



**RIGA
GRADUATE
SCHOOL OF
LAW**

Violations of Article 3 of the ECHR in the Detention Conditions of Migrant Minors

BACHELOR THESIS

AUTHOR:

Kristiāna Jana Biksone
LL.B 2020/2021 year student
student number B020059

SUPERVISOR:

Kate Kārkliņa
LL.M.

DECLARATION OF HONOUR:

I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed)

RIGA, 2023

ABSTRACT

The safeguards provided by Article 3 of the European Convention on Human Rights reinforce the Council of Europe's commitment to uphold human dignity and well-being of all individuals as the fundamental human rights principles. From this commitment, a positive obligation arises of states to provide asylum-seeking children with protection and humanitarian assistance, irrespective of the child's accompanying status. The thesis determines the extent of the violations of Article 3 of the ECHR in the detention conditions of migrant minors and identifies the contributing factors to these violations. The child's extreme vulnerability stands as the decisive factor, taking precedence over any considerations concerning the migration status of the child. When determining a violation of Article 3 of the ECHR, the ECtHR takes into consideration the children's young age, the duration of the detention and the suitability of the premises with regard to the specific needs of children.

Key words: Article 3, ECHR, migrant minors, detention

SUMMARY

The thesis aims to determine the extent of the violations of Article 3 of the European Convention on Human Rights (hereafter, the ECHR) in the detention conditions of migrant minors and establish the contributing factors to these violations. The author applied a doctrinal research method for the thesis, using the analytical approach to establish the scope of Article 3 of the ECHR, as well as to determine to what extent the detention conditions for migrant minors violate Article 3 of the ECHR and what are the contributing factors that lead to such violations through a comprehensive analysis of the relevant case law of the European Court of Human Rights (hereafter, the ECtHR). Interdisciplinarity of the research arises from the analysis of the effect of political tensions on the scope of Article 3 and on the development of additional protection for migrant minors in international law, as well as the potential limits to the principle of non-refoulement. The comparative research method was used when examining how the ECHR, the UN Convention on the Rights of the Child (hereafter, the CRC) and the 1951 Refugee Convention ensure protection of migrant minors in detention, with the important conclusion that Article 3 of the CRC provides an increasingly greater independent source of protection over the principle of non-refoulement under the 1951 Refugee Convention in cases concerning removal of a child from a host state.

The first chapter consists of four subchapters and is dedicated to determining the scope of Article 3 of the ECHR. The first subchapter illustrates the absolute nature of Article 3 of the ECHR. The second subchapter focuses on the minimum level of severity that is required in order for the act of ill-treatment to fall within the scope of Article 3 of the ECHR. The third subchapter defines and draws a distinction between the three prohibited acts under Article 3 of the ECHR. The fourth subchapter is dedicated to an analysis on the role of margin of appreciation, political tensions and the principle of non-refoulement in the scope of Article 3 of the ECHR.

The second chapter of the thesis consists of two subchapters, each examining the additional protection of migrant minors provided in international law, the CRC and the 1951 Refugee Convention respectively. A third-level subchapter of the first subchapter is dedicated to the four general principles of the CRC, which are highly prioritized by the ECtHR in cases concerning migrant minors.

The third chapter delves into an analysis of Article 3 of the ECHR violations in the detention conditions of migrant minors in the ECtHR case law. The first subchapter covers the positive obligation of states to provide protection and humanitarian assistance to migrant minors under Article 3 of the ECHR, which must be fulfilled irrespective of the child's accompanying status. However, the ECtHR has acknowledged differences in some specific state obligations depending on whether the child is accompanied by the parents or is unaccompanied, and, therefore, the second subchapter focuses on the case of accompanied children, while the third subchapter focuses on the case of unaccompanied children. When determining violations of Article 3 of the ECHR, the ECtHR emphasizes that the child's extreme vulnerability stands as the decisive factor and must take precedence over any considerations regarding the child's migration status. In the evaluation method of determining an Article 3 of the ECHR violation, the ECtHR takes into consideration the children's young age, the duration of the detention and the suitability of the premises with regard to the specific needs of children. In addition, states must ensure the physical and cognitive development of the child due to the young age and developmental stage, acknowledging their evolving capacities. Exposure to ill-treatment or

other risks of the accompanying parent may impact the well-being of the accompanied minor due to the child's dependence on the care and protection provided by the parent. If the quality of the material conditions of detention is extremely low, even a significant reduction of the duration of the detention may not suffice to rule out a violation of Article 3, while satisfactory material conditions of detention increase the weight of the duration of the detention in determining an Article 3 violation. However, the ECtHR emphasizes that the cumulative nature of unfavorable conditions of detention lasting for a longer period would have adverse consequences for young children, exceeding the minimum level of severity required to constitute a breach of Article 3 of the ECHR.

TABLE OF CONTENTS

List of Abbreviations	6
Introduction	7
1. The scope of Article 3 of the European Convention on Human Rights	9
1.1. The absolute nature of Article 3 of the ECHR	9
1.2. Minimum level of severity under Article 3 of the ECHR	10
1.3. Distinction between torture, inhuman and degrading treatment and punishment under Article 3 of the ECHR.....	12
1.4. The role of margin of appreciation, political tensions and the principle of non-refoulement in the scope of Article 3 of the ECHR	14
2. Additional protection of migrant minors in International Law.....	17
2.1. The UN Convention on the Rights of the Child.....	17
2.1.1. The four general principles of the CRC.....	18
2.2. The 1951 Refugee Convention and its 1967 Protocol.....	21
3. Violations of Article 3 of the ECHR in the detention conditions of migrant minors in the ECtHR case law.....	24
3.1. Positive obligation of states to provide protection and humanitarian assistance	24
3.2. The case of accompanied children	26
3.3. The case of unaccompanied children	29
Conclusion.....	33
Bibliography	35

LIST OF ABBREVIATIONS

1951 Refugee Convention	Convention Relating to the Status of Refugees
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRC	United Nations Convention on the Rights of the Child
ECHR	European Convention on Human Rights
EComHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
GC	Grand Chamber
IRA	Irish Republican Army
Resolution 3452 (XXX)	Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UN	United Nations
UN Convention Against Torture	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UNHCR	The United Nations High Commissioner for Refugees

INTRODUCTION

The safeguards provided by Article 3 of the European Convention on Human Rights (hereafter - the ECHR) preserve one of the fundamental values of the democratic societies making up the Council of Europe and reinforce the Council of Europe's commitment to uphold human dignity.¹ From this commitment of parties of the Convention stems a positive obligation of states to provide asylum-seeking children with protection and humanitarian assistance for the purpose of ensuring compliance with Article 3 of the ECHR. Migrant minors have often fled their home country due to a risk of being subjected to ill-treatment and are therefore categorized as highly vulnerable individuals that require special care and attention during their detention. Thus, the vulnerability of the child must always take precedence over other considerations relating to their immigration status and must be effectively addressed by states through accommodating the child's specific needs that arise from the child's age, developmental stage, health status, personal history and other factors, in order to mitigate the risk of a violation of Article 3 of the ECHR.

The thesis aims to answer the following research question: To what extent do detention conditions for migrant minors violate Article 3 of the ECHR, and what factors contribute to these violations?

Thus, the main objective of the thesis is to determine the extent of the violations of Article 3 of the ECHR in the detention conditions for migrant minors and establish the contributing factors to these violations.

The author applied a doctrinal research method for the thesis. The analytical approach was used to establish the scope of Article 3 of the ECHR, as well as to determine to what extent the detention conditions for migrant minors violate Article 3 of the ECHR and what are the contributing factors that lead to such violations through a comprehensive analysis of the case law of the European Court of Human Rights (hereafter - the ECtHR). Interdisciplinarity of research arises when analyzing the effect of political tensions on the scope of Article 3, potential limits to the principle of non-refoulement and the impact of political events on the development of additional protection for migrant minors in international law. In addition, the author used the comparative research method when analyzing how the ECHR, the UN Convention on the Rights of the Child and the 1951 Refugee Convention ensure protection of migrant minors in detention, highlighting that Article 3 of the CRC provides an increasingly greater independent source of protection over the principle of non-refoulement under the 1951 Refugee Convention in cases concerning removal of a child from a host state.

The limitation of the research includes changing policies and practices regarding detention conditions of migrant minors, affecting the relevance of findings, as well as a legal void at the national levels in respect to regulation of detention of migrant minors. Additional limitations concern the privacy and well-being of the children, the respect of which may impose limitations on the types of data that are collected and reported by states. In addition, the failure of states to provide comprehensive and detailed reports of the quality of the detention conditions further impedes the validity of the research, as well as the lack of enforcement and monitoring mechanisms for determining the extent of underreporting and deploying preventive measures for potential violations. Finally, states may lack legal resources available to migrant minors in

¹ *Tyrrer v. United Kingdom*, ECtHR, 5856/72, judgment of 25 April 1978, para. 33

detention to report any violations, as well as seek legal assistance and representation for protection of their rights under Article 3 of the ECHR.

The thesis consists of three main chapters. The first chapter is dedicated to the objective of determining the scope of Article 3 of the ECHR. It consists of four subchapters, each on the following respective subjects: the absolute nature of Article 3 of the ECHR, minimum level of severity under Article 3, distinction between the three prohibited acts under Article 3, and, finally, the role of margin of appreciation, political tensions and the principle of non-refoulement in the scope of Article 3 of the ECHR.

The second chapter of the thesis delves into the objective of examining additional protection of migrant minors provided in international law. The first subchapter of the second chapter is dedicated to the historical development of the UN Convention on the Rights of the Child, with a third-level subchapter dedicated to the four general principles of the CRC and their safeguards provided for children. The second subchapter of the second chapter is dedicated to the historical development of the 1951 Refugee Convention and its 1967 Protocol, and their safeguards provided for migrant minors.

The third chapter consists of three subchapters and is dedicated to an analysis of violations of Article 3 of the ECHR in the detention conditions of migrant minors in the ECtHR case law. The first subchapter focuses on the positive obligation of states to provide protection and humanitarian assistance to migrant minors under Article 3 of the ECHR and determining the necessary measures that the positive obligation requires states to undertake. The second and third subchapters are dedicated to analysis on the role of the accompanying status of the migrant minors in the nuances in the assessment of Article 3 violations in conditions of their detention, with a focus on accompanied children in the second subchapter and a focus on unaccompanied children in the third subchapter.

1. THE SCOPE OF ARTICLE 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

In the interest of successfully implementing the safeguards provided by Article 3 of the European Convention on Human Rights, it is important to first define the scope of Article 3, which has been well-established in the case law of the ECtHR. Since Article 3 of the ECHR contains multiple concepts that call for further explanation on their meaning, the scope of Article 3 has raised doubts in many complex cases. The following examines some of the most essential elements defining the scope of the Article, such as the absolute nature of Article 3, the minimum level of severity that the act of ill-treatment must attain in order to fall within the scope of Article 3, the distinction between the three prohibited acts that come under the scope of Article 3, as well as the impact of margin of appreciation, the principle of non-refoulement and political tensions as influential factors.

1.1. The absolute nature of Article 3 of the ECHR

To highlight the weight of the obligation of states to respect and protect individuals from torture and inhuman or degrading treatment under Article 3 of the ECHR, it is crucial to illustrate the absolute nature of Article 3. Case law of the ECtHR will be analyzed to illustrate the non-derogability of Article 3, irrespective of the conduct of the person at risk.

