Migrant children through Hermes' winged sandals (*πτερόεντα πέδιλα*): far from home, close to justice?

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MIGRANT CHILDREN THROUGH HERMES' WINGED SANDALS (*πτερόεντα πέδιλα*[1]): FAR FROM HOME, CLOSE TO JUSTICE?

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1. INTRODUCTION

Every year thousands of children flee their home countries to seek asylum protection in European Union: in 2018 there were around 198.000 asylum applications from migrant children[2], with more than 20.000 being from unaccompanied minors[3].

Migrant children arriving in the European Union have generally lived through a range of traumatic experiences. Forced to leave their home country, compelled to embark on a precarious and unsafe journey to Europe[4], these children are often exposed to innumerous risks and different forms of violence – such as physical, psychological and sexual abuse, exploitation, trafficking and also of going missing or becoming separated from their families[5]. And if we add the fact that many of these migrant children are unaccompanied by any family members or any adult at all, the risks they are vulnerable to increase dramatically[6].

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[1] The πτερόεντα πέδιλα (winged sandals) are not exclusive of Hermes in ancient Greek mythology, as it is discussed in CURSARU, 2013: 95-112. "[L]es fonctions hermaïques qui sont associées aux πέδιλα [sont] la capacité de voler en premier lieu, la mobilité et la rapidité d'Hermès, mais aussi sa capacité de passer inaperçu" (Ibidem, p.109), but the image of the sandals is also used to show the metaphorical and symbolical dimension of the journey, as we intend to demonstrate in this paper. Therefore, we believe the use of the "winged sandals" in the title suits the analogous journey migrant children endure.

[2] Data available at: http://ec.europa.eu/eurostat/web/asylum-and-managed-migration/data/database (accessed February 21, 2019).

[3] A dramatic number which is, however, decreasing if compared with the 102,685 applications from unaccompanied minors that took place in 2015. Information available at: http://ec.europa.eu/eurostat/web/asylum-and-managed-migration/data/database (accessed March 25, 2019).

[4] In 2017, 172,301 people arrived by sea (Mediterranean), 20% of them were children. Data available at: http://ec.europa.eu/justice/fundamental-rights/files/rights_child/data_children_in_migration.pdf (accessed March 3, 2019)

[5] As the European Commission informs, in its Communication from the commission to the European Parliament and the council (2017), concerning the protection of children in migration, available at: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52017DC0211 (accessed April 4, 2019); As FAZEL & STEIN (2002: 366-367) underline, "[r]efugee children are at significant risk of developing psychological problems", especially during three stages: while in their country of origin; during the flight to safety; and when having to settle in a country of refuge. The most frequent diagnostic categories are post-traumatic stress disorder, anxiety with sleep disorders, and depression, as it is outlined in the previous cited article.

[6] Being unaccompanied is a major risk factor for the physiological and emotional well-being of the unaccompanied migrant minors, resulting in important emotional and behavioral problems. Research shows that these children suffer more frequently from anxiety and depression symptoms than accompanied minor refugees – as in VODO, 2017. Their vulnerabilities are result of deprivement of support systems such as family and community life, but are also consequence of being at increased risk of neglect, sexual assault, and other abuses, FAZEL & STEIN (2002: 369). The (sometimes specialist) treatment of children refugee must not be delayed, or else it will increase their chances of long-term psychiatric problems (TUFNELL, 2003: 431-443).

Despite this awful truth, most of the legal instruments regarding refugee status and their rights, tend to focus on the adult refugee, failing to capture the predicaments of the migrant child. Consequently, by disregarding refugee children's true needs and treating them as adults, the States where the international protection is appealed, rather than contracting the risks and traumas these children have been through, become a risk increasing factor themselves.

When faced with such circumstances, it is crucial, considering children's special vulnerability[7], to ensure that those thousands of migrant children receive proper protection. Once these children reach EU boundaries, EU Member States become responsible for their well-being and thus become obliged to reduce and overcome the intense risks the children have been exposed to. In order to carry this out, it is compulsory to make an individual evaluation of every migrant child, so there are no violations of Article 4 of Protocol 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms (CPHRFF), also reproduced in Article 19, § 1 of the EU Charter of Fundamental Rights (EU Charter or CFREU)[8]. The European Court of Human Rights (ECtHR) has also implicitly recognized that States have the duty to fully protect migrant minors, even after releasing them from any kind of detention[9].

[7] The concept of vulnerability combines two elements: "an exposure to the possibility of harm to an individual's well-being, and a lack of, or limited, ability to protect oneself from that harm", TOBIN, 2015: 167. As SANDBERG (2015: 221-247) reminds us, children have a particular vulnerability as children, yet there are peculiar factors that improve that special vulnerability. The scholar gives some examples and points out the migration as a huge increasing factor on children´s vulnerability to violations of their rights. Vulnerability is truly linked to dependency. See Case *O. and Others*, dated 06.12.2012, C-356/11 and C-357/11, paragraph 56, the meaning of dependence, which is not only financial but also legal or emotional (see also Chavez Vilchez, C-133/15, and Case *K.A. and others*, C-82/16). For BERNERI (2018: 308) these conditions (financial, legal, emotional) are alternative.

