

## **REFOULEMENT AT THE BORDER UNDERMINES THE BEST INTEREST OF THE CHILD: PRELIMINARY REMARKS**

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### *1. – Introduction*

Migration is a complex phenomenon composed by multiple intervening elements, and unfolded in diverse phases across time and space. The first critical point in the migratory process is access to a new territory. Detention and retention at the border of this new territory relate to the first stage for those who are to be considered migrants. The lack of clear legal pathways and the externalization of border controls are responsible for the majority of human rights violations. According to Article 2 of the 1997 Resolution of the Council on Unaccompanied Minors, the European Union ('EU') demands to stop illegal human trafficking.<sup>1</sup> However, the Resolution is not

<sup>1</sup> Council Resolution of 26 June 1997 on Unaccompanied Minors Who Are Nationals of Third Countries, 18 March 1998, 97/C 221/03. Art. 2. See also, Council framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography, *considerandum* (2); European Commission, "Towards an EU Strategy on the Rights of the Child - Preliminary inventory

binding on all Member States of the European Union and does not sufficiently protect the vulnerability of minors, as it allows and authorizes the rejection of minors and their repatriation if there are guarantees in the country of origin.

As a primary consideration, child entry and residence should be taken in the framework of appropriate mechanisms and procedures in the child's best interests.<sup>2</sup> At the border, and without any assessment of their age, minors can also be rejected, under the condition of family reunification in their country of origin, or may be considered simply as irregular migrants, without any age discrimination.

This contribution takes into account the decision of the European Court of Human Rights ('ECtHR') about the *refoulement*<sup>3</sup> at the border and the indiscriminate expulsion of minors, which is put into effect disregarding the best interests of the minor as provided for by Article 3 of United Nations Convention on the Rights of the Child ('UNCRC'), together with the provisions set by Article 24 (2) of EU Charter of Fundamental Rights. The latter applies to the entry requirements of the EU asylum *acquis* related to children. It establishes that in all actions relating to minors, public authorities or private institutions of EU Member States ought to "...ensure that the best interests of the child are a primary consideration". Access to the territory of a Member State by irregular migrant minors is dealt with in Article 8 of the European Convention on Human Rights ('ECHR'), which guarantees the right to protect private and family life. Article 8 is often referred to in cases involving the expulsion of children who would otherwise have been assessed as not in need of international protection, including subsidiary protection. Violations under Article 8 have been found in cases involving minors, as forced separation from close family members could have an acute impact on their education, social and emotional stability and identity.

By using interpretative approaches that focus on the positive obligations inherent in the ECHR provisions, the ECtHR has developed a large body of case-law dealing with children's rights. In this chapter, a case concerning Italy and Greece is analysed,<sup>4</sup> on an illegal practice of *refoulement* along the Hellenic coast to potential asy-

of EU actions affecting children's rights", 31 July 2006, para. 2.

<sup>2</sup> POBJOY, *The Child in International Refugee Law*, Cambridge, 2017, p. 46 ff.

<sup>3</sup> *Refoulement* is the act of forcing a refugee or asylum seeker to return to a country or territory where he or she is likely to face persecution.

<sup>4</sup> European Court of Human Rights, *Sharifi et al. v. Italy and Greece*, Application No 16643/09, Judgment of 21 October 2014.

lum seekers from Afghanistan in 2009. The analysis will cover also a case concerning Spain,<sup>5</sup> dealing with the immediate return to Morocco of sub/Saharan migrants who attempted on 13 August 2014 to enter Spanish territory illegally by scaling the fences that surround the North African city of Melilla.

Thus, this chapter focuses on first entry immigration and subsequent expulsion of minors not in accordance with the best interest of the child. It is set to compare two EU Mediterranean frontier countries (Spain and Italy) taking into account ECtHR rulings, and providing a broader perspective at similar cases in Europe. An examination of Spanish and Italian legal provisions and practices regarding rejections will be made to address the question of whether or not the policy of border control prevails upon that of protection to minors.

## 2. – *Setting the Context*

The reception and protection of unaccompanied migrant minors ('UMM') has been a subject of growing interest and debate within the European Union. In general terms, the protection of UMM lacks of a legal conceptualization of them as a separate category and, thus, of political representation. The EU legal framework regarding unaccompanied juvenile migration was developed in 1997 with the adoption of the resolution on reception, stay, and return (or asylum procedure) of minors. Yet, when the legal framework comes to practical developments, individual States are primarily responsible for the protection of children's human rights and, consequently, the effective realization of the rights of children depends on policies enacted by the governments of those Member States.<sup>6</sup> This pressing issue has reached in some situations the level of social emergency.

In the context of the ongoing migration crisis, the number of applications for international protection presented by unaccompanied foreign minors has been conspicuous. 30,000 children, of which 12,700 were unaccompanied or separated children, arrived in Europe in 2018.<sup>7</sup> In 2016, there had been 63,300 migrant children, a

<sup>5</sup> Id., *N.D. and N.T. v. Spain*, Applications Nos. 8675/15 and 8697/15, Judgment of 3 October 2017.

<sup>6</sup> ALAKBAROVA, "Lack of Opportunities and Family Pressures Drive Unaccompanied Minor Migration from Albania to Italy", *The Online Journal of the Migration Policy Institute*, 18 July 2019, p. 5 ff.

<sup>7</sup> United Nations Children's Fund (UNICEF), *Latest statistics and graphics on refugee and migrant children*, 2019, available at: <<https://www.unicef.org/eca/emergencies/latest-statistics-and-graphics-refugee-and-migrant-children>>.

number lower by about a third compared to 2015<sup>8</sup>. However, this figure represented almost five times the annual average for the 2008-2013 period of around 12,000 per year.<sup>9</sup> Faced with the challenges posed by these developments, new interactions among actors related to migration, asylum and child protection have evolved rapidly at EU level, albeit in different ways.

