

## ECBA Spring Conference

### Criminal Aspects of the Refugee Crisis

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#### Overview

1. Since 2014, the number of refugees and migrants arriving in Europe, fleeing poverty, violence and persecution, has reached record levels not seen since the Second World War.
2. According to the UNHCR, over 65 million people were forcibly displaced from their homes by conflict and persecution by the end of 2015, including 21 million refugees outside their countries of origin<sup>2</sup>. The number of first time applicants for asylum in EU member states in 2015 more than doubled from 563 thousand in 2014 to almost 1.26 million in 2015.<sup>3</sup> Having failed to anticipate the scale of migrant flows following the Syrian war and instability in North Africa, the EU and its member states did not have the structures in place to cope.
3. The impact continues. The scale of the resulting crisis has been described as “*the greatest humanitarian challenge to have faced the European Union since it’s foundation*”.<sup>4</sup>

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<sup>1</sup> The author and barrister Jelia Sane conducted an observation of child rights on behalf of the Bar Human Rights Committee of England and Wales during the dismantling of “The Jungle” camp in Calais by French and British authorities (2016). Numerous violations were recorded in a report. In 2018, in Athens, she interviewed Judges and prosecutors who have fled Turkey and are seeking asylum in Greece, Germany and the U.K. She is on GLAN’s Advisory Board. During her period as Chair of BHRC, BHRC conducted one fact finding in three refugee camps: the Olive Grove (the unofficial extension of Moria) and Kara Tepe in Lesvos, and Thiva near Athens (conducted by barrister Blinne Ní Ghrálaigh) This paper is in outline to complement a panel discussion at the ECBA Spring Conference. There is concentration upon UK law in national law references as this is the author’s practitioner jurisdiction.

<sup>2</sup> “With 1 human in every 113 affected, forced displacement hits record high,” UNHCR (20 June 2016) available at <http://www.unhcr.org/afr/news/press/2016/6/5763ace54/1-human-113-affected-forced-displacement-hits-record-high.html>.

<sup>3</sup> “Asylum in EU Member States: Record number of over 1.2 million first time asylum seekers registered in 2015,” EUROSTAT (4 March 2016) <http://ec.europa.eu/eurostat/documents/2995521/7203832/3-04032016-AP-EN.pdf>

<sup>4</sup> “Children in crisis: unaccompanied migrant children in the EU,” HOUSE OF LORDS, EUROPEAN UNION COMMITTEE, 2<sup>nd</sup> Report of Session 2016-17 (26 July 2016) available at <https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/34/34.pdf>.

## Child Rights

4. In 2018, 19, 700 asylum seekers applying for international protection in the Member States of the **European Union** (EU) were considered to be unaccompanied minors. This is down by more than one third compared with 2017 (31, 400) and below the 2014 level (23, 100), when the first increase was observed after remaining at a relatively constant level of around 12, 000 per year between 2008 and 2013. In 2018, at the EU level, unaccompanied minors accounted for 10% of all asylum applicants aged less than 18.
5. In 2018, a majority of unaccompanied minors were males (86%). Three quarters were aged 16 to 17 (14,800 persons), while those aged 14 to 15 accounted for 17% (3 400 persons) and those aged less than 14 for 7% (1 400 persons). Over half of asylum applicants considered to be unaccompanied minors in the **EU** in 2018 were the citizens of six countries: **Afghanistan** (16%), **Eritrea** (10%), **Pakistan** or **Syria** (both 7%) and **Guinea** or **Iraq** (both 6%).
6. In 2018, the highest number of asylum applicants considered to be unaccompanied minors was registered in **Germany** (4,100 unaccompanied minors, or 21% of all those registered in the EU Member States), followed by **Italy** (3 900, or 20%), the **United Kingdom** (2 900, or 15%) and **Greece** (2 600, or 13%). Among the Member States with more than 1,000 asylum seekers considered to be unaccompanied minors in 2018, numbers rose most compared with the previous year in the **United Kingdom** (700 more unaccompanied minors in 2018 than in 2017, or +30%) ahead of **Greece** (200 more unaccompanied minors in 2018 than in 2017, or +8%). By contrast, the largest decreases among Member States with more than 1,000 asylum seekers were recorded in **Italy** (6,100 fewer unaccompanied minors in 2018 than in 2017, or -61%) and **Germany** (5,000 fewer, or -55%).

**(This information is issued by Eurostat, the statistical office of the European Union)**

*International Human Rights Law Framework*

7. The legal framework governing the treatment of unaccompanied children when they reach the EU is underpinned by the principle, embodied in both international<sup>5</sup> and domestic law,<sup>6</sup> that the child's best interests must be taken into account as a primary consideration in any decision that concerns them.
8. The United Nations Convention on the Rights of the Child of 20 November 1989 (UNCRC), ratified by Greece (and all EU member states), further sets out universal civil, political, economic, social and cultural rights which must be made available to all children, including asylum seeking, refugee and migrant children. Governments are obliged to take measures to guarantee the exercise of these rights without discrimination.<sup>7</sup>
9. Within the context of EU law and policy, the principle of the best interests of children is intended to underpin all EU activity<sup>8</sup>. A range of legislative and policy instruments have been adopted that seek to harmonise standards and procedures across the EU in relation to the reception, identification and treatment of refugees<sup>9</sup>. All of these instruments contain

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<sup>5</sup> The Convention on the Rights of the Child of 20 November 1989 provides that in all actions concerning children (whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies) "*the best interests of the child shall be a primary consideration*," Article 3(1).

General Comment No. 14 (2013) by the Committee on the Rights of the Child, provides a framework for assessing and determining the child's best interests. Best interests' considerations should underpin all actions and decisions relating to the child and should be adapted to the individual circumstances and characteristics of the child.

UNHCR guidance further states that any decisions relating to return, resettlement or local integration must be informed by a best interests determination to ascertain (i) the most appropriate durable solution; