

CAN IMMIGRATION DETENTION EVER BE IN THE BEST INTERESTS OF THE CHILD? THE DETENTION OF UNACCOMPANIED CHILDREN IN EUROPE UNDER INTERNATIONAL AND EUROPEAN LAW

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Abstract: This article analyses how law and judicial practice on the detention of unaccompanied migrant children in Europe reflect a fundamental tension between migration policies and children's rights. At the universal level, interpretation of the Convention on the Rights of the Child has evolved toward a substantive prohibition of migration-related child detention. Yet this development remains only partially internalised in Europe. EU law still permits detention as an exceptional measure, while the EU Pact risks expanding de facto detention. Meanwhile, the Committee on the Rights of the Child addresses this issue inconsistently in its case law and the ECtHR condemns harmful conditions but avoids declaring a general ban. These inconsistencies contribute to the normalisation of a practice increasingly rejected under international human rights law.

Keywords: Immigration detention, Child detention, Best interests of the child, CRC, ECHR, EU Pact on migration and asylum, Unaccompanied minors, Unaccompanied children.

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1. INTRODUCTION

Forced migration and displacement have continued to rise in recent years, reaching an estimated 117.3 million forcibly displaced people worldwide by mid-2025, including 73.5 million internally displaced persons (UNHCR, 2026a, Table 1). Children represent around 40% of the displaced population —49 million by the end of 2024 (UNHCR, 2026a, Table 2)—, comprising approximately 19.1 million refugee and asylum-seeking children and 29.4 million children internally displaced by war and violence (UNICEF, 2025, para. 1).

In this context, assessing the scale of unaccompanied children remains difficult, as only 48% of states currently report data on children travelling alone to the United Nations High Commissioner for Refugees (UNHCR) (IDAC, p. 8). Available figures nevertheless illustrate the scale of the phenomenon. Ethiopia hosts the largest number worldwide, with over 41,000 unaccompanied children who have fled the conflict in South Sudan (UNHCR, 2026b, para. 2). In Europe, an estimated 21,828 unaccompanied children arrived in EU member states in 2024, mainly in Italy, followed by Spain, Greece, Bulgaria, Cyprus and Malta (UNHCR et al., 2025, p. 1-2). Against this backdrop, the immigration detention of unaccompanied children has emerged as one of the most contested practices at the intersection of international human rights law and border control.

Over the past decade, European states and the EU have repeatedly reaffirmed their commitment to the protection of children on the move, while simultaneously expanding legal frameworks that rely on deprivation of liberty as an accepted tool of migration management. This tension is particularly acute in relation to unaccompanied children, whose situation clearly exposes the difficulties of agreeing on —let alone implementing— a genuinely rights-based and child-centred migration governance framework. Contemporary migration policies in Europe have increasingly taken a punitive orientation that clashes with states' international and domestic human rights obligations, including children's rights. As Dauvergne has argued, the convergence of liberal democracies towards restrictive migration policies, which frame migration as a crisis and marginalize or criminalize migrants, is closely linked to the expansion of legal regimes designed primarily for immigration control. In a context where the politics of immigration cast human rights and economics as antagonists to one another and have become securitised, and embedded in legal instruments that increasingly serve state control imperatives, the capacity of the law to provide robust protection of migrants' rights is being called into question (Dauvergne, 2016, pp. 174-200; Dauvergne, 2020, p. 99).

Focusing on the detention of unaccompanied children as one of the most concerning practices in this context, this article advances a critical challenge to asylum and migration law, as well as to the jurisprudential practice of international human rights bodies. It argues that their weak and at times inconsistent positions on this issue undermine the coherence and protective function of international human rights law. At the universal level, international human rights law has undergone a significant normative shift, through which the detention of children for reasons related to their migration status is understood as substantively incompatible with the rights and best interests of the child, on the basis that immigration detention is inherently harmful to children and incapable of serving any legitimate protective function.

In Europe, however, this emerging prohibition has not been internalised. European Union law continues to permit the detention of children under conditions of proclaimed exceptionalism, while the European Court of Human Rights (ECtHR) has developed a body of case law that repeatedly condemns the concrete effects of detention, but fails to articulate a clear prohibition. At the national level, these ambiguities translate into persistent practices of deprivation of liberty affecting unaccompanied children, often occurring at the earliest stages of contact with migration authorities.

This article argues that the continued detention of unaccompanied children is not merely the result of isolated failures of implementation, but rather the manifestation of a fundamental tension inherent to contemporary migration governance. By failing to draw a clear legal boundary around the detention of children for migration-related purposes, European legal frameworks and judicial approaches contribute to the normalisation of a practice that international human rights law increasingly rejects. At the same time, the principled position in favour of the best interests of the child adopted by the Committee on the Rights of the Child in its General Comments is not effectively reflected in its case law.

The analysis adopts a problem-driven and analytical structure. Section 2 examines how international human rights law has reframed the detention of unaccompanied children from a measure of last resort into a substantive violation of children's rights. Section 3 analyses the European Union's reliance on exceptionalism and legal fictions as techniques of governance that preserve the permissibility of detention, and how this approach persists in the EU Pact on Migration and Asylum. Section 4 critically assesses the case law of the ECtHR, highlighting the limits of an approach that only focuses on the procedural aspects of the best interests of the child. Section 5 examines how the Committee on the Rights of the Child's case law on detention illustrates the way normative ambiguity produces concrete and recurring violations at national level, while at the same time highlighting how the selective engagement of the Committee weakens the enforceability of the prohibition the Committee itself has articulated. The concluding section reflects on the broader implications of the weaknesses of international human rights case law on this question and on what the detention of unaccompanied children reveals about current limits of migration regulatory frameworks from a human rights perspective. It further advances the argument that child protection must be reconceptualised as a substantive and non-derogable limit on state power to regulate migration and asylum, in accordance with the best interests of the child.

2. THE DETENTION OF UNACCOMPANIED CHILDREN IN INTERNATIONAL HUMAN RIGHTS LAW: FROM FORMAL EXCEPTIONALITY TO SUBSTANTIVE PROHIBITION

2.1. Unaccompanied children as rights-holders under international law

As the cornerstone of the child protection framework, the Convention on the Rights of the Child (CRC) recognizes children as both autonomous rights-holders and a particularly vulnerable group requiring special protection, obliging states to adopt all necessary measures to ensure their welfare (Art. 3.2). Central to this is the principle of the best interests of the child (Art. 3), which must be a primary consideration in all actions

affecting children (Committee on the Rights of the Child, 2013) —a principle echoed in Article 24.2 of the EU Charter of Fundamental Rights (EUCFR). Two additional principles complement this framework: non-discrimination, prohibiting differential treatment based on race, gender, origin, migration status or being unaccompanied, which also requires proactive measures to counter prejudice or social exclusion affecting unaccompanied children (Committee on the Rights of the Child, 2005, para. 18), and the right to be heard (Art. 12 CRC; Art. 24.1 EUCFR), ensuring that children can express their views and receive relevant information, including on asylum procedures and available services (Committee on the Rights of the Child, 2005, para. 25).

Unaccompanied children require heightened protection due not only to their age but also to the structural vulnerability resulting from the absence of parental care.² In that context, Article 20 CRC requires states to provide special protection and assistance to children deprived of their family environment, an obligation incompatible with treating them primarily as irregular migrants subject to containment. Article 6 further guarantees the right to life, survival and development in its physical, mental, moral, psychological and social dimensions, closely linked to the rights to health and education. Article 8 protects the child's right to identity, which the Committee has interpreted as encompassing minority status. Furthermore, Articles 19, 32 and 34 impose obligations on states to protect children from all forms of violence, exploitation, sexual abuse and trafficking. Finally, Article 22 requires states to provide protection and humanitarian assistance to children seeking refugee status, including access to asylum procedures and respect for the principle of non-refoulement.

The Committee has also issued several clarifying General Comments, notably No. 6 on unaccompanied and separated children (Committee on the Rights of the Child, 2005), No. 12 on the right of the child to be heard (Committee on the Rights of the Child, 2009), No. 14 on the best interests of the child (Committee on the Rights of the Child, 2013) and No. 22 and 23 on the human rights of children in the context of international migration, adopted jointly with the Committee on Migrant Workers (CMW and CRC, 2017a and 2017b). Taken together, these instruments provide a comprehensive interpretation of states' obligations under the Convention in relation to unaccompanied migrant children.