Given this context, on 12 April 2017 the Commission adopted the Communication on “The protection of children in migration”,<sup>10</sup> addressing the rights and needs of all children on the move, which links migration, asylum and the protection of minors. In addition, it shifted attention from UMM and Unaccompanied and Separated Children (‘UASC’)<sup>11</sup> to cover children who migrate on their own and with their families together with a working document explaining the implementation of the action plan on “unaccompanied migrant minors” (2010-2014).<sup>12</sup> The Communication, in sum, highlighted the needs of both categories regarding accompanied and unaccompanied minors. To prepare targeted actions for the protection of migrant children, there are numerous areas (in particular identification, reception and protection) on which to pay attention. First of all, there is a need to quickly identify children when they arrive in EU soil. This is crucial for the provision of appropriate treatment according to their age and conditions: all children must have immediate access to legal and health care, psychosocial support and to education, regardless of their status (in adequate facilities and in a friendly environment).

While some encouraging improvements have taken place, it is also noticeable that child protection actors (public and private) have left their counterparts (the migratory system) the leading role in managing migrant and refugee children, while providing training, guidance, support and access to services. The migration agents (public and private) have, in turn, adopted concepts relating to children's rights and incorporated them into their practice. In this dichotomy, migration management agencies conduct the game, transporting the issue of migrant minors, accompanied or separated in the migratory narrative. The nature of the partnership is still evolving,

<sup>8</sup> *Ibid.*

<sup>9</sup> UNICEF, *Uprooted. The Growing Crisis for Refugee and Migrant Children*, New York, 2016, p. 21.

<sup>10</sup> European Commission, *Communications on the Protection of Children in Migration*, COM(2017)211 final.

<sup>11</sup> UNHCR/Council of Europe, *Unaccompanied and Separated Asylum-Seeking and Refugee Children turning eighteen: what to celebrate?*, Strasbourg, 2014, p. 7.

<sup>12</sup> European Commission, *Communication from the Commission to the European Parliament and the Council, Action Plan on Unaccompanied Minors (2010-2014)*, 6 May 2010, COM 213 final.

but a new discourse has developed which puts children's rights at the core of migration and asylum policy and practice.

The precise content of the principles and standards stemming from the children's rights may vary at national level, depending on each Member State's legislative system. Nevertheless, the jurisprudence of the Court of Justice of the European Union ('CJEU') and of the ECtHR provides an exhaustive list of these principles and therefore defines the fundamental meaning of the child's best interests, as a common EU value in accordance with Article 3 of the UNCRC.

These principles include the right to life, which implies the right to health, to be heard, to family life and to education; but also the ruling out of arbitrariness by executive powers; the right to impartial treatment and non-discrimination; the integral compliance of fundamental rights; and the equal and fair treatment before the law and the tribunals. Both the Court of Justice and the European Court of Human Rights confirmed that those principles are not purely formal and procedural requirements. They are the vehicle for ensuring compliance with and respect for children's rights and human rights. The best interest of the child is to be considered a legal principle with both formal and substantial components that are intrinsically linked to fulfil both democratic values and fundamental rights.

### *3. – Protecting Borders across Europe*

The EU has competence to legislate in the area of migration and asylum concerning both its land and sea borders. It covers a wide range of migration situations, such as long-term work-related migration, asylum, subsidiary protection or irregular situations. All of these situations also include the governance of migrant children.

The main EU laws on protecting borders are:

- the 'Free Movement Directive'<sup>13</sup>, preamble (para. 24), Article 7, Article 12, Article 13 and Article 28 (3) (b);
- the 'Return Directive'<sup>14</sup>, Article 17;

<sup>13</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 (the 'Free Movement Directive').

<sup>14</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (the 'Return Directive').

- the 'Directive on Reception Conditions',<sup>15</sup> Article 11.

Various legal instruments regulate the migration of EU nationals in a more straightforward manner. Instead, the freedom of movement of third-country nationals is subject to more restrictions. The latter is partially regulated by EU law and partially regulated by national immigration laws.

In the context of international protection procedures, children are regarded as "vulnerable persons" whose specific situation Member States are required to take into account when implementing EU law.<sup>16</sup> This requires Member States to identify and accommodate any special provision that asylum-seeking children in particular might need when they enter the host State. Article 24 of the EU Charter of Fundamental Rights applies to the entry and residence requirements of the EU asylum *acquis* as it relates to children. It implies that in all actions relating to children, whether taken by public authorities or private institutions, EU Member States ensure that the best interests of the child are a primary consideration. These underpin the implementation of Directive 2013/32/EU on common procedures for granting and withdrawing international protection (the 'Asylum Procedures Directive').<sup>17</sup> They also apply to the Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining any application for international protection lodged in one of the Member States by a third-country national or a stateless person (the Dublin Regulation) as they relate to children.<sup>18</sup> Both texts also contain specific guarantees for UMM, including their legal representation.

The Regulation (EU) 2016/399 on the Schengen Borders Code requires border guards to check that those persons accompanying children have parental care over them, especially when the children are with an adult and there are doubts about the legitimacy of the accompanying persons. In this case, the border guard must investigate further for any inconsistencies or contradictions in the information provided. If

<sup>15</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, (the 'Reception Directive').

<sup>16</sup> See *ibid.* Art. 21 and Return Directive, Art. 3 (9).

<sup>17</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), Art. 25(6), (the 'Dublin Regulation').

<sup>18</sup> Regulation No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), Art. 6.

children are travelling unaccompanied, border guards must ensure, by means of thorough checks on travel and supporting documents, that the children are not leaving the territory against the wishes of the person(s) legitimate responsible for their parental care.<sup>19</sup> However, according to the standards of the Council of Europe (CoE), States have the right to control the entry, residence and expulsion of foreigners. As a matter of consolidated international law and without prejudice to the treaty obligations, including the ECHR, it is legitimate to fully control their borders.

Expulsion, however, takes effects for adults and for minors, despite the guarantees that European and international law has put in place. The subject of rejections and related appeals is also regulated at supranational level. Police authorities should comply with the bilateral agreements stipulated with the migrants' countries of origin, which however, cannot be used as justification for the derogation of the constitutional or EU rules. Article 13 para. 1 of Directive 2008/115 / EC, concerning appeals against return decisions, provides that:

“A third-country national concerned shall be granted effective remedies against decisions related to repatriation referred to in Article 12 (1) or to request a review before a competent judicial or administrative body or a competent body composed of impartial members offering guarantees of independence”.