[8] See ECtHR Case *Hirsi Jamaa and others* v. Italy, no. 27765/09 (p. 75): "the purpose of the provision is to guarantee the right to lodge a claim for asylum which will be individually evaluated". See also for the linkage between lack of individual assessment and collective expulsion, PERRUCHOUD, 1988: 677-680 and FAVILLI (2013: 267). The prohibition of massive or collective expulsion can also be seen in ECtHR Case *Khlaifia and others* v. Italy, (Application no. 16483/12, 15.12.2016). However, in this same case, the Great Chamber affirmed that Article 4 of Protocol 4 to CPHRFF does not guarantee "the right to an individual interview in all circumstances", because "the requirements of this provision may be satisfied where each alien has a genuine and effective possibility of submitting arguments against his or her expulsion, and where those arguments are examined in an appropriate manner by the authorities of the respondent State' (paragraph 248). So, "la sentenza Khlaifia ha valorizzato il criterio del "contest generale di emergenza migratória", this means, there has been a, perhaps, overestimation of the general context of migration emergency (SACUCCI, 2017: 563). The same author believes that with *Khlaifia* case, the ECHR will struggle to make Europe be seen as «an island of hope in stormy times» (p. 565), since the level of protection of applicants' rights has been lowered, due to the migration emergency. SACUCCI (2017: 555) refers to a "*componente inovativa sul piano interpretativo*" regarding the position of the Great Chamber of ECHR in the case *Khlaifia* and others vs Italy, for example in paragraph 185: "While the constraints inherent in such a crisis cannot, in themselves, be used to justify a breach of Article 3, the Court is of the view that it would certainly be artificial to examine the facts of the case without considering the general context in which those facts arose. In its assessment, the Court will thus bear in mind, together with other factors, that the undeniable difficulties and inconveniences endured by the applicants stemmed to a significant extent from the situation of extreme difficulty confronting the Italian authorities at the relevant time", which possibly makes way to the possibility of justifying a violation of article 3 of ECHR, jeopardizing "*il principio dell'intangibilità del divieto di trattamenti inumani o degradanti*". It goes against previous case law, Case *Hirsi Jamaa and others* vs Italy, paragraph 122 and 176, and Case *M.S.S. vs Belgium and Greece*, paragraph 223.

[9] Otherwise, there would be a breach of Article 3 of European Convention on Human Rights (ECHR), see Case *Rahimi* v. Greece, 5th April 2011, Application no. 8687/08, paragraphs 92, 94, 95. We, therefore, agree with GIL, 2015: 455-456.

However, the increasing number of migrant children who arrive in the EU has put national migrants management and child protection systems under a lot of pressure and has demonstrated innumerous gaps and shortcomings in the protection of children in migration[10]. The problem is now more real than it ever was.

In this essay we intend to explore those shortcomings and aim to propose alternatives to overcome them, especially when talking about unaccompanied minors.

Protecting these migrant children is, after all, "*about upholding European values of respect for human rights, dignity and solidarity. It is also about enforcing European Union law and respecting the Charter of Fundamental Rights of the European Union and international human rights law on the rights of the child*"[11].

2. UNACCOMPANIED MIGRANT CHILDREN IN INTERNATIONAL REFUGEE LAW

An unaccompanied minor is, first of all, a migrant seeking a foreign country's protection.

The Universal Declaration of Human Rights (1948) states the right to seek asylum from persecution in other countries (Article 14). Nevertheless the United Nations Convention (The Convention Relating to the Status of Refugees, also known as the 1951 Refugee Convention) and the U.N. Protocol Relating to the Status of Refugees, which entered into force on 4 October 1967, regarding the refugees' status and rights, remain the key international instruments for the refugee protection.

According to the 1951 Convention, a refugee is a person who, due to some individual characteristics – race, religion, nationality, membership of a particular social group, or political opinion – has come into conflict with her or his State and, for having a "well founded" fear of being persecuted in the country of origin, is forced to seek protection in a foreign country (Article 1)[12]. Towards someone in such conditions, the States where the asylum request is presented must ensure that she/he is entitled to a refugee status.

Despite the fact that an enormous number of refugees are children (1 in 4 asylum applicants in the EU in 2015 was a child - source UNICEF, 2017), the truth is that international refugee law

[10] As in the Communication from the commission to the European Parliament and the council (2017) – COM/2017/0211 final – concerning the protection of children in migration, available at: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52017DC0211 (accessed February 19, 2019).
[11] As in the Communication from the commission to the European Parliament and the council (2017), concerning the protection of children in migration, available at: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52017DC0211 (accessed April 15, 2019).
[12] For a further analysis of this definition, EDWARDS (2013: 513-527).

tends to center its focus on adults, disregarding children's difficulties[13]. The refugee children status is often given without considering each minor's specificities and needs.

As the 1951 Convention gives a general definition, the precise nature and extent of the protected characteristics are determined at the national level by the signatory States[14], which, nonetheless, must be interpreted according to the international general principles relating to the refugees, laid down in the Geneva Convention[15]. But, as we previous stated, only when one has been granted refugee status, may one obtain protective measures.

However, if we are facing a migrant child – especially when unaccompanied – the answer cannot be the same or at least it cannot be given from the same perspective. Thus as regards a migrant child asylum applicant, the protective answer does not involve only the 1951 Convention definition of refugee analysis, but also and mainly, upholding the basic values of respect for human rights, dignity, solidarity and endorsing the international refugee law principle of *non-refoulement*. We must weigh this against the individual child's best interests.

In fact, the United Nations Convention on the Rights of the Child (CRC) remains the main legal instrument regarding children's rights, therefore it must be an interpretive aid for dealing with migrant children claims as it creates a child-centered perspective for all the refugee international law[16].