The safeguards provided by Article 3 of the ECHR preserve one of the core values of democratic societies and strengthen the Council of Europe's commitment to uphold human dignity.² Article 3 of the ECHR states that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment"³. It is important to note that the prohibition imposed by Article 3 is absolute and no derogation from it is permitted according to Section 2 of Article 15 of the ECHR even in the case of public emergency threatening the life of the nation or in the most difficult circumstances⁴ and regardless of the conduct of the person at risk⁵, as well as irrespective of the alleged offense committed by the person at risk⁶.

Article 3 provides an absolute protection against conduct that has serious physical or psychological effects on individuals. This absolute right imposes a high threshold, thus tempering the strict approach.⁷

The judgment put forth by the ECtHR in the case of *Ireland v. United Kingdom*⁸ is an example where the alleged offense committed by the persons at risk did not impede the absolute nature of Article 3 of the ECHR. In this particular case, members of the Irish Republican Army

² *Ibid*, p. 7

³ European Convention on Human Rights, Council of Europe, F-67075 Strasbourg Cedex, 1 June 2010, p. 7. Available on: https://www.echr.coe.int/documents/convention_eng.pdf. Accessed September 12, 2023.

⁴ European Court of Human Rights, "Guide on Article 3 of the Convention - Prohibition of torture" (Council of Europe/European Court of Human Rights, 2022), https://www.echr.coe.int/documents/d/echr/Guide_Art_3_ENG

⁵ *A. and Others v. the United Kingdom* [GC], ECtHR, 3455/05, 2009, para. 126; *Mocanu and Others v. Romania* [GC], ECtHR, 10865/09 and 2 others, 2014 (extracts) para. 315; *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], ECtHR, 39630/09, 2012, para. 195; *Z and Others v. the United Kingdom* [GC], ECtHR, 29392/95, 2001-V, paras. 187-188.

⁶ *Ramirez Sanchez v. France* [GC], ECtHR, 59450/00, 2006-IX, para. 116; *Gäfgen v. Germany* [GC], ECtHR, 22978/05, 2010, para. 87.

⁷ Stephanie Palmer. "A Wrong Turning: Article 3 ECHR and Proportionality." *The Cambridge Law Journal* 65, no. 2 (2006): 438-51. Accessed October 3, 2023. <http://www.jstor.org/stable/4509209>.

⁸ *Ireland v. The United Kingdom*, 5310/71, ECtHR, judgment of 20 March 2018.

(hereinafter, IRA) were convicted of multiple acts of terrorism in the United Kingdom, leading to arrest and detention of several members of the IRA in the United Kingdom. The arrested members of IRA suffered various interrogation practices, including hooding, wall-standing and deprivation of sleep and food, which the Court concluded as amounting to a practice of inhuman and degrading treatment, despite the IRA being deemed responsible for several acts of terrorism.⁹

Another illustration of the absolute nature of Article 3 of the ECHR is the case of *A. v. the Netherlands*¹⁰. In this case, the applicant was suspected of terrorism and was facing expulsion on the grounds that he was an endangerment to national security. Nevertheless, the Court reiterated

the absolute nature of the prohibition under Article 3, irrespective of the conduct of the person concerned, however undesirable or dangerous this may be. The Court has also reaffirmed the principle that it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3.¹¹

Given the absolute nature of Article 3 of the ECHR, the Court has set in its jurisprudence that there is no room for proportionality assessments upon which the scope of Article 3 could be limited. Thus, it can be concluded that this principle prevails regardless of the gravity of the offense committed by the victim, as it can never justify ill-treatment of the victim.

Since Article 3 of the ECHR establishes the prohibition of torture and inhuman or degrading treatment as an absolute and non-derogable right, it has a crucial role in upholding and reinforcing the principle of non-refoulement, which prohibits the forced return or deportation of individuals to a country where they would face a real risk of torture, inhuman or degrading treatment or punishment. In the case of *Soering v. the United Kingdom*¹², the ECtHR has characterized the prohibition provided by Article 3 of the ECHR as "one of the fundamental values of the democratic societies making up the Council of Europe". The Court has also recognized in many of its rulings that the safeguards provided by Article 3 of the ECHR would lose their significance and non-derogability if the receiving state was entitled to send an individual back to a state where he or she could potentially be exposed to torture or other forms of ill-treatment.¹³

1.2. Minimum level of severity under Article 3 of the ECHR

The determination of the scope of Article 3 of the ECHR begins with assessing the minimum level of severity that is required for the committed act of ill-treatment to fall within the scope of the article¹⁴. The case law of the ECtHR will be used to establish the criteria that is taken into consideration when assessing whether the act of ill-treatment has attained the minimum level of severity that is required for the act to fall within the scope of Article 3.

⁹ *Ibid.*, p. 9.

¹⁰ *A. v. the Netherlands*, no. 4900/06, ECHR, 20 July 2010.

¹¹ *Ibid.*, para. 142.

¹² *Soering v. the United Kingdom*, no. 14038/88, 7 July 1989, para. 88.

¹³ See e.g. *Saadi v. Italy* [GC], no. 37201/06, 28 February 2008, para. 125; *Soering v. the United Kingdom*, no. 14038/88, 7 July 1989, paras. 90–91; *Vilvarajah and Others v. the United Kingdom*, nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, 30 October 1991, para. 103.

¹⁴ *Ireland v. The United Kingdom*, *supra* note 8, para. 162.

The aspects that influence the Court's decision on whether or not the committed act of ill-treatment falls within the scope of Article 3 of the ECHR involve the duration of the treatment, the physical effects of the treatment, the mental effects of the treatment, as well as the sex, age and state of the health of the victim. This comprehensive evaluation emphasizes the multidimensional nature of ill-treatment, acknowledging that ill-treatment can manifest in various forms and can affect victims differently, depending on the victim's individual characteristics and condition. In addition, this evaluation method has been reiterated in multiple cases adjudicated by the ECtHR and it continues to function as the standard for determining whether the committed act of ill-treatment has met the minimum level of severity required for a potential breach of Article 3 of the ECHR¹⁵. Once the European Commission or Court establishes that the committed act of ill-treatment meets the minimum threshold of severity, it can determine whether the committed act can be classified as torture, inhuman and degrading treatment or punishment, depending on the severity of the committed act.¹⁶

For instance, the case of *Florea v. Romania*¹⁷ in 2010 is an example of the victim's individual circumstances, namely their health condition, being essential for the ECtHR to deem the ill-treatment that the victim has been exposed to as having reached the threshold of severity required by Article 3 of the ECHR. In this particular case, the applicant had to endure the smoking of his fellow prisoners in the prison infirmary and the prison hospital, despite being advised against it by the applicant's doctor. The ECtHR took into consideration the chronic hepatitis and arterial hypertension that the applicant suffered from in order to deem the acts of the fellow prisoners as having reached the required minimum level of severity for them to fall within the scope of Article 3 of the ECHR.

However, the ECtHR has struggled with balancing the demands of the general interest of the community with the protection of the individual's right to protection against ill-treatment under Article 3 of the ECHR. For example, the ruling of the case of *N v. the United Kingdom*¹⁸ involved consideration of the applicant's life expectancy being significantly reduced if he were to be removed from the contracting state, yet this particular risk was not sufficient in itself to give rise to breach of Article 3 of the ECHR.

Even though the protections offered by Article 3 of the ECHR are absolute in nature, some restrictions exist regarding the prohibition of certain forms of punishment under Article 3. For instance, the judgment by the ECtHR in the case of *Kudła v. Poland*¹⁹ provides that measures depriving a person of his or her liberty often involve a certain element of suffering and/or humiliation. According to the Court, in order for the punishment to fall within the scope of Article 3 of the ECHR,

the suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.²⁰

¹⁵ *Price v. the United Kingdom*, no. 33394/96, ECtHR, 10 July 2001, para. 24; *Mouisel v. France*, no. 67263/01, ECtHR, 14 November 2002, para. 37; *Naumenko v. Ukraine*, no. 42023/98, ECtHR, 10 February 2004, para. 108; *Jalloh v. Germany* [GC], no. 54810/00, ECtHR, 11 July 2006, para. 67.

¹⁶ *Ibid.*

¹⁷ *Florea v. Romania*, ECtHR, no. 37186/03, 14 September 2010

¹⁸ *N v. United Kingdom*, ECtHR [GC], 27 May 2008, paras. 35-41.

¹⁹ *Kudła v. Poland* [GC], ECtHR, no. 30210/96, 26 October 2000, para. 93.

²⁰ *Ibid.*

Certain lawful punitive measures already imply some level of discomfort and, therefore, do not automatically constitute a violation of Article 3. Thus, it can be concluded that the absolute nature of the protections provided by Article 3 of the ECHR is subject to the understanding that the ill-treatment must reach a certain level of threshold of suffering to fall within the scope of Article 3 and its non-derogable prohibition, by extension.

1.3. Distinction between torture, inhuman and degrading treatment and punishment under Article 3 of the ECHR

Since the prohibition provided by Article 3 of the Convention does not inherently define all occurrences of ill-treatment, the scope of Article 3 must be defined for the protections put forth by Article 3 to serve their purpose effectively. By simply establishing the prohibition of torture, inhuman and degrading treatment or punishment through Article 3 of the ECHR, the European Human Rights judicial bodies, namely the ECtHR and the European Commission of Human Rights, has produced intricate definitions of the terms set out within.²¹ Consequently, criteria that allows for the three prohibited acts to be distinguished has been identified, the foundation of which lies in the threshold of severity of the committed abuse.

According to the judgment of the ECtHR in the case of *Pretty v. the United Kingdom*: "the Court's case-law refers to ill-treatment that [...] involves actual bodily injury or intense physical or mental suffering."²² In addition, the Court provided the criteria that allows to deem the committed act of ill-treatment as degrading in terms of Article 3 of the ECHR, which requires for the act to be humiliating or debasing for the individual, showing a lack of respect for, or diminishing, his or her human dignity, or arousing feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance.²³ Thus, it can be concluded that the act must attain the threshold that surpasses the unavoidable level of suffering inherent in the process of detention, arrest or any other circumstance where the individual is under the power of governmental authorities, in order for it to be classified as degrading treatment under Article 3 of the ECHR. Furthermore, higher levels of suffering and pain are more in line with the criteria for inhuman treatment.

The case of *Ireland v. the United Kingdom* has been a landmark judgment of the ECtHR in drawing a distinction between torture and other forms of ill-treatment due to the consequent establishment of a classification of five techniques of interrogation. In this particular case, the Court decided that the five particular interrogation techniques that the United Kingdom practiced upon the detained member of the IRA in Northern Ireland during the conflict of 1970s did not amount to torture and, instead, fell into the category of inhuman treatment.²⁴ The five interrogation techniques were wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink. Hooding is defined as "the practice of fully covering the head

²¹ Debra Long, "Guide to Jurisprudence on Torture and Ill-treatment: Article 3 of the European Convention for the Protection of Human Rights" (Association for the Prevention of Torture: Geneva, 2002), https://www.files.ethz.ch/isn/16023/Guide%20to%20Jurisprudence%20on%20Torture_E.pdf

²² *Pretty v. the United Kingdom*, ECtHR, no. 2346/02, 29 April 2002, para. 52.

²³ *Ibid.*

²⁴ *Ireland v. The United Kingdom*, *supra* note 8.

of a person"²⁵, according to a statement issued by the Istanbul Protocol. According to the ECtHR, hooding can amount to torture if used in conjunction with other interrogation methods.