In any case, Article 13 of Regulation No. 562 of 2006 (Schengen Borders Code)<sup>20</sup> stipulates that '*refoulement*' may be ordered only with a motivated provision stating the precise reasons for such a decision. It is to be adopted by a competent authority according to national legislation and is applicable immediately. Nevertheless, the rejected persons have the right to appeal. Appeals are settled in accordance with national legislation. Third-country nationals are also given written indications regarding contact points that can provide information to the representatives entitled to act on behalf of third-country nationals in accordance with domestic law. However, the opening of the appeal procedure does not have suspensive effects on the refusal provision. Forced repatriation procedures are characterized by speed, following the adoption of rejection measures. Thus, the timeliness of the appeal is essential, as is access to legal assistance.

<sup>19</sup> Regulation 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders Annex VII, 6 (the 'Schengen Border Code').

<sup>20</sup> *Ibid.*, Art. 13.

It is therefore necessary to distinguish between the immediate border rejection that implies a limitation of the freedom of movement (as the person physically is prevented to entry into the territory, although he/she remains free to circulate in the space outside the State territory), and all other forms of rejection, with or without a formal provision (in the latter instance violating Schengen Borders Regulation).<sup>21</sup>

Further distinctions can be made regarding asylum. The regulation provides a list of factors to help the authorities to determine what is in the best interests of the child, for those seeking asylum ('UASASC')<sup>22</sup>. This includes the possibility of family reunification of the minor as well as the well-being and social development of the child.<sup>23</sup> The regulation includes considerations on safety and security, in particular where there is a risk that the child could be a victim of trafficking in human beings; and the child's own opinion and information, in accordance with his age and maturity.<sup>24</sup> Concerning asylum-seeking children whose claims have been rejected, authorities must apply the best interests of the child relating to the process of return of unaccompanied children.<sup>25</sup> Moreover, before removing an unaccompanied child from a Member State, the authorities of that Member State must secure that the child is to be returned to a member of his/her family, a nominated guardian or to adequate reception facilities in the State of return.<sup>26</sup>

#### 4. – *The Border Blackout*

Although the ECHR does not refer to the principle of the best interests for the child, and despite it had preceded the UNCRC by over thirty years, the ECtHR has produced a long series of interpretations where the best principle is a 'hidden' protagonist.<sup>27</sup> Thus, in the parental child abduction case of *Neulinger and Ahuruk v Switzerland*, the Court held that there is a broad consensus in support of the idea that in all decisions concerning children, their best interest must be paramount.<sup>28</sup>

<sup>21</sup> In this case in violation of Article 14 of the the Schengen Border Code.

<sup>22</sup> UNHCR/Council of Europe, *cit. supra* note 11.

<sup>23</sup> SCHWEIGER, "Should states prioritize child refugees?", *Ethics & Global Politics*, 2019, 12:2, p. 48 ff.

<sup>24</sup> Dublin Regulation, Art. 6.

<sup>25</sup> Return Directive, Art. 10

<sup>26</sup> *Ibid.*, Art. 10(2).

<sup>27</sup> SMYTH, "The best Interests of the child in the Expulsion and First-Entry Jurisprudence of the European Court of Human Rights: How Principled is the Court's Use of the Principle?", *European Journal of Migration and Law*, 2019, p.70 ff.

<sup>28</sup> European Court of Human Rights, *Neulinger and Ahuruk v Switzerland*, Application No. 41615/07,



In this chapter, and for the sake of comparison, the choice of the two judgments: *N.D. y N.T. v. Spain*,<sup>29</sup> and *Sharifi and Others v. Italy and Greece*<sup>30</sup> has taken into account the similarities of the events, as well as the modality and commensurability of the Court's judgments. Both Spain and Italy had been in the not too distant past migrant countries themselves, but now they face complex migratory flows for which they are partly unprepared.<sup>31</sup>

The Court ruled on Article 4 of Protocol 4 on collective expulsions. The aforementioned Protocol, drawn up in 1963, was the first international treaty to deal with collective expulsion, and its purpose was to prevent States from being able to remove a certain number of aliens without examining their personal circumstances and without allowing them to present their arguments.

In the two cases examined, Spain and Italy were both convicted of collective expulsions that, among other things, did not allow identification and violated the child's right to protection. The "*devolución en caliente*",<sup>32</sup> as well as the collective expulsions, violated article 6 of the UNCRC. The expulsion *de facto* and without identifying the migrants who were in the border areas prevented the identification of the UMM.

#### 4.1 – *N.D. and N.T. v. Spain*

On 3 October 2017, the third section of the ECtHR held responsible Spain for the violation of Article 4 of Protocol No. 4 ECHR (prohibition of collective expulsions of aliens), and for the violation of Article 13 ECHR (right to an effective remedy)<sup>33</sup>.

The Court noted that the applicants, N.D. and N.T., had been expelled and sent back to Morocco against their wishes and that the removal measures were taken in the absence of any prior administrative or judicial decision. At no point they were subjected to any identification procedure by the Spanish authorities. The Court concluded that, in those circumstances, the measures were indeed collective in nature,

Judgment (GC) of 6 July 2010, para.135.

<sup>29</sup> *Id.*, *N.D. y N.T. v. Spain*, II, *cit. supra* note 5.

<sup>30</sup> *Id.*, *Sharifi and Others v. Italy and Greece*, *cit. supra* note 4.

<sup>31</sup> In the case of *Sharifi and Others* Greece is involved too, as being another country on the southern border of the EU, to complement the scenario of the three main migratory routes to the 'fortress Europe'. Definition used in COOPER, "Historical sociology, 'Fortress Europe' and the EU's frontier politics", Paper presented to the Institute of Human Sciences Fellows Colloquium, 5th November 2018, p. 10 ff.

<sup>32</sup> Summary return is the practice of expelling an irregular immigrant from the country at the time he/she attempts to cross the border, without any guarantee of the country's foreign legislation being applied.

<sup>33</sup> European Court of Human Rights, *N.D. and N.T. v. Spain*, *cit. supra* note 5, para. 15.

according to the article 4 of Protocol n.4.

The applicants were, respectively, Malian and Ivorian nationals; they were born in 1986 and 1985, both arrived in Morocco in March 2013 and stayed for about nine months in the makeshift camp on Gurugu Mountain, near the border crossing around Melilla<sup>34</sup>. After scaling the fence, they were immediately arrested, handcuffed and returned to Morocco by members of the Spanish *Guardia Civil*.<sup>35</sup> At no point were their identities checked; neither did they have an opportunity to explain their personal circumstances or to receive assistance from lawyers, interpreters or medical personnel. They were subsequently transferred to the Nador police station, and then to Fez, more than 300 km away from Melilla, in the company of a group of other adult migrants who had attempted to enter Melilla on the same date.

