Gallagher, 2002, pp.323–24

⁷⁵ Ibid.

⁷⁶ Lelliott, 2017, p.15

⁷⁷ See also Convention against Transnational Organized Crime, art 25(1)

⁷⁸ Isabel et al., 2014. p.37

⁷⁹ Trafficking in Person Protocol, Art 6(4).

⁸⁰ UNODC, 2020, p.62.

⁸¹ OHCHR, no date, p. 11.

⁸² Kneebone and McSherry. 2008, p.76.

whether unaccompanied minors or not, should be referred to appropriate agencies at the earliest possible opportunity⁸³, with provision of assistance regardless of whether the victim expressed a desire to participate in the investigation or prosecution of their alleged trafficker, or not⁸⁴. In cases where victims of trafficking are involved in court proceedings, they should, where appropriate and needed, be assisted including with '[i]nformation on relevant court and administrative proceedings' and be provided with assistance allowing them to participate in proceedings effectively and to express their views and concerns⁸⁵. Such assistance should be provided in a language they can understand⁸⁶. Even though the Protocol does not deal with the specific issue of child victims participation in criminal proceedings, the Legislative Guides state that there should be a particular focus on protection measures for child witnesses and their safety⁸⁷. The Trafficking in Persons Protocol contains a number of provisions connected to return⁸⁸. Article 7(1) requires States Parties to consider 'adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases'. Article 7(2) states that 'humanitarian and compassionate factors' should be taken into account when implementing subsection (1). 'Humanitarian factors' are understood as rights that are enshrined in international human rights instruments, such as the Convention relating to the Status of Refugees, established in light of the 1967 Protocol relating to the Status of Refugees⁸⁹ and the Convention on the Rights of the Child⁹⁰. 'Compassionate factors' constitute personal circumstances, such as family situation and age, which should be considered on a case-by-case basis. If a State party does not allow a victim of trafficking to remain in its territory, Article 8 of the Trafficking in Persons Protocol outlines several obligations regarding repatriation. Notably, Article 8(2) mandates that the returning State must take into account the victim's safety and the status of any court proceedings connected to the trafficking. Ensuring the victim's safety is crucial in any repatriation decision, and it may be necessary to delay the return to enable the victim to undergo some aspects of physical, psychological, and social recovery⁹¹. The primary consideration in repatriation decisions concerning children should be the best interest standard⁹². If children are repatriated, a suitable relative or guardian should have agreed to take responsibility and provide care and protection for the child before their return⁹³. In addition, all necessary steps should be taken to facilitate family reunification when it is in the best interests of the child⁹⁴.

⁸³ UNODC, 2020, p.56.

⁸⁴ UNODC, 2020, p.57.

⁸⁵ Trafficking in Persons Protocol, Art 6(2).

⁸⁶ UNODC, 2020, p. 59.

⁸⁷ UNODC, 2020, p. 62

⁸⁸ Gallagher and David. 2014, p. 725.

⁸⁹ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137

⁹⁰ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).

⁹¹ UNODC, 2020, p. 68.

⁹² OHCHR, no date. p. 11.

⁹³ UNODCR, 2020, p. 70.

⁹⁴ *ibid.*

The Palermo Protocol's impact on the criminalization of human trafficking is wide-reaching because all countries that have ratified it are obliged to criminalize human trafficking through their national legislations⁹⁵. Furthermore, the Protocol provides guidance on how to design and implement measures that enable victims of trafficking to receive remedies. However, simply ratifying conventions and protocols that address human trafficking is not sufficient to deal with it as it is up to the state parties to polish their own jurisdictions through measures for the development of trafficking specific measures⁹⁶. Moreover, it is uncertain to what extent these measures will actually be implemented on a national level by the state parties. Therefore, its effective implementation, law enforcement agencies' commitment to investigating trafficking crimes, and prosecution of trafficking perpetrators are crucial in the fight against human trafficking⁹⁷.

2.4 COMPARISON BETWEEN BOTH PROTOCOLS

While neither the Smuggling of Migrants Protocol nor the Trafficking in Persons Protocol offers comprehensive or substantive rights and protections for adults or minors, the Trafficking Protocol generally provides a higher standard of protection. The Smuggling Protocol does not grant unaccompanied minors any additional rights beyond those they are already entitled to under other international treaties or customary international law⁹⁸. This reflects the Protocol's primary focus on criminalizing migrant smuggling and its vague, discretionary approach to protecting smuggled migrants⁹⁹. Notably, smuggled migrants are not referred to as "victims" in the Protocol, despite the similar experiences of smuggled unaccompanied minors and trafficking victims¹⁰⁰. The rights of minors, particularly those exploited during the smuggling process, receive little acknowledgment in the Protocol. It does not contain provisions related to family reunification, detention, participation in legal proceedings, non-discrimination, and the best interests of the child principle, which is paramount in any state action involving a child¹⁰¹. Additionally, the Protocol does not provide removal protections for smuggled minors, even though it recognizes the application of the non-refoulement principle to smuggled migrants¹⁰².

The Trafficking in Persons Protocol on the other hand provides numerous protections applicable to UAMs who are victims of trafficking¹⁰³. Whereas a few of the measures are framed in mandatory language, the Protocol and its supporting documents call for a higher standard of protection – in particular emphasizing the need to support the recovery of victims from any trauma stemming from the trafficking process. This can be observed in other removal provisions as well which, in comparison to those in the Smuggling of Migrants Protocol, point to the need of victim protection and recovery in

⁹⁵ Gallagher, 2002, p.23.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, 2000, para 109.

⁹⁹ Schloenhardt and Stacy, 2013, p.64.

¹⁰⁰ Schloenhardt and Stacy, 2013, p.67.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Obokata, 2005, p.406.

such cases. Nevertheless, the Trafficking in Persons Protocol has been subjected to criticisms as failing to provide the expected standard of protection for children, which applies to UAMs as well¹⁰⁴. One of them revolves around the protection measures in the Protocol being 'so broad as to be almost meaningless in terms of measuring compliance¹⁰⁵ and as overly focused on how victims can be utilized as witnesses in legal proceedings¹⁰⁶. Furthermore, it is worth mentioning that during the drafting process the arguments for a section of the Protocol devoted specifically to children were neglected¹⁰⁷.

Based on the previous paragraphs, two conclusions can be drawn. Firstly, an unaccompanied minor regarded as a 'smuggled migrant' by the authorities is generally denied the stronger protections afforded to an unaccompanied minor with the status of 'victim of trafficking'. As explained previously, this disparity may not be related to the actual experiences of unaccompanied minors. Secondly, although victims of trafficking enjoy better protection, both smuggled and trafficked unaccompanied minors receive little substantive protection from both Protocols. Crime control is the primary purpose of both Protocols. In comparison to the mandatory criminalization and cooperation measures in each Protocol, the protection provisions are relatively brief and discretionary¹⁰⁸. This is a reflection of their parent convention, the Convention against Transnational Organized Crime, which is mostly concerned with crime control, cooperation between states, and prevention. Consequently, a protection-based approach to such minors must be founded on international law more broadly – including international human rights and refugee law¹⁰⁹. The enforcement of these rights is guaranteed by the saving clauses in Articles 19 and 14 of the Smuggling of Migrants Protocol and the Trafficking in Persons Protocol, respectively, which have identical wording: 'Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein'.

Despite potential overlaps in the conduct subjected to criminalization by the Smuggling of Migrants Protocol and the Trafficking in Persons Protocol, the rights and interests protected by each differ to a considerable extent. The Trafficking Protocol focuses on the victim's right not to suffer exploitation. Although as already mentioned it generally provides limited protections for individual trafficked persons, the offense of trafficking aims to punish traffickers and protect the rights, freedom, and integrity of trafficked individuals. In contrast, while smuggled migrants are the object of the offense under the Smuggling Protocol, migrant smuggling is considered a crime against the state, specifically its border control and sovereignty¹¹⁰. The infringed right by migrant smuggling is the state's right to regulate who enters and remains in its territory, which defines the inherent wrongfulness of smuggling

¹⁰⁴ Isabel and Sanchez,

¹⁰⁵ Fredette, 2009, pp. 130-31.