Consequently, although the general international refugee law (and specifically the Geneva Convention) does not take in consideration, relating to the refugee status, the uniqueness of the child, all the migrant children legislative regime must be interpreted according to a child-centered

[13] For example, there is no specific provision in the 1951 Convention for refugee children, which means that "according to the Geneva Refugee Convention first of all a (…) child has to meet the same requirements to qualify as a refugee as an adult", FERENCI, 2000: 527.

[14] MARIÑO MENENDEZ (1983: 337-369) reminds us that, to interpret the definition firmed in article 1 of the 1951 UN Convention, we must embrace a humanitarian point of view, endorsing a "*in dubio pro refugee*" principle.

[15] The United Nations High Commissioner for Refugees (UNHCR) – whose primary purpose is to ensure the rights and well-being of people who have been forced to flee to another country – has had a major roll, making efforts to safeguard an equal and harmonized application of the referred definition between the several signatories States.

[16] As SADOWAY (2018: 80) reminds us, "[t]*his is relevant in addressing subjective fear of persecution, credibility assessment, and the increased fact-finding responsibility of the decision-maker when dealing with child claimants. The child-centered lens of the CRC* [Convention on the Rights of the Child] *also focuses on the myriad variety of serious harms that constitute persecution of children. Although some of these particular harms may not be persecutory for adults, they are persecutory for children as a result of their emotional and physical dependency, their developmental needs, and their greater sensitivity and vulnerability*". FERENCI (2000: 527), for example, signals that the "well-founded fear" criteria of Article 1 A (2) of 1951 Convention, when determining the refugee status of a minor, must take into account that «one cannot attach the same meaning to the impressions and sensation of a minor as to those of an adult". This interpretation is the most correct, considering the best interests of the child, contained in article 3 of CRC.

prism, taking in consideration the CRC. The principle of the best interests of the child[17] must be the primary consideration in all actions or decisions concerning migrant children[18].

3. UNACCOMPANIED MIGRANT CHILDREN IN EU LAW

It all started in 1993 with the Treaty of Maastricht where cooperation on asylum was brought to the EU's stage. Since then, the EU institutions have been gathering efforts towards a common asylum system development (also called SECA), an intent that has developed into a pressing issue with the refugee crisis that has been overwhelming Europe since 2014.

Although the fact that neither the Treaty on the Functioning of the European Union (TFEU) nor the EU Charter of Fundamental Rights provides a definition of refugee, as both instruments expressly refer to the Geneva Convention for guideline principles on refugee protection matters (Article 78 (1) TFEU and Article 18 EU Charter).

If a child presents a request for international protection, the Member States must obey specific legal documentation and procedures. All EU Member States are obligated to respect, protect and fulfil the children rights set forth in the UN Convention on the Rights of the Child. In fact, the Treaty on European Union (TEU) expressly establishes the objective for the EU to promote protection of the rights of the child (Article 3 (3)). The EU Charter also ensures the children's rights protection by the EU institutions and by EU Member States when they implement EU law (Article 24).

Thereby, prior to any other consideration regarding the migrant status of the child or any procedures relating to asylum requests, when deciding, the Member State has the obligation to respect and fulfil his/her rights and best interests, as imposed by those legal instruments[19].

Before an unaccompanied migrant child, who arrives at a Member State demanding for protective measures, the main EU legal instruments applicable are the SECA's legal compilation, specifically the Dublin III Regulation[20] and the Brussels II-A Regulation. Both Regulations uphold the best interest of the child as a guide principle.

[17] The practice of the European Court, when demanded to evaluate the principle of the best interests of the child in cases relating to immigration, has shown that, in both first-entry and expulsion cases, the Court scrutinizes a few factors in evaluating whether the impugned measure would be contrary to the child´s best interests or not. The Court evaluates the following factors: the child´s age, the extent of the child´s ties with the country of origin and with the third country and the existence of an effective family bond of attachment (to determine the impact of a new or continued separation on family life). SMYTH (2015: 70-103)
[18] SADOWAY (2018: 80).

While Dublin III Regulation establishes the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, the Brussels II-A Regulation determines the competent jurisdiction for judgments concerning parental responsibility matters, and, therefore, establishes the criteria for determining the Member State with competence to decide on the protective measures regarding the child.

To establish the criteria for determining the Member State responsible in case of an unaccompanied child international protection request, you look at the Dublin III Regulation[21].

Under this Regulation (Dublin III), a minor is "*a third-country national or a stateless person below the age of 18 years*" (Article 2 (i)), being an unaccompanied minor the one "*who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her, whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such an adult; it includes a minor who is left unaccompanied after he or she has entered the territory of Member State*".

The Brussels II-A Regulation, on the contrary, does not clarify who is considered a minor, failing to limit a scope or a maximum age to be considered a child. Consequently, the definition of who a minor is, must be given by the national law applicable to the case, since there is no universal definition.

For instance, all over Europe, government policy documents use different terminology, including "*child*", "*minor*", "*unaccompanied child*", "*unaccompanied minor*" and "*unaccompanied migrant minor*". Data on child migrants may be broken down into those who are accompanied, such as those who travel with their family members or guardians, and travel alone, either because they are unaccompanied or because they have been separated from their family or guardian during their journey. Some data sources also have a category for those who are *"accompanied-non-accompanied*", which means they are traveling with an adult, but the relationship with the adult is uncertain or defined by child marriage.