According to the Court, there were substantial failings to respect fundamental rights despite the fact that Spain had been condemned in a similar case for the violation of Article 13 (entitlement to an effective remedy) in a previous judgment: *A.C. and Others v. Spain*.<sup>36</sup> The latter judgment had already clearly ruled that the Spanish authorities should have suspended the procedure for removal of international protection seekers until their allegations about the risks they faced in their country of origin had been thoroughly examined.

Following a request from Spain, the case of *N.D. and N.T.* was referred to the Grand Chamber of the ECtHR. The Spanish government submitted on August 17, 2018 new documentation,<sup>37</sup> insisting on defending the legality of these express expulsions. The centre-right Rajoy Government presented a circular letter of a 'restricted' nature prepared by the previous Socialist Minister of Foreign Affairs, Miguel Angel Moratinos, and sent in 2009 to all ambassadors and consular offices with instructions in the implementation of the new asylum law. With this circular, the Government intended to strengthen some of the arguments included in its appeal to

<sup>34</sup> The Spanish enclaves Ceuta and Melilla are on the northern shores of Morocco's Mediterranean coast.

<sup>35</sup> Spanish National Police Guard.

<sup>36</sup> European Court of Human Rights, *A.C. and Others v. Spain*, III, Application no. 6528/11, Judgment, 22 April 2014, para. 88.

<sup>37</sup> According to Article 43 ECHR, and within three months from the date of a Chamber judgment, any party may request exceptionally that the case be referred to the 17-Member Grand Chamber of the Court. European Court of Human Rights, Grand Chamber hearing in the case *N.D. and N.T. v. Spain* Cases: 8675/15 and 8697/15, Press release ECHR 314, 26 September 2018.

defend the expulsion of N.D. and N.T. in August 2014.<sup>38</sup> The hearing in Strasbourg took place on 26 September 2018. A final judgment is expected in the course of 2019.

#### 4.1.1. Spanish Legislative Framework

The peculiarity of the Spanish southern borders is that while Spain and Morocco are largely separated by the Mediterranean Sea, the countries share a short land border at the Spanish enclaves of Melilla and Ceuta in North Africa. Both land borders are 'sealed' with a six-metre-high fence.<sup>39</sup> For many years, Ceuta and Melilla have been migrant gates of access to Europe from the African continent, the so-called Western Mediterranean route. A mixed flow of immigrants enters through them, mainly from Sub-Saharan Africa and Syria.

The migrant population entering Spain is a heterogeneous group that includes asylum seekers, involuntary migrants (victims of trafficking in human beings), unaccompanied minors and economic migrants who seek a better life for themselves and their families. While their reasons for leaving their land of origin may vary considerably, they have all been exposed to the same harsh conditions on their itinerary to Spain, and have faced similar risks.

Spain complies with the principle of *non-refoulement* enshrined in the 1951 Convention on the Status of Refugees 1951, in the Charter of Fundamental Rights of the European Union, and in the legal instruments of European Union that make up the Common European Asylum System, with the Law 12/2009.<sup>40</sup> All of them regulate the right to asylum and subsidiary protection and include provisions applicable to all applicants for international protection. In fact, the Spanish Organic Law 4/2000 – Articles 49.a), 51.1.b) and 53.1) – has overcome the punitive concept of the previous Organic Law of 1 July 1985 No. 7/85, by changing the concept of expulsion. Furthermore, it requires that in the case of very serious infringements of letters a), b),

<sup>38</sup> EL PAIS, "El Gobierno insiste en defenderlas devoluciones en caliente ante Estrasburgo", 26 septiembre 2018, available at: <[https://elpais.com/politica/2018/09/25/actualidad/1537889632\\_746605.html](https://elpais.com/politica/2018/09/25/actualidad/1537889632_746605.html)>.

<sup>39</sup> The greater part of the border between Beni Ansar, Morocco and Melilla, Spain is delineated by a security zone containing six rows of fences: three on Moroccan territory and three on Spanish territory. CASTAÑO and ESTRADA, "Situation report at the Spanish-Moroccan border", in *On Europe's External Southern Borders*, Budapest, 2018, p. 17 ff.

<sup>40</sup> Ley 12/2009, de 30 de octubre, reguladora del derecho de asilo y de la protección subsidiaria. Modified by: Ley 2/2014, de 25 de marzo BOE núm. 74, de 26 de marzo.

c), d) and f) of Article 53, a fine shall be imposed.<sup>41</sup>

Likewise, and following the provisions established in Article 2 of the 1997 Resolution of the Council of the European Union,<sup>42</sup> Spain ought to pursue the policy of combating the trafficking of human beings, with the eventual rejection at the border and the devolution of unaccompanied minors.<sup>43</sup> However, Article 57.5b of the Ley Orgánica 4/2000, prohibits the expulsion of minors in *desamparo*<sup>44</sup>, including them in the broadest category of serious cases and in situations of vulnerability.<sup>45</sup>

The application of the Immigration Law<sup>46</sup> that entitles Spain to defend its borders, together with the Citizen Security Law,<sup>47</sup> which replaces the Organic Law 1/1992, of the same name, has created a loophole for the regulation of border rejection around the perimeter of Ceuta and Melilla.

Summary returns, which found regulatory accommodation in the above mentioned Citizen Security Law through the newly created legal figure labelled 'border rejection', refers to the act of delivering back migrants intercepted on jumping the border fence separating Morocco and the Spanish cities of Ceuta and Melilla. Spain appealed to the Court because when there is the possibility of a legal passage, the Spanish State has the right and the obligation to protect the border against attempts to illegal passage.<sup>48</sup> It is important to mention also the Mobility Partnership between the Kingdom of Morocco, the European Union and its Member States, which was signed in Brussels on 3 June 2013, as well as the Agreement between the government of the Kingdom of Spain and the government of the Kingdom of Morocco on the free movement of persons, transit and the readmission of foreigners entering the

<sup>41</sup> Ley Organica 4/2000, de 11 de Enero, sobre derechos y libertades de los extranjeros en España y su integración social (Arts 49.a), 51.1.b) y 53.1), en regulación mantenida por la reforma operada por Ley Orgánica 8/2000, de 22 de Diciembre (Arts 53.a), 55.1.b) y 57.1).