In the case of *Ireland v. the United Kingdom*, the Court referred to Article 1 of Resolution 3452 (XXX) adopted by the General Assembly of the United Nations on 9 December 1975, which states that "torture constitutes and aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."²⁶ In addition, Article 1 of the UN Convention Against Torture is also often used by the Court to distinguish torture apart from other practices of ill-treatment²⁷. According to Article 1 of the UN Convention Against Torture, torture is defined as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.²⁸

Therefore, the following criteria for the act of ill-treatment to be deemed as torture under Article 3 of the ECHR can be developed: severe physical or mental pain or suffering inflicted upon the victim; the intent which the severe pain or suffering has been inflicted with; the specific purpose which the severe pain or suffering has been inflicted for, for instance, to acquire relevant information or a confession from the victim or to punish or intimidate the victim²⁹.

The case of *Aksoy v. Turkey*³⁰ of 1996 was the first individual complaint in which the Court concluded that torture had been inflicted upon a person. In this case, the applicant had been detained incommunicado for at least fourteen days, as determined by the Commission. Subsequently, there had appeared visible injuries to the arms of the applicant upon his appearance before the Public Prosecutor. The applicant claimed that the cause of the arm injuries was the so-called Palestinian hanging, a type of suspension during which the arms are tied behind the back leading to a temporary paralysis of both arms³¹. Besides ruling this type of suspension as torture under Article 3 of the ECHR, the Court also held that

where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation as

²⁵ Statement on Hooding, Istanbul Protocol, submitted to the United Nations High Commissioner for Human Rights, 9 August 1999. Available on: <https://irct.org/istanbul-protocol/statement-on-hooding>

²⁶ *Ireland v. The United Kingdom*, *supra* note 8, para. 167.

²⁷ *Selmouni v. France* [GC], ECtHR, 25803/94, judgment of 28 July 1999, 25803/94, para. 97.

²⁸ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entry into force 26 June 1987

²⁹ Alexander Morawa and Nicole Bürli, Peter Coenen, Laura Ausserladscheider Jonas, "Article 3 of the European Convention on Human Rights: A Practitioner's Handbook" (Geneva: World Organisation Against Torture (OMCT), 2014), pp. 159-162.

³⁰ *Aksoy v. Turkey*, ECtHR, no. 21987/93, para. 30

³¹ Fanny De Weck. "Non-Refoulement under the European Convention on Human Rights and the UN Convention Against Torture : The Assessment of Individual Complaints by the European Court of Human Rights under Article 3 ECHR and the United Nations Committee Against Torture under Article 3 CAT" (Leiden: BRILL, 2016) Accessed October 9, 2023. ProQuest Ebook Central. p. 142

to the causing of the injury, failing which a clear issue arises under Article 3 the [ECHR] [...].³²

However, it is important to emphasize that the defining characteristic of torture is the purpose which the act is inflicted for and not the severity of the pain or suffering of the committed act, as ruled by the European Commission of Human Rights in *The Greek Case*³³. In fact, the Commission's ruling in *The Greek Case* has had a crucial role in the development of distinction between the three prohibited acts under Article 3 of the ECHR³⁴. Prior *The Greek Case*, the European Commission of Human Rights had never ruled that a member state had inflicted torture, which underscores the importance of the case in defining the concept of torture. By thoroughly analyzing case law of the ECtHR, it can be concluded that torture is the most intense form of ill-treatment out of the three mentioned in Article 3 of the ECHR, as it constitutes an aggravated and intentional inhuman treatment causing very serious and cruel suffering³⁵. Furthermore, it is necessary to point out that the dynamic nature of the ECHR has a crucial role in the process of distinguishing between torture and inhuman or degrading treatment and, thus, these concepts might change over time, as stated by the Court in *Selmouni v. France*³⁶ and *Öcalan v. Turkey* cases³⁷.

1.4. The role of margin of appreciation, political tensions and the principle of non-refoulement in the scope of Article 3 of the ECHR

The additional factors that influence the scope of Article 3 of the ECHR are the margin of appreciation, additional protocols and guidelines that have been developed and consequently extended the scope of the ECHR, as well as the ever changing present-day events and conditions that amplify the dynamic nature of the Convention. These influential factors will be analyzed respectively, ending with an illustration of violation of the principle of non-refoulement as an indirect way of a breach of Article 3 of the ECHR.

The legal status of the ECHR gives it superiority over any national law. Thus, in cases where national law is conflicting with the provisions of the Convention, national authorities should give precedence to the ECHR. However, the existence of margin of appreciation offers a room for manoeuvre to national authorities in implementing and interpreting the Convention's provisions³⁸. This principle acknowledges the need for a balance between upholding fundamental human rights principles and the recognition of diversity of legal systems and cultural contexts in the countries that are party to the ECHR. It is important to note that there is a division in the opinion of scholars regarding the universality of the application of the margin of appreciation across the Convention. For instance, Ronald St. John Macdonald argued that the ECtHR has never imposed a limit to the articles of the Convention to which the margin of

³² *Ibid*, p. 13, para. 165

³³ *The Greek Case*, EComHR, report of 5 November 1969, Yearbook 12 (1969), para. 197.

³⁴ Ed Bates, "The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights" (Oxford: Oxford University Press, 2010), p. 26

³⁵ *Belousov v. Ukraine*, no. 4494/07, ECtHR, 7 November 2013, para. 66.

³⁶ *Selmouni v. France* [GC], ECtHR, 28 July 1999, no. 25803/94, para. 101.

³⁷ *Öcalan v. Turkey*, ECtHR, 12 March 2003, no. 46221/99, para. 194.

³⁸ Steven Greer, "The margin of appreciation: interpretation and discretion under the European Convention on Human Rights" (Council of Europe: Strasbourg, 2000), p. 5.

appreciation could be applied³⁹. In contrast, J. Callewaert stated that the margin of appreciation has never been enforced in relation to the right not to be subjected to torture or to inhuman or degrading treatment or punishment under Article 3 of the ECHR⁴⁰. While the existence of margin of appreciation is essential for appropriate integration of the Convention in national law, as well as maintaining objectivity in the decisions of national institutions, it also requires boundaries in order to preserve the efficiency of certain provisions in the protection of human rights, such as Article 3 of the ECHR.

Existing and rising tensions among communities and states can have an impact on the scope and application of Article 3 of the ECHR. In extreme situations of political pressures, national authorities might be inclined to undertake exceptional measures for the purpose of maintaining order or security. As a result, the criteria that constitutes a risk of torture or inhuman or degrading treatment may be subjected to leniency in its interpretation. Political tensions might also lead to an increase in the risk assessment that the court will execute in cases concerning the principle of non-refoulement under Article 3 of the ECHR. In such situations of political instability, the ECtHR is inclined to heightened scrutiny in the assessment of the circumstances in the receiving state. In addition, the Court may give special consideration to vulnerable groups, such as political opponents, journalists, or members of minority communities who may be disproportionately affected due to political conflict. For instance, the case of *Makhmudzhan Ergashev v. Russia* was the first time the ECtHR addressed a case arising from tensions between the Uzbek and Kyrgyz communities in Kyrgyzstan⁴¹. The case dealt with the expulsion of a member of the Uzbek minority from Russia to Kyrgyzstan. In its ruling, the Court found a violation of Article 3 of the ECHR if the person were extradited, and stated:

it follows from the evidence before the Court that the situation in the south of the country is characterised by torture and other ill-treatment of ethnic Uzbeks by law-enforcement officers, which increased in the aftermath of the June 2010 events and has remained widespread and rampant, being aggravated by the impunity of law-enforcement officers. The problem must be viewed against the background of the rise of ethno-nationalism in the politics of Kyrgyzstan, particularly in the south, the growing inter-ethnic tensions between Kyrgyz and Uzbeks, continued discriminatory practices faced by Uzbeks at the institutional level and under-representation of Uzbeks in, inter alia, law-enforcement bodies and the judiciary.⁴²

The broader political context, including the risk of discrimination of minorities, can lead to the principle of non-refoulement under Article 3 of the ECHR being upheld to a higher standard in order to prevent torture and ill-treatment of individuals facing deportation.

It is important to distinguish that a breach of the principle of non-refoulement is an indirect way of violating the prohibitions provided by Article 3 of the ECHR. In circumstances where the returning state extradites an individual to a state, in which there is a risk of the individual being subjected to torture, inhuman or degrading treatment, the returning state

³⁹ R. J. Macdonald, "The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights", in Anon (ed), *International Law at the Time of its Codification, Essays in Honour of Judge Roberto Ago* (Giuffrè, Milan 1987) 187-208, 192.

⁴⁰ J. Callewaert, "Is there a Margin of Appreciation in the Application of Articles 2, 3 and 4 of the Convention?" (1998) 19 *Human Rights Law Journal* 6, 6-9.

⁴¹ Alexander Morawa and Nicole Bürli, Peter Coenen, Laura Ausserladscheider Jonas, "Article 3 of the European Convention on Human Rights: A Practitioner's Handbook" (Geneva: World Organisation Against Torture (OMCT), 2014)

⁴² *Makhmudzhan Ergashev v. Russia*, no. 49747/11, 16 October 2012, para. 72

violates the protections enshrined in Article 3 of the ECHR. The principle of non-refoulement is a manifestation of the means of protection that Article 3 of the ECHR imposes upon states to limit the risks of individuals being subjected to torture or other forms of ill-treatment.

2. ADDITIONAL PROTECTION OF MIGRANT MINORS IN INTERNATIONAL LAW

One of the most important legal instruments establishing protection of migrant minors is the UN Convention on the Rights of the Child. The UN Convention on the Rights of the Child provides a comprehensive legal framework that emphasizes the protection of all children's rights, regardless of their nationality or immigration status. In addition, since the 1951 Refugee Convention primarily focuses on the protection of refugees, including minors, it also provides crucial safeguards for the children who are seeking asylum on the basis of having fled their home country where they are at risk of torture or inhuman or degrading treatment or punishment, with the obligatory requirement that they can establish a valid claim for a refugee status. The 1951 Refugee Convention obliges states to ensure protection and humanitarian assistance to refugees, including minors.

2.1. The UN Convention on the Rights of the Child

The UN Convention on the Rights of the Child is a legal instrument that ensures that the child's extreme vulnerability is taking precedence over considerations concerning their status of an illegal immigrant. The ECtHR has reiterated in multiple judgments that:

[T]he child's extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant (...). ... [C]hildren have specific needs that are related in particular to their age and lack of independence, but also to their asylum-seeker status. The [European] Court [of Human Rights] would, moreover, observe that the Convention on the Rights of the Child encourages States to take the appropriate measures to ensure that a child who is seeking to obtain refugee status enjoys protection and humanitarian assistance, whether the child is alone or accompanied by his or her parents (...).⁴³

It is important to outline the history and development of the CRC, as well as the four general principles, for the purpose of highlighting the impact of the dynamic nature of the Convention on the global commitment to protect the rights of children, as well as ensuring correct interpretation of the provisions set out within.

Growing concerns about the rights and well-being of children globally became the source of the increasing need for the CRC. The first international legal instrument that established the need of special care and protection for children in the broadest sense was the Declaration of Geneva, which was drafted by the Save the Children International Union, a non-governmental organization established by Eglantyne Jebb in response to the needs of children during the aftermath of World War I⁴⁴. The adoption of the Declaration by the League of Nations occurred in 1924⁴⁵.