¹⁰⁶ Ray, 2006, pp. 119-119.

¹⁰⁷ Fredette, 2009, p. 123.

¹⁰⁸ UNHCR, 2006, p.4.

¹⁰⁹ Lelliott, 2017, p. 253.

¹¹⁰ Mountz, 2003, p. 622.

and justifies its criminalization¹¹¹. These differing purposes affect the level of protection provided to trafficking victims and smuggled migrants. Smuggled migrants are not recognized as "victims" under the Smuggling Protocol and therefore do not receive the special protections afforded to crime victims under international law¹¹². The recognition of trafficking as a criminal offence, which does not require a transnational element, aims to protect trafficked persons from violations of their rights and liberties rather than national interests.

The purpose of each Protocol, and the level of protection they grant, has implications for unaccompanied minors both during and after their irregular migration. The classification of a minor as a 'smuggled migrant' or a 'victim of trafficking' largely depends on the legal definitions and the criminal status of the person facilitating their journey, rather than the specific experiences of the minor. As discussed earlier, this classification is problematic because it does not effectively distinguish between cases of smuggling and trafficking. An unaccompanied minor may be subjected to serious exploitation or abuse during their journey but not enjoy the protections victims of trafficking are provided with. This situation can be observed explicitly in article 6(3)(b) of the Smuggling of Migrants Protocol which accords punishment to a migrant smuggler for the exploitation or subjection of a smuggled migrant to inhuman or degrading treatment, however it does not provide protection compatible with the one provided to victims of trafficking. Furthermore, indeterminacy between classification of smuggled migrants and trafficked persons may hinder the identification of victims of trafficking, or may otherwise lead to states labeling trafficked people as smuggled migrants¹¹³. As a result, this may affect the protection of unaccompanied minors.

2.5 BEST INTERESTS OF THE CHILD AND THE CRC

The principle of the best interests of the child is a fundamental element of the international legal framework when it comes to child protection, and is also vital for the protection of smuggled and trafficked unaccompanied minors. Its most widely adopted expression can be found in Article 3(1) of the Convention on the Rights of the Child (CRC), which is the main international instrument that outlines the rights of children. In addition, the CRC is the most widely ratified international treaty in the world as 193 UN Member States are parties to it except the United States, which has signed but not ratified the treaty. The rights under the CRC apply to all children regardless of their status, including citizenship or immigration status¹¹⁴. The principle of best interests of the child is vital for the way all rights in the CRC will be interpreted and implemented¹¹⁵. Article 3(1) from CRC stipulates that 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'. When it comes to unaccompanied minors, States are required under this principle to take into account their best interests in all decisions that affect them, which includes immigration

¹¹¹ Koser, 2005, p.10.

¹¹² Abramson, 2003, p.478.

¹¹³ Lelliott, 2017, p 9.

¹¹⁴ CRC, art 2(1); Pobjoy, 2015, p. 331.

¹¹⁵ Freeman, 2007, p. 32.

procedures, the availability of family reunification mechanisms, accommodation, and practices related to removal.

The UN Committee on the Rights of the Child has stated that the principle of best interests can be seen as a threefold concept¹¹⁶. It is simultaneously a rule of procedure, a substantive right, and a fundamental interpretative legal principle¹¹⁷. The wording of Article 3(1) is integral to understand the scope and effect of this principle. For instance, by using both the singular and plural form of ‘child’ in article 3(1) it is ensured that the principle is conceived as both an individual and a collective right¹¹⁸. Including ‘legislative bodies’ renders the CRC applicable to all ‘political and macro-social dimensions’, which means that it has an impact on the policies and laws at any level of government or administration¹¹⁹. Moreover, the word ‘actions’ in article 3(1) does not only cover positive acts but it also extends to omissions, which constitute failures to act. Therefore, in the hypothetical case of a state not providing appropriate healthcare to unaccompanied minors this can be interpreted as a failure of the state to fulfil its obligations under article 3(1)¹²⁰. Article 3(1) says that the aforementioned principle is ‘a’ primary consideration but not ‘the’ primary consideration, which gives rise to anticipation of other ‘primary considerations’ of equal weight. For example, prima facie some states may prioritize the interests connected to deterrence of migrant smuggling or the placement of certain immigration controls over the best interests of the child. However, during the drafting of the CRC, it was discussed that the best interests of the child might be displaced exclusively in extremely compelling circumstances¹²¹. When it comes to unaccompanied minors, the Committee states that such minors, in the case they are in a third country, may only be returned to their country of origin if there are other rights-based considerations that override the best interests consideration. Furthermore, it states that ‘[n]on rights-based arguments such as those relating to general migration control, cannot override best interests considerations’¹²². Accordingly, the principle of the child’s best interests is an integral element of a protection-based approach to trafficked and smuggled unaccompanied minors, and should form the foundation for guiding how these children are treated in practice.

2.6 OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY (SEX TRAFFICKING PROTOCOL)

Children are consequently preferred targets for commercial sexual exploitation, especially more vulnerable and disadvantaged groups such as refugees, minorities, street children, poor children, disabled children, and juveniles from broken homes¹²³. The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (Sex Trafficking

¹¹⁶ UN Committee on the Rights of the Child, 2013, General Comment No 13, Art 3, para 1.

¹¹⁷ UN Committee on the Rights of the Child, 2003, General Comment No 5, Arts. 4, 42 and 44(6)), para 6.

¹¹⁸ UN Committee on the Rights of the Child, General Comment No 14, Art. 8.

¹¹⁹ Zermatten, 2010, p.488.

¹²⁰ See also CRC, art 24.

¹²¹ UN Economic and Social Council, 1981, para 24.

¹²² UN Committee on the Rights of the Child, 2005, para 85.

¹²³ Kerr, 2018, Available from: <https://www.bpb.de/themen/migration-integration/kurzdossiers/279050/trafficking-in-children-the-supply-and-demand-of-exploitation/>, Accessed on 27/05/2024.

Protocol) was established to address the growing issue of child trafficking for sexual exploitation¹²⁴. It defines and prohibits the sale of children, child prostitution, and child pornography¹²⁵. Furthermore, it requires that a state's criminal or penal law regulate certain prohibited acts, establishes various grounds for claiming jurisdiction and requesting extradition, and ensures protection of the rights and interests of child victims of sex trafficking¹²⁶. Governments must provide legal and other support services to child victims. This obligation entails taking into account the best interests of the child in any interactions with the criminal justice system¹²⁷. Children must also be supported with necessary financial, logistical, psychological and medical support to support their rehabilitation and reintegration¹²⁸.

The Preamble to the Sex Trafficking Protocol includes several vital provisions. It stipulates that in order to better fulfill the goals of the CRC and ensure its provisions are enacted, it is necessary to expand the measures that States Parties should implement to protect children from being sold, as well as from child prostitution and child pornography¹²⁹. It also includes protection of children from being sold for non-sexual purposes, such as organ donation, forced labor, and illegal adoption¹³⁰. In addition, the Preamble puts an explicit emphasis on the necessity of implementing the CRC. More importantly, the Preamble makes a reference to Articles 34 and 35, which provide children, including unaccompanied minors, with a broad protection against trafficking, sexual exploitation, and abuse¹³¹. Finally, the Preamble references the language typical for the CRC by emphasizing the child's right to be protected from 'economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development'¹³². The Preamble serves as a foundation for the interpretation and implementation of the Sex Trafficking Protocol in a way that fully aligns with and enhances the protections enshrined in the CRC. In fact, since a number of its key provisions, such as Article 3(1), Article 4(4), and Article 11) imposed minimum compliance standards only, states may implement and uphold measures for child protection which are stricter than the measures stipulated under the Sex Trafficking Protocol¹³³.

To begin with, the Sex Trafficking Protocol mandates that States Parties must prohibit the 'sale of children, child prostitution, and child pornography'¹³⁴. The sale of children is defined as 'any act or transaction where a child is transferred to another for remuneration or any other consideration'¹³⁵. Child prostitution is further defined as 'the use of a child in sexual activities for remuneration or other

¹²⁴ Pais, 2010, p 559.