<sup>42</sup> *Cit. supra*, note 1, Art. 2

<sup>43</sup> Real Decreto 155/1996 de 2 febrero, por el que se aprueba el Reglamento de ejecución de la Ley Orgánica 7/1985, Art. 62.4.

<sup>44</sup> *Abandonment* in Spanish.

<sup>45</sup> Ley Organica 4/2000, *cit. supra* note 41, Art. 57.5.b.

<sup>46</sup> Real Decreto 557/2011, de 20 de abril, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social, tras su reforma por Ley Orgánica 2/2009, Art. 11.

<sup>47</sup> Ley Organica 4/2015, de 30 de marzo, de protección de la seguridad ciudadana BOE núm. 77, de 31 de marzo.

<sup>48</sup> Gran Chamber hearing on returns to Morocco of migrants who scaled the fence in Melilla, Twitter on 16/09/2018 by @ECHR\_Press.

country illegally, which was signed in Madrid on 13 February 1992. The implementation of these agreements led to a decrease in the number of arrivals in the border fences. Moreover, a lack of coordination among competent authorities was noted with regard to arrivals on the Andalusian shores, while deficiencies were identified in the provision of information on the right to apply for protection.<sup>49</sup>

#### 4.2. – Sharifi and Others v. Italy and Greece

On 21 October 2014, the ECtHR held Italy and Greece responsible for the collective and arbitrary *refoulements* of Afghan, Sudanese and Eritrean migrants from the port of Ancona to Patras, in 2009.

The Second Section of the Court, in the case *Sharifi et al against Italy and Greece*, found appropriate the application concerning the rejection of summaries from the Adriatic ports of 35 asylum seekers (including 10 children). With this ruling, the ECtHR reiterated the principle already expressed in *M.S.S. against Belgium and Greece*, namely that concerning the notion of ‘safe country’.<sup>50</sup>

The Court holds that no collective expulsion can be carried out in the application of the Dublin Regulation, which must be interpreted and applied in accordance with the ECHR, following the individual examination of each person concerned. According to the Court, Italy and Greece had violated ECHR and, in particular:

- Article 3 (Prohibition of torture and other inhuman or degrading treatment),
- Article 13 (Right to an effective remedy),
- Article 4 of Protocol No. 4 (Prohibition of collective expulsions).

The case concerned 35 applicants, 32 of Afghan origin, 2 Sudanese and one Eritrean, some of whom, at the time when the events occurred, were minors. They had tried to enter in Italy between January 2008 and February 2009. After passing through Greek territory, they were rejected by the border police at the ports of Bari, Ancona and Venice. Their rejection was motivated on the basis the bilateral agreement of the Italian and Hellenic governments concluded in 1999.<sup>51</sup> Although the applicants complained about the violation of Articles 2, 3 and 13 ECHR against Greece

<sup>49</sup> Spanish Commission on Refugee Aid / Comisión Española de Ayuda Al Refugiado CEAR, Input to the EASO Annual Report 2018.

<sup>50</sup> European Court of Human Rights, *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Judgment 21 January 2011, para. 338.

<sup>51</sup> Camera Dei Deputati, Accordo tra Italia e Grecia sulla riammissione delle persone in situazione irregolare, Rome, 30 April 1999.

and the infringement of Articles 2, 3, 13 and 34 ECHR against Italy, the Court upheld the violation of Articles 3 and 13 against Greece and the violation of Articles 2, 3 and 13; plus Article 4 of Protocol 4 for Italy. In addition to the already accepted criterion of collective and indiscriminate expulsion, it should be noted that the Court held responsible Italy for the violation of Article 3 because the applicants did not have access to the request for international protection, also due to their age.

The CoE Committee of Ministers (in its Deputy meeting of 12-14 of March 2019) rejected the requests put forward by the Italian government to close the supervision processes following the *Khlaifia v. Italy* and *Sharifi v. Italy* judgments.<sup>52</sup> On 26 June 2019, the Italian authorities provided information on the legislative measures adopted to reorganise Italy's migrant reception system. In particular: (a) the Legislative Decree No. 142 of 18 August 2015, which transposed into national law directives 2013/33/EU and 2013/32/EU; (b) the Legislative Decree No. 220 of 22 December 2017 on international protection for unaccompanied minors; and (c) a circular letter sent out on 29 June 2011 which expressly forbids "... repatriations without first examining the individual situation of the people concerned".<sup>53</sup> The information provided is under assessment<sup>54</sup> as "leading repetitive".<sup>55</sup> This is a leading Court judgment with innovative reasoning. In this case systemic and structural problems have been found. Such a case requires the adoption of new general measures to prevent similar violations in the future.

<sup>52</sup> The Committee asked Italian Authorities to provide further information, CM/Del/Dec(2019)1340/H46-9.

<sup>53</sup> Department of Public Security, 29 June 2011.

<sup>54</sup> Previously the authorities had provided information on 26 September 2017 (DH-DD(2017)1099), followed by an action report on 23 January 2019 (DH-DD(2019)77). On 18 January 2019, the Office of the United Nations High Commissioner for Refugees ('UNHCR') submitted a communication pursuant to Rule 9.3 of the Rules of the Committee of Ministers (DH-DD(2019)90). Two communications were also submitted pursuant to Rule 9.2 of the Rules of the Committee of Ministers by the *Associazione per gli studi giuridici sull'immigrazione* ('ASGI') (DH-DD(2019)176) and *The Aire Centre* (DH-DD(2019)191) on 11 and 15 February 2019 respectively. Moreover, the Italian authorities submitted additional information on 12 March 2019, during the 1340th meeting (DH) of the Committee of Ministers (DH-DD(2019)275). See, Council of Europe, Committee of Ministers (DH), 1340th Meeting, *Sharifi and Others v. Italy and Greece*. Case: 16643/09 – Pending – Enhanced Procedure - Judgment of 21 October 2014 – Final Judgment of 21 January 2015, Leading Repetitive, 12 March 2019.