The Brussels II-A Regulation, in Article 13 (2), refers to *refugee children*, establishing the jurisdictional competence criteria in case of a migrant child seeking protective measures. Nonetheless, it does not define who a refugee child is. Considering what we have been explaining, it seems that the *refugee child* definition, for the purpose of the Brussels II-A Regulation, must not depend on the migrant child refugee status entitlement[22]. As we have previous stated, the

[21] Are also relevant, relating to an asylum application analysis, besides the Qualification Directive (2011/95/EU), the Reception Conditions Directive (2013/33/EU) and the Asylum Procedures Directive (2013/32/EU).
[22] REQUEJO ISIDRO (2017: 482-505).

predicaments of the migrant child that arrives in the EU demanding protection, must not depend on the granting of the refugee status. Therefore, it looks as though a case similar to the one presented could be covered by Brussels II-A Regulation in a *prima facie* analysis, since Article 13 (2) states that the competent Member State must operate protective measures where the child is physically present.

4. EUROPEAN ENACTED LAWS FOR PROTECTION OF MIGRANT CHILDREN

We have seen in the first part of this paper that children will be protected by the Refugee Convention if they meet the criteria established under Article 1A (2) of the Convention Relating to the Status of Refugee (1951)[23] and will be granted asylum[24]. The proof of existence of a well-founded fear of persecution on the basis of race, religion, nationality, membership of a particular social group or political opinion (demanded by that provision) might be complex during the asylum procedure[25]. However, if children fail to qualify for refugee status, they will not be left in the legal void. Indeed, the child may be protected under "subsidiary protection" or "temporary protection".

The application for subsidiary protection may only be considered after the refusal of the application for refugee status[26]. Subsidiary protection covers persons who have good reason to be outside their country of origin owing to a real risk of serious harm arising from the death penalty or execution, torture or inhuman or degrading treatment or punishment, or even serious and individual threat to their life or person by reason of indiscriminate violence in situations of international or internal armed conflict[27]. Thus, the subsidiary protection regards the protection given by a Member State whenever the person may not be returned to the origin country, due to the *non-refoulement principle*[28]. The Directive 2011/95/EU regulates the eligibility for subsidiary protection.

The temporary protection consists of "measures of protection of a temporary nature for displaced persons"[29], who request international protection in case of the sudden mass flight of people and who may qualify as refugees under the 1951 Convention (Article 2 (c) of Directive 2001/55/EC, 20 July 2001[30]). Since the concept "refugee" in the Refugee Convention is so rigid and

[23] With the amendment of the 1967 Protocol.
[24] *Asylia*, a (not) sylia (subject to seizure), about the *asylia* in the ancient Greek world as sacred and inviolable places, BEHRMAN, 2016: 61-66.
[25] The concept of persecution is not defined which leads courts to face difficulties to interpret its meaning, as it is discussed in CONTE, 2016: 329-330. People who have fled as a consequence of armed conflict cannot qualify for refugee status when there is no link between the harm that they suffer and the Convention grounds. The well-founded fear (this subjective element) must be objectively rooted in circumstances in the country of origin that provoke a genuine alienation from his or her own society.
[26] Case C-604/12, *H. N.*, 8 May 2014, paragraphs 30, 32, 57.
[27] Article 15 of Directive 2011/95/EU, 13 December 2011.
[28] LAMBERT, 1999: 430.
[29] LAMBERT, 1999: 431.
[30] *Temporary Protection Directive.*

strict, this Directive increases the range of (displaced) persons who will be granted international protection, even though there is not a prejudgement of the recognition of refugee status under the Geneva Convention (Article 3 (1)). Hence, it "plugs the gap created by the narrow interpretation of the Refugee Convention and thus ensures protection in the EU for those fleeing war and conflict"[31].

Mainly, it gives Member States the advantage of a time-limited protection. Once the time period of three years (Article 4 (1) and (2)) has been reached, those protected by the Directive must return home (but always respecting the *non-refoulement*[32]). It does not require the determination of an individual status, as a group-based approach and sufficient. Once the "Temporary Protection Directive" is activated, protected persons will receive immediate protection and will not have to go through lengthy status determination procedures"[33].

Unaccompanied minors are secured with swifter protection through Directive 2001/55/CE, since immediate protection is granted to those seeking refuge in the EU[34]. They would also be provided with suitable accommodation (in accordance with Article 13 (1)), necessary medical or other assistance (Article 13 (4)), be granted access to education system under the same conditions as nationals of the host Member State (Article 14 (1)).

These are undoubtedly some pros towards protection of unaccompanied minors. Nevertheless, since the Temporary Protection Directive is geared to short-time periods, we believe that the best interests of child (Article 3 of CRC), as the primary consideration, imposes a more stable and durable protection for these children, more than that which is defined in Directive 2001/55/CE.

The unaccompanied minor is substantially defined the same way in both directives (Article 2 (f) of 2001/55/EC and Article 2 (l) of 2011/95/EU) and is a person below the age of eighteen who arrives in the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person, including a minor who is left unaccompanied after he or she has entered the territory of the Member States.

Having briefly discussed the three possible ways to grant some level of international protection to unaccompanied minors in the EU (through refugee status, the status of person eligible for subsidiary protection of Directive 2011/95/EU, and temporary protection of Directive

[31] KOO, 2018: 173.
[32] Article 6 (2). KOO (2018: 175) extracts the same conclusion, but if the temporary protection comes mandatorily to an end (Article 6 (1)(a)),
[33] INELI-CIGER, 2016: 25
[34] INELI-CIGER, 2016: 25. KOO (2018: 166) believes that TP directive has not been successful and it is not the adequate way to address mass influxes.