¹²⁵ Unicef, no date. Available from: <https://www.unicef.org/child-rights-convention/strengthening-convention-optional-protocols>, Accessed on 27/05/2024.

¹²⁶ Pais, 2010, p 559.

¹²⁷ The principle of best interests was elaborated on above; Pais, 2010, p 559.

¹²⁸ Unicef, no date. Available from: <https://www.unicef.org/child-rights-convention/strengthening-convention-optional-protocols>, Accessed on 28/05/2024.

¹²⁹ Revaz, 2001, p 13.

¹³⁰ Unicef, no date. Available from: <https://www.unicef.org/child-rights-convention/strengthening-convention-optional-protocols>, Accessed on 29/05/2024.

¹³¹ Revaz, 2001, p 13.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Sex Trafficking Protocol, Art. 1

¹³⁵ Sex Trafficking Protocol, Art 2.

forms of consideration'¹³⁶. Child pornography is defined as 'any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child, the dominant characteristic of which is depiction for a sexual purpose'¹³⁷.

Moreover, the Protocol covers criminalization and states that certain practices should be punishable under the criminal and/or penal code of the State Party, including attempts, complicity, or participation in acts connected to the sale of children, child prostitution, and child pornography¹³⁸. It requires suitable penalties that reflect the 'grave nature' of these offenses. When it comes to the sale of children, Article 3 makes punishable the 'offering, delivering, or accepting by whatever means of a child' for sexual exploitation, organ transfer for profit, or forced labor¹³⁹. Moreover, it criminalizes the 'offering, obtaining, procuring, or providing' of a child for child prostitution and the 'production, distribution, dissemination, importation, exportation, offering, selling, or possession' of child pornography¹⁴⁰. Importantly, Article 3 applies to both domestic and international contexts, as well as to individuals and organizations¹⁴¹.

Article 4 specifies the grounds for States Parties to claim jurisdiction over offenses that are connected to the sale of children, child prostitution, and child pornography. It states that each party needs to take necessary measures for the establishment of jurisdiction over these offenses when they occur within its territory¹⁴². Jurisdiction is claimed as well if the alleged offender is a national or habitual resident of the state, or if the victim is a national of that state¹⁴³. Additionally, Article 4 does not interfere with or limit the ability of a country to apply its own criminal laws within its territory¹⁴⁴. Article 5 points to the strengthening of the ability of States Parties to extradite those who commit offenses under the Sex Trafficking Protocol, and classifies these violations as extraditable offenses in all current and future extradition treaties between State Parties¹⁴⁵. Furthermore, it stipulates that the Protocol can be used as a legal basis for extradition in the absence of an existing extradition treaty¹⁴⁶.

The Sex Trafficking Protocol specifies provisions for the protection and assistance of child victims throughout the criminal justice process¹⁴⁷. Article 8(1) requires that States Parties adopt "appropriate measures" to safeguard the rights and interests of child victims, specifying several responsibilities, including: acknowledgement of the vulnerability of child victims and adoption of procedures that cater to their special needs; informing child victims of their rights; enabling child victims to present their views and have them considered in proceedings that affect their personal interests; provision of

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Sex Trafficking Protocol, Art. 3.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Sex Trafficking Protocol, Art.5.

¹⁴⁶ Ibid.

¹⁴⁷ Sex Trafficking Protocol, Art.8.

appropriate support services to child victims; protection of the privacy and identity of child victims; shielding child victims from retaliation and intimidation; avoiding unnecessary delays in resolving cases and executing compensation orders for child victims. Lastly, Article 8(3) emphasizes that the best interests of the child must be the primary consideration in all judicial matters concerning children.

Article 9 revolves around practices that ensure protection. It further emphasizes that in order to enable prevention and tackling of offenses under the Sex Trafficking Protocol, States Parties' main focus should be on protecting those children who are especially vulnerable to the proscribed acts. It states that States Parties should undertake 'all feasible measures' to provide suitable victim assistance. This includes ensuring their complete social reintegration and both psychological and physical recovery. Furthermore, the article mandates that child victims have equitable access to procedures for seeking compensation for damages from those legally responsible. Article 10 advocates for the enhancement of international cooperation by taking all necessary measures in the prevention, detection, investigation, prosecution, and punishment of acts connected to the sale of children, child prostitution, child pornography, and child sex tourism.

2.7 CRITICISMS OF THE SEX TRAFFICKING PROTOCOL

It is argued that the Protocol weakens existing protections under the CRC, especially CRC's Article 34 and 35 that protect children, including unaccompanied minors, from sexual exploitation, sexual abuse, the abduction of, the sale of, or traffic in children for any purpose or any form¹⁴⁸. Some NGOs expressed concerns that, despite increased international efforts to combat commercial sexual exploitation through prosecution, the Sex Trafficking Protocol's prosecution emphasis is not likely to lead to protection of child victims from such crimes¹⁴⁹. Furthermore, whereas the CRC's upper age limit constitutes eighteen years old in Article 1, some NGOs pointed out a criticism about the lack of an upper age limit in the Protocol¹⁵⁰. Moreover, they do not agree with the various references to domestic laws in the Protocol, such as in Article 8(1)(c) and (e), which argue that they might potentially impede the obligations imposed on Member States under Articles 34 and 35, which mandate taking all appropriate national, bilateral, and multilateral measures to prevent the sexual exploitation of children¹⁵¹.

As the negotiations proved to be of challenging nature, the Sex Trafficking Protocol is a representation of the minimum consensus achievable by the working group members at the UN General Assembly at the time of the Protocol's adoption¹⁵². Even though there are criticisms, the Protocol is seen positively because it contributes to the extension of the CRC's broad language on sex trafficking. It defines strictly the phenomena of child prostitution, the sale of children, child pornography, and related practices, and consolidates the bases for extradition, jurisdiction, and international cooperation¹⁵³. Moreover, providing greater specificity to the CRC's broad terms could enhance its practical implementation. The Protocol also has the capacity to raise international awareness of the issue of sex trafficking.

¹⁴⁸ Revaz, 2001, p.15.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² Revaz, 2001, p.16.

¹⁵³ Ibid.

Importantly, there are no provisions within it that could undermine the broad obligations of States Parties to the CRC¹⁵⁴. As the Preamble states, the Protocol's aim is to contribute to the realization of the purposes of the CRC. Ultimately, its effectiveness depends on how thoroughly its obligations are incorporated into and enforced by national laws and jurisdictions¹⁵⁵.

At the time of writing, although all the Member States have signed the Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, the Czech Republic, Germany, Finland, Hungary, Ireland, Luxembourg, and Malta still have not ratified it.

2.8 COUNCIL OF EUROPE CONVENTION ON ACTION AGAINST TRAFFICKING IN HUMAN BEINGS (ANTI-TRAFFICKING CONVENTION)

The Council of Europe is the main human rights organization in Europe which works on unifying the human rights standards across all its 46 Member States¹⁵⁶. It strives to do so through the creation of legally binding treaties in various fields which the Member States then decide if they are willing to ratify them or not¹⁵⁷. All 46 Council of Europe Member States have ratified the aforementioned Convention, as well as two non-Member States- Belarus and Israel¹⁵⁸. In comparison to the UN Protocols, this Convention strongly emphasizes on the protection and promotion of the rights of all potential victims of trafficking- women, men, and children. It states that since human trafficking constitutes a grave violation of victims' rights, a human rights based approach is necessary to deal with the aftermath of this criminal offence¹⁵⁹. This makes it the first international legal instrument that takes a human rights based approach to deal with human trafficking, and significantly builds upon the protection afforded to victims of trafficking in other international instruments¹⁶⁰. Furthermore, it contains provisions to prevent trafficking and prosecute trafficking perpetrators. This section will focus on the protections granted to (potential) victims of trafficking who are unaccompanied minors.