<sup>55</sup> European Court of Human Rights, *Annual Report 2018*, Strasbourg, 2019, p.150 ff. 'Leading cases': these are cases revealing new structural and/or systemic problems that require new general measures. Leading cases are identified by the Court directly in its judgment, or by the Committee of Ministers in the course of its supervision of execution.

#### 4.2.1. Italian Legislative Framework.

Since its original formulation, the Legislative Decree<sup>56</sup> 286/1998<sup>57</sup> provided for the prohibition of the expulsion of the minor under eighteen years and unaccompanied minors (except cases of expulsion for “reasons of public order or State security”, according to Article 13, para. 1, on prevention of acts of terrorism). However, the Law 47/2017<sup>58</sup> added to Article 19 the new paragraph *1-bis*, according to which “...under no circumstances can unaccompanied foreign minors be rejected at the border”. It provided disciplinary certainty to a widely debated issue. Likewise, this Law aims at solving some practical problems regarding the reception system.<sup>59</sup>

The reception system for unaccompanied minors in Italy, confirmed by Law 142/2015 and more recently by Law 47/2017, specifically deals with UMM. The role of the Italian Ministry of Interior<sup>60</sup> in the governance of unaccompanied minor migrants has been strengthened. Previously, this role had been under the responsibility of the Ministry of Labour and Social Policy<sup>61</sup>, which financed reception centres. The Ministry of Interior continues to be responsible for the Information System on Minors and tracks their movement and location in Italy.<sup>62</sup> Since 2017, institutional interventions are described in the National Action Plan to deal with the extraordinary flows of non-EU citizens, families and unaccompanied migrants.<sup>63</sup>

At the time of crossing the border, the condition of UMM is ascertained by verifying the legitimacy of the adults with whom the child is accompanied. On this point, the new text of Article 33, c. 1, Law 184/1983,<sup>64</sup> says that:

<sup>56</sup> A legislative decree is a normative act having the force of law adopted by the executive power (Government) by express and formal mandate of the legislative power (Parliament).

<sup>57</sup> Decreto Legislativo 286/1998, Testo Unico sull'Immigrazione, Art. 19, c. 2, lett.a t.u..

<sup>58</sup> Legge 7 aprile 2017, n. 47, “Disposizioni in materia di misure di protezione dei minori stranieri non accompagnati”..

<sup>59</sup> *Ibid.* As a solution to minors escaping from the first reception facilities, the permanency timing in these structures has been reduced from 60 days to 30 days .After this, unaccompanied minors will be allocated in the centres of the SPRAR (Protection System for Refugees and Asylum Seekers) throughout Italy.

<sup>60</sup> *Ministero dell'Interno.*

<sup>61</sup> *Ministero del Lavoro e delle Politiche Sociali.*

<sup>62</sup> DEMURTAS et al., “In search of Protection: Unaccompanied Minors in Italy”, *Center for Migration Studies of New York*, 2018, p. 22 ff., available at: <<https://cmsny.org/publications/2018smcsc-cse-uam/>>.

<sup>63</sup> *Ministero dell'Interno, Circolare 6909*, “Piano nazionale per fronteggiare il flusso periodico di cittadini extracomunitari adulti, famiglie e minori stranieri in accompagnati”, 1 August 2014.

<sup>64</sup> Legge 4 maggio 1983, n. 184, “Disciplina dell'adozione e dell'affidamento dei minori”.

“... minors who do not have an entry visa issued pursuant to article 32 of this law and who are not accompanied by at least one parent or relatives by the fourth degree will apply the provisions of art. 19, paragraph 1-bis, of the consolidated text referred to in Legislative Decree 25 July 1998, n. 286”.

The provisions of Annex 7, par. 6, of the Schengen Borders Code<sup>65</sup> stipulate that, in the case of accompanied minors, the border guard ought to verify the existence of parental responsibility towards the minor,

“... especially, if the minor is accompanied by an adult only and there are serious reasons to believe that the child has been illegally removed from custody of the person or persons legally exercising parental authority over him. In the latter case, the border guard carries out further investigations, in order to identify inconsistencies or there are contradictions in the given information, the existence of parental responsibility is verified”.

In the case of minors travelling alone, it is necessary to ensure, “... by means of thorough checks of travel documents and supporting documents, that the child does not leave the territory against the will of the person or persons exercising parental authority over him”.

Guidance centres located in the transit areas of the border crossings are to be improved, in accordance with the provisions of Article 11 c. 6 of the Consolidated Act,<sup>66</sup> now implemented through agreements stipulated by the Minister of Interior with some selected institutions, although, *de iure condendo*, the legislative provision of the indispensable presence at the border crossings of a third party, guarantor of the right to *non-refoulement* and of the prohibition of refusal of minors<sup>67</sup> would be much more effective.

According to the combined provisions of Articles 14 and 19 of the Consolidated Act<sup>68</sup> the child cannot be the subject of administrative measures of detention, as well as with regard to minor applicants for asylum, following Article 19, c. 4, of the legislative decree 18 August 2015, n. 142 (which implemented the 2013/32 / EU and 2013/33 / EU directives).<sup>69</sup>

<sup>65</sup> Schengen Border Code.

<sup>66</sup> Decreto Legislativo 25 luglio 1998, n. 286, Testo Unico, *cit. supra* note 57, Titolo II - Disposizioni sull'ingresso, il soggiorno e l'allontanamento dal territorio dello Stato.

<sup>67</sup> BHABHA, *Child Migration & Human Rights in a Global Age*, Princeton, 2016, pp. 20 ff.

<sup>68</sup> Decreto Legislativo 25 luglio 1998, n. 286, Testo Unico, *cit. supra* note 57.