2.2. The conventional starting point: Article 37 of the Convention and its basic guarantees

The CRC establishes, in Article 37(b), that no child shall be deprived of his or her liberty unlawfully or arbitrarily and that the arrest, detention, or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time. This provision is reinforced by a set of substantive and procedural safeguards

² "Unaccompanied children" are defined as those who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, bears such responsibility, while "separated children" are minors separated from both parents or their legal or customary guardians, though not necessarily from other relatives (Committee on the Rights of the Child, 2005, paras. 7 and 8).

for the exceptional cases in which detention is deemed necessary, including treatment in accordance with the inherent dignity of the child, the need to ensure separation from adults — unless this is contrary to the child's best interests— and the right to legal assistance and to challenge the legality of the deprivation of liberty before a competent and impartial authority (Article 37 c) and d)).

Traditionally, this clause was interpreted as an exceptional authorization for the deprivation of liberty of children in various contexts, including migration control, provided that the requirements of legality, necessity, and proportionality were respected. However, a systematic reading of the Convention requires a nuanced interpretation when detention occurs in the context of migration. Indeed, Article 37 cannot be isolated from other fundamental obligations of the CRC to which we have referred, particularly those relating to the best interests of the child, the protection of children deprived of their family environment and the special protection of children in need of international protection, whether accompanied or not.

From this perspective, the detention of children for immigration reasons is not a mere neutral administrative measure, but rather an extremely serious state intervention that directly affects the enjoyment of a wide range of fundamental rights and the child's physical, psychological, and emotional development. This realization has been central to the subsequent evolution of international standards. Indeed, while the wording of Article 37 might suggest that detention of children is not absolutely prohibited, the interpretation developed by United Nations (UN) human rights bodies has progressively transformed this provision into a substantive prohibition in the migration context.

2.3. The gradual construction of a reinforced standard in the migration context

2.3.1. Special procedures: The first warnings

From the early 2000s, various United Nations mechanisms began questioning the compatibility of migration detention with international child protection obligations. Initially, this questioning was framed in terms of enhanced exceptionality: migrant detention should always be a measure of last resort, applied only after an individualized assessment and when no less coercive alternatives exist. At this initial stage, certain international bodies already showed particular concern for the situation of unaccompanied children: the Working Group on Arbitrary Detention stated that they should not be detained under any circumstances (Working Group on Arbitrary Detention, 1998, para. 37), while the Special Rapporteur on the human rights of migrants maintained that their detention should be legally prohibited (Special Rapporteur on the Rights of Migrants, 2002, para. 75 a)).

These statements foreshadowed a deeper doctrinal evolution. Over time, the emphasis on the inherently harmful nature of deprivation of liberty for children was consolidated through thematic reports and empirical studies, eventually codified in principles and guidelines. An important milestone in this process are the Principles and Guidelines adopted by the Working Group on Arbitrary Detention pursuant to Human Rights Council resolution 20/16, as well as its Deliberation n. 5: both establish that the

detention of unaccompanied or separated migrant children is prohibited, and that detaining children because of their parents' migration status always violates their best interests (Working Group on Arbitrary Detention, 2015, Principle 21; Working Group on Arbitrary Detention, 2018, para. 11 and 40).

The Special Rapporteur on Torture also took that view in 2015, arguing that the deprivation of liberty of children based on their or their parents' migration status is never in the best interests of the child, as it exceeds the requirement of necessity and is grossly disproportionate (Special Rapporteur on Torture, 2015, para 80). The Special Rapporteur further noted that such detention may constitute cruel, inhuman or degrading treatment, a view confirmed by the ECtHR in numerous cases involving child detention in the migration context, as will be discussed later.

Finally, the Special Rapporteur on the human rights of migrants devoted his 2020 report entirely to the detention of children in the context of migration. The report not only reiterates that detaining children for migration-related reasons "is never in the best interests of the child and is a violation of international human rights law", but also underscores the growing international consensus among mental health experts that even short periods of deprivation of liberty have profoundly harmful effects on children's mental health and development (Special Rapporteur on the Rights of Migrants, 2020, para 13; see also Priestley *et al.*, 2025, p. 870-79; and Sherif *et al.*, 2026, p. 47-73). As a result, the Special Rapporteur makes a clear call to action: states must end the detention of children on the basis of their immigration status and implement alternative measures grounded in human rights, care and protection, rather than control or deterrence. The report also presents examples of good practices, demonstrating that immigration detention of children can be avoided.

*2.3.2. The central role of the Committee on the Rights of the Child:
from caution to prohibition*

The most significant interpretative evolution in this field has taken place within the Committee on the Rights of the Child. In its General Comment No. 6 (2005) on unaccompanied children, the Committee stated that, as a general rule, such children should not be deprived of their liberty and that detention could not be justified solely on the basis of their migration status or their separation from their family (para. 7 and 8). At that stage, however, the Committee still left open the possibility of exceptional detention on other grounds, provided that it complied with the requirements of Article 37(b) CRC.

This cautious approach reflected both the state of the international debate at the time and the internal logic of Article 37 itself, but it soon revealed its limits. In practice, the reference to detention as a "last resort" was invoked by states to legitimise systematic detention practices, formally presented as exceptional yet applied almost automatically in contexts of migration control. Aware of this drift, the Committee took a decisive step in 2017 through the adoption, together with the Committee on Migrant Workers, of Joint General Comment No. 4 and 23, which includes an unequivocal position: states must expeditiously and completely cease the detention of children for migration-related reasons, and such detention should be prohibited by law and eliminated in practice (CMW and CRC, 2017b, para. 5 and 12).

The most significant contribution of this Joint General Comment lies in its interpretative clarification of Article 37(b). The Committees affirm that while detention as a measure of last resort may be applicable in other contexts, such as juvenile criminal justice, it cannot be applied to the migration context, as this would be incompatible with the best interests of the child and with the child's right to development (CMW and CRC, 2017b, para. 10; see also Smyth, 2019). This interpretation fundamentally transforms the understanding of Article 37: detention of children on migration-related grounds is no longer a potentially permissible exceptional measure but a substantive violation of the Convention. Indeed, while such a punitive and harmful measure may, in exceptional circumstances, be justified in contexts involving criminal responsibility, it cannot be justified in the migration context, where children have done nothing else than fleeing their country of origin or residence to seek protection of their fundamental rights.

From a theoretical perspective, this shift may be understood as the consolidation of a material limit on the state's power of migration control, derived from children's heightened vulnerability and the reinforced status of child protection under international human rights law.

2.3.3. Broad international consensus and the obligation to develop alternatives

The position of the Committee is not an isolated one. UN agencies and programs, including UNHCR, affirmed that the detention of migrant children is incompatible with a human rights-based approach to migration (ILO et al., 2017, Principle n. 8). UNHCR also progressively departed from its first more nuanced approach (UNHCR, 2012, Guideline 9.2) to end up adopting a position that clearly opposes detention:

UNHCR's position is that children should not be detained for immigration related purposes, irrespective of their legal/migratory status or that of their parents, and detention is never in their best interests. Appropriate care arrangements and community-based programmes need to be in place to ensure adequate reception of children and their families (UNHCR, 2017).

UNHCR based its position on recent evidence that detention seriously harms children's psychological, physical and cognitive development, even when it is short-term or occurs with their families. Detained children commonly suffer depression, anxiety and post-traumatic stress symptoms, and face significant risks of further harm, including sexual and gender-based violence (UNHCR, 2017, p. 1-2). There is also no evidence that detaining children deters refugee, asylum-seeker, or irregular migration.

As far as intergovernmental bodies are concerned, they tend to be more reluctant to adopt a clear-cut position, but recent instruments reflect a commitment by states to end the practice of child detention. The Human Rights Council called upon states to consider alternatives to detention for children and families when detention is based solely on their migratory status, referring to the negative impact on children of such practice and reaffirming the obligation to consider the best interests of the child (Human Rights Council, 2009, para. 4 a)). More recently, it noted that detention of children on migration grounds rarely—if ever—serves their best interests, and urged states to end this practice

and adopt appropriate alternatives to detention (Human Rights Council, 2017, para. 6). Similarly, despite the fact that the prohibition of child detention was not included in the 2018 Global Compact for Safe, Orderly and Regular Migration, states nonetheless pledged to work to “end the practice of child detention in the context of international migration” and to ensure “availability and accessibility of a viable range of alternatives to detention in non-custodial contexts, favouring community-based care arrangements” (United Nations General Assembly, 2018, para 29, Objective 13 (h)).

At the European level, the Council of Europe’s Parliamentary Assembly has consistently opposed the detention of unaccompanied foreign children in all circumstances, urging states to prioritise alternatives to detention, such as family-based care, supervised placement, or residential accommodation (Council of Europe, 2022a, para. 11). The Committee of Ministers has similarly rejected their detention in the context of age determination procedures, stressing that, from the outset, accommodation must ensure the immediate safety and well-being of the presumed child and be adapted to his or her specific needs throughout the process (Council of Europe, 2022b, para. 21).