The Anti-Trafficking Convention of the Council of Europe mandates that 'each Party shall provide its competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings, in identifying and helping victims, including children and shall ensure that the different authorities collaborate with each other as well as with relevant support organizations, so that victims can be identified in a procedure duly taking into account the special situation of women and child victims and, in appropriate cases, issued with residence permits under the conditions provided for in Article 14 of the present Convention'¹⁶¹. Furthermore, it mandates that 'each Party shall adopt such legislative or other measures as may be necessary to identify victims as appropriate in collaboration with other Parties and relevant support organizations. Each Party shall ensure that, if the

¹⁵⁴ Unicef, no date. Available from: <https://www.unicef.org/child-rights-convention/strengthening-convention-optional-protocols>, Accessed on 29/05/2024.

¹⁵⁵ Pais, 2010, p 559.

¹⁵⁶ Reichel et al., 2020, p.2.

¹⁵⁷ Ibid

¹⁵⁸ Ibid

¹⁵⁹ Anti-Trafficking Convention of the CoE. Preamble.

¹⁶⁰ Ibid.

¹⁶¹ Anti-Trafficking Convention of the CoE. Art. 10(1).

competent authorities have reasonable grounds to believe that a person has been a victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim of an offence provided for in Article 18 of this Convention has been completed by the competent authorities and shall likewise ensure that that person receives the assistance provided for in Article 12, paragraphs 1 and 2'¹⁶².

In the event an unaccompanied minor is identified as a victim of trafficking an appointment of a legal guardian, organization or authority should follow as soon as possible as this will enable them to act in the best interests of that child¹⁶³. However, identification of the victims is of vital importance because it is the first stage before this can occur¹⁶⁴. The identification revolves around the procedures that are needed to ensure that 'victims can be identified in a procedure duly taking into account the special situation of women and child victims and, in appropriate cases, issued with residence permits...'¹⁶⁵. It also makes a specific reference to young people whose age is not certain by stipulating that 'when the age of the victim is uncertain and there are reasons to believe that the victim is a child, he or she shall be presumed to be a child and shall be accorded special protection measures pending verification of his/her age'¹⁶⁶. It also specifies the minimum measures which should be taken when an unaccompanied child is identified as a victim of trafficking. They require States Parties respectively¹⁶⁷ to: a) 'provide for representation of the child by a legal guardian, organization or authority which shall act in the best interests of that child; b) "take the necessary steps to establish his/her identity and nationality; c) 'make every effort to locate his/her family when this is in the best interests of the child'.

However, it is important to beware of the way these provisions are implemented in practice. For example, while the aforementioned principle that unaccompanied minors should be assigned a temporary legal guardian enjoys wide acceptance, the way guardianship is implemented in many countries often undermines its purpose¹⁶⁸. The reason for this is because social workers or administrative officials are often the ones appointed as guardians for numerous children simultaneously. As a result, this prevents them from developing trust-based relationships with the children for whom they are responsible. Consequently, they are not able to effectively support trafficked children through decision-making processes in a way that enables them to be genuine advocates for their best interests. Although it is crucial for a child to have someone being legally responsible for them ("in loco parentis"), it is equally important for an individual adult to guide a trafficked child through the complex legal and procedural landscape they face. This would become even more complicated if the child testified in a criminal investigation or prosecution or needs to undergo medical treatment for issues associated with their health. Furthermore, when it comes to provision 10.4.c the Explanatory Report, which accompanies the Convention, states that "the family of the child should be found only when this is in the best interests of the child given that sometimes it is his/her

¹⁶² Anti-Trafficking Convention of the CoE. Art.10(2).

¹⁶³ OSCE Office of the Special Representative and Co-ordinator for Combatting Trafficking in Human Beings, 2018, p. 40.

¹⁶⁴ Ibid

¹⁶⁵ Anti-Trafficking Convention of the CoE. Art. 10(1).

¹⁶⁶ Anti-Trafficking Convention of the CoE. Art. 10(3).

¹⁶⁷ Anti-Trafficking Convention of the CoE. Art. 10(4).

¹⁶⁸ OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, 2018, p.40.

family who is at the source of his/her trafficking'. This is of paramount importance because if the child is returned to such an environment this may bring back the cycle of trafficking.

When it comes to other protections enshrined in this Convention that are applicable to unaccompanied minors as well, such include measures necessary for their social, physical, and psychological recovery, which include provision of secure accommodation, psychological and material assistance; access to emergency medical treatment; translation and interpretation services; counselling and information regarding their legal rights and services available to them. Moreover, it provides for the granting of a recovery and reflection period for at least 30 days, when there are 'reasonable grounds to believe that the person concerned is a victim'¹⁶⁹. During this period, victims have the opportunity to recover from the detrimental trafficking experience, escape from the influence of the traffickers, and make an informed decision whether they would like to cooperate with the competent authorities further or not¹⁷⁰. What is more, it is not possible to expel them from the country during this period¹⁷¹. Similar to this, the Convention mandates that renewable residence permits shall be issued by each State Party to victims in cases when 'the competent authority considers that their stay is necessary owing to their personal situation'¹⁷², or when 'the competent authority considers that their stay is necessary for the purpose of their cooperation with the competent authorities in investigation or criminal proceedings'¹⁷³. The Convention also calls for States Parties' internal law should provide the right to legal assistance and to free legal aid under specific conditions provided by their domestic legislation¹⁷⁴. In addition, they need to ensure that the right to compensation from the perpetrators is present in their domestic legal systems as well¹⁷⁵.

2.9 EU ANTI-TRAFFICKING DIRECTIVE 2011

Directive 2011/36/EU of the European Parliament and of the Council of April 5th 2011 focuses on the prevention and dealing with the crime of human trafficking and the protection of those that fall victims to it. A Directive in the context of the EU constitutes a legislative act that contains an aim that EU countries are required to achieve. However, the individual EU states have the discretion to reach the required goal through their own individual laws. The EU Anti-trafficking directive contains rules that are legally binding on EU Member States which are in the fields of criminal offences definitions, severity of sanctions against perpetrators, as well as improvement of the level of protection that is granted to victims of this criminal offence.

As regards unaccompanied minors and the protection the Directive grants, its Preamble states that an extended protection framework for unaccompanied minors is needed. This comes from the fact that many other international legal instruments focus on criminalization and prevention of the crime of trafficking in human beings rather than providing substantial protection measures to unaccompanied

¹⁶⁹ Anti-Trafficking Convention of the CoE. Art. 13(1).

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² Anti-Trafficking Convention of the CoE. Art. 14(1).

¹⁷³ Anti-Trafficking Convention of the CoE. Art. 14(1)b.

¹⁷⁴ Anti-Trafficking Convention of the CoE. Art. 15(2).

¹⁷⁵ Anti-Trafficking Convention of the CoE. Art. 15(3).

minors that are victims of trafficking. Article 16 from the Directive covers the assistance, support and protection for unaccompanied child victims of trafficking in human beings. Firstly, it ensures that their vulnerability and personal circumstances are taken into account in situations of applications of the protective and supportive measures enshrined in Article 14(1), which is reflected in the subsequent sub-articles of Article 16. It mandates that Member States take measures to find ‘a durable solution based on an individual assessment of the best interests of the child’¹⁷⁶. In addition, similarly to the Council of Europe Anti-Trafficking Convention, under this Directive the appointment of a legal guardian needs to be realized by the EU States when considered appropriate¹⁷⁷. When it comes to unaccompanied minors’ participation in criminal investigations and proceedings, a representative shall be appointed to enable the participation ‘in accordance with the role of victims in the relevant justice system’¹⁷⁸.