<sup>69</sup> BIEL, “Detention of Minors in EU Return Procedures: Assessing the Extent to Which Polish Law is



Concerning the prohibition of expulsion of the UMM, subtracting this competence from the office of the Ministry of Labour and Social Policy,<sup>70</sup> Article 8, Law 47/2017<sup>71</sup> provides that the repatriation is to be voluntary and consensual, and can only be adopted:

“... where reunification with family members in the country of origin or in a third country corresponds to the child's best interests, by the competent court for minors, after hearing the minor and the guardian and considering the results of the family surveys in the country of origin or in a third country and the report of the competent social services regarding the situation of the minor in Italy.”<sup>72</sup>

During 2018, the Italian government delayed or hindered access to individuals rescued at sea, including applicants for protection, such as unaccompanied minors.<sup>73</sup>

### 5. – Analytical Findings

A specific legal treatment aimed at immigrant minors in general and those unaccompanied minors in particular is a very important manifestation of the immigration policy of any State. From the analysis of the literature and case studies, the treatment of unaccompanied migrant minors, in Spain and Italy, exposes the vulnerability of multiple principles of the UNCRC. On the one hand, there is the violation of some principles that govern the Convention, such as the principle of non-discrimination (Art. 2), and the best interests of the child (Art. 3). On the other hand, there are concrete violations of rights such as, among others, the right to receive adequate protection, taking into account that they are outside their country of origin, in a condition of vulnerability.<sup>74</sup>

The very concept of vulnerability is key in the court sentences condemning collective expulsions, which is defined as “... any measure of the competent authorities

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Reflective of the EU Migration Regime and International Human Rights Standards”, *Central and Eastern European Migration Review*, 2017, pp. 69-102.

<sup>70</sup> *Direzione Generale per l'Immigrazione del Ministero del Lavoro*.

<sup>71</sup> Legge 7 aprile 2017, n. 47, *cit. supra* note 58.

<sup>72</sup> *Ibid.* Art. 8

<sup>73</sup> MORSELLI, *Testo Unico dell'Immigrazione: Commentario di legislazione, giurisprudenza, dottrina*, Pisa, 2019.

<sup>74</sup> DALRYMPLE, “Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied”, *Boston College Third World Law Journal*, 2006, pp. 1-39.

compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group".<sup>75</sup>

Let us remind that the principle *non-refoulement* in international law prevents a State from delivering an individual to another State in which there are serious risks to his life or his physical integrity. It also prohibits the surrender of a person to a State that could turn it over to a third State where that risk exists, according to the interpretation by the Court of Article 3 ECHR (Article 33 of the 1951 Convention on the Status of Refugees).

According to the drafters of Protocol No. 4, the word 'expulsion' should be interpreted in the generic meaning of 'driving away from a place', as the Court stated in the *Hirsi Jamaa and Others v. Italy* case,<sup>76</sup> when referring to *the travaux préparatoires* of Protocol No. 4. It follows the pattern of other sentences against Italy as when the Court considered that an applicant had been brought back to Tunisia against his will.<sup>77</sup>

The circumstances of the case *Sharifi and Others* took place at the time of the great wave of landings of migrants in the island of Lampedusa in 2011, but the issues raised by the applicants, as well as the principles confirmed by the Grand Chamber, are more relevant than ever concerning the current management of the 'migratory question'. Now the institutions of the European Union and the Member States face a pressing need to deal with the so-called 'hotspot approach', which Italy adopted in the framework of the immediate actions envisaged by the European Agenda for Migration<sup>78</sup> and the expulsion procedures negotiated by the agreements between Italy and the non-European countries. Responsibility for the treatment of migrants and the violation of human rights can be regarded also as a responsibility of agreements between the European Union and third countries.

The same applies to the other frontier object of this study. It is important to mention the 'Mobility Partnership' between the Kingdom of Morocco, the European Union and its Members States,<sup>79</sup> as well the Agreement between the government of the

<sup>75</sup> European Court of Human Rights, *Conka v. Belgium*, Application No. 51564/99, Judgment 5 February 2002, para. 59.

<sup>76</sup> European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, Judgment (GC) of 23 February 2012, para.174.

<sup>77</sup> European Court of Human Rights, *Khlaifia and Others v. Italy*, Application No. 16483/12, Judgment (GC) of 15 December 2016, paras. 243-244.

<sup>78</sup> *Ministero dell'Interno, Circolare* of 6 October 2015.

<sup>79</sup> The Mobility Partnership was signed in Brussels on the 3 June 2013.

Kingdom of Spain and the government of Kingdom of Morocco, on the free movement of foreigners entering the country illegally, which was signed in Madrid, on the 13 February 1992.

With reference to minors, the Court has repeatedly established that it is crucial to bear in mind that the child's extreme vulnerability is the decisive factor that takes precedence over considerations relating to the status of illegal immigrant.<sup>80</sup> Children have specific needs that are related in particular to their age and lack of independence, but also to their asylum-seeker status.<sup>81</sup> The Court has insisted in the interpretation that the Convention on the Rights of the Child encourages States to act appropriately 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.<sup>82</sup>

In application of the general principle, the Court establishes that the expulsion must be organized following a case-by-case assessment. There ought to be procedures prior an expulsion decision (as well as *refoulement*) against vulnerable persons (disabled, elderly), minors, members of single-parent families with minor children, or victims of serious psychological, physical or sexual violence. Expulsions must be conducted in such ways that are compatible with individual personal situations. No form of collective and indiscriminate returns could be justified by reference to the Dublin system.

## 6. – Conclusion

This chapter has analysed issues revolving around the best interest of the child, even if the status of such a general principle is notoriously problematic.<sup>83</sup> It has been described as a principle of interpretation or principle of duty. The concept becomes even more labile in the context of migration. So the meaning is doubled, the best

<sup>80</sup> See, *inter alia*, European Court of Human Rights, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application No. 13178/03; and *Popov v. France*, Application Nos. 39472/07 and 39474/07. In doctrine, see RINALDI, *The Best Interest of the Child: Tabhita Case*, Master's Thesis, Madrid: Repositorio Universidad Pontificia Comillas, 2012, p. 42 ff.

<sup>81</sup> BYRNE, "Migrant, refugee or minor? It matters for children in Europe", *Forced Migration Review*, 2017, p. 94 ff.

<sup>82</sup> European Court of Human Rights, *Popov v. France*, Application Nos. 39472/07 and 39474/07, Judgment of 19 January 2012, para. 91.

<sup>83</sup> POBJOY, "The best interest of the child principle as an independent source of international protection", *International & Comparative Law Quarterly*, 2015, pp. 327-363.

interest can mean to enter or be rejected by the country of destination. The principle can also be used to control immigration and can become a tool for the protection of the border and not for the protection of the child. Hence the defence and definition of vulnerability, which the Court provides in its judgments, goes through and exceeds the concept itself, defending the minor (or the alleged minor), in condemning collective expulsion. In the *Hirsi Jamaa and others v. Italy* ruling, the Court considered the vulnerability of migration regardless of the age of the subjects<sup>84</sup>.