The UN Convention on the Rights of the Child was officially adopted by the UN General Assembly in 1989 as the concluding process, which was initiated during the 1979 International Year of the Child. A draft convention submitted by the Government of Poland during the Year

⁴³ *Popov v. France*, ECtHR, 39472/07 and 39474/07, judgment of 19 January 2012, para. 91. See also *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, ECtHR, 13178/03, judgment of 12 October 2006, para. 55.

⁴⁴ Cohen, Cynthia Price. "UNITED NATIONS: CONVENTION ON THE RIGHTS OF THE CHILD." *International Legal Materials* 28, no. 6 (1989): 1448–76. <http://www.jstor.org/stable/20693385>.

⁴⁵ C.P. Cohen, "The Human Rights of Children," 12 *Capital University Law Review* (1983).

of the Child spearheaded discussions for the need for the CRC. The aim of the CRC was to provide a comprehensive, internationally binding framework for the protection of children's rights, as a response to the grave injustices that children globally were subjected to, namely abuse and exploitation in prostitution and harmful jobs, imprisonment and other difficult circumstances, such as armed conflicts. The drafting was executed primarily by government delegates, but important roles were also appointed to representatives of United Nations bodies and specialized agencies, as well as multiple non-governmental organizations, which led to the unanimous adoption. The UN Convention on the Rights of the Child officially entered into force in 1990, as 20 states ratified it. By 2015, the CRC was ratified by 196, since subsequent initiatives had advocated for its ratification, for instance the World Summit for Children in 1990.⁴⁶

2.1.1. The four general principles of the CRC

The four general principles of the UN Convention on the Rights of the Child are fundamental for the general interpretation of the Convention, which ensures the protection of children's rights and their well-being. They provide a framework for understanding the rights of children and serve as a guide for national authorities, institutions and individuals in their responsibility to treat children with dignity, respect and consideration of their best interests by correctly implementing the Convention. The four general principles will be outlined in the following way: non-discrimination, best interests of the child, the right to life, survival and development, and the views of the child.

The first of the four general principles enshrined in the CRC is the non-discrimination principle of Article 2, which obliges all states to ensure that all children within their jurisdiction enjoy their rights enshrined in the Convention without discrimination of the child's, the child's parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.⁴⁷ Therefore, Article 2 of the CRC establishes the right to equal opportunity for all children, irrespective of the personal circumstances listed above.

The second general principle is enshrined in Article 3 of the CRC and emphasizes the paramount importance of the best interests of the child in all decisions and actions that affect children.⁴⁸ As the ECtHR has stated:

A measure of confinement must (...) be proportionate to the aim pursued by the authorities, namely the enforcement of a removal decision ... It can be seen from the Court's case-law that, where families are concerned, the authorities must, in assessing proportionality, take account of the child's best interests. In this connection (...) there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount (...). [T]he protection of the child's best interests involves both keeping the family together, as far as possible, and considering alternatives so that the detention of minors is only a measure of last resort (...)⁴⁹

⁴⁶ United Nations, Committee on the Rights of the Child, "Background to the Convention", available on: <https://www.ohchr.org/en/treaty-bodies/crc/background-convention>

⁴⁷ Convention on the Rights of the Child, United Nations, adopted by General Assembly resolution 44/25 on 20 November 1989, entry into force on 2 September 1990.

⁴⁸ *Ibid.*

⁴⁹ *Popov v. France*, ECtHR, 39472/07 and 39474/07, judgment of 19 January 2012, paras. 140-141.

Thus, it can be concluded that the principle of the best interests of the child ensures that in cases involving families and the enforcement of removal decisions, proportionality is upheld by ensuring that measures involving detention of children or separation of children from their families are justified by a compelling need and must be a measure of last resort. The principle of best interests of the child enshrined in Article 3 of the CRC underscores the value of family unification whenever it can be achieved.

It is important to note that Article 3 of the CRC provides an increasingly greater independent source of protection, which may prohibit the removal of a child from a host state, irrespective of the eligibility of the child for protection as a refugee or for protection under the principle of non-refoulement⁵⁰. Moreover, the principle of the best interests of the child guides the interpretation of a state's obligations under the Refugee Convention or under the principle of non-refoulement in international law, widening the scope of protection⁵¹. Due to the extensive scope of the principle of the best interests of the child, it can be argued that, in cases where a state is a party to both the CRC and the Refugee Convention, Article 3 of the CRC should be understood as providing the primary foundation for international protection in claims concerning children. Consequently, the principle should not be interpreted as offering solely complementary protection to the Refugee Convention⁵².

The right to life, survival and development as the third general principle is provided by Article 6 of the CRC and, besides the establishment of the inherent right to life of every child, it also obliges states to ensure "the maximum extent possible the survival and development of the child"⁵³. It is important to note that the Committee on the Rights of the Child requires for a qualitative dimension to be added to the term "development", thus, not only implying physical health, but also mental, emotional, cognitive, social and cultural development⁵⁴.

The fourth and final general principle of the CRC concerns the views of the child and is enshrined in Article 12. It obliges states to assure to the child who is capable of forming his or her own views "the right to express those views freely in all matters affecting the child, the views of the child given due weight in accordance with the age and maturity of the child"⁵⁵.

Therefore, Article 12 of the CRC establishes the shift from viewing children as passive recipients of care, but recognizing them as individuals with the right to be heard and have their opinions be considered seriously. In addition, it acknowledges the growth and evolving capacities of every child, assigning more importance to their expressed views as they develop and become older. As a result, children are recognized as active participants in the matters affecting them and their opinions regarding these matters are given higher importance, including any judicial and administrative proceedings, where national authorities are also

⁵⁰ Pobjoy, Jason M. "THE BEST INTERESTS OF THE CHILD PRINCIPLE AS AN INDEPENDENT SOURCE OF INTERNATIONAL PROTECTION." *The International and Comparative Law Quarterly* 64, no. 2 (2015): 327–63. <http://www.jstor.org/stable/24760683>.

⁵¹ J. Bhabha and W. Young, "Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New US Guidelines" (1999) 11(1) *IJRL* 84, 97-8.

⁵² G.S. Goodwin-Gill, "The United Nations Convention on the Rights of the Child and its Application to Child Refugee Status Determination and Asylum Processes: Introduction" (2012) 26(3) *Journal of Immigration Asylum and Nationality Law* 226, 228-9.

⁵³ Convention on the Rights of the Child, United Nations, adopted by General Assembly resolution 44/25 on 20 November 1989, entry into force on 2 September 1990.

⁵⁴ United Nations, Committee on the Rights of the Child, *supra* note 46.

⁵⁵ Convention on the Rights of the Child, United Nations, *supra* note 47.

obliged to provide the opportunity for a child to be heard through a representative or an appropriate body, if necessary.

Although Article 44 of the CRC obliges states to accept the duty to submit regular reports to the Committee on the Rights of the Child on the measures they have adopted to give effect to the children's rights provided by the CRC and on the progress that has been made in the enjoyment of those rights in their jurisdiction, it is imperative to acknowledge that states may still underreport or not report violations of those rights at all. Thus, a correct assessment of all violations of children's rights is challenged by the lack of accurate reporting, the lack of transparency and accountability of states in their reports, as well as the lack of resources for deploying effective reporting mechanisms and conducting extensive data collection.

The UN Committee on the Rights of the Child lacks authority to sanction countries that fail to adequately implement the treaty and instead relies on moral pressure applied by civil societies and other state actors to foster adherence to international norms.⁵⁶

Since the UN Committee on the Rights of the Child does not have the authority to enforce its decisions with the use of economic sanctions or trade limitations, and moral persuasion and diplomatic pressure are unreliable for holding national authorities accountable for their violations of the CRC, there is a need for stronger enforcement mechanisms to ensure greater compliance with the CRC.

In its general commentary on the treatment of unaccompanied and separated children outside their country of origin, the UN Committee on the Rights of the Child has also recognized the 1951 Refugee Convention as the safeguard for the rights of unaccompanied or separated children that have been recognized as refugees and granted asylum. In addition, the commentary issued by the UN Committee also establishes the right of unaccompanied or separated children, who have not met the requirements for granting refugee status under the 1951 Refugee Convention, to benefit from complementary protection to the extent determined by their protection needs.⁵⁷

In conclusion, the four general principles of the UN Convention on the Rights of the Child encompass non-discrimination, the best interests of the child, the right to life, survival and development, the views of the child, and form the foundation of a comprehensive legal framework that safeguards and promotes the well-being and development of children worldwide, including migrant minors in detention. Although the effectiveness of the implementation of these principles faces multiple challenges, such as underreporting by the respective authorities and a lack of enforcement mechanisms, the principles collectively guide states, their detention facilities and other relevant institutions in upholding the human dignity and rights of every child, prioritizing their particular vulnerability and best interests in all decision-making processes, ensuring their physical and cognitive development, and recognizing their evolving capacities.

⁵⁶ Libal, Kathryn, Susan C. Mapp, Eileen Ihrig, and Aviva Ron. "The United Nations Convention on the Rights of the Child: Children Can Wait No Longer for Their Rights." *Social Work* 56, no. 4 (2011): 367–70. <http://www.jstor.org/stable/23719876>.

⁵⁷ United Nations Committee on the Rights of the Child, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, CRC/GC/2005/6, 1 September 2005.

2.2. The 1951 Refugee Convention and its 1967 Protocol

A comprehensive understanding of the legal and ethical foundations upon which the 1951 Refugee Convention and its 1967 Protocol for refugees were developed is crucial for effective interpretation and implementation of the safeguards provided within. The 1951 Refugee Convention establishes a unified legal framework for refugee protection, irrespective of the specific circumstances the refugees are subjected to. In this subchapter, the historical context that spearheaded the development of the 1951 Refugee Convention will be outlined, as well as the foundational principles and definitions that form the core purpose of the Convention, namely the principle of non-refoulement and definitions of migrants and asylum-seekers, which also secure the rights of migrant minors.

The beginnings of the development of the modern refugee law can be marked back to the 1920s due to countries in the 'New World' imposing restrictions on immigration. During and after the First World War, international migration was significantly burdened by the adoption of passport controls and immigration restrictions by multiple countries. For instance, a quota was established by the United States authorities, determining the total number of immigrants that can be accepted, even specifying their ethnic origin.⁵⁸ In fact, refugees were the most vulnerable group affected by these immigration restrictions. These people who were forced to leave their home countries due to a state of war or persecution included over one million Russians, 300,000 Magyars, over one million Greeks, as well as 500,000 refugees escaping Nazi Germany and 400,000 Spanish Republicans in the 1930s⁵⁹. It is essential to highlight that the priority behind the development of the modern refugee law was an effort to protect those who were forced to flee their home countries, including the provision of legal status that would assist them in forming and integrating their lives abroad.

The development of legal tradition throughout the interwar years was the source of inspiration for the drafters of the 1951 Refugee Convention, with the 1922 Nansen Passport System marking the beginning of the legal foundation for the drafting process. Rather than being the effect brought about by a comprehensive approach to refugee issues, this legal foundation served more as an *ad hoc* method to defining key principles that were consequently embodied by the 1951 Refugee Convention and the establishment of the United Nations High Commissioner for Refugees. These key principles established refugees as a distinct category of migrants with the right to special attention and aid, and prohibited states from sending back refugees to the state where they face the risk of persecution.⁶⁰ Specifically, the special attention needed includes the right not to be expelled to the state from which the refugee has fled to escape being subjected to serious threats to his or her life or freedom, i.e., the principle of non-refoulement.