2001/55/EC), it is of great interest to discuss Article 13 (2) of Brussels II-A and some matters of the Regulation No. 604/2013 (Dublin III), that determines which jurisdiction will appreciate an application for asylum of a child.

4.1. ARTICLE 13 (2) OF BRUSSELS II-A

Article 13 of Regulation Brussels II-A states:

"*Jurisdiction based on the child's presence*

1. Where a child's habitual residence cannot be established and jurisdiction cannot be determined on the basis of Article 12, the courts of the Member State where the child is present shall have jurisdiction.

2. Paragraph 1 shall also apply to refugee children or children internationally displaced because of disturbances occurring in their country"

The Courts of the Member State where the migrant child is present have jurisdiction in matters such as those set out in Article 1 (2) - placement of the child, representation and assistance to the child, measures for the protection of the child, among others.

The scope of Article 13 (1) and (2) is to provide a solution for those cases in which the factor "habitual residence"[35] cannot be determined and, therefore, the person cannot be linked with an EU Member State system. In fact, to determine the *permanent centre of interests* of refugee children or children internationally displaced because of disturbances in their home country would be puzzling. The centre of interests of those children will coincide with the place where they are present, otherwise they would not be there asking for international protection.

It seems clear, in short, that this provision seems a self-limited rule, restricted to the territory of the State Member where the child is present. But does this statute indicate the substantial rule which will give solution? Or must this statute be applied regardless of the normal rules of the conflict of laws? Could this Article 13 (1) be understood as a Functionally Restricted Substantive Rule or spatially conditioned internal rule (*Régle d'application immédiate* or *norma di applicazione necessaria*)? If it were a *loi de police*, it would be '*une méthode a priori indifférente à la solution*

[35] As stated in Case C-297/89, Rigsadvokaten and Nicolai Christian Ryborg, 23 April 1991 "Normal residence must, according to consistent decisions of the Court in other spheres of Community law, be regarded as the place where a person has established his permanent centre of interests (see judgments in Case 13/73 Angenieux [1973] ECR 935, Case 284/87 Schäfleinv Commission [1988] ECR 4475 and Case C-216/89 Reibold [l990] ECR 1-4163)". The determination of the habitual residence, as DAVRADOS (2017: 134) points out, is "made with reference to objective factors (e.g., duration of stay in one place) as well as subjective factors (e.g., intent to settle in a particular place, relations and connections with one place, etc.)". The habitual residence is a process that occurs in small stages over a period of time, but might be interrupted suddenly, if an "individual abandons a place and moves elsewhere" (DAVRADOS, 2017: 134).

substantielle, alors que l'élément spatial était intimement liè à la coherence matérielle de la loi, à son efficacité'[36].

There is an unbreakable link between the spatially conditioned internal rules and its territorial applicability. The method of these functioned restricted substantive rules is different and beyond the method of rules of conflicts. In this case, we tend to think that, because one factor cannot be determined to link a person to a legal system, a subsidiary factor has been created, which is the "presence of the person [child] in that territory at that time". So, it is still a rule of conflict, but a rule of conflict which functions due to the failure of other factors. The spatial factor is deeply linked to the applicable law and it can be said with some certainty that Article 13 is self-limited. The Member State Court will not have jurisdiction if the migrant child is in another Member State.

This Article 13 (2) must be read in light of Articles 14 (1) UDHR and 18 of CFREU. The latter recognizes the subjective and enforceable right of all individuals with an international protection need to be granted an asylum (notwithstanding the accordance with the TEU and TFEU[37])[38]. By stating that the courts of the Member State where the refugee or internationally displaced child is present have jurisdiction, somehow is linked to the enforceable and justiciable right contained in article 18 of CFREU. Through this latter provision, the Charter clearly "promotes the integration and protection of citizens of third countries"[39]. By attributing jurisdiction to the courts of the Member State where the refugee child is present, the European Union managed to find a procedural path to make the granting of asylum easier.

4.2. DUBLIN III

The Dublin III regulation establishes a system of allocation of responsibility of EU State Members to appreciate asylum applications. In some way, it is the EU enacted law that deals with

[36] I. FADLALLAH, apud SANTOS, 1991: 940.

[37] '*The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties')*'.

[38] IPPOLITO (2015: 20) argues this article does not have autonomous legal content, due to its remission to TEU and TFEU, and the provision does not ensure a clear and unconditional right. We believe it does grant an enforceable right, even though it is dependant of procedural rules provided in other legislation. This is more consonant with the nature of CFREU, which in case law is seen as a tool of interpretation, especially when it comes to the fundamental rights and the principles recognised in particular by the Charter (for example, *Aydin Salahadin Abdulla and others* v *Bundesrepublik Deutschland*, joined cases C-175/08, C-176/08, C-178/08 and C-179/08, 2 March 2010, paragraph 54, *Federaal agentschap voor de opvang van asielzoekers* v. *Saciri* and others, (C-79/13), 27 February 2014, paragraph 35, the latter refers to Article 1 of the CFREU, the protection of human dignity, as an imposing interpretative tool, and Case C-648/11, *M.A. and others* v. Secretary of State for the Home Department, 6 June 2013, paragraph 59).

[39] IPPOLITO (2015: 19).

the issue of "*burden-sharing*"[40], in other words, the responsibility-sharing of refugee protection amongst States.

The Dublin III regulation is essential since EU Member States cannot neglect the hard principles of international refugee law[41]. Some of the fundamental elements of this body of law are the obligation to provide international protection to persons defined as refugees, the *non-refoulement* principle and the duty to rescue persons in distress at sea[42]. These are regarded as customary international law, that is to say, consistent practices by States with the correspondent acceptance of the legal binding of the rules[43]. Even though the right of States of controlling migration is considered a truism, it "does not necessarily entail that these [States] can exclude the same people from the right to life as well"[44].

The respect of human rights imposes the principle of burden-sharing and solidarity between State-Members of EU, to avoid the ones with external borders of the EU do not comply with human rights' needs. Altogether, it is shown that in the area of asylum and immigration (Article 80 TFEU), three responsibilities of Member-States coexist[45]: towards refugees and migrants; fellow EU countries, executed in accordance with fair-sharing; and the EU as an integral entity, which finds its legal foundation in the sincere cooperation principle (Article 4 (3) TEU).

Nevertheless, after an attentive analysis of Dublin III, it is defensible that it does not represent the fairest or most equitable system of burden-sharing[46]. The general rule is that that an applicant who has irregularly crossed the border into a Member State by land, sea or air having come from a third country shall see the application for international protection examined by the Member State thus entered (Article 13 (1)). Even when the migrant requests asylum in a different

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[40] This term may be seen as insensitive and inhuman, "*since it may imply that refugees constitute a burden for their host countries*", promoting a negative perception of displaced persons who are entitled the right to be protected and disregarding the humanitarian duty of every State to protect those, see DOWD & McADAM, 2017: 869-870; INDER, 2017: 529. This norm of international refugee law does not establish legally binding obligations on States (DOWD & McADAM, 2017: 879).

[41] The "body of law that regulates the status and rights of refugees and the securing of long-term solutions to their situation", in order to ensure that they "receive protection of their basic rights, which they no longer enjoy from their own governments", EDWARDS, 2013: 514.

[42]"[Sont] *obligation de nature coutumière codifiée dans de nombreuses conventions internationals"*, FAVILLI, 2013: 263. Giving a comprehensive overview of the fundamental rule of rescuing persons at sea, PAPANICOLOPULU, 2016: 491-514. These principles are understood as ground for duties, inasmuch "as normative relationships, human rights imply duties" (BESSON, 2013: 40).

[43] Specifically approaching *non-refoulement* as a hard law of international law, '*which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character*', LEISERSON, 2017: 192; KOO, 2018: 165 and HURWITZ, 2009: 204-209. The principle of *non-refoulement* "*n'implique pas que l'État soit tenu d'accueillir les réfugiés sur son propre territoire: il suffit qu'il ne les envoie pas vers un État qui mettrait leur vie en peril*" (FAVILLI, 2013: 264). This means if the State sends the refugee to another country where his or her life, physical integrity and freedom are guaranteed, article 33 (1) of Convention related to the Status of Refugee (1951) is not violated. This article truly constitutes 'an exception to the general discretion of states in respect of immigration control' and contains an immediately applicable right, EDWARDS, 2013: 521 and 523.

[44] SPIKERBOER, 2017: 29.

[45] MORANO-FOADI (2017: 241).

[46] Legitimizing the statement of INELI-CIGER (2016: 29) that Dublin III is not "a burden-sharing mechanism per se".

Member State of the State of entry (with several exceptions, for example Article 13 (2), second paragraph).

It is true that there is the advantage of determining the responsible Member State swiftly[47]. The principle since Dublin rules that came into force in 1997 was and always remained that "an asylum seeker is entitled to make one claim for asylum in one state only"[48] and has the premise that all states within the system are safe.

However, upon evaluating the unaccompanied minor regime in Dublin III (Articles 2 (j), 6 and 8 (4)), it is perceptible that the Regulation determines that the responsible Member State to examine the asylum request of a minor, without any traceable family, will be the one where the minor has lodged his or her application for international protection, "provided that it is in the best interests of the minor". This Article 6 (1) refers once again to the best interest of child by stating that the "*best interests of the child shall be a primary consideration for Member States with respect to all procedures provided for in this Regulation*".

EU Member States must always assess the "best interests of the child" by taking into account possibilities for family reunification, the minor's well-being and social development, safety and security considerations, and the minor's viewpoint[49].

Unaccompanied minors with a family member, sibling or relative legally present in a Member State may have their application examined there. In this regard, YOUNG[50] recalls that this principle of paramountcy must guarantee that the best interests of child are the paramount consideration in all actions concerning children. Cecilia WIKSTRÖM understands that Article 6 (1) is not in accordance with the CRC [as well as Article 24 (2) of CFREU], since this Convention would require the best interests of the child to be the (unique and solely) primary consideration[51].

This is even more understandable, if it is considered that an unaccompanied minor might have lodged an application in one Member State, but is present on a regular basis in other Member State. Hence, an unaccompanied minor might need protective measures in this last Member State, for which the Courts of the Member State where the child is present will have jurisdiction (Article 13 (1)(2) Brussels II-A).

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[47] MORANO-FOADI, 2017: 235.
[48] KOO, 2018: 161, and for Dublin II, HURWITZ, 2009: 91.
[49] Committee on the Rights of the Children, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 2013, pp. 13-18.
[50] (2017: 390).
[51] WIKSTRÖM, 2017: 7; as well as YOUNG, 2017: 391.