2.4. Critical assessment

The analysis above indicates that international human rights law is shifting from a paradigm of exceptionality to one that effectively prohibits the detention of children for migration-related reasons, in particular for unaccompanied children. This prohibition is grounded in an evolving interpretation of the CRC, which recognizes the structural incompatibility between deprivation of liberty and the best interests of the child. From this perspective, the detention of unaccompanied children appears not only as a violation of the right to personal liberty, but also as a breach of the best interests of the child provision and of the protection and assistance obligations stipulated in Articles 20 and 22 CRC. Deprivation of liberty thus becomes symptomatic of a structurally inadequate approach that prioritizes immigration control over the comprehensive protection of the child, that is, the prevalence of a law enforcement approach over a human rights-based approach.

This emerging normative consensus provides a benchmark for assessing the compatibility of regional and national frameworks with international child protection obligations. As discussed in the following sections, the gap between these standards and European Union law, as well as its implementation by Member states, raises serious doubts about compliance with these obligations.

3. THE DETENTION OF CHILDREN IN EUROPEAN UNION LAW: BETWEEN DECLARED EXCEPTIONALITY AND PRACTICAL NORMALIZATION

3.1. The European regulatory framework prior to the Pact on migration and asylum: Formal limits without a substantive prohibition

EU law does not reflect the consensus developed by international bodies. Rather than prohibiting the detention of children pending return, EU legislation merely restricts it. Both Directive 2008/115/EC on the return of irregularly residing third-country nationals

(Return Directive) and Directive 2013/33/EU establishing standards for the reception of applicants for international protection (Reception Conditions Directive, or RCD) allow for the detention of children, although they surround this power with a series of formal safeguards. Both instruments are based on a common formulation: children may be detained only as a measure of last resort, for the shortest possible period, and solely where less coercive alternative measures cannot be effectively applied (Return Directive, Article 17(1), and RCD, Article 11(2)). In addition, detention must take into account the best interests of the child and be carried out in appropriate facilities, with access to education, recreational activities, and age-appropriate care (RCD, Article 11(2)).

In the specific case of unaccompanied children seeking international protection, the Reception Conditions Directive establishes a formally more restrictive standard, permitting detention only in exceptional circumstances, prohibiting their placement in prison facilities and requiring their separation from adults (RCD, Article 11(3)). However, these guarantees are weakened by open-ended clauses such as “as far as possible” or “where necessary” which, give member states a wide margin of discretion.

Furthermore, the border asylum procedures set out in Article 43 of Directive 2013/32/EU (Asylum Procedures Directive) have operated as a de facto deprivation of liberty. Although formally limited to specific cases involving accelerated procedures on admissibility or merits, they entail prolonged confinement of applicants in border or transit areas, with severe restrictions on freedom of movement and harsh living conditions. Unaccompanied children have not been fully excluded from these procedures: those from so-called “safe” countries or whose applications that are deemed manifestly unfounded can be subjected to border procedures and, as a consequence, to detention.

From a critical perspective, this regulatory framework reflects an illusory balance between protection and control. While the EU legislator recognizes the vulnerability of children, it stops short of establishing clear substantive limits on the state’s power to deprive them of liberty. The result is a system that proclaims the exceptional nature of detention but allows its repeated and, in some contexts, systematic use (Council of Europe, 2017, p. 45).

3.2. European practice: border procedures, hotspots and de facto detention

The normative flexibility of EU law has had a direct impact on practice, enabling states to make extensive use of the discretionary margins it provides. As a result, the detention of children arriving at border posts remains widespread. This practice has been documented by governmental and non-governmental organizations and international human rights bodies. Several studies identified the detention of unaccompanied asylum-seeking children as a major concern, noting, for instance, that in Belgium it is common for unaccompanied children to be detained for weeks during age assessment procedures; that the law in Slovakia enshrines a presumption of majority during the age assessment procedure, and that 175 unaccompanied children were detained in Slovakia in the first half of 2021 alone; and that in the Czech Republic detention rules for unaccompanied children over 15 do not differ from those applicable to adults (Euro-Med Human Rights Monitor,

2023, p. 18, p. 92-93, and p. 31; see also UNICEF, 2020). In cases of age dispute, both the Czech Republic and France have failed to apply the presumption of minority, detaining children with adults until age assessment is completed (Euro-Med Human Rights Monitor, 2023, p. 31 and 39-44).

Concerns regarding the detention of unaccompanied migrant children at EU borders — including in the context of border procedures — were also raised by the Council of Europe and the European Parliament (Council of Europe, 2017, p. 45; European Parliament, 2021, p. 5). In parallel, the Committee on the Rights of the Child has repeatedly called on European states, including Greece, Finland, France, Poland, and Lithuania, to end the detention of unaccompanied children seeking asylum in its concluding observations directed to these countries (Committee on the Rights of the Child, 2024, paras. 43 and 44; 2023a, paras. 38 and 39; 2023b, paras. 44 and 45; 2022, paras. 39 and 40; and 2021, para. 41). The European Committee on the Prevention of Torture also urged Malta to stop detaining unaccompanied and separated children, who were held in poor conditions and alongside unrelated adult men (Council of Europe, 2021). As will be examined later, the case law of the Committee on the Rights of the Child and the ECtHR confirms that this practice is frequent in countries such as France, Greece, Italy and Spain.

Finally, the persistent detention of unaccompanied children has been documented in the “hotspots” established since 2015 at the EU’s main entry points, particularly in Greece and Italy (EU Fundamental Rights Agency, 2019, pp. 39-44). In this context, it is of particular concern that the EU Pact on Migration and Asylum, rather than addressing these shortcomings, consolidates and generalizes this “hotspots” border approach, despite substantial evidence that this model represents a real threat for the rights of migrant children.

3.3. The 2024 Pact on Migration and Asylum: The institutionalization of border procedures

With the exception of a few specific provisions, the adoption of the Pact on Migration and Asylum in 2024 marks yet another turning point in the gradual distancing of European migration policy from the human rights principles and values that constitute the foundational values of the Union. Comprising eight Regulations and one Directive, which replace the current framework from mid-2026 —or later, since the previous framework applies to applications for international protection submitted until mid-2026—, the Pact establishes a system based on the widespread use of accelerated and border procedures that permit detention for up to 12 weeks (Asylum Procedure Regulation (APR), Article 42, 43 and 51.2) —an increase from the previous 4-week limit. Although under this new legal framework applicants for international protection may not be detained solely on the basis of their status, member states may detain them following an individual assessment, where less coercive alternatives are ineffective, and only on the grounds exhaustively listed in the recast Reception Directive (RD), which are relatively broad (Article 26 APR and Article 10 RD).

3.3.1. Border procedures and children

The APR and the RD establish, as a rule, that children should not be detained and should instead be accommodated in non-custodial facilities. This principle, however, is

immediately qualified by an exception allowing detention in exceptional circumstances, where it is strictly necessary and as a measure of last resort, following an individual assessment concluding that detention is in the child's best interests (Recital 69 APR and Recital 40 and Article 13.2 RD). Such detention is permitted only in narrowly defined situations: for accompanied children, when their parent or main caregiver is detained, and for unaccompanied children, when detention is necessary to "protect the child" (Article 13.2 RD). This latter ground is particularly problematic due to its vagueness and the broad discretion it affords to member states, and directly contradicts the international human rights and scientific consensus that detention is inherently harmful to children and can never serve their best interests.

The Directive provides safeguards for detained children: the requirement that detention be as short as possible, the prohibition of placement in prisons or police facilities, and guarantees of access to education and leisure (Article 13.2 RD). In the case of unaccompanied children, detention should take place in specialized facilities with qualified staff. However, even this safeguard may be derogated from in border or transit areas and for limited periods (Article 13.3 and 13.6 RD). While the obligation to separate children from adults is non-derogable, the possibility of exceptions to sex-based separation in border detention facilities is particularly concerning (Article 13.3 and 13.6 RD), especially in light of well-documented instances of sexual and gender-based violence in migrant holding centres. Evidence from countries such as the United States and Greece reveals systemic failures to ensure protection from sexual assaults in these facilities (Cone, 2020; Gisel Zarate, 2022; UNHCR, 2018).

Finally, although unaccompanied children are in principle excluded from border procedures, this protection is weakened by an open-ended exception based on grounds of national security or public order (Article 53.1 APR). More broadly, the new APR represents a regression in EU asylum law by normalizing border procedures for the majority of asylum seekers. In doing so, it deprives them of "the right to remain on the territory of the Member state [...] until the determining authority has taken a decision on the application" (Article 10 APR), weakens procedural guarantees and extends potential border detention from four to twelve weeks (Chetail and Ferolla Vallandro Do Valle, 2024; International Commission of Jurists *et al.*, 2025). Taken together, these developments undermine both the right to asylum and the principle of non-refoulement, which is of special concern considering that unaccompanied children are, due to their vulnerability, particularly exposed to violations of these rights.