Article 1 of the Refugee Convention defines a refugee as

any person who [...] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is

⁵⁸ John Torpey, *The invention of the passport. Surveillance, Citizenship and the State* (Cambridge, New York: Cambridge University Press, 2000)

⁵⁹ Claudena M. Skran, "The Emergence of a Regime", *Refugees in Inter-War Europe: The Emergence of a Regime* (Oxford: Oxford University press, 2011)

⁶⁰ Claudena M. Skran, "Part One Background, Historical Development of International Refugee Law", *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford: Oxford University Press, 2011)

outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁶¹

This definition of the refugee status reiterates the protection for the principle of non-refoulement. Since there are many cases where a person is not eligible for the acquisition of refugee status, subsidiary protection status has been established for additional protection for asylum seekers. The UN High Commissioner for Refugees has defined an asylum-seeker in its glossary as

[...] any person who is seeking international protection. In some countries, it is used as a legal term referring to a person who has applied for refugee status or a complementary international protection status and has not yet received a final decision on their claim. [...] Not every asylum-seeker will ultimately be recognized as a refugee, but every refugee is initially an asylum seeker.⁶²

It is imperative to note that the subsidiary protection status that applies to asylum-seekers also prohibits authorities to send the person back to their home country, if their claim for asylum has not yet been examined in a fair procedure. In addition, certain minimum standards of treatment pertain to an asylum-seeker whose status determination process is still pending.⁶³ The ECtHR has also accepted that, if the individual does not yet have his or her status declared and even if the applicant has not expressly requested asylum, the state is not exempt from fulfilling its obligations under Article 3 of the ECHR.⁶⁴ Thus, the state is still obliged to ensure the necessary measures in order to fulfill its obligations under Article 3 of the ECHR, regardless of the lack of an explicit request for asylum or the lack of evidence of the individual's status.

In regards to safeguards which are of special importance to children, Article 22 of the 1951 Refugee Convention obliges the contracting states to grant the same treatment as nationals in primary education, and treatment at least as favorable as that given to non-refugee aliens in secondary education⁶⁵. This requirement also pertains to the right to development enshrined in Article 6 of the CRC, as the specific vulnerabilities of children require education in a safe and nurturing environment during their critical stages of development. In addition, the Convention also recognizes the importance of refugee family unification, as separation from family members can cause emotional distress to children.

In conclusion, a thorough understanding of the historical development of the 1951 Refugee Convention and its foundational principles is crucial for its effective implementation, particularly in safeguarding the rights of refugee and asylum-seeking children and their specific vulnerabilities. The principle of non-refoulement, the definition of the refugee status and subsidiary protection recognizes the need for special attention and humanitarian assistance for refugees and asylum-seekers, protecting migrant minors from being deported back to the country which they fled due to risk of ill-treatment. In addition, the Convention provides

⁶¹ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <https://www.refworld.org/docid/3be01b964.html> [accessed 29 October 2023]

⁶² UN High Commissioner for Refugees, *UNHCR master glossary of terms*, 2023, available at: <https://www.unhcr.org/glossary> [accessed 2 November 2023]

⁶³ *Ibid.*

⁶⁴ *Hirsi Jamaa v. Italy*, ECtHR, 27765/09, judgment of 23 February 2012, para. 133.

⁶⁵ UN General Assembly, *supra* note 61.

specific protections that pertain to the need for education for migrant minors, as well as to family unification, addressing the particular vulnerability of children.

3. VIOLATIONS OF ARTICLE 3 OF THE ECHR IN THE DETENTION CONDITIONS OF MIGRANT MINORS IN THE ECtHR CASE LAW

The child's extreme vulnerability stands as the decisive factor, taking precedence over any considerations linked to the child's migration status, as reiterated by many judgments of the ECtHR. The compliance of states with this general principle is assessed when determining their success in bearing the positive obligation to safeguard migrant minors in detention under Article 3 of the ECHR.

Children have specific needs that are related in particular to their age and lack of independence, but also to their asylum-seeker status. The [European] Court [of Human Rights] has also observed that the Convention on the Rights of the Child encourages States to take appropriate measures to ensure that a child who is seeking to obtain refugee status enjoys protection and humanitarian assistance, whether the child is alone or accompanied by his or her parents ...⁶⁶

The special vulnerability of the child and the protection necessary arises from the children's young age, lack of independence, and asylum-seeker or migrant status. Since children are in the process of physical, cognitive, and emotional development, they may lack the ability to comprehend the consequences of their actions. Thus, the ECtHR has acknowledged that these evolving capacities require special care and protection. In addition, the children's lack of independence implies that their well-being is dependent on the care provided by their parents or guardians, making them more vulnerable to ill-treatment or exploitation. With regard to the vulnerability of the child that arises from his or her asylum-seeker or migrant status, the process of migration, particularly when it involves fleeing home due to conflict or persecution, can significantly impact the well-being of the child. During migration, migrant minors may suffer from separation from family members, stress and anxiety of displacement, exposure to violence and other forms of ill-treatment, all of which can lead to physical and psychological trauma, and, therefore, require special protection measures. The necessary measures may take the form of health care, educational opportunities, psychological assistance, legal representation, adequate reception conditions that consider the unique vulnerabilities of migrant minors.

Due to the child's extreme vulnerability, states are obliged to undertake the necessary measures to afford suitable protection and humanitarian assistance to asylum-seeking children, irrespective of their accompanied or unaccompanied status. Thus, the positive obligation of states to provide migrant minors with protection and the measures necessary for their vulnerabilities is irrespective of whether the children are accompanied by their parents or not. Nevertheless, the Court has acknowledged differences in some specific state obligations depending on whether the child is accompanied by his or her parents or is unaccompanied, and, therefore, case law concerning each group will be analyzed in respective subchapters.

3.1. Positive obligation of states to provide protection and humanitarian assistance

One of the fundamental aspects of ensuring compliance with Article 3 of the ECHR is the positive obligation of states to provide asylum-seeking children with protection and humanitarian assistance, which will be analyzed in this subchapter. This positive obligation is

⁶⁶ *Abdullahi Elmi and Aweys Abubakar v. Malta*, ECtHR, 25794/13 and 28151/13, judgment of 22 November 2016, para. 103

derived from the commitment of parties of the Convention to uphold human dignity and well-being of all individuals as the fundamental human rights principles. Since asylum-seeking children, who have often fled from their home country in which they may face persecution or other forms of endangerment, are categorized as highly vulnerable individuals, the absolute nature of Article 3 of the ECHR obliges states to take adequate measures to ensure that the rights of the vulnerable children are safeguarded, irrespective of the eligibility of their migration status. The vulnerability of the child must be effectively addressed by taking into consideration the child's age and specific needs and providing access to education, health care, legal assistance and representation and psychological support. Thus, failure to provide adequate detention and reception conditions in line with the specific vulnerability of the child, as well as failure to provide access to essential services may expose children to ill-treatment, leading to a violation of their rights under Article 3 of the ECHR.

It is important to note that detaining children in an adult detention center already amounts to a violation of Article 3 of the ECHR, irrespective of the child's accompanying status, due to the conditions of detention inherently lacking adaptation to needs of children.⁶⁷ In addition, the ECtHR has deemed police stations as inappropriate premises for the detention of individuals awaiting the application of administrative measures.⁶⁸ Furthermore, the Court has recognized that detention at an airport that lasts for more than 10 days amounts to inhuman and degrading treatment.⁶⁹ Regarding detention of migrant minors at an airport or at detention centers that are built near an airport, the Court has established that the exposure to the particularly strong noise pollution contributes to a violation of Article 3 of the ECHR due to the children's need for regular periods of outside playtime.⁷⁰

The case of *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*⁷¹ is one of the landmark judgments by the ECtHR in establishing the importance of the child's vulnerability in the assessment of a potential violation of Article 3 of the ECHR. The second applicant's position was deemed as extremely vulnerable due to her young age, the fact that she was an illegal immigrant in a foreign land and the fact that she was unaccompanied by her family from whom she had become separated.⁷² The Court held that the Belgian state had failed its positive obligation under Article 3 of the ECHR by not taking adequate measures to provide the necessary care and protection for the child. The factors that contributed to the violation of Article 3 of the ECHR included the fact that the detention center, which the child was held in for two months, was designed for adults. In fact, the Belgian authorities acknowledged the detention center's lack of adaptation to the child's needs. Besides not assigning anyone to attend to the child during the whole duration of the detention, there were also no measures taken to ensure proper counseling and educational assistance, which the child's vulnerable situation called for. Furthermore, the child was deported to the Democratic Republic of Congo without adequate consideration of her vulnerability and the lack of proper care awaiting her. In addition, the Court also found that the failure of the authorities to inform the mother about her daughter's deportation significantly contributed to the level of distress and anxiety that the mother suffered

⁶⁷ *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, ECtHR, 13178/03, judgment of 12 October 2006, para. 50.

⁶⁸ *Dougoz v. Greece*, ECtHR, 40907/98, judgment of 6 March 2001.

⁶⁹ *Riad and Idiab v. Belgium*, ECtHR, 29787/03 and 29810/03, judgment of 24 January 2008.

⁷⁰ *R.M. and Others v. France*, ECtHR, 33201/11, judgment of 12 July 2016

⁷¹ *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, ECtHR, 13178/03, judgment of 12 October 2006

⁷² *Ibid.*, para. 55.

from over her daughter's detention, reaching the threshold of severity to constitute a violation of Article 3⁷³. The Court also emphasized the legal void in the general law regarding unaccompanied foreign minors. Thus, the detention conditions and deportation of the child amounted to inhuman treatment, leading to a violation of Article 3 of the ECHR.

It can therefore be concluded that the commitment of parties to the ECHR to uphold human dignity and the well-being of all individuals as fundamental human rights principles implies a positive obligation upon states to provide asylum-seeking children with protection and humanitarian assistance. In conclusion, failure of states to provide adequate detention and reception conditions in line with the specific vulnerability of the child, as well as the failure to provide access to essential services, may expose children to inhuman or degrading treatment, leading to a violation of their rights under Article 3 of the ECHR. Satisfactory reception conditions include informing the child's parents about their child's deportation, as well as providing adequate care awaiting the child upon arrival, while satisfactory provision of essential services and favorable detention conditions include appointment of relevant personnel for attending the child, access to counseling and educational assistance in line with the child's developmental stage.

3.2. The case of accompanied children

The ECtHR has repeatedly addressed the relationship between the positive obligation of the state under Article 3 of the ECHR and parental responsibilities concerning migrant minors who had been placed in immigration detention with their parents. In many of its rulings, the Court has highlighted that the fact that the children are accompanied by their parents throughout the duration of their detention is not sufficient to free authorities from their positive obligation to take appropriate measures to ensure protection of the children under Article 3 of the ECHR.⁷⁴ It is also imperative to acknowledge that the absolute nature of Article 3 of the ECHR ensures that the conduct of the accompanying parent is not a decisive factor in the assessment of whether the minimum level of severity has been reached in the treatment of the child to constitute a breach of Article 3 of the ECHR⁷⁵. While not as vulnerable as unaccompanied migrant minors, accompanied children still face specific challenges during their detention, such as their dependence on their parents or other adult guardians. In cases where the accompanying parent or adult guardian faces ill-treatment or is susceptible to other risks, their vulnerability may indirectly impact the well-being of the accompanied minor due to their interdependence. In addition, the anxiety, distress and the presence of any health issues and trauma in the parents or other adult guardians can affect their ability to provide adequate care and protection for their vulnerable children, leaving these responsibilities to the respective authority of the detention facility. Thus, the state is still obliged to take the necessary measures to provide the migrant children with proper education opportunities, health care, protection, psychological supports and other means that are in line with the child's particular vulnerabilities, such as their young

⁷³ *Ibid*, p. 25, paras. 50-59.