Nonetheless the court which will appreciate the asylum request will be in another State Member, since the application for asylum was lodged there[52]. A decision to transfer an unaccompanied minor based on this provision would most probably violate the best interests of the child[53]. Likewise, YOUNG[54] highlights that "in the case of an unaccompanied minor with no relatives present in the EU, the Member State of first arrival should become the Member State responsible for resettling the minor", in order to not waste and consume time. The minor should also "immediately be placed into the education system of the Member State responsible for his or her guardianship as any delay in education should not be considered in the best interests of the child in any circumstances"[55]. However, allocating an unaccompanied minor to the Member State of the first arrival is against the best interests of child, because it will only cause unnecessary and harmful delay. The best solution would be to impose that the Member State responsible for examining the application for asylum would be the one where the child is present (similarly to the provision of Article 13 (2) Brussels II-A)[56].

Advocate General Cruz Villalón in Case C-648/11 also supports this result, bearing always in mind Article 3 of CRC, and the need to attend to the particular circumstances of each case: "*In any event, the application of the rule which, in accordance with my proposal, allocates responsibility to the Member State where the most recent application has been lodged, must be liable to exception if, once again, the minor's best interests so require. (…) it must be understood that, when there are a number of asylum applications, allocating liability to the Member State where the most recent application was lodged must also be subject to exception if the minor's best interests again so require. In other words, the criterion of the most recent application is justified only in that it is best*

[52] As REQUEJO ISIDRO (2017: 482-505) indicates, "[d]os instrumentos jurídicos sirven a determinar el Estado miembro a cargo de la protección: en el marco de la responsabilidad parental, en términos de competencia judicial internacional, el Reglamento Bruselas II bis; en el contexto de los procedimientos de asilo, en términos de Estado responsable, el Reglamento de Dublín III. Las medidas son las mismas; los criterios atributivos de competencia/responsabilidad, en cambio, no".

[53] As in Case C-648/11, 6 June 2013, *MA and others vs the Secretary of State for the Home Department*: "Since unaccompanied minors form a category of particularly vulnerable persons, it is important not to prolong more than is strictly necessary the procedure for determining the Member State responsible, which means that, as a rule, unaccompanied minors should not be transferred to another Member State", paragraph 55. GIL (2015: 456) concludes that that discretionary margin of States when deciding to expel minors (or transfer them to other States) is very reduced, due to the best interests of child. And the decision of children transference, on account of not being the State Member with jurisdiction according to Dublin III, must always be preceded by individual assessment, as it is conveyed in paragraph 223 of ECtHR Case *Sharifi and others* v. Italy and Greece, (no. 16643/09). Otherwise, it would breach Article 4 of Protocol 4 of CPHRFF.

[54] 2017: 393.

[55] *Idem*.

[56] This seems to be the opinion, delivered in 21 February 2013, of Advocate General Cruz Villalón in Case C-648/11, M.A. and others v. Secretary of State for the Home Department: "It is true that the minor applicant could always be returned to the Member State where he lodged his first application. However, I consider that neither for reasons of time nor in view of the best treatment owed to minors is it appropriate to make this type of asylum seeker engage in travel that can be avoided", paragraph 75.

suited, in principle, to serve the minor's best interests, so that if, in a given case, that principle is inapplicable, the minor's interests require an exception to be made"[57].

The reason behind this solution is, as IPPOLITO[58] clearly depicts, according to the best interest of the child, "to not delay the procedure for determining the responsible Member State more than is strictly necessary, thus preventing the risk of children being returned to another country for their application to be examined".

It would also be the best way possible to prevent an (eventual) excessive length of minor detention, which ostensively violates Article 37 (b) of CRC[59]. Whereas 20 demonstrates that concern as does 21 with regard to the need to avoid jeopardizing the rights of asylum seekers, even when the asylum systems face particular pressures[60].

Therefore, we tend to believe that there might be a potential dissonance between Articles 13 (2) Brussels II and Article 8 (4) Dublin III, when an unaccompanied minor has lodged an asylum application in one Member State but he or she is present in another, where he or she has been subjected to protective measures.

4.3. DUBLIN IV PROPOSAL

The Dublin IV proposal of 2016 has been extensively criticised, mainly for maintaining the same old principles of the previous Dublin Regulations and for not ensuring sufficiently equitable burden-sharing and protection of vulnerable minors (since it does not express the best interests of child as the paramountcy principle[61]). It is true that Dublin IV aims to be an instrument for the "fair and equitable distribution of responsibility among Member States" (Dublin IV, 604/2013, recital 7

[57] Paragraph 78.
[58] 2015: 24.
[59] The International Organization for Migration (Global Compact Thematic Paper (Detention and Alternatives to Detention, p. 5-6) suggests that there should be legally prescribed "human-rights compliant alternatives to detention, so that detention is a last resort imposed only where less restrictive alternatives have been considered and found inadequate to meet legitimate purposes". Like in Case *Popov* v. France, ECtHR, 19 January 2012, Applications nos. 39472/07 and 39474/07, "*it is important to bear in mind that the child's extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant*" and the authorities must implement all necessary means to limit, as far as possible, the duration of the detention of minors. Any other solution would be against Article 3 of CRC.
[60] Case C-79/13, *Federaal agentschap voor de opvang van asielzoekers* v. *Saciri* and others, 27 February 2014, paragraph 35: ''[i]n addition, the general scheme and purpose of Directive 2003/9 and the observance of fundamental rights, in particular the requirements of Article 1 of the Charter of Fundamental Rights of the European Union, under which human dignity must be respected and protected, preclude the asylum seeker from being deprived – even for a temporary period of time after the making of the application for asylum and before being actually transferred to the responsible Member State – of the protection of the minimum standards", see also Bero & Bouzalmate (G. and R. (C-838/13)) and Mahdi (C-146/14).
[61] YOUNG (2017: 390). For example, Article 10 (5) of Dublin IV proposal: 'In the absence of a family member, a sibling or a relative as referred to in paragraphs 2 and 3, the Member State responsible shall be that where the unaccompanied minor first has lodged his or her application for international protection, provided that it is unless it is demonstrated that this is not in the best interests of the minor' –according to recital 16 (available at: https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-270-EN-F1-1.PDF, accessed March 21, 2019), the best interests of the child is only one of the several considerations necessarily made for the determination of the Member State responsible.

new). The corrective allocation mechanism would only function in situations when a Member State is confronted with a disproportionate number of applications for international protection for which is responsible. Dublin IV provides an opt-out temporarily clause, for a maximum of 12 months, during which the applicants who were the responsibility of the opting out Member State would be absorbed by other States. But at what cost? It would cost € 250,000 for an applicant to be transferred to other State[62]. Dublin IV does not accomplish its goals, nor does it offer an equitable mechanism which reflects the importance of the burden-sharing principle.

In order to have fair sharing of responsibility, the Member States "should distribute the burden depending on their capabilities"[63] thus preventing that a Member State hosts the lion's share[64].

5. FINAL REMARKS

All children are full owners of rights, regardless of their immigration status.

The Geneva Convention of July 1951 relating to the Status of Refugees ('the Geneva Convention'), as supplemented by the New York Protocol of January 1967 provides the cornerstone of the international legal regime for the protection of refugees.

If we think only about unaccompanied minors as asylum seekers, we cannot disrupt our analysis from the EU Regulation: Brussels II-A, Dublin III and the Directive 2011/95/EU, in aiming for a higher degree of protection.

Bear in mind that an unaccompanied child is a child who has been separated from both parents and is not being cared for by an adult legally responsible to do so. Therefore, this child is defenceless and in need of special security.

Although we believe Member States apply common criteria for the identification of children genuinely in need of international protection, we also judge the disruptions of the system created to protect these vulnerable individuals.

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[62] It is unjustifiable and "outweighs any reasonable estimation of the costs associated with the RSD [refugee status determination] procedure and is an enormous increase to the figure of 6,000 euros provide in the September 2015 relocation decisions", YOUNG, 2017: 276. The most likely countries to require opt-out would be the most exposed ones (Greece, Italy). PROGIN-THEUERKAUF (2016: 4) outlines the same idea: "paying a solidarity contribution of € 250'000 to another Member State who is willing to take over the asylum seeker is simply absurd – not only because the amount is totally arbitrary, but also because it is actually not a sign of solidarity, but the exact opposite. Moreover, it will be impossible to execute this provision in practice, as Member States would have to transfer money back and forth all year long".

[63] (MORANO-FOADI, 2017: 247).

[64] However, as COSTELLO (2016: 275) signals, the utmost importance with a new Dublin regulation would have to be the "thorough and individualized assessment in all cases" and the "duty not to deport anyone to a place where the relevant risk of inhuman and degrading treatment is established".

On the one hand we have the 'best interests of the child' as a primary consideration of Member States when implementing the EU regulations, but on the other hand, the recognition of refugee status is a declaratory act given by the Member State in which the migrant child has lodged her/his appeal. In some cases, this can mean not attending to the special needs of that child in particular, since separated and unaccompanied children may not stop their journey in the first Council of Europe State they reach.

As soon as a child is registered as an asylum-seeker they should receive information about a whole range of rights: the right to a guardian, to information and to receive legal assistance, to special protection and assistance if they have been a victim of torture, to social protection and access to health and social services, not to be punished for illegal border crossings, to an effective remedy, to have their asylum claim considered on child-specific grounds if relevant. However, serious information gaps about children's rights in the context of asylum procedures are a reality.

And this only gets worse if you add the fact that the Member State granting asylum to this child may not be the one where the child is actually present or where the procedural measures are being granted to this minor.

We realize that judges and prosecutors around Europe are working to diminish this problem of coherence between regulations, but we also know that the specific needs of these particularly vulnerable groups of children (such as the unaccompanied ones) should not be decided without proper guidelines and law.

Appropriate safeguards must be applied to all children present in the European Union, at all stages of the asylum and return procedure. Currently, a number of key protection measures, notably as regards access to information, legal representation and guardianship, the right to be heard, the right to an effective remedy and multidisciplinary and rights-compliant age assessments, need to be stepped up.

Durable solutions are crucial to establish normality and stability for all children in the long term. The identification of durable solutions such as integration in a Member State, return to the country of origin, resettlement or reunification with family members in a third country, are all options that should be considered as soon as a child enters an EU Member State.

It is essential though that the Dublin III criteria of the Member State responsible and the Brussels II-A standards of the competent Member State shall be unified as one: the best interests of the unaccompanied minor, his opinion (if possible) and where he is physically present, should be the determinations carried out in all cases.

So, we can only imagine a world where the best interest of the unaccompanied minor will prevail and the guidelines of the regulations will find a unique and appropriate answer to this refugee and migrant children problem in Europe.

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