3.3.2. *The Screening Regulation: The erosion of safeguards from the very first contact*

Another highly controversial aspect of the Pact is the introduction of a mandatory screening phase. The Screening Regulation (SR) applies to all persons arriving irregularly at the EU's external borders, including children, and aims to conduct identity, health, and security checks, as well as a preliminary vulnerability assessment, in order to determine whether individuals are channelled into the ordinary asylum procedure, the border asylum procedure or the return procedure. This phase, which may last up to seven days in border areas, creates a situation of *de facto* detention and a "fiction of non-entry" into the EU territory. In addition to the restriction on their freedom of movement, individuals concerned

do not enjoy full access to the safeguards inherent in the asylum procedure at a decisive stage, namely the phase that determines the procedure to which they will be channeled.

In the case of unaccompanied children, the Screening Regulation reiterates the primacy of the best interests of the child and the obligation to appoint a representative or qualified person, independent from screening authorities, to assist them during the procedure (Article 13.3 and 13.4). However, these safeguards remain extremely limited. The Regulation neither establishes a procedure for determining minority in cases of missing documentation or doubt nor clarifies how children are to be referred to the ordinary asylum procedure rather than the border one. In particular, it provides no age-assessment procedure applicable during the screening phase and no effective means to challenge erroneous age determinations at that stage.

These shortcomings have serious consequences. If minority is not identified during the screening, and children are unaware of the implications of failing to prove their age at that very early stage, they may easily be treated as adults and channelled into a border asylum procedure or even a return procedure, with dramatic consequences. Indeed, both procedures involve forms of deprivation of liberty and reduced procedural guarantees that are incompatible with child protection standards. As a result, the failure to identify minority at this initial stage risks emptying later safeguards of substance. From a human rights perspective, this regulatory design is deeply problematic, as it shifts the decisive moment of protection —the first contact with authorities— to a phase in which safeguards are minimal and the prevailing logic is one of control and security. Evidence of the current systemic problem of non-identification of children at the border only reinforces these concerns, as demonstrated by the case law of the Committee on the Rights of the Child and the ECtHR, examined below, and reported by the European Parliament (2021) and other bodies (see 3.2. above).

3.3.3. *Critical assessment*

From a children's rights perspective, the Pact reveals a clear structural tension. On the one hand, the new instruments formally reiterate the primacy of the best interests of the child and the need for age-appropriate treatment. However, the design of the system makes deprivation of liberty a central element of migration management, even for particularly vulnerable groups. Under the new system, the combination of screening, accelerated and border procedures and the lack of legal safeguards significantly increases the risk of detention, misidentification and refoulement of children. This tension is not merely theoretical. As will be examined below, the case law of the European Court of Human Rights has highlighted, time and again, the concrete consequences of this normalization of detention for the rights and dignity of migrant children.

4. THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS: AN ESTABLISHED INCOMPATIBILITY WITHOUT EXPLICIT PROHIBITION

The ECtHR has on numerous occasions examined the detention of children in the migration context. From its earliest decisions, the Court has held that the deprivation of liberty of children is not prohibited *per se*, but that it is compatible with the European

Convention of Human Rights (ECHR) only where it is strictly necessary and fully adapted to the child's specific needs.

This approach has led the Court to develop a particularly strict standard of scrutiny, considering factors such as the child's age, the duration and material conditions of detention, the availability of less restrictive alternatives, and the heightened vulnerability arising from prior traumatic experiences (Cools, 2021; Haumont, 2022). In doing so, the Court has repeatedly relied on the CRC, especially Articles 3 and 37, as interpretative benchmarks for defining states' obligations under the ECHR (*Rahimi v. Greece*, 2011, para. 108; and *Darboe and Camara v. Italy*, 2022, para. 156). Nevertheless, this engagement with international child protection standards has not translated into the explicit recognition of a substantive prohibition on the detention of unaccompanied children for migration-related reasons. Instead, the Court relies on a case-by-case assessment grounded in the specific circumstances of each detention.

4.1. Article 3 ECHR: Detention conditions and the vulnerability of the child

Most judgments issued by the ECtHR in this field are based on violations of Article 3 ECHR, which prohibits inhuman or degrading treatment. In its settled case law, the Court has found violations of Article 3 having regard to the length and conditions of detention (*Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 2006, para. 50-59; *Abdullahi Elmi and Aweys Abubakar v. Malta*, 2016, paras. 113-115). It further recognised that the detention of migrant children, even for relatively short periods, may attain the minimum level of severity required by Article 3 when combined with inadequate material conditions, the impact of detention on their psychological well-being and the particular vulnerability of children; the latter has been described by the Court as “the decisive factor” which “takes precedence over considerations relating to his or her status as an illegal immigrant”, as first stated in *Mubilanzila Mayeka and Kaniki Mitunga* (2006, para. 55) and consistently reiterated in its subsequent case law on unaccompanied children.

A paradigmatic case in this regard is *Rahimi v. Greece*, in which the Court held that the detention of an unaccompanied child for only two days in the Pagani centre amounted to degrading treatment, given the extremely poor conditions of the facility —described as “unsanitary beyond description” with “abominable detention conditions” (paras. 30-31 and 82-84)— and the failure to take into account the child's specific situation. The Court emphasised that, in conditions considered inhuman even for adults, the position of a child reinforced the seriousness of the violation.

This line of reasoning has been reiterated in numerous subsequent cases, such as *M. D. and A. D. v. France* (2021) and *Darboe and Camara v. Italy* (2022), in which the Court highlighted that the conditions inherent in migrant detention centres —as well as police stations or makeshift container facilities— are structurally incompatible with children's needs and generate anxiety, fear, and significant deterioration in their mental health. In *Darboe*, a Gambian unaccompanied child had been interned in an overcrowded reception centre for adult migrants for 4 months. The length and conditions of detention (an adult centre) were sufficient for the Court to establish that he had been subjected to inhuman

and degrading treatment. Importantly, the Court added that, considering the absolute character of Article 3, the difficulties deriving from the increased inflow of migrants did not exonerate the state from its responsibility (para. 182).

In more recent judgments, such as *J. B. and Others v. Malta* (2024), the ECtHR has gone a step further by explicitly emphasising the cumulative impact of age, length of detention, and the effects of detention on mental health, concluding that the prolonged detention of unaccompanied children in adult detention facilities constitutes, in itself, inhuman and degrading treatment (para. 52). The Court reached the same conclusion in *A. D. v. Malta* (2023), concerning an unaccompanied foreign child suffering from tuberculosis, post-traumatic stress disorder, and depression, who not only failed to receive the medical care he required but was also detained in wholly inadequate conditions, including in a container, in isolation, or together with juvenile offenders (para. 117-136). In both cases, the Court also found a violation of Article 13 ECHR, as the children did not have access to an effective remedy.

In June 2025, the Court once again condemned Greece, in several joined cases, for the prolonged detention of 39 unaccompanied children in police stations, pre-removal detention centres, reception shelters for children, and the Malakasa camp, finding such detention contrary to Article 3 ECHR (*M. Y. and Others v. Greece*, 2025; *A. I. and Others v. Greece*, 2025). Similar concerns have arisen with respect to other countries. In a decision adopted in June 2024 on Italy's execution of several judgments concerning the unlawful detention and poor conditions of migrants in the Lampedusa and Taranto hotspots, the Committee of Ministers expressed concern that unlawful deprivation of liberty, including of unaccompanied children, appears to persist in these centres. It urged the Italian authorities to provide full information on the measures taken to ensure that the domestic prohibition on the detention of unaccompanied children is effectively implemented, with specific reference to the *Darboe* group of cases (Council of Europe, 2024, para. 1).

4.2. Article 5 ECHR: Arbitrary detention and the absence of individualised assessment

The ECtHR has also consistently found breaches of Article 5 ECHR, which protects the right to liberty and security. The Court has held that the detention of migrant children is arbitrary and contrary to Article 5.1 when it is applied automatically, without an individualised assessment that considers their status as children and the availability of less restrictive alternatives. It has repeatedly stressed that the detention of migrant children should be avoided and has found violations of Article 5.1 in cases where children were placed in detention centres without establishing that no alternative measures involving a lesser restriction of their liberty were available (*Rahimi v. Greece*, 2011, paras. 109-110, *Popov v. France*, 2012, para 119; *M. D. and A. D. v. France*, 2021, para 89, and *A. D. c. Malta*, 2023, paras. 185-191).

In *Moustahi v. France*, the Court found a violation of Article 5.1—in addition to Article 3—where the French authorities arbitrarily associated two children aged three and five with an unrelated adult, detained them together with him and other adults,

and subsequently returned them with him to the Comoros. This was done without any examination of their individual situation and in clear disregard of the best interests of the child, reflecting a regrettably established practice of French authorities on the island of Mayotte (2020, para. 93-94).