It is worth mentioning that on April 23rd 2024, the European Parliament voted to adopt a revised version of the EU Anti-Trafficking Directive, with the aim to strengthen the protection provided to victims of trafficking¹⁷⁹. The Council needs to formally approve the agreement, which will be followed by its publication in the EU Official Journal, after which twenty days need to pass before the Directive comes into force officially. Afterwards, the EU Member States will have two years to implement its provisions. The input of civil society organizations, such as Eurochild, Hope and Homes for Children and others, was taken into account when considering the amendments to the Directive¹⁸⁰. This is crucial because in this way organizations dedicated to children rights and child protection were able to provide expert opinions based on practice¹⁸¹. The revised Directive includes measures, such as the creation of a Europe-wide referral mechanism so victims can be identified at an early stage, cooperation between states and unified approaches to this issue, improvement of the data collection in Member States, and the provision of a child-sensitive approach during identification, legal proceedings, and reporting¹⁸². Furthermore, it calls for the implementation of the non-punishment principle for victims of traffickers for all unlawful activities committed while they were trafficked. Lastly, it speaks about the need to prioritize the relationship between asylum and victims’ protection frameworks, which means that the EU migration policies need to adapt to the risk of trafficking certain individuals may face. For instance, transfers of asylum seekers based on the Dublin Regulation, should not go ahead when there may be a risk of violation of the fundamental rights of the asylum seekers in the country where the authorities intend to bring them¹⁸³.

¹⁷⁶ EU Anti-Trafficking Directive. Art. 16(2).

¹⁷⁷ EU Anti-Trafficking Directive. Art. 16(3).

¹⁷⁸ EU Anti-Trafficking Directive. Art. 16(4).

¹⁷⁹ Eurochild, 2018, available from: <https://eurochild.org/news/the-revised-eu-anti-trafficking-directive-strengthen-measures-to-protect-child-victims/>, Accessed on 02/06/2024.

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

¹⁸² La Strada International, 2024, available from: <https://documentation.lastradainternational.org/lisidocs/3551-Joint%20statement%20on%20recast%20EU%20THB%20adoption%20EP%20-%20final.pdf>.

¹⁸³ European Council on Refugees and Exiles, 2023, available from: <https://ecre.org/revising-the-eu-anti-trafficking-revising-the-eu-anti-trafficking-directive-an-opportunity-to-strengthen-the-rights-of-trafficked-persons-an-opportunity-to-strengthen-the-rights-of-trafficked-person/>, Accessed on 03/06/2024.

3 CHAPTER 3: IMPLEMENTATION OF MEASURES TARGETING TRAFFICKING OF UNACCOMPANIED MINORS IN EUROPE

This chapter will introduce examples of measures that have been taken by European states as a result of their obligations under the legal framework in the field of tackling trafficking of unaccompanied minors that was discussed in the previous chapter. In particular, it will look into Italy's successful practice of guardianship of unaccompanied minors which had been introduced in 2017. Furthermore, it will cover the implementation of the national referral mechanism by the UK, and the need of collaboration between countries (such as between police authorities) in order to exchange data regarding the location of unaccompanied minors, and identify (potential) unaccompanied minor victims of trafficking.

3.1 ZAMPA'S LAW IN ITALY (ON GUARDIANSHIP)

As already mentioned, The Trafficking Convention of the Council of Europe requires that as soon as an unaccompanied child is identified as a possible victim of trafficking, a legal guardian, organization or authority must be appointed to act in the best interests of that child¹⁸⁴. Furthermore, in 2006 UNICEF issued a Check list for guardians: roles and responsibilities as part of a reference guide on how to protect trafficked children¹⁸⁵. When it comes to more recent publications of guidance, the EU's Fundamental Rights Agency (FRA) has also published a handbook on guardianship for trafficked children¹⁸⁶.

In March 2017 Italy introduced a comprehensive framework when it comes to the protection of unaccompanied minors in Europe, which made it the first country on the continent to do so. This marked three years since the introduction of the Bill and since the considerable advocacy efforts by various human rights organizations during the parliamentary process. As a result of these efforts, the 'Provisions on protective measures for unaccompanied foreign minors'- '(Disposizioni in materia di misure di protezione dei minori stranieri non accompagnati)' was passed in the Italian Parliament with a large majority. This framework has been described by Save the Children as the 'most elaborate system for child protection in Europe', and has been put forward by the United Nations Children's Fund (UNICEF) as a model for other European countries to follow. Such a legal framework was essential to be enacted due to the large numbers of unaccompanied children who travel to Italy through the Mediterranean Sea. Between January 1st and December 31st in 2017 15,779 unaccompanied children reached Italy through sea¹⁸⁷. The children's countries of origin are predominantly African countries, Bangladesh and Syria. Frequently the difficulty and desperation of their journeys, the sexual and physical abuse they are subjected to, and the chance for them to fall victim to human trafficking, have been reported in

¹⁸⁴ Council of Europe, Trafficking Convention, Art. 10.

¹⁸⁵ Unicef, 2006, Available from: <https://www.unhcr.org/sites/default/files/legacy-pdf/4d9450889.pdf>, Accessed on 09/06/2024.

¹⁸⁶ Fundamental Rights Agency, 2014. Available from: <https://fra.europa.eu/en/publication/2014/guardianship-children-deprived-parental-care>, Accessed on 10/06/2024.

¹⁸⁷ UNHCR, 2018, Available from: <https://reliefweb.int/report/italy/italy-unaccompanied-and-separated-children-uasc-dashboard-december-2017>, Accessed on 06/06/2024.

many studies and documents¹⁸⁸. More specifically, the articles of Zampa's law are a reflection of many of the already established international standards regarding care of unaccompanied minors from the United Nations Convention on the Rights of the Child, including legal representation enabled through guardianship provisions. The principle of best interests of the child was incorporated into it as well.

To understand how the notion of the guardianship law occurred in the Italian context, one needs to look at the work of the Sicily-based NGO AccoglieRete. It made sure to establish a database of people willing to act as guardians and to enable them to undergo training to prepare them for this following the large numbers of unaccompanied or separated children that have landed or have been accommodated in transit centers. Furthermore, it provides a description of the 'guardian' role in the following way: 'The guardian is first and foremost a volunteer who declares his or her willingness to become the legal representative of a minor, an essential spokesperson in front of official institutions to take care of the interests of the child who has arrived [in Italy] without parents, an orphan or otherwise a child with no-one exercising parental authority over him or her'¹⁸⁹.

Article 11 from Zampa's law was inspired from the work of AccoglieRete in that it strengthens the protection of unaccompanied minors by establishing lists of volunteer guardians for unaccompanied children within the youth courts across Italy. However, first of all the candidates must undergo a selection and adequate training by the Ombudspersons for Children of the regions or the autonomous provinces of Trento and Bolzano. Furthermore, according to the Procedure Decree, the guardian bears the responsibility to assist the unaccompanied minor during the asylum procedure, and even afterwards if necessary, and in case the decision of the child's asylum claim proves to be negative¹⁹⁰. To facilitate this, the child is escorted to the police by the guardian in question, which is where the minors are fingerprinted if they are over the age of 14. In addition, the guardians help the children through filling out the necessary forms which are necessary for lodging the asylum claim. The role of the guardian is of vital importance when it comes to the child's interview before the Territorial Commission as well because the latter cannot interview the child without the presence of the guardian. However, the Territorial Commission may still continue to interview the child without a parent or a guardian present if it is found necessary due to the child's personal situation, how mature and developed they are, and if it is considered necessary for the child's best interests to be respected. The guardian can also appeal against a negative asylum decision if they are authorized by the Juvenile Court to do so.

As of December 31st 2021 there were 3,457 voluntary guardians that had been appointed by the Juvenile Court. This compares with the significantly higher number of unaccompanied minors which comprised 12,284 at the end of 2021¹⁹¹. When it comes to the profile of the volunteer guardians, it can

¹⁸⁸ O'Donnell, and Kanics, 2016, p. 76.

¹⁸⁹ OSCE, 2018, p. 40.

¹⁹⁰ European Council on Refugees and Exiles, 2023. Available from:

https://asylumineurope.org/reports/country/italy/asylum-procedure/guarantees-vulnerable-groups/legal-representation-unaccompanied-children/#_ftn9, Accessed on 11/06/2024.

¹⁹¹ Autorità garante per l'infanzia e l'adolescenza, 2023. Available from: <https://www.garanteinfanzia.org/migranti-minorenni-lautorita-garante-prepariamoci-ad-accoglierli-con-piu-tutori-volontari-0>, Accessed on 11/06.2024.

be seen that as of these 3,457, 67 % were female, 65,18% had a university degree, and 41,70% were aged between 46 and 60¹⁹².