⁷⁴ *Muskhadzhiyeva and Others v. Belgium*, ECtHR, 41442/07, judgment of 19 January 2010, paras. 57-58; *Popov v. France*, ECtHR, 39472/07 and 39474/07, judgment of 19 January 2012, para. 91; *R.M. and Others v. France*, ECtHR, 33201/11, judgment of 12 July 2016, para. 71; *M.H. and Others v. Croatia*, ECtHR, 15670/18 and 43115/18, judgment of 18 November 2021, para. 192; *R.R. and Others v. Hungary*, ECtHR, 36037/17, judgment of 2 March 2021, para. 59.

⁷⁵ *R.R. and Others v. France*, ECtHR, 57035/18, judgment of 22 July 2021, para. 70.

age, their pending migration status, any health issues that are present, as well as their specific history of trauma.

The Court's method of assessment in finding a violation of Article 3 of the ECHR in the detention conditions of migrant minors includes the following factors: the children's young age, the duration of the detention and the suitability of the premises with regard to the specific needs of children⁷⁶. Importantly, it must be emphasized that, even a significant reduction of the duration of the detention may not suffice to rule out a violation of Article 3 of the ECHR if there is an extreme lack of suitability of the premises with regard to the specific needs of children. In other words, the quality of the material conditions of detention is of paramount importance, and even a very short detention of a migrant minor may be subject to a violation of Article 3, if the facility and circumstances are grossly unsuitable for the well-being of the child.

For instance, the Court found a violation of Article 3 in the case of *S.F. and Others v. Bulgaria*⁷⁷ due to poor detention conditions, irrespective of the duration of the detention being thirty-two to forty-one hours. The submitted video of evidence by the applicants demonstrated a run-down, unsanitary and overcrowded cell, and was a contributing factor to the violation of Article 3 of the ECHR. In addition, the lack of accessibility of the toilet, leading to urinating on the floor, and other basic needs, such as food and water, all amounted to inhuman and degrading treatment. The Court also reiterated that the absolute nature of Article 3 ensures that an increasing influx of migrants does not exempt the state from its positive obligations under that provision, despite the state of Bulgaria alleging an emergency of such proportions that it was practically impossible for its authorities to ensure minimally decent detention conditions.⁷⁸ Thus, the Court's case law indicates that failure to meet the basic needs of the detainees, such as the need for food, water and accessibility of a toilet, amounts to inhuman and degrading treatment under Article 3 of the ECHR. It can also be concluded that the absolute nature of Article 3 of the ECHR ensures that the protection of individuals from inhuman or degrading treatment is paramount and non-negotiable, irrespective of the challenges faced by the states, such as significant influx of migrants.

In contrast, the satisfaction of the material conditions of the detention facility increases the importance of the duration of the detention in the determination of a violation of Article 3 of the ECHR. Thus, if the detention facility meets the basic standards in terms of hygiene, safety, and general living conditions, a short-term detention may not automatically reach the minimum level of severity required to establish a breach of Article 3.⁷⁹ However, the Court has reiterated in multiple judgments that, in the case of detention lasting for a longer period, the repetition and accumulated nature of mental and emotional assaults from unfavorable conditions of detention would necessarily have adverse consequences for young children,

⁷⁶ *A.B. and Others v. France*, ECtHR, 11593/12, judgment of 12 July 2016, para. 109; *R.M. and Others v. France*, ECtHR, 33201/11, judgment of 12 July 2016, para. 70; *A.M. and Others v. France*, ECtHR, 24587/12, judgment of 12 July 2016, para. 46; *R.C. and V.C. v. France*, ECtHR, 76491/14, judgment of 12 July 2016, para. 34; *R.K. and Others v. France*, ECtHR, 68264/14, judgment of 12 July 2016, para. 66; *M.D. and A.D. v. France*, ECtHR, 57035/18, judgment of 22 July 2021, para. 63; *R.R. and Others v. Hungary*, ECtHR, 36037/17, judgment of 2 March 2021, para. 49.

⁷⁷ *S.F. and Others v. Bulgaria*, ECtHR, 8138/16, judgment of 7 December 2017.

⁷⁸ *Ibid.*

⁷⁹ *A.B. and Others v. France*, ECtHR, 11593/12, judgment of 12 July 2016, para. 114; *R.M. and Others v. France*, ECtHR, 33201/11, judgment of 12 July 2016, para. 75; *M.H. and Others v. Croatia*, ECtHR, 15670/18 and 43115/18, judgment of 18 November 2021, para. 199.

exceeding the relevant threshold of severity required to fall within the scope of Article 3 of the ECHR.⁸⁰

In addition to the children's young age, the duration of the detention and the suitability of the premises with regard to the specific needs of children, the ECtHR also has taken into consideration the children's vulnerability in respect to their health status or their personal history when assessing a potential violation of Article 3 of the ECHR. For instance, in the case of *Muskhadzhiyeva and Others v. Belgium*⁸¹, one of the decisive factors in determining a breach of Article 3 was the children's psychological problems which had been certified by doctors. In addition, the case of *Kanagaratnam and Others v. Belgium*⁸² serves as an example where the children's personal history influenced the Court's decision in finding a violation of Article 3 of the ECHR, namely the fact that the children had experienced a traumatic situation in the country of origin. Another example of the children's personal history increasing their vulnerability and need for special protection under Article 3 is the case of *M.H. and Others v. Croatia*⁸³, where the children had witnessed the death of their sister near the border. This underscores the potential psychological impact of the exposure to traumatic events on children as a relevant consideration in the context of Article 3 of the ECHR. It can therefore be concluded that failure of the state to make the detention conditions accommodating to the medical evidence of the child's health status and to the child's personal history of exposure to traumatic events may lead to a violation of Article 3 of the ECHR.

It is important to note that in some cases concerning detention of accompanied migrant minors adjudicated by the ECtHR, there has been no violation found of Article 3 of the ECHR in respect of the parents, despite the establishment of a violation of Article 3 in respect of the children. For instance, the Court has reasoned that the fact that the parents had not been separated from their children during the detention provided some relief from the feelings of anxiety and frustration that the parents suffered from.⁸⁴ In addition, the failure to meet the minimum level of severity of the ill-treatment of the parent as the applicant in the aforementioned cases was mainly influenced by the continuity of the parent-child relationship as a mitigating factor for the distress caused by detention.⁸⁵ Thus, it is apparent that the Court's evaluation approach for cases concerning detention of accompanied migrant minors recognizes the complexity of family dynamics during detention and indicates that the continuity of the family unit during detention alleviates the severity of the impact that detention carries on the parent's mental well-being, as a result, reducing the risk of a breach of Article 3 of the ECHR.

In contrast, the circumstances of some other cases included a particular vulnerability of the accompanying parent, which led to the Court finding a violation of Article 3 in respect of the accompanying parent.⁸⁶ These circumstances included inadequate provision of food, lack

⁸⁰ *Ibid.*

⁸¹ *Muskhadzhiyeva and Others v. Belgium*, ECtHR, 41442/07, judgment of 19 January 2010, para. 63

⁸² *Kanagaratnam and Others v. Belgium*, ECtHR, 15297/09, judgment of 13 December 2011, para. 67

⁸³ *M.H. and Others v. Croatia*, ECtHR, 15670/18 and 43115/18, judgment of 18 November 2021

⁸⁴ *Muskhadzhiyeva and Others v. Belgium*, ECtHR, 41442/07, judgment of 19 January 2010, para. 66; *Popov v. France*, ECtHR, 39472/07 and 39474/07, judgment of 19 January 2012, para. 105; *M.H. and Others v. Croatia*, ECtHR, 15670/18 and 43115/18, judgment of 18 November 2021, para. 210.

⁸⁵ *Popov v. France*, ECtHR, 39472/07 and 39474/07, judgment of 19 January 2012, para. 104.

⁸⁶ *R.R. and Others v. Hungary*, ECtHR, 36037/17, judgment of 2 March 2021, paras. 55-65; *M.D. and A.D. v. France*, ECtHR, 57035/18, judgment of 22 July 2021, para. 71; *H.M. and Others v. Hungary*, ECtHR, 38967/17, judgment of 2 June 2022, para. 18.

of assessment of special needs, as well as the lack of psychological assistance, which was particularly required due to the presence of elements resembling a prison environment in the detention facility, overcrowding constraints during confinement, as well as constant security checks, which are found to cause anxiety and psychological disturbance to the applicants. The Court has also recognized the special bond between the mother and her infant, and their interactions such as breastfeeding, highlighting the shared emotions between the mother and her baby, which can be intensified by poor detention conditions and are taken into account when assessing whether the treatment of the applicants has exceeded the threshold of severity required by Article 3 of the ECHR. Thus, it is important to emphasize the presence of a high-risk pregnancy as an attributing factor to an accompanying parent's vulnerability due to the requirement of medical attention and repeated complications. It can be therefore concluded that constraints inherent during confinement combined with the presence of a high-risk pregnancy for the applicant and repeated complications can cause anxiety and psychological suffering, amounting to degrading treatment.

In the case of *G.B. and Others v. Turkey*⁸⁷, the Court found a violation of Article 3 of the ECHR in the detention conditions at both Kumkapı and Gaziantep pending deportation from Turkey due to overcrowding in the dormitories, lack of access to outside for fresh air, exposure to cigarette smoke from other detainees, as well as lack of suitable food for children. It is important to note that the fact that the conditions of detention were unfavorable for adults only emphasized their damaging effect to the three children due to their particular vulnerability.⁸⁸ Thus, it can be concluded that the existence of evidence of violation of Article 3 of the ECHR in regards to detention conditions of adults indicates a more extreme level of Article 3 violation in regards to minors in detention.

In conclusion, analysis of the case law of the ECtHR regarding the detention of accompanied migrant minors reveals that the mere presence of parents during detention does not absolve authorities from their positive obligation to ensure adequate care and protection for children under Article 3 of the ECHR. In addition, the absolute nature of Article 3 emphasizes that the conduct of the accompanying parents does not minimize the responsibility of the state to safeguard minors from inhuman or degrading treatment. The Court also recognizes family unification as a mitigating factor for any distress and anxiety that arises in children and their parents during detention. Nevertheless, it also acknowledges the weight of the emotional interdependence between children and their parents in the assessment of whether a violation of Article 3 of the ECHR has occurred, as unfavorable detention conditions for adults exacerbate their damaging impact on the children's well-being.