The ECtHR has also found violations of Article 5.4 ECHR due to the lack of effective access to a prompt and effective remedy to challenge the lawfulness of detention. In several cases, the Court has emphasised that the remedies available under domestic law did not meet the Convention requirements of independence, impartiality, or speed, particularly where unaccompanied children were concerned and were not provided with adequate legal representation (*Abdullahi Elmi and Aweys Abubakar v. Malta*, 2016, paras. 116-124; *Moustahi v. France*, 2020, paras. 103-104; or *J. B. and Others v. Malta*, 2024, paras. 149-159).

4.3. The best interests of the child: An essentially procedural incorporation

One of the most relevant —and controversial— aspects of the ECtHR's case law in this area concerns the way in which the Court incorporates the principle of the best interests of the child. Although this principle is not expressly set out in the ECHR, the Court introduced it through an evolutive interpretation, as noted in relation to *Rahimi*, relying on the CRC as an international instrument of fundamental importance in the context of children's rights.

However, this incorporation has taken place primarily from a procedural perspective. The best interests of the child, as enshrined in Article 3 CRC, are framed as a safeguard requiring an individualised assessment, enhanced reasoning in detention decisions, and access to effective remedies. Read in conjunction with Article 37 CRC, the Court held that the principle also requires that the detention of a child be used only as a measure of last resort. The absence of these guarantees is what, in most cases, leads the Court to find a violation of the Convention. Moreover, the Court has clarified that even where a state complies with these requirements —having established that less coercive measures were unavailable and having ensured satisfactory detention conditions— an additional requirement applies in order not to violate Article 5.1 f) ECHR: it must be applied for a short period of time (*M. H. and S. B. v. Hungary*, 2024, para. 76; and *M. H. and Other v. Croatia*, 2021, para 237).

From a critical perspective, it can be argued that the Court has been more reluctant to develop the best interests of the child as a substantive right capable of imposing material limits on the state's power to detain. Unlike the Committee on the Rights of the Child, the ECtHR has not held that the detention of children for migration-related reasons is per se incompatible with children's rights and their best interests. Instead, it has maintained the fiction of a theoretical compatibility, conditional upon extremely restrictive circumstances.

This approach, which diverges from the positions adopted by UN and European human rights bodies, generates significant doctrinal tension. On the one hand, the Court's case law shows that such restrictive circumstances very rarely —if ever— exist. On the other hand, the absence of an explicit prohibition allows states to continue to justify the

detention of children normatively, despite repeated findings of violations by the Court. Even if this approach may be explained, in part, by the structural limitations of the ECHR and the Court's role as a subsidiary supervisory body, from a human rights perspective, it is nevertheless legitimate to ask whether such caution is justified and whether it does not, in practice, contribute to perpetuating a situation of structural violations of children's rights.

5. THE DETENTION OF UNACCOMPANIED CHILDREN BEFORE THE COMMITTEE ON THE RIGHTS OF THE CHILD: AN UNEVEN CASE LAW

As already noted, the Committee on the Rights of the Child has adopted a total of eighteen decisions concerning unaccompanied children: fifteen against Spain, two against France and one against Switzerland. While the decisions concerning France and Switzerland do not involve situations of detention, thirteen of the fifteen decisions concerning Spain relate to cases in which children were deprived of liberty in police stations or migrant holding centres. As a result, the case law of the Committee on this issue is confined to Spain, which is indeed one of the main external border states through which migrants enter the European space.

5.1. A brief overview of the Spanish Legal Framework and its Operational Gaps

At the formal level, the Spanish legal system recognises the need for special protection of unaccompanied foreign children. Organic Law 4/2000 on the Rights and Freedoms of Foreigners in Spain and their Social Integration, together with its implementing regulations, provides that, under the presumption of minority, unaccompanied children should not be detained in immigration detention centres (Centros de Internamiento de Extranjeros – CIEs) and that, once minority is established, or where there is a reasonable doubt, the child must be placed under the responsibility of the regional child protection services (Spain, 2000, Art. 35.3 and 35.4).

The Organic Law 1/1996 on the Legal Protection of Minors, as amended by Organic Law 8/2015 Modifying the System for the Protection of Children and Adolescents, enshrines the child's best interests as a primary consideration and guarantees foreign children access to education, healthcare, and basic social services on an equal footing with Spanish children (Spain, 1996, Articles 2.1 and 10.3). This protection is reinforced by the constitutional framework, which recognises the comprehensive protection of children (Article 39 of the Constitution) and requires public authorities to respect international treaties ratified by Spain, including the CRC. In principle, this framework should exclude the detention of unaccompanied children in the migration context.

In practice, however, this architecture of protection is undermined by structural failures, particularly in age determination procedures, where legal safeguards are either insufficient or inconsistently applied. Some courts have acknowledged these deficiencies. The Supreme Court has affirmed the primacy of official documentation submitted by the child and the obligation to apply the presumption of minority, while certain courts overseeing CIEs have ordered releases where there were sufficient indications of minority. Nevertheless, in the absence of comprehensive legislative reform

and binding protocols, practices incompatible with children's rights persist. Although a bill establishing a new age determination procedure with enhanced guarantees was approved by the government in 2024, its parliamentary process remains stalled (Milano, 2025, pp. 212-222).

5.2. Detention as a consequence of shortcomings in the age determination process

The extensive case law on Spain reveals that detention is mainly linked to the absence of an effective rights-based age-determination procedure, which recurrently leads to misidentification and to the detention of unaccompanied children in adult migrant holding centre (CIEs). When a young person arrives without documentation and claims to be a child, the authorities rely almost exclusively on radiological age-assessment tests, typically wrist or dental X-rays, which are unanimously criticised by international bodies and medical organizations as scientifically unreliable to determine adulthood (European Economic and Social Committee, 2020, para 4.6, 4.9 and 4.10). These tests are sometimes carried out immediately upon arrival and in other cases after days or weeks spent in CIEs or in child-protection facilities. Based on these tests alone, and without an interview, a multidisciplinary assessment or an evaluation of specific vulnerabilities being carried out, as international and European standards actually require (CMW and CRC, 2017b, para. 4; European Economic and Social Committee, 2020, para 4.3-4.12; EASO, 2019, p. 34-36), individuals are declared adults and transferred to or kept in adult CIEs. Throughout this process, children are frequently denied access to a guardian, an interpreter, or to legal assistance.

This pattern is illustrated by cases such as *A. L.*, an Algerian adolescent who arrived in Almería in 2017, claimed to be 17, and was declared over 19 based on a wrist X-ray (*A. L. v. Spain*, 2019). He was detained in a CIE, where he reported being subjected to inhuman treatment and physical abuse by guards. A similar sequence unfolded again in Almería in the case of *M. B. S.*, a Guinean national who was declared an adult following a wrist X-ray and detained in a CIE, despite later producing an original birth certificate proving his minority. He was eventually released because of his minority but received no assistance whatsoever (*M. B. S. v. Spain*, 2020).

Comparable facts appear in several other cases examined by the Committee, including *M. A. B.* (2020), *S. M. A.* (2020), and *C. O. C.* (2021). In the latter, a 17 years-old Gambian boy arrived by boat in Tenerife and declared his minority, yet was deemed an adult on the basis of a wrist X-ray and a dental orthopantomography, conducted without his informed consent and in the absence of a guardian or an interpreter. In the meantime, he was detained in an annex to a police station for 16 days, after which he was transferred to a CIE, where he remained deprived of liberty until the submission of his communication to the Committee.

In other cases, the situation was even more serious, as children were deprived of liberty from the outset, without any age-assessment procedure being carried out, despite their explicit claims of minority, in blatant disregard of the presumption of minority. For example, *M. B.*, a 17-year-old from Guinea, was registered as a 21-year-old adult, issued

a return order and detained in a CIE for 52 days before being released upon presentation of his birth certificate, once again without any form of support (*M. B. v. Spain*, 2020). The cases of *B. G.* is even more serious. This Algerian boy arrived aboard a small boat on the coast of Lorca in November 2017. Despite stating that he was a child, he was locked in a cell for three days until his detention was ordered at the Málaga II prison in Archidona (a regular prison which was controversially used as a CIE at the end of 2017) and a deportation order was issued: all this without any age determination procedure being applied, despite repeated requests from his lawyer (*L. D. and B. G. v. Spain*, 2020). Similar treatments were documented in *H. B.* (2020), *M. T.* (2019) and *R. K.* (2019), all of whom were detained in police cells and/or CIEs alongside adults, without any age-assessment procedure, guardian appointment, or access to child-specific protection.