As of 2021 the number of successful pairings of tutors and unaccompanied foreign minors comprised 5,737. The reasons why many potential guardians do not accept their matches with unaccompanied minors are various. One of the main reasons volunteer guardians did not accept the matching proposals were issues associated with employment- 73,31% of the guardians are employed. Other reasons include personal and/or health reasons, lack of personal resources, or considerable distance from where the unaccompanied minor is located. When it comes to the latter reason, it can be seen that most of the unaccompanied minors are concentrated in certain Italian regions (such as Sicily), which creates a geographical barrier for volunteer guardians¹⁹³. Furthermore, a survey conducted by these organizations shows that volunteer guardians would often refuse a pairing with an unaccompanied minor if they are located far from one another, or if the support provided by social services is not sufficient¹⁹⁴. Nevertheless, there is a new regulatory provision that could change this as it tries to address the aforementioned issues through provision of expense reimbursements to guardians for the assignment performed. On September 19th the Decree of the Ministry of Interior and the Ministry of Economy and Finance concerning the practice of reimbursements and interventions for voluntary guardians of unaccompanied minors entered into force. The Decree states that volunteer guardians can be reimbursed for their voluntary work for up to 60 hours per year. Furthermore, it makes sure to reimburse transport costs if public transport has been used and reimbursement per kilometer in case a private vehicle has been used by the volunteer guardian.

3.2 HOW DO VOLUNTEER GUARDIANS CONTRIBUTE TO UAMS' PROTECTION?

It is important that according to Zampa's law a guardian can be assigned a maximum of 3 minors as this ensures a more individualized approach. This is important because in this way each guardian can take better care of every unaccompanied minor they are assigned to instead of being simultaneously responsible for multiple unaccompanied minors which could leave them unable to provide sufficient protection to any of them. Guardians play a crucial role in the protection of UAMs, which means they can contribute to UAMs' protection from falling victim to trafficking. They do this in the following ways: Firstly, they participate in the identification and age assessment procedures of the unaccompanied minors as their presence is of mandatory nature in order to guarantee that the methods used in them are in respect of the rights of the child and so harmful age assessment practices, such as X-rays, are avoided¹⁹⁵. Secondly, they make sure to inform the children of information relevant to their case, such as on available legal paths, the reception system, the right to a cultural mediator, or how to access

¹⁹² European Council on Refugees and Exiles, 2023. Available from:

https://asylumineurope.org/reports/country/italy/asylum-procedure/guarantees-vulnerable-groups/legal-representation-unaccompanied-children/#_ftn9, Accessed on 14/06/2024.

¹⁹³ Defense for Children and Cespi, 2021. Available from: <https://www.meltingpot.org/2022/06/applicazione-della-legge-47-2017-per-i-msna-il-rapporto-2021-su-4-regioni-sicilia-puglia-marche-e-liguria/#easy-footnote-1-490017>, Accessed on 14/06/2024.

¹⁹⁴ Ibid.

¹⁹⁵ Unicef, 2019, Available from: <https://www.unicef.org/eca/media/9386/file>. Accessed on 15/06/2024.

specific services¹⁹⁶. Thirdly, they collaborate with the unaccompanied minor to decide on an appropriate social inclusion path¹⁹⁷. Fourthly, the guardians facilitate the child's access to legal aid during asylum and residence permit procedures, they ensure that vulnerable children who are in need of psycho-social or mental health support receive such support in reception facilities¹⁹⁸. Lastly, they also help them access educational and vocational training opportunities, and make sure that the best interests of the child are always taken into account up until they reach adulthood¹⁹⁹. By adding such a 'human' factor to the experiences of unaccompanied minors, a more secure future for them can be achieved. As a result, the likelihood of them falling victim to trafficking could be reduced.

3.3 NATIONAL REFERRAL MECHANISM. CASE OF THE UK

National referral mechanisms (NRMs) constitute co-operative frameworks which allow states to fulfill and promote the human rights and dignity of trafficked individuals, by collaborating with civil society. At the core of the National referral mechanism is the identification and location process of likely victims of trafficking, who in general are known as 'presumed trafficked persons'. This process is crucial because for a long time there has been an overemphasis on crime control strategies to deal with the crime of trafficking in human beings, by criminalizing the offence of human trafficking²⁰⁰. Moreover, even when there have been efforts to set up a victim centered approach to victims of transnational crime, the UN legal framework, such as the United Nations Convention Against Transnational Organized Crime (UNTOC), only offers a partial protection to victims, as it mainly revolves around retaliation and threats, along with mechanisms to provide restitution and compensation to victims, rather than concrete help and protection²⁰¹. For this reason, identification is crucial because in this way authorities can recognize victims or potential victims of this crime, and then ensuring that the victim of crime would receive an adequate provision of care and services. Furthermore, UNTOC and the Palermo Protocol do not mention the issue of identification of trafficked victims. Identification of trafficked victims has been first recognized by the Council of Europe Convention on Action against Human Trafficking²⁰².

The UK case is a good example of how the NRM can be successfully implemented on a national level as a result of the legal obligations that arose on state parties following the establishment of the Convention on Action Against Trafficking in Human Beings by the Council of Europe, which came into force on February 1st 2008. More specifically, the NRM was created in response to the legal obligations which arose from Article 10 of the Convention: "Article 10(1) places an obligation on each Party to CAT to provide trained persons for their Competent Authorities so that victims may be identified...". In other words, the first task envisaged for these specially trained people is the identification of those who have been the victim of trafficking. This point is reinforced by the first sentence of Article 10(2), which places an obligation on Parties to CAT to adopt legislative or other measures "to identify victims as

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

²⁰⁰ ECPAT UK, no date. Available from: <https://www.ecpat.org.uk/national-referral-mechanism>. Accessed on 17/06/2024.

²⁰¹ UNTOC, Article 25(1).

²⁰² Council of Europe Convention on Action against Trafficking in Human Beings, 2005.

appropriate...”. The NRM is also a mechanism which enables the collection of data by the UK Home Office. This information can help raise more awareness on the situation of human trafficking in the UK.

The way the NRM operates is the following: Firstly, in order for potential victims to be referred to the NRM, they need to be referred to the UK’s Single Competent Authority (SCA) by a designated ‘first responder’, which include the Home Office, local authorities, UK police forces, Migrant Help, Refugee Council, health and social care trusts, etc. Since November 1st 2015, public authorities, such as local authorities and the police, are required to notify the Home Office about all potential victims of trafficking and slavery by filling out an online form²⁰³. Modern slavery, including child trafficking, constitutes child abuse. In the case that an agency encounters a child who may have been exploited or trafficked, they should immediately notify Local Authority Children’s Services and the police. All children, regardless of their immigration status, have the right to safeguarding and protection under the law. Referrals to the NRM should be made for all potential victims of trafficking and modern slavery, regardless of nationality²⁰⁴. This includes British national children who may have been trafficked for purposes such as child sexual exploitation or criminal exploitation, like drug supply within the UK. If there is a reason to believe an individual could be a child, they should be treated as such until an assessment is conducted. Age assessments should only be performed when there is substantial doubt about the person’s age and should not be a routine part of the local authority’s assessment of unaccompanied or trafficked children²⁰⁵. Adults must give consent to be referred to the NRM, and if they do not provide informed consent, there is still a duty to notify the Home Office. Consent is not required for children (those under 18), but it is essential to explain the process to them. The duty to notify is fulfilled by the NRM in all cases involving children. While there is no specific deadline for making an NRM referral, it is recommended to do so as soon as possible to help safeguard the child²⁰⁶.