3.3. The case of unaccompanied children

Unaccompanied migrant minors are considered particularly vulnerable to violations of Article 3 of the ECHR due to several factors. One of these factors is the age and developmental stage of the unaccompanied minors, which requires special care to ensure their physical, emotional and cognitive development, including the provision of an appointed responsible person to attend to these needs. In addition, the lack of presence of adult family members or guardians who provide special protection for unaccompanied migrant minors leads to their increased

⁸⁷ *G.B. and Others v. Turkey*, ECtHR, 4633/15, judgment of 17 October 2019

⁸⁸ *Ibid.*

susceptibility to harm. In fact, the separation from their families constitutes an inherent emotional trauma of unaccompanied migrant minors, exacerbating their vulnerability and increasing their need for health care and psychological assistance. Furthermore, despite having limited understanding of their legal rights, asylum procedures and the complexities of international legal frameworks, unaccompanied migrant minors still possess the right to adequate legal representation and protection, which the state is obliged to ensure for the child. Additional contributing factors to the specific vulnerability of unaccompanied migrant minors include the increased risk of exploitation and discrimination based on their migrant status, leading to further feelings of isolation. Thus, while the suitability of the detention conditions alone may not constitute a breach of Article 3 of the ECHR, the added combination of the aforementioned factors that increase the vulnerability of unaccompanied migrant minors may lead to reaching the threshold of severity required under Article 3 of the ECHR.

The positive obligation of states to provide asylum-seeking children with protection and humanitarian assistance is irrespective of whether the children are accompanied by their parents or are unaccompanied. However, there are recognized differences in some specific state obligations depending on whether children are unaccompanied or accompanied by their parents. For instance, the case of *Rahimi v. Greece*⁸⁹ involved a disagreement revolving around whether the applicant was accompanied by his cousin, N.M., as claimed by the Government, or whether he had not asserted the presence of any relatives, as contended by the applicant. The Court acknowledged the critical nature of the disagreement regarding the applicant's accompanying status, since this status holds crucial implications for the legal obligations under Article 3 of the ECHR. Namely, the state's obligations regarding the treatment of migrant minors may differ based on whether they are accompanied or unaccompanied.

Similarly, in the case of *Abdullahi Elmi and Aweys Abubakar v. Malta*⁹⁰, the Court reiterated the weight of the child's accompanying status in the assessment of whether the treatment of the applicant amounts to a violation of Article 3 of the ECHR. Although the Court found violations in both scenarios in this particular case, determining the extent to which Article 3 of the ECHR was violated still requires the determination of the child's accompanying status. For instance, the Court found that the poor detention conditions, namely overcrowding, lack of light and ventilation, no organized activities and a tense, violent atmosphere, for a period of eight months, had a cumulative effect that amounted to degrading treatment, the severity of which was reinforced by the children's vulnerability due to absence of an accompanying parent or a guardian, as well as their young age and asylum-seeking status.⁹¹ It can therefore be concluded that the ECtHR recognizes in its case law the weight of the child's accompanying status in the assessment of the extent of Article 3 violations. In addition, it is apparent that the nuanced differences in state obligations based on the accompanying status of the children underscore the dual nature of the positive obligation for states to protect and provide humanitarian assistance to asylum-seeking children under Article 3 of the ECHR.

In contrast, in the case of *Moustahi v. France*⁹² the Court found a violation of Article 3 of the ECHR in respect of the treatment of children, while there was no violation of Article 3

⁸⁹ *Rahimi v. Greece*, ECtHR, 8687/08, judgment of 5 April 2011, para. 63.

⁹⁰ *Abdullahi Elmi and Aweys Abubakar v. Malta*, ECtHR, 25794/13 and 28151/13, judgment of 22 November 2016, para. 112.

⁹¹ *Ibid.*

⁹² *Moustahi v. France*, ECtHR, 9347/14, judgment of 25 June 2020, paras. 77-78.

found in regards to the father. While the father had suffered due to the detention and separation from his children, who were unaccompanied at the material time, the Court held that the mitigating factor was the father's awareness that the children would be taken care of by his own mother upon their return.

Due to the increased vulnerability of the unaccompanied status of migrant children, the Court may disregard the duration of the detention if the detention conditions are extremely poor. For instance, in the case of *Rahimi v. Greece*⁹³ the conditions of detention of the child at the Pagani center were described as significantly below the standards prescribed by international law, particularly violating the requirements of Article 3 of the ECHR. The evaluation of the detention conditions at the Pagani center was executed by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in 2009 and it characterized them as unsanitary beyond description, amounting to inhuman and degrading treatment. The factors that contributed to this characterization included inadequate accommodation, hygiene and infrastructure of the facility, all of which were so poor that they undermined the very essence of human dignity. In addition, there had been reports of violent incidents at the Pagani center in 2009 due to the poor conditions of detention, including riots that broke out of a hunger strike, which was initiated by many detainees with the purpose to persuade the authorities to improve the detention conditions. Thus, the Court disregarded the duration of the detention in this case due to the extremely poor detention conditions amounting to degrading treatment in violation of Article 3 of the ECHR. It can therefore be concluded that the severity of poor conditions of detention can lead to the Court disregarding the duration of the detention, highlighting the well-being of the migrant minors in detention as the highest priority in the assessment of whether a violation of Article 3 has occurred. It is also apparent that the particularly poor detention conditions at the Pagani center has raised concerns for the ECtHR repeatedly, with observations made by non-governmental organizations that there had been no improvement in the detention conditions at the facility in spite of their alarming findings in the past.⁹⁴

In the case of *Sh.D. and Others v. Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia*⁹⁵, the Court found that the detention conditions of three of the applicants, unaccompanied migrant minors from Afghanistan, in various police stations had amounted to degrading treatment and, therefore, led to a violation by Greece of Article 3 of the ECHR. One of the factors that accumulated to a violation of Article 3 were features at the police stations that were liable to give those detained there a feeling of solitude, such as no outdoor access to take a walk or have physical exercise, no internal catering arrangements and no radio or television to allow contact with the outside world. Thus, the detention conditions were likely to cause in the unaccompanied migrant minors feelings of isolation from the outside world, with potentially negative impact on their physical and mental well-being, amounting to degrading treatment.⁹⁶ It can therefore be concluded that adequate detention conditions of migrant minors must ensure contact with the outside world through outdoor access for taking

⁹³ *Rahimi v. Greece*, ECtHR, 8687/08, judgment of 5 April 2011, paras. 85-86.

⁹⁴ *Mahmundi and Others v. Greece*, ECtHR, 14902/10, judgment of 31 July 2012

⁹⁵ *Sh.D. and Others v. Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia*, ECtHR, 14165/16, judgment of 13 June 2019

⁹⁶ *Ibid.*

walks or for opportunities of physical exercise, as well as through the presence of radio or television.

The case of *H.A. and Others v. Greece*⁹⁷ further illustrates the weight that a child's feelings of isolation from the outside world carries in the Court's assessment of whether a violation of Article 3 of the ECHR has occurred in the detention conditions of migrant minors. It found that the detention conditions in the police stations amounted to degrading treatment due to the absence of a courtyard for walks or physical exercise, no catering facility, no radio or television for communication with the outside world, in combination with lack of the detention facility's suitability for lengthy periods of imprisonment.⁹⁸ Thus, it is apparent in the Court's case law that ensuring access to the outside world through outdoor access for walks or physical exercise and through radio or television communication is imperative for reducing feelings of isolation for unaccompanied migrant minors in detention. The failure of states to provide the aforementioned necessary measures amounts to degrading treatment of minors under Article 3 of the ECHR, since the unaccompanied status of a minor increases the risk of feelings of isolation from the outside world.

In conclusion, analysis of rulings of the ECtHR regarding cases of unaccompanied migrant minors in detention reveal the various vulnerabilities that arise from their age, separation from family, lack of independence, migrant or asylum-seeker status, as well as limited legal understanding and increased risk of exploitation and discrimination. These vulnerabilities require special care by states to ensure the physical, emotional and cognitive development of unaccompanied minors in detention. The weight of the child's accompanying status is evident in the Court's assessments, impacting the level of Article 3 violation determined by the Court. The unaccompanied status of a minor requires special attention to mitigate feelings of isolation from the outside world by providing outdoor access for walks or physical exercise and access to radio or television communication, the absence of which amounts to degrading treatment. The Court's case law recognizes the well-being of unaccompanied migrant minors as the highest priority during their detention, which obliges states to provide comprehensive protection and humanitarian assistance, reinforcing their commitment to uphold human dignity as the foundational principle of the ECHR.

⁹⁷ *H.A. and Others v. Greece*, ECtHR, 19951/16, judgment of 28 February 2019

⁹⁸ *Ibid.*

CONCLUSION

The commitment of the parties of the ECHR to uphold human dignity and well-being of all individuals as the fundamental human rights principles obliges them to fulfill the positive obligation under Article 3 of the ECHR to provide asylum-seeking children with protection and humanitarian assistance. These obligations are established by the ECHR, the CRC, and the 1951 Refugee Convention. When determining violations of Article 3 of the ECHR, the child's extreme vulnerability stands as the decisive factor and must take precedence over any considerations that are related to the child's migration status.

The purpose of the thesis was to determine the extent of the violations of Article 3 of the ECHR in the detention conditions for migrant minors and establish the contributing factors to these violations, both of which were fulfilled through a comprehensive analysis of the relevant ECtHR case law.

The state must ensure the physical, mental, emotional, cognitive, social and cultural development of the child, particularly during detention due to their vulnerable asylum-seeking or refugee status. The compliance of states with the aforementioned principles is evaluated by analyzing the quality of the measures taken and their suitability for children's needs. The necessary measures are access to health care, educational opportunities, psychological assistance, legal representation and assistance, adequate reception and detention conditions that address the child's specific vulnerabilities and personal history.

The fact that the migrant minor is accompanied by parents throughout the duration of their detention is not sufficient to exempt the states from their positive obligation to take appropriate measures to ensure protection of the children under Article 3 of the ECHR. In addition, the absolute nature of Article 3 ensures that the conduct of the accompanying parent is not a decisive factor in the determination of whether the ill-treatment of their child has reached the minimum level of severity to fall within the scope of Article 3. The susceptibility to ill-treatment or other risks of the accompanying parent or adult guardian may indirectly impact the well-being of the accompanied minor due to their interdependence, since the presence of any health issues and emotional trauma in the accompanying parent can impede their ability to attend to their child and provide the necessary care and protection.

The ECtHR takes into consideration the following factors in the evaluation method to assess whether a violation of Article 3 of the ECHR in the detention conditions of migrant minors has occurred: the children's young age, the duration of the detention and the suitability of the premises with regard to the specific needs of children. In cases of extreme lack of suitability of the premises for children, even a significant reduction of the duration of the detention may not suffice to rule out a violation of Article 3. In contrast, satisfactory material conditions of detention increase the weight of the duration of the detention in the determination of a violation of Article 3. However, the cumulative nature of unfavorable conditions of detention in cases of detention lasting for a longer period would necessarily have adverse consequences for young children, exceeding the relevant threshold of severity required to fall within the scope of Article 3 of the ECHR.

The failure of states to meet the basic needs of migrant minors in detention, such as the need for food suitable for children, water and accessibility of a toilet, amounts to inhuman and degrading treatment. It is also important to note that the Court's evaluation approach for cases concerning detention of migrant minors recognizes the complexity and interdependence of

family dynamics. In fact, the continuity of the family unit during detention decreases the severity of the negative effects of detention on migrant minors, thus, mitigating the risk of a violation of Article 3 of the ECHR.

Unaccompanied migrant minors are considered particularly vulnerable to violations of Article 3 of the ECHR, one of the contributing factors being the lack of presence of adult family members or guardians who provide special protection for unaccompanied migrant minors. The separation from family members constitutes an inherent emotional trauma in the unaccompanied migrant minor in detention. The Court has also acknowledged that the state's positive obligations regarding the treatment of migrant minors in detention may differ based on their accompanying status, the lack of an accompanying parent only exacerbating the low quality of detention conditions.