The case of *R. K.* illustrates very well the extreme situations many of these young adolescents endure before, during and after their trip. This Guinean adolescent fled his country after witnessing the murder of his parents, surviving an attempt on his own life and being enslaved by criminal groups while he was crossing Africa. When after two years he finally reached Almería by small boat at the age of 17, he was taken directly to a police cell, where he remained for three days in detention alongside adults. Despite repeatedly stating that he was 17 years old, he was registered as a 21-year-old adult, a deportation order was issued against him, and he was detained at the Aluche CIE in Madrid. After obtaining a copy of his birth certificate, he was finally released after 52 days in the CIE, but was transferred to an adult facility without being assigned a guardian.

Taken together, these cases reveal a recurrent practice of detaining unaccompanied children —either immediately upon arrival or following defective age-determination procedures— alongside adults and in conditions marked by serious violations of due-process guarantees. Such practice contradicts Article 3 and 37(b) CRC which, according to the interpretation made by the Committee in its Joint General Comment No. 23, require the best interests of the child to be prioritized over migration-control objectives and prevent resorting to the detention of children for migration control purposes.

5.3. A limited and uneven consideration of detention as a separate human rights violation

When the Committee addresses the immigration detention of unaccompanied children —which, in addition, took place alongside adults in all cases— it tends to frame it as an issue of concern under Article 20.1 CRC. In doing so, the Committee treats the deprivation of liberty as one among other elements that reveal a broader failure by the state to comply with its obligation to provide protection and assistance to children deprived of their family environment. However, it consistently fails to address detention as a separate and autonomous violation of the Convention, as it does, for example, with the right to identity under Article 8, where the failure to recognise a child's minority is explicitly characterised as a breach of an essential component of identity under that Article.

This indirect approach to condemning the detention of children —by subsuming it under a general breach of the duty to protect— is striking. It suggests that the arbitrary

deprivation of liberty of children is not considered a violation of sufficient gravity to warrant recognition as a stand-alone breach of a fundamental right. Given the centrality of the right to liberty within the Convention framework, and within international human rights law as a whole, this approach is difficult to justify.

Moreover, the Committee's approach is not only indirect but also markedly inconsistent. As noted above, the Committee has adopted a total of thirteen decisions involving the detention of unaccompanied children in police stations or migrant holding centres. Yet, strikingly, in only two of these decisions does the Committee explicitly address detention as an issue of concern giving rise to a violation of the Convention by the state concerned.

In the case of *B. G.*, the Committee found a violation of Article 20.1 on the basis that the child has been deprived of liberty and detained for over a month in a prison operating as a de facto immigration detention centre together with adults, despite the authorities having access to a birth certificate confirming his minority. The Committee reasoned as follows:

The Committee also notes the author's allegations, which have not been contested by the State party, that the State party failed to provide him with protection even though he was a defenceless and extremely vulnerable unaccompanied child migrant. The author was treated as an adult, deprived of his liberty and placed in a prison that served as a holding centre for foreign nationals, together with adults, despite the fact that the State party had a birth certificate indicating that he was a minor. The author spent more than a month in a detention centre before being transferred to a centre for minors. The Committee is therefore of the view that this inaction constitutes a violation of article 20 (1) of the Convention (*L. D. and B. G.*, 2020, para 10.17).

In *C. O. C.*, the Committee also found a violation of Article 20.1 in relation to detention, albeit in considerably weaker terms. The Committee focused primarily on the time the child spent in an annex to a police station—and on the fact that he was subsequently released without any child-specific support—rather than on the period of detention in the CIE itself:

In addition, the Committee notes the author's claims, which have not been contested by the State party, that the State party failed to provide him with protection, even though he was defenceless and extremely vulnerable. This failure occurred even before the author had been placed in the migrant holding centre, since he was held for days in a detention centre other than the one stipulated in the court order and, in particular, after the holding centre itself had released him on the grounds that it was impossible to obtain the documentary evidence needed to carry out the deportation. The Committee is of the view that this failure to provide protection constitutes a violation of article 20 (1) of the Convention (*C. O. C.*, 2021, para 8.15).

By contrast, in other cases involving equally serious —if not more severe— deprivations of liberty, the Committee remains entirely silent on the detention endured by the child. In *R. K.*, for instance, the child was detained for three days in a police cell together with adults and subsequently for 52 days in an adult migrant holding centre. While the Committee established multiple violations related to the age-determination procedure, the right to be heard and the right to identity, it made no reference whatsoever to the deprivation of liberty as an element that could entail a violation of the Convention. Similarly, in *M. B.* and *M. B. S.*, the Committee identified a violation of Article 20.1 only in relation to the authorities' failure to provide access to child-protection services following the children's release from the CIE, without characterising their prior detention in adult immigration holding centres as a breach of the state's obligation to protect them or to refrain from arbitrarily or unlawfully depriving them of liberty:

The Committee also notes the author's claims, which have not been contested by the State party, that the State party failed to provide him with protection, even though he was a defenceless and extremely vulnerable unaccompanied child migrant. The Committee notes that this failure to provide protection continued even after the author had submitted his birth certificate to the Spanish authorities and, in particular, after the holding centre for foreign nationals itself had released him. The Committee is of the view that this failure to provide protection constitutes a violation of article 20 (1) of the Convention (*M. B. v. Spain*, 2020, para. 9.16; in almost identical terms, *M. B. S. v. Spain*, 2020, para 9.17).

Nothing else is being said on the child's detention in the holding centre. The same silence is to be found in the case of *J. A. B.* (2019), a 15-year-old boy detained for five months in an adult migrant holding centre, as well as in all other cases except the two above-mentioned cases: *L. D. and B. G.* and *C. O. C.*

This limited and uneven engagement with detention is difficult to reconcile with the fundamental importance of the right to liberty and with the strong normative position adopted by the Committee in its Joint General Comment No. 23 of 2017, in which it unequivocally rejected the lawfulness of the detention of children for migration-related purposes. Particularly striking is the fact that, in none of the cases examined, did the Committee assess the deprivation of liberty under Article 37(b) CRC, nor did it find a violation of that provision. Nor has it characterized this detention as a violation of the best interests of the child (art. 3 CRC). These omissions are especially troubling given the gravity of deprivation of liberty and its well-documented and severe impact on children's physical and mental health. It is further aggravated by the fact that, in all of these cases, the children were detained together with adults, a situation that additionally engages Article 37(c) CRC that prohibits such detention unless it is deemed in the best interests of the child.

Against this background, the failure to characterise the detention of unaccompanied migrant children in police cells or CIEs as a violation of Article 37(b) and (c) and Article 3 CRC is difficult to justify. The tension is particularly stark when contrasted with the Committee's own categorical statement in General Comment No. 23 that detention for migration-related reasons is incompatible with Article 37(b) "as this would conflict with

the principle of the best interests of the child” (CMW and CRC, 2017b, para. 10). The dissonance between this clear normative stance and its lack of enforcement in cases involving serious and well-documented violations brought by affected children reveals a deeply concerning practice.

6. CONCLUSIONS

Through its multi-layered analysis, this article has highlighted a profound normative dissonance between the strengthened prohibition of child detention articulated at the international level and its fragmented, conditional or poor implementation within European legal frameworks and international jurisprudential practice. At the universal level, the interpretative evolution of the Convention on the Rights of the Child demonstrates a shift from the notion of detention as an exceptional measure of last resort to a substantive prohibition of the deprivation of liberty of children for migration-related purposes, based on the harmful impact of detention on the mental health and development of children. This shift, consolidated through General Comments and supported by a broad consensus among UN and European bodies, establishes child protection as a material limit on states’ powers of migration control.

By contrast, European Union law has failed to internalise this normative development. As shown, EU legislation continues to allow the detention of children under conditions of declared exceptionality that, in practice, operate as a mechanism of normalization. The legal architecture of the Return Directive, the Reception Conditions framework, and, more recently, the Pact on Migration and Asylum relies on open-ended clauses, screening procedures that entail a legal fiction of non-entry and a lack of due process guarantees, and accelerated border procedures that generate widespread de facto detention. These mechanisms are particularly detrimental to unaccompanied children, whose identification and protection depend on safeguards that, under the new EU framework, are weakest precisely at the earliest stages of contact with migration authorities.

The case law of the European Court of Human Rights occupies an intermediate and ambivalent position. While the Court has consistently condemned the concrete effects of child detention under Articles 3 and 5 ECHR and developed an enhanced standard of scrutiny grounded in children’s vulnerability, it has refrained from recognising detention as per se incompatible with children’s rights. This reluctance preserves a theoretical space of legality that is increasingly difficult to reconcile with the Court’s own empirical findings and with the evolving consensus under international human rights law.