What follows afterwards is the decision-making process- the SCA makes a ‘reasonable grounds decision’. An important aspect to mention is that the threshold of it is rather low as decision-makers’ principle at this stage is: ‘I suspect but cannot prove’²⁰⁷. This process should be completed within 5 days after the referral has taken place. In case of a positive decision a 45-day recovery and reflection period will be granted. In addition, during this period further information should be sought by the competent authorities²⁰⁸. The next stage is a conclusive grounds decision that needs to be made by the same competent authority. However, in this scenario the balance of probabilities is applied to make a decision regarding whether someone is a victim of modern slavery (including human trafficking) or not- ‘It is more likely than not’²⁰⁹. During the aforementioned period of 45 days the UK authorities cannot remove the victim from the country. The police can also apply for an extension of this period if considered necessary. Furthermore, victims have the right to apply for asylum or receive temporary admission²¹⁰.

²⁰³ ECPAT UK, no date. Available from: <https://www.ecpat.org.uk/national-referral-mechanism>. Accessed on 17/06/2024.

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ The Anti-Trafficking Monitoring Group. 2014. p. 15.

²⁰⁸ Ibid.

²⁰⁹ Ibid p. 17.

²¹⁰ ECPAT UK, no date. Available from: <https://www.ecpat.org.uk/national-referral-mechanism>. Accessed on 18/06/2024.

Unlike other countries, victims in the UK will receive support packages regardless of whether they cooperate in the criminal investigation of their case or not. However, one aspect that is often criticized in the process is that there is no opportunity to appeal in the NRM process²¹¹. If those assisting the child believe the decision is incorrect, they should request a review by the SCA. Additionally, the child should be directed to a specialist solicitor who can provide advice on whether it is appropriate to challenge the negative decision through judicial review proceeding²¹².

What happens afterwards is that victims can be granted discretionary leave to remain in the UK for several reasons: so they have the opportunity to co-operate in a police investigation, for personal reasons, or to apply for compensation. When it comes to children, the Home Office must always consider the best interests of the child and grant them their discretionary leave based on their circumstances. Currently, this process is limited in practice, and the child needs a specialist immigration legal advisor to represent them when seeking leave to remain. This ensures that the leave granted and its duration align with the child's best interests. This type of leave must automatically be considered for all victims under immigration control once a positive conclusive grounds decision is made²¹³.

In 2020, the number of children referred to the NRM comprised almost 5,000. This constitutes nearly a half (47%) of the total number of suspected trafficking victims in 2020, which is a 10 % rise when compared to the previous year. When it comes to the most commonly represented nationalities among suspected victims of trafficking, they include the UK (58 %), Vietnam (5 %), Sudan (3 %), Albania (3%), Romania (less than 3%), and Eritrea (less than 3 % as well). Other common countries include Afghanistan, Iran, Iraq, and Nigeria²¹⁴.

The NRM is crucial for the protection of unaccompanied minors from trafficking because it allows individuals and authorities to report potential cases of trafficking. This is important especially because trafficked victims are largely unable to report the trafficking offences themselves. This can prevent trafficking cases from continuing to happen. In addition, in cases of identification of trafficking victims, they are referred to appropriate support services based on their needs and circumstances, which enables them to recover from the immense psychological and physical harm that they were subjected to. Moreover, this could end the cycle of exploitation and provide the victim with the recovery period they need to succeed later in life.

3.4 CROSS-BORDER COOPERATION TO PREVENT TRAFFICKING OF CHILDREN IN MIGRATION

There are various situations where cross-border collaboration becomes necessary for migrant children. These include instances where a child needs to be reunited with family, has gone missing, or requires consistency in their care plan. However, substantial deficiencies in these cross-border procedures expose children to exploitation and impede effective responses to child trafficking²¹⁵.

²¹¹ Ibid.

²¹² Ibid.

²¹³ The Anti-Trafficking Monitoring Group. 2014. p. 18.

²¹⁴ ECPAT UK, no date. Available from: <https://www.ecpat.org.uk/national-referral-mechanism>. Accessed on 20/06/2024.

²¹⁵ ECPAT UK. 2019. Available from: <https://www.ecpat.org.uk/Handlers/Download.ashx?IDMF=8e3fb7f7-40b7-472b-927c-eacef399a8bf>. Accessed on 21/06/2024.

When dealing with cases of missing or trafficked migrant children, cross-border cooperation is essential. Children may disappear from countries of arrival, transit, or destination due to factors such as delays in transfers, lengthy asylum procedures, lack of safe and legal routes, insufficient child-friendly information about their situation and rights, unsafe accommodation, destitution, ongoing abuse or exploitation, or being recruited into exploitation²¹⁶.

Improving cross-border cooperation can prevent children from going missing or being (re)trafficked by addressing these push factors. For instance, better information sharing at the beginning of the identification and registration processes can speed up procedures. Identifying child victims of trafficking is particularly complex and faces many challenges²¹⁷. Member States are obligated to establish mechanisms to identify trafficked children as early as possible, but research shows that identification and disclosure are gradual processes²¹⁸.

However, significant barriers to disclosure for migrant children include fear of retribution, debt bondage, spiritual abuse, fear of arrest, fear of deportation, immigration detention, or feelings of shame. Therefore, children are unlikely to reveal their exploitation during initial encounters with public authorities, and practitioners may miss crucial information held by professionals in other countries the children have traveled through²¹⁹.

In order to address situations of disappearances or trafficking, cross-border cooperation is also essential. By proactively alerting other Member States about a child's possible whereabouts or presence, effective information sharing can aid in the resolution of cases. Reducing the amount of repetitious procedures that a kid must go through when crossing borders, such as being interviewed several times and having to share their story numerous times, is critical²²⁰.

During identification or aftercare, cooperation ensures that children receive support and protection based on their best interests, and their care plans continue seamlessly across borders. When it comes to guaranteeing the child's best interests, guardians or experts responsible for the medical and psychological monitoring should be able to interact with each other. Cross-border collaboration is essential for law enforcement investigations involving trafficking minors, as it strengthens their ability to prosecute offenders²²¹.

Cross-border collaboration is hampered by significant obstacles in the various ways that the plight of migrant children may demand. In general, the Member States' procedural obligations to protect children in migration are unclear, and there are large legal and institutional gaps. These inefficient or nonexistent procedures could make children more susceptible to exploitation or might not recognize a

²¹⁶ Ibid.

²¹⁷ Ibid.

²¹⁸ EU Anti-Trafficking Directive, Art. 11(4).

²¹⁹ Pearce et al., 2009. Available from: <https://uobrep.openrepository.com/handle/10547/293702>.

²²⁰ ECPAT UK. 2019. ECPAT UK. 2019. Available from:

<https://www.ecpat.org.uk/Handlers/Download.ashx?IDMF=8e3fb7f7-40b7-472b-927c-eacef399a8bf>. Accessed on 20/06/2024.

²²¹ Sigona and Humphris, 2017. Available from: <https://blogs.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2017/01/child-mobility-eu>. Accessed on 22/06/2024.

child who has been abused and give them the help they need to get over the trauma. Few Member States address the issue of missing migrant children in a legal and procedural way, and even when such regulations exist, actual practices may differ²²². Reporting protocols for these cases vary significantly, and professionals often indicate that these cases are given lower priority or experience a delay before police investigations commence. In 2018, only 25% of the disappearances of migrant children reported to the 116 000 hotlines were resolved within the year²²³. Once cooperation stops at national borders, unresolved cases remain largely unknown, which can be extremely dangerous for the children involved. Therefore, addressing the disappearance of migrant children necessitates multi-agency cooperation across borders to ensure their safety. Currently, such cooperation is rare and relies more on personal connections than on formal procedures²²⁴.

²²² ECPAT UK. 2019. Available from: <https://www.ecpat.org.uk/Handlers/Download.ashx?IDMF=8e3fb7f7-40b7-472b-927c-eacef399a8bf>.

²²³ Sigona and Humphris, 2017. Available from: <https://blogs.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2017/01/child-mobility-eu>. Accessed on 27/06/2024.

²²⁴ Tuggey and Smith. 2019. Available from: https://downloads.unicef.org.uk/wp-content/uploads/2016/01/Unicef_DurableSolutions_Report2015.pdf?_ga=2.68372497.1487273109.15415242. Accessed on 29/06/2024.