With respect to unaccompanied migrant minors in detention, the Court may disregard the duration of the detention in the assessment of a potential violation of Article 3 of the ECHR in cases where the detention conditions are extremely poor, underscoring the well-being of migrant minors as the highest priority during their detention. In addition, unaccompanied migrant minors are more susceptible to feelings of isolation from the outside world during detention, and, must therefore be provided by the detention facility with outdoor access, as well as radio or television communication. The failure of states to provide the aforementioned measures amounts to degrading treatment of migrant minors under Article 3 of the ECHR.

For further research, the author could explore the legal void at national levels in respect to regulation of detention conditions of migrant minors, as well as examine any developments in the changing policies and practices in the detention conditions. The author could also further the research by exploring the limitations that the rights of children to their privacy impose on the types and amount of data that can be collected and reported by states. Potential solutions for enforcement and monitoring mechanisms for determining the extent of underreporting and deploying preventive measures by states could also be explored.

BIBLIOGRAPHY

Primary sources

Legislation

1. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entry into force 26 June 1987
2. Convention on the Rights of the Child, United Nations, adopted by General Assembly resolution 44/25 on 20 November 1989, entry into force on 2 September 1990.
3. Convention on the Rights of the Child, United Nations, adopted by General Assembly resolution 44/25 on 20 November 1989, entry into force on 2 September 1990.
4. Convention Relating to the Status of Refugees, UN General Assembly, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <https://www.refworld.org/docid/3be01b964.html> [accessed 29 October 2023]
5. European Convention on Human Rights, Council of Europe, F-67075 Strasbourg Cedex, 1 June 2010, p. 7. Available on: https://www.echr.coe.int/documents/convention_eng.pdf. Accessed September 12, 2023.

Case law

1. *A. and Others v. the United Kingdom* [GC], ECtHR, 3455/05, 2009.
2. *A. v. the Netherlands*, ECtHR, no. 4900/06, 20 July 2010.
3. *A.B. and Others v. France*, ECtHR, 11593/12, judgment of 12 July 2016.
4. *A.M. and Others v. France*, ECtHR, 24587/12, judgment of 12 July 2016.
5. *Abdullahi Elmi and Aweys Abubakar v. Malta*, ECtHR, 25794/13 and 28151/13, judgment of 22 November 2016.
6. *Aksoy v. Turkey*, ECtHR, no. 21987/93, 18 December 1996.
7. *Belousov v. Ukraine*, no. 4494/07, ECtHR, 7 November 2013.
8. *Dougoz v. Greece*, ECtHR, 40907/98, judgment of 6 March 2001.
9. *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], ECtHR, 39630/09, 2012.
10. *Florea v. Romania*, ECtHR, no. 37186/03, 14 September 2010.
11. *G.B. and Others v. Turkey*, ECtHR, 4633/15, judgment of 17 October 2019.
12. *Gäfgen v. Germany* [GC], ECtHR, 22978/05, 2010.
13. *H.A. and Others v. Greece*, ECtHR, 19951/16, judgment of 28 February 2019.
14. *H.M. and Others v. Hungary*, ECtHR, 38967/17, judgment of 2 June 2022.
15. *Hirsi Jamaa v. Italy*, ECtHR, 27765/09, judgment of 23 February 2012.
16. *Ireland v. The United Kingdom*, ECtHR, 5310/71, judgment of 20 March 2018.
17. *Jalloh v. Germany* [GC], ECtHR, no. 54810/00, 11 July 2006.
18. *Kanagaratnam and Others v. Belgium*, ECtHR, 15297/09, judgment of 13 December 2011.
19. *Kudła v. Poland* [GC], ECtHR, no. 30210/96, 26 October 2000.
20. *M.D. and A.D. v. France*, ECtHR, 57035/18, judgment of 22 July 2021.
21. *M.H. and Others v. Croatia*, ECtHR, 15670/18 and 43115/18, judgment of 18 November 2021.

22. *Mahmundi and Others v. Greece*, ECtHR, 14902/10, judgment of 31 July 2012.
23. *Makhmudzhan Ergashev v. Russia*, no. 49747/11, 16 October 2012.
24. *Mocanu and Others v. Romania* [GC], ECtHR, 10865/09 and 2 others, 2014 (extracts).
25. *Mouisel v. France*, ECtHR, no. 67263/01, 14 November 2002.
26. *Moustahi v. France*, ECtHR, 9347/14, judgment of 25 June 2020.
27. *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, ECtHR, 13178/03, judgment of 12 October 2006.
28. *Muskhadzhiyeva and Others v. Belgium*, ECtHR, 41442/07, judgment of 19 January 2010.
29. *N v. United Kingdom*, ECtHR [GC], 27 May 2008.
30. *Naumenko v. Ukraine*, ECtHR, no. 42023/98, 10 February 2004.
31. *Öcalan v. Turkey*, ECtHR, 12 March 2003, no. 46221/99.
32. *Popov v. France*, ECtHR, 39472/07 and 39474/07, judgment of 19 January 2012.
33. *Pretty v. the United Kingdom*, ECtHR, no. 2346/02, 29 April 2002.
34. *Price v. the United Kingdom*, ECtHR, no. 33394/96, 10 July 2001.
35. *R.C. and V.C. v. France*, ECtHR, 76491/14, judgment of 12 July 2016.
36. *R.K. and Others v. France*, ECtHR, 68264/14, judgment of 12 July 2016.
37. *R.M. and Others v. France*, ECtHR, 33201/11, judgment of 12 July 2016.
38. *R.R. and Others v. France*, ECtHR, 57035/18, judgment of 22 July 2021.
39. *R.R. and Others v. Hungary*, ECtHR, 36037/17, judgment of 2 March 2021.
40. *Rahimi v. Greece*, ECtHR, 8687/08, judgment of 5 April 2011.
41. *Ramirez Sanchez v. France* [GC], ECtHR, 59450/00, 2006-IX.
42. *Riad and Idiab v. Belgium*, ECtHR, 29787/03 and 29810/03, judgment of 24 January 2008.
43. *S.F. and Others v. Bulgaria*, ECtHR, 8138/16, judgment of 7 December 2017.
44. *Saadi v. Italy* [GC], ECtHR, no. 37201/06, 28 February 2008.
45. *Selmouni v. France* [GC], ECtHR, no. 25803/94, 28 July 1999.
46. *Sh.D. and Others v. Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia*, ECtHR, 14165/16, judgment of 13 June 2019.
47. *Soering v. the United Kingdom*, ECtHR, no. 14038/88, 7 July 1989.
48. The Greek Case, EComHR, report of 5 November 1969, Yearbook 12 (1969).
49. *Tyrer v. United Kingdom*, ECtHR, 5856/72, judgment of 25 April 1978.
50. *Vilvarajah and Others v. the United Kingdom*, ECtHR, nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, 30 October 1991.
51. *Z and Others v. the United Kingdom* [GC], ECtHR, 29392/95, 2001-V.

Official documents

1. Statement on Hooding, Istanbul Protocol, submitted to the United Nations High Commissioner for Human Rights, 9 August 1999. Available on: <https://irct.org/istanbul-protocol/statement-on-hooding>
2. United Nations Committee on the Rights of the Child, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, CRC/GC/2005/6, 1 September 2005.

Secondary sources

Books

1. Bates Ed, "The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights" (Oxford: Oxford University Press, 2010), p. 26.
2. De Weck Fanny. "Non-Refoulement under the European Convention on Human Rights and the UN Convention Against Torture: The Assessment of Individual Complaints by the European Court of Human Rights under Article 3 ECHR and the United Nations Committee Against Torture under Article 3 CAT" (Leiden: BRILL, 2016) Accessed October 9, 2023. ProQuest Ebook Central. p. 142.
3. European Court of Human Rights, "Guide on Article 3 of the Convention - Prohibition of torture" (Council of Europe/European Court of Human Rights, 2022), https://www.echr.coe.int/documents/d/echr/Guide_Art_3_ENG
4. Greer Steven, "The margin of appreciation: interpretation and discretion under the European Convention on Human Rights" (Council of Europe: Strasbourg, 2000), p. 5.
5. Long Debra, "Guide to Jurisprudence on Torture and Ill-treatment: Article 3 of the European Convention for the Protection of Human Rights" (Association for the Prevention of Torture: Geneva, 2002), https://www.files.ethz.ch/isn/16023/Guide%20to%20Jurisprudence%20on%20Torture_E.pdf
6. Morawa Alexander and Nicole Bürli, Peter Coenen, Laura Ausserladscheider Jonas, "Article 3 of the European Convention on Human Rights: A Practitioner's Handbook" (Geneva: World Organisation Against Torture (OMCT), 2014).
7. Torpey John, *The invention of the passport. Surveillance, Citizenship and the State* (Cambridge, New York: Cambridge University Press, 2000)

Articles

1. Bhabha J. and W. Young, "Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New US Guidelines" (1999) 11(1) *IJRL* 84, 97-8.
2. Callewaert J., "Is there a Margin of Appreciation in the Application of Articles 2, 3 and 4 of the Convention?" (1998) 19 *Human Rights Law Journal* 6, 6-9.
3. Cohen C.P., "The Human Rights of Children," 12 *Capital University Law Review* (1983).
4. Cohen, C.P. "UNITED NATIONS: CONVENTION ON THE RIGHTS OF THE CHILD." *International Legal Materials* 28, no. 6 (1989): 1448-76. <http://www.jstor.org/stable/20693385>.
5. Goodwin-Gill G.S., "The United Nations Convention on the Rights of the Child and its Application to Child Refugee Status Determination and Asylum Processes: Introduction" (2012) 26(3) *Journal of Immigration Asylum and Nationality Law* 226, 228-9.
6. Libal, Kathryn, Susan C. Mapp, Eileen Ihrig, and Aviva Ron. "The United Nations Convention on the Rights of the Child: Children Can Wait No Longer for Their Rights." *Social Work* 56, no. 4 (2011): 367-70. <http://www.jstor.org/stable/23719876>.

7. Macdonald R.J., "The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights", in Anon (ed), *International Law at the Time of its Codification, Essays in Honour of Judge Roberto Ago* (Giuffrè, Milan 1987) 187-208, 192.
8. Palmer Stephanie. "A Wrong Turning: Article 3 ECHR and Proportionality." *The Cambridge Law Journal* 65, no. 2 (2006): 438-51. Accessed October 3, 2023. <http://www.jstor.org/stable/4509209>.
9. Pobjoy, Jason M. "THE BEST INTERESTS OF THE CHILD PRINCIPLE AS AN INDEPENDENT SOURCE OF INTERNATIONAL PROTECTION." *The International and Comparative Law Quarterly* 64, no. 2 (2015): 327-63. <http://www.jstor.org/stable/24760683>.
10. Skran Claudena M., "Part One Background, Historical Development of International Refugee Law", *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford: Oxford University Press, 2011)
11. Skran Claudena M., "The Emergence of a Regime", *Refugees in Inter-War Europe: The Emergence of a Regime* (Oxford: Oxford University press, 2011)

Websites

1. UN High Commissioner for Refugees, *UNHCR master glossary of terms*, 2023, available at: <https://www.unhcr.org/glossary> [accessed 2 November 2023].
2. United Nations, Committee on the Rights of the Child, "Background to the Convention", available on: <https://www.ohchr.org/en/treaty-bodies/crc/background-convention> [accessed 2 November 2023]