Finally, the analysis of the Committee on the Rights of the Child’s individual communications, centred on Spain, illustrates how these normative ambiguities translate into concrete and recurring violations of children’s rights by state authorities. However, despite clear evidence of prolonged and arbitrary detention of unaccompanied children in adult facilities, the Committee fails to characterise such deprivation of liberty as an autonomous violation under Article 37(b) and (c) or Article 3 of the Convention. Instead, detention is addressed indirectly, inconsistently or, in most cases, not at all. In this regard, several questions remain unanswered. First, why does the Committee refrain from addressing the detention of migrant children directly as a violation of the Convention in its own right, grounded in Article 37(b) read in conjunction with Article 3, instead treating

it as a mere consequence of flawed procedures or as an ancillary aspect of a failure to provide appropriate protection to children deprived of their family under Article 20.1?

Second, why does the Committee lack coherence even within this indirect approach, identifying the immigration detention of children as one of the elements that constitute a violation of Article 20.1 in only a handful of cases, while remaining silent in most cases involving similarly serious deprivations of liberty? This selective engagement is particularly disturbing: it weakens the enforceability of the prohibition the Committee itself has articulated in its General Comment No. 23 and undermines the coherence of the Convention's protective framework.

From a propositive perspective, overcoming these contradictions requires a reconceptualisation of child protection as a substantive constraint on migration governance. First, both EU law and its implementation at national level should incorporate an explicit and unqualified prohibition of the detention of children for migration-related purposes, including at borders and during screening procedures, while prioritising the development and effective use of alternative solutions to detention.

Second, age determination must be recognised as a core protection mechanism rather than a purely administrative tool at the service of migration control. In practice, many instances of detention occur in the context of age assessment procedures or as a consequence of their deficiencies, which lead to the misidentification of children as adults. A rights-based approach therefore requires multidisciplinary procedures grounded in the presumption of minority and ensuring immediate access to guardianship, legal assistance, and appropriate child-sensitive accommodation and care. Detention of children—and, crucially, of presumed children—should be strictly prohibited. For this prohibition to be effective in practice, legal and operational frameworks must clearly regulate the activation and conduct of age-determination procedure across all types and stages of migration procedures, so as to prevent children from being treated as adults. In this regard, the EU Screening Regulation, despite the concerns it raises, should include a dedicated section on unaccompanied migrant children, establishing specific procedural guarantees at the screening stage and clarifying how claims of minority are to be assessed and processed, as well as how the age-determination procedure established in the Asylum Procedures Regulation is to be activated at that initial stage.

Third, considering its fundamental incompatibility with the best interests of the child, and in light of the persistent detention of unaccompanied children across Europe notwithstanding the formal rule of exceptionality, judicial and quasi-judicial bodies should move beyond a procedural scrutiny and adopt a more direct and robust condemnation of the deprivation of liberty of unaccompanied children for migration-related purposes.

Ultimately, the detention of unaccompanied children functions as a revealing stress test for human rights-based approaches to migration. As long as deprivation of liberty remains available as a governance tool, children's rights will continue to be subordinated to migration-control objectives. Reasserting the absolute primacy of the best interests of the child therefore requires not incremental adjustments, but a clear legal and institutional

break with the logic of child detention in migration contexts. It entails moving beyond the notion of child protection as a mere procedural safeguard and reconceptualising it as a substantive limit on state power. This requires the recognition, in both law and judicial practice, that child detention for migration-related purposes is, in light of the best interest of the child, not merely undesirable, but unlawful.

REFERENCES

Academic Publications and Research Studies

- CHETAIL, V. and FEROLLA VALLANDRO DO VALLE, M. (2024). 'The Asylum Procedure Regulation and the erosion of refugees' rights', *EU Immigration and Asylum Law and Policy Blog*, 23 May. Available at: <https://eumigrationlawblog.eu/the-asylum-procedure-regulation-and-the-erosion-of-refugees-rights/>
- CONE, D. (2020). *Seeking asylum in Greece: Women and unaccompanied children struggle to survive*, 27 February. *Refugees International*. Available at: <https://www.refugeesinternational.org/reports-briefs/seeking-asylum-in-greece-women-and-unaccompanied-children-struggle-to-survive/>
- COOLS, L. (2021). 'L'enfermement d'enfants migrants à la lumière de la jurisprudence belge et strasbourgeoise', in SAROLÉA, S. and SINON, A. (Eds.), *20 ans après l'affaire Tabitha. De nouvelles plumes pour analyser la détention d'enfants migrants à la lumière des droits humains*. Wavre: Anthemis, pp. 265–283.
- DAUVERGNE, C. (2016). *The new politics of immigration and the end of settler societies*. Cambridge: Cambridge University Press.
- DAUVERGNE, C. (2020). 'Revisiting the new politics of immigration', *International Migration*, 58(6), pp. 96–107. Available at: <https://doi.org/10.1111/imig.12739>
- EURO-MED HUMAN RIGHTS MONITOR (2023). *Happiness, love and understanding: The protection of unaccompanied minors in the 27 EU Member States*. Available at: <https://euromedmonitor.org/en/article/5641/Unaccompanied-asylum-seeking-minors-in-Europe-face-inadequate-protection:-New-report-documents-disparities>
- GISEL ZARATE, V. (2022). 'Disposable immigrants: The reality of sexual assault in immigration detention centers', *Saint Mary's Law Journal*, 53(2), pp. 619–648.
- HAUMONT, G. (2022). 'M. D. and A. D. v. France: Milestone towards a principled prohibition on the immigration detention of children?', *Strasbourg Observers*, 11 February. Available at: <https://strasbourgobservers.com/2022/02/11/m-d-and-a-d-v-france-milestone-towards-a-principled-prohibition-on-the-immigration-detention-of-children/>
- INTERNATIONAL COMMISSION OF JURISTS, SAVE THE CHILDREN AND KIDS IN NEED OF DEFENSE (2025). *Legal considerations around the application of the asylum border procedure to unaccompanied children*, 1 December. Available at: https://www.icj.org/wp-content/uploads/2025/12/Legal-opinion_APR-Article-53_1-Dec-2025.pdf

- MILANO, V. (2025). *Los derechos de los menores extranjeros no acompañados en la frontera: Normativa internacional y práctica española a la luz de la jurisprudencia del Comité de los derechos del niño y de los tribunales europeos*. Madrid: Dykinson. Available at: <https://doi.org/10.14679/4149>
- PRIESTLEY, I., CHERIAN, S., PAXTON, G. ET AL. (2025). 'The impact of immigration detention on children's mental health: Systematic review', *The British Journal of Psychiatry*, 227(6), pp. 870–879. Available at: <https://doi.org/10.1192/bjp.2025.29>
- SHERIF, B., HOCKING, D. C., ASGHARI-JAFARABADI, M., REES, S., AFFATICATI, L. M. AND SUNDRAM, S. (2026). 'Immigration detention of children: A systematic review and meta-analysis of physical and mental health impacts', *European Child & Adolescent Psychiatry*, 35, pp. 47–73. Available at: <https://doi.org/10.1007/s00787-025-02832-4>
- SMYTH, C. M. (2019). 'Towards a complete prohibition on the immigration detention of children', *Human Rights Law Review*, 19(1), pp. 1–36. Available at: <https://doi.org/10.1093/hrlr/ngy045>

International Institutions Documents

- COMMITTEE ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES AND COMMITTEE ON THE RIGHTS OF THE CHILD (CMW and CRC) (2017a). *Joint general comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 of the Committee on the Rights of the Child (2017) on the general principles regarding the human rights of children in the context of international migration*, CMW/C/GC/3 – CRC/C/GC/22.
- COMMITTEE ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES AND COMMITTEE ON THE RIGHTS OF THE CHILD (CMW and CRC) (2017b). *Joint general comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 of the Committee on the Rights of the Child (2017) on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, CMW/C/GC/4 – CRC/C/GC/23.
- 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.
- COMMITTEE ON THE RIGHTS OF THE CHILD, GENERAL COMMENT NO. 12 (2009). *The right of the child to be heard*, CRC/C/GC/12.
- COMMITTEE ON THE RIGHTS OF THE CHILD, GENERAL COMMENT NO. 14 (2013). *On the right of the child to have his or her best interests taken as a primary consideration (art. 3, para 1)*, CRC/C/GC/14.
- COMMITTEE ON THE RIGHTS OF THE CHILD (2021). *Concluding observations on the combined fifth and sixth periodic reports of Poland*, 6 December, CRC/C/POL/CO/5-6.