Domestic laws often circumvent vulnerability. Spain, in its recent Organic Law 4/2015,<sup>85</sup> has 'legalized' the hotspot returns. It should be noted that, against this law, two unconstitutionality appeals have been filed and admitted, and many national and international public bodies have expressed their opposition to it.<sup>86</sup> The Citizen Security Law should be changed to put an end to the immediate devolutions that take place in Ceuta and Melilla, or alternatively guarantees should be established on minors. The also called 'hot return' of UMM is not only an illegal act, which does not respect national and international laws and violates human rights, but can be regarded as a violent act given the abruptness with which it is carried out.

Therefore, the Spanish Ombudsman has recommended to the Minister of Interior<sup>87</sup> that the procedure should contemplate the need to issue an administrative resolution, with legal assistance, an interpreter and information about potential legal actions.<sup>88</sup> All this should be accomplished in accordance with the Judgment of the Constitutional Court 17/2013.<sup>89</sup> It has also recommended to the Home Office Secretary, that written evidence should be incorporated in the file stating that the foreigner has been provided with information on international protection and that, through an adequate mechanism of identification and referral, international protection needs have been verified, that he/she is a minor or that there is a concurrence of signs that he may be a victim of trafficking in human beings. These recommendations have not yet been accepted.

The main obstacles regarding access to the Spanish territory are faced mostly at

<sup>84</sup> European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, *cit. supra* note 81, paras. 125-126.

<sup>85</sup> Ley Organica 4/2015, *cit. supra* note 47.

<sup>86</sup> The 'Consejo General de la Abogacia Espanola' (Committee against Torture and the Committee on the Rights of the Child, in its periodical report of Spain).

<sup>87</sup> *Ministro del Interior* (author's translation).

<sup>88</sup> Defensor del Pueblo, *V y VI Informe sobre la aplicacion de la convención sobre los Derechos del Niño y sus Protocolos Facultativos*, INDH, Madrid, 2017, pp. 40-45.

<sup>89</sup> *Resolucion del Tribunal Constitutional* n. 17/2013, of 31 January 2013.

the Ceuta and Melilla borders and checkpoints. These physical obstacles are mainly due to the impossibility of asylum seekers to cross the border and exit Morocco. One of the ways used by migrants and asylum seekers to enter the territory is to attempt to climb border fences in groups. The increasing numbers of attempts to jump border fences occur because migrants and asylum seekers (mostly sub-Saharan nationals) still face huge obstacles in accessing the asylum points at the Spanish border, due to the severe checks of the Moroccan police at the Moroccan side of the border. There are several reported cases concerning refusal of entry, *refoulement*, collective expulsions and *pushbacks*, including incidents involving up to a thousand persons during 2017.<sup>90</sup> In addition, the Human Rights Committee<sup>91</sup> has expressed its concern about the 'hot expulsions' that are taking place on the borderline of the territorial demarcation of Ceuta and Melilla.

The Italian case is no different from the Spanish one, and the rejections towards Libya continue despite the rulings of the ECtHR. In January 2018, the ECtHR declared admissible the appeals of five Sudanese citizens, who on 24 August 2016 were victims of a collective *refoulement* in Ventimiglia, near the French border. Sudanese migrants subject to a raid in the Ligurian town illegally locked up in a hotspot in Taranto, with attempted forced repatriation.<sup>92</sup> Some of these migrants have actually been forced to return to Sudan, although their situation could fall into the status of 'international protection'.<sup>93</sup> The ban on disembarkation in Italian ports can be considered as a form of 'collective refoulement', and cases of omitted sea rescue are starting to arrive at the Court, like that of the Sea Watch3 boat on 5 November 2017<sup>94</sup>.

Collective expulsions or *refoulement* do not allow the State to examine the situation of each individual or to assess the risk of serious personal damage. For this reason, this type of expulsion is prohibited in numerous international treaties (see Article 4 of Protocol 4 ECHR, and Article 19.1 of the Charter of Fundamental Rights of the European Union).

<sup>90</sup> Asylum Information Database, *Country report: Spain*, 2017 p. 16 ff.

<sup>91</sup> Human Rights Committee, UN Doc. CCPR/C/ESP/6 of 14 August 2015, para. 18.

<sup>92</sup> European Court of Human rights, *W.A. and Others v. Italy*, Application No. 18787/17, lodged on 13 February 2017.

<sup>93</sup> The appeals filed by the Sudanese citizens against the Italian Government for collective rejection have been declared admissible. On August 24, 2016, the Italian Police Chief and his Sudanese counterpart, according to the "Memorandum d'intesa tra Italia e Sudan", Roma 3 agosto 2016.

<sup>94</sup> European Court of Human rights, *S.S. and Others v. Italy*, Application No. 21660/18, lodged on 3 May 2018.

Minors are of great concern for the Court according to Strasbourg jurisprudence.<sup>95</sup> The ECtHR has also participated in developing legal protection for children through its jurisprudence. At level of the EU, the entry into force of the Lisbon Treaty recognises the importance of fundamental rights, including children's rights on the EU agenda<sup>96</sup>. The reason given was the the particular vulnerability of minors<sup>97</sup>. In accordance with Directive 2013/32/EU, of the European Parliament and of the Council, of 26 June 2013, on common procedures for the granting or withdrawal of international protection, Member States should endeavour to identify applicants who need special procedural guarantees for reasons, among others, of their age. With the implementation of 'systematic collective *refoulements* at the borders', the rights of minors are at risk. Many are put again in the hands of sea and land smugglers.

The analyses carried out in this chapter served not only to construct an evolutionary path through the development of the case-law, but they can also reinforce the ideology of *non-derogable* obligation under international law. Along this procedure, the ECtHR would clarify constitutive elements that justified the peremptory nature of the clause, and also identify other human rights provisions that could not be dissociated from its application.

<sup>95</sup> European Court of Human rights, *Tarakhel v. Switzerland*, Application No. 29217/12, Judgment (GC) of 4 April 2014, para.118.

<sup>96</sup> EU Parliament, EU Framework of Law for Children's Rights, 2012 p. 8 ff.

<sup>97</sup> BIEL, *cit. supra* note 69, p. 78 ff.