4 CONCLUSION

This thesis has looked at the phenomenon of trafficking of unaccompanied minors, the ways they are legally protected under the UN, EU, and Council of Europe legal framework, and successful practices in the European countries of Italy and the UK, as well as the need for further cross-border collaboration. As it became apparent throughout the thesis, unaccompanied minors are particularly vulnerable to becoming victims of trafficking in human beings as they lack protective factors, such as guardians. Moreover, two groups of unaccompanied minors in particular were identified as risk groups- children affected by war, crisis, or natural disasters, and those involved in migration initiatives planned by their families. Two main individual characteristics have been found to constitute determinants of vulnerability- history of physical, psychological and/or sexual abuse, and a low awareness of risks. The reason for this is because the majority of trafficked children have a prior abuse history, and the incidence of former abuse is particularly prevalent among unaccompanied migrant children, which makes it the most common risk factor²²⁵. Moreover, as discussed in the first chapter 98 % of trafficked children have been abused in the past²²⁶. The French, Greek, and Spanish country reports in particular emphasize the link between domestic violence and abuse in the home country and the decision to migrate²²⁷. Low awareness of risks is the second characteristic that stands out when it comes to what contributes to the vulnerability of children as often children who have been trafficked recognize their situation only when it is too late²²⁸. Unaccompanied minors can fall victim to trafficking under two scenarios: during the reception procedure, and during the smuggling process. It is astonishing that thousands of children disappear from reception centers which renders them vulnerable to falling victim to trafficking²²⁹. When it comes to the smuggling process, due to the dependency unaccompanied minors are under they rely completely on their smugglers, who may take advantage of this and decide to exploit the unaccompanied minors for sexual, labor exploitation purposes etc²³⁰.

The UN framework for protection of unaccompanied minors from human trafficking comprises the two Optional Protocols to the United Nations Convention Against Transnational Organized Crime- The Protocol against the Smuggling of Migrants by Land, Sea, and Air, and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children. An important fact that needs mentioning is that both Protocols put an emphasize on criminalization and prevention practices, and largely neglect providing protection and assistance to victims²³¹. Moreover, there is a discrepancy between the ways smuggled migrants and victims of trafficking in human beings are defined, which can be observed in cases where people are given “smuggled migrants” status but have actually suffered

²²⁵ Dimitrova et al., 2015. Available from: file:///C:/Users/user/Downloads/study%20on%20high-risk%20groups%20for%20trafficking%20in%20human-DR0215412ENN-2.pdf, Accessed on 28/06/2024.

²²⁶ Ibid.

²²⁷ Ibid.

²²⁸ Ibid.

²²⁹ Slot, 2016. Available from: <https://www.asiloineuropa.it/wp-content/uploads/2017/07/Final-version-thesis-lucia-slot-1-1.pdf>, Accessed on 04/07/2024.

²³⁰ İçduygu and Toktas, 2002, p 31.

²³¹ International Council on Human Rights Policy, 2010, p 79.

exploitation or abuse which is technically identical to the crime of trafficking in human beings²³². This is especially problematic because trafficked individuals, who have been identified as smuggled migrants, would be deprived of all protections that are afforded to victims of human trafficking. Another international legal standard in this field is that the best interests of the child should always be considered in all decision-making processes. It can be found in the Convention on the Rights of the Child²³³. An example of how it can be applied to the context of unaccompanied minors is that they can only be returned to their home country if it is found that other rights-based considerations are deemed more important than the best interests of the child principle. The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography was established to address the ever increasing issue of child trafficking for the purposes of sexual exploitation. This means again that the focus is on criminalization of the criminal offence of sex trafficking, however at the same time there are provisions that protect children during legal proceedings²³⁴. The Anti-Trafficking Convention of the Council of Europe is the first international legal instrument that undertakes a human rights based approach to tackle the crime of trafficking in human beings²³⁵. It offers the broadest protection to victims of trafficking because it puts a strong emphasize on the protection and assistance to victims of trafficking in human beings, such as provision of a legal guardian to unaccompanied minors, the imposed requirement on states to establish his/her identity and nationality, and to make every effort to locate his/her family when this is in the best interests of the child²³⁶. Furthermore, it includes measures that allow victims' social, physical, and psychological recovery, which includes the provision of secure accommodation, psychological and material assistance, access to emergency medical treatment, translation and interpretation services, counselling and information regarding their legal rights and services available to them. It further provides for the granting of a recovery and reflection period for at least 30 days when there are 'reasonable grounds to believe that the person concerned is a victim'²³⁷. Lastly, the EU Anti-Trafficking Directive is crucial as well because it puts a legal obligation on Member States to achieve the aims set out in it on their own. The rules enshrined in it address criminal offences definition, severity of sanctions against perpetrators, and the required extended protection to victims.

When it comes to the measures taken by the European countries of Italy and the UK as a result of their legal obligations under the aforementioned treaties, it can be seen that the way they have implemented the guardianship and the national referral mechanism systems has proved to be successful. Guardians are crucial in the protection of UAMs, as they can contribute to the protection of unaccompanied minors from falling victim to trafficking²³⁸. The reason for this is because they take part in the identification and age assessment procedures of the unaccompanied minors so they can ensure that the practices used during the identification are in respect of the rights of the child and so harmful age

²³² Ibid.

²³³ Freeman, 2007, p. 32.

²³⁴ Revaz, 2001, p.16.

²³⁵ Anti-Trafficking Convention of the CoE. Preamble.

²³⁶ Anti-Trafficking Convention of the CoE. Art. 10(4).

²³⁷ Anti-Trafficking Convention of the CoE. Art. 13(1).

²³⁸ OSCE, 2018, p. 40.

assessment practices, such as X-rays, are avoided²³⁹. Secondly, they advise children on matters such as available legal paths, the reception system, the right to a cultural mediator, or how to access specific services²⁴⁰. Thirdly, an appropriate social inclusion path is decided through collaboration of the child and the guardian²⁴¹. Fourthly, the guardians facilitate the child's access to legal aid during asylum and residence permit procedures, and they ensure that vulnerable children who are in need of psycho-social or mental health support receive such support in reception facilities²⁴². Lastly, they help them navigate educational and vocational training opportunities, and make sure that the best interests of the child are always taken into account up until they reach adulthood²⁴³. The other successful practice that has been looked into is the one of the national referral mechanism of the UK. It protects unaccompanied minors because authorities and organizations called 'first responders' can identify and refer them to the national referral mechanism, which then makes a decision about whether the referred child could be a victim of trafficking or not²⁴⁴. Even if they are found to be a suspected or likely victim of trafficking they are entitled to a referral to appropriate support services for them which can decrease the likelihood of them for being re-trafficked²⁴⁵. Moreover, having this mechanism in place places the duty for identification of authorities which could come into contact with unaccompanied minors and can as a result identify them as victims of human trafficking. This is beneficial considering that trafficking victims often may not be able to escape from their traffickers and seek protection themselves. Lastly, cross-border cooperation in Europe has been found to constitute an important mechanism to combat trafficking in human beings and help identify and support victim of trafficking, however it needs further improvement.

Overall, this thesis shows that even though there has been an emphasize on criminalization of trafficking of human beings as a way of dealing with this crime, the Council of Europe and the EU have taken measures that address trafficking and potential trafficking victims' needs by providing them with support services and identification measures. To be more specific, a well-structured guardianship system, such as the one in Italy, and the UK example of a successful national referral mechanism have been established as a result of the countries' obligations under the aforementioned organizations' legal documents. Furthermore, the implemented measures by Italy and the UK have the potential to contribute to unaccompanied minors' protection from falling victim to trafficking, as the provision of such support services would provide them with further security and protection.

²³⁹ Ibid.

²⁴⁰ Unicef, 2019, Available from: <https://www.unicef.org/eca/media/9386/file>. Accessed on 15/06/2024.

²⁴¹ Ibid.

²⁴² Ibid.

²⁴³ Ibid.

²⁴⁴ ECPAT UK, no date. Available from: <https://www.ecpat.org.uk/national-referral-mechanism>. Accessed on 17/06/2024.

²⁴⁵ Ibid.

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