- COMMITTEE ON THE RIGHTS OF THE CHILD (2022). Concluding observations on the combined fourth to sixth periodic reports of Greece, 28 June, CRC/C/GRC/CO/4-6.
- COMMITTEE ON THE RIGHTS OF THE CHILD (2023a). Concluding observations on the combined fifth and sixth periodic reports of Finland, 15 November, CRC/C/FIN/CO/5-6.
- COMMITTEE ON THE RIGHTS OF THE CHILD (2023b). Concluding observations on the combined sixth and seventh periodic reports of France, 4 December, CRC/C/FRA/CO/6-7.
- COMMITTEE ON THE RIGHTS OF THE CHILD (2024). Concluding observations on the combined fifth and sixth periodic reports of Lithuania, 7 March, CRC/C/LTU/CO/5-6.
- COUNCIL OF EUROPE (2017). *A study of immigration detention practices and the use of alternatives to immigration detention of children*. Strasbourg: Council of Europe.
- COUNCIL OF EUROPE (2021). *Council of Europe's anti-torture Committee calls on Malta to improve the treatment of detained migrants*, 10 March. Available at: <https://www.coe.int/en/web/cpt/-/council-of-europe-s-anti-torture-committee-calls-on-malta-to-improve-the-treatment-of-detained-migrants>
- COUNCIL OF EUROPE (2022a). Parliamentary Assembly, *Protection and alternative care for unaccompanied and separated migrant and refugee children*, Resolution 2449 (2022).
- COUNCIL OF EUROPE (2022b). *Recommendation CM/Rec(2022)22 of the Committee of Ministers to member States on human rights principles and guidelines for age assessment in the context of migration*.
- COUNCIL OF EUROPE (2024). Committee of Ministers, Decision H46-18 J. A. and Others group v. Italy (Application No. 21329/18), CM/Del/Dec(2024)1501/H46-18, 14 June.
- EU FUNDAMENTAL RIGHTS AGENCY (FRA) (2019). *Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the 'hotspots' set up in Greece and Italy*, Opinion 3/2019.
- EUROPEAN ASYLUM SUPPORT OFFICE (EASO). (2019). *Practical Guide on Age Assessment*. Available at: <https://www.euaa.europa.eu/sites/default/files/easo-practical-guide-on-age-assesment-v3-2018.pdf>
- EUROPEAN ECONOMIC AND SOCIAL COMMITTEE (2020). Opinion of the European Economic and Social Committee on 'The protection of unaccompanied minors in Europe', EESC 2020/02281.
- EUROPEAN PARLIAMENT (2021). *Report on the implementation of Article 43 of Directive 2013/32/EU on common procedures for granting and withdrawing international protection* (2020/2047(INI)), A9-0005/2021.
- HUMAN RIGHTS COUNCIL (2017). *Unaccompanied migrant children and adolescents and human rights*, Resolution 36/5, UN Doc. A/HRC/RES/36/5.

- HUMAN RIGHTS COUNCIL (2009). *Human Rights of migrants: migration and the human rights of the child*, Resolution 12/6, UN Doc. A/HRC/RES/12/6.
- IDAC (INTERNATIONAL DATA ALLIANCE FOR CHILDREN ON THE MOVE) (2025), *Alone, On the Move and Unseen, Spotlighting the Urgent Needs of Unaccompanied and Separated Children*.
- ILO, IOM, OHCHR, UNESCO, UNHCR, UNICEF, UNODC, UNU, UN WOMEN AND WHO (2017). *Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations*.
- SPECIAL RAPPORTEUR ON THE RIGHTS OF MIGRANTS (2002). *Report to the Commission on Human Rights*, UN Doc. E/CN.4/2003/85.
- SPECIAL RAPPORTEUR ON THE RIGHTS OF MIGRANTS (2020). *Ending immigration detention of children and providing adequate care and reception for them*, Report to the General Assembly, A/75/183.
- SPECIAL RAPPORTEUR ON TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (2015). *Thematic report on torture and ill-treatment of children deprived of their liberty*, UN Doc. A/HRC/28/68.
- UNHCR (2012). *Guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention*.
- UNHCR (2017). *UNHCR's position regarding the detention of refugee and migrant children in the migration context*.
- UNHCR (2018). *Refugee women and children face heightened risk of sexual violence amid tensions and overcrowding at reception facilities on Greek islands*, 7 February.
- UNHCR (2026a). *Refugee Data Finder*. Available at: <https://www.unhcr.org/refugee-statistics>
- UNHCR (2026b). *Fleeing unaccompanied. Healing the Suffering of Children Who've Lost Everything*. Available at: <https://www.unhcr.org/hk/en/unaccompanied-children>
- UNHCR, UNICEF AND IOM (2025). *Migrant and Refugee Children Via Mixed Migration Routes in Europe: Accompanied, Unaccompanied and Separated*, 15 September, Available at: <https://data.unhcr.org/en/documents/details/118625>
- UNICEF (2020). *Making the invisible visible. The identification of unaccompanied and separated girls in Bulgaria, Greece, Italy and Serbia*.
- UNICEF (2025, June). *DISPLACEMENT*. Available at: <https://data.unicef.org/topic/child-migration-and-displacement/displacement/>
- UNITED NATIONS GENERAL ASSEMBLY (2018). *Global Compact for Safe, Orderly and Regular Migration*, UN Doc. A/RES/73/195.
- WORKING GROUP ON ARBITRARY DETENTION (1998). *Report of the Working Group on Arbitrary Detention on its visit to the United Kingdom on the issue of immigrants and asylum seekers*, UN Doc. E/CN.4/1999/63/Add.3.

WORKING GROUP ON ARBITRARY DETENTION (2015). *Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, Report of the Working Group on Arbitrary Detention, UN Doc. A/HRC/30/37.

WORKING GROUP ON ARBITRARY DETENTION (2018). *Revised deliberation No. 5 on deprivation of liberty of migrants*, Annex to Report UN Doc. A/HRC/39/45.

Legal Instruments

Asylum Procedure Regulation or APR (2024). Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, ELI: <http://data.europa.eu/eli/reg/2024/1348/oj>

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

Reception Directive or RD (2024). Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 laying down standards for the reception of applicants for international protection, ELI: <http://data.europa.eu/eli/dir/2024/1346/oj>

Screening Regulation or SR (2024). Regulation (EU) 2024/1356 of the European Parliament and of the Council of 14 May 2024 introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 (Screening Regulation or SR), ELI: <http://data.europa.eu/eli/reg/2024/1356/oj>

Spain (1996). Organic Law 1/1996, of 15 January, on the Legal Protection of Minors. Official State Gazette: BOE-A-1996-1069. Available at: <https://www.boe.es/eli/es/lo/1996/01/15/1/con>

Spain (2000). Organic Law 4/2000, of January 11, on the rights and freedoms of foreigners in Spain and their social integration, Official State Gazette: BOE-A-2000-544. Available at: <https://www.boe.es/eli/es/lo/2000/01/11/4>

Spain (2015). Organic Law 8/2015, of 22 July, Modifying the System for the Protection of Children and Adolescents, Official State Gazette: BOE-A-2015-8222. Available at: <https://www.boe.es/eli/es/lo/2015/07/22/8/con>

Case Law (Committee on the Rights of the Child)

A. L. v. Spain, 31/05/2019, CRC/C/81/D/16/2017.

C. O. C. v. Spain, 29/01/2021, CRC/C/86/D/63/2018.

H. B. v. Spain, 27/03/2020, CRC/C/83/D/25/2017.

J. A. B. v. Spain, 09/07/2019, CRC/C/81/D/22/2017.

L. D. and B. G. v. Spain, 14/10/2020, CRC/C/85/D/38/2017.

M. A. B. v. Spain, 07/02/2020, CRC/C/83/D/24/2017.

M. B. v. Spain, 27/10/2020, CRC/C/85/D/28/2017.
M. B. S. v. Spain, 28/09/2020, CRC/C/85/D/26/2017.
M. T. v. Spain, 05/11/2019, CRC/C/82/D/17/2017.
R. K. v. Spain, 05/11/2019, CRC/C/82/D/27/2017.
S. M. A. v. Spain, 28/09/2020, CRC/C/85/D/40/2018.

Case Law (European Court of Human Rights)

Abdullahi Elmi and Aweys Abubakar v. Malta (2016). Applications nos. 25794/13 and 28151/13.
A. D. v. Malta (2023). Application no. 12427/22.
A. I. and Others v. Greece (2025). Applications nos. 11588/20, 13865/20 and 17152/20.
Darboe and Camara v. Italy (2022). Application no. 5797/17.
J. B. and Others v. Malta (2024). Application no. 1766/23.
M. D. and A. D. v. France (2021). Application no. 57035/18.
M. H. and Others v. Croatia (2021). Applications nos. 15670/18 and 43115/18.
M. H. and S. B. v. Hungary (2024). Applications nos. 10940/17 and 15977/17.
Moustahi v. France (2020). Application no. 9347/14.
Mubilanzila Mayeka and Kaniki Mitunga v. Belgium (2006). Application no. 13178/03.
M. Y. and Others v. Greece (2025). Applications nos. 51980/19 and 5 others.
Popov v. France (2012). Applications nos. 39472/07 and 39474/07.
Rahimi v. Greece (2011). Application no. 8687/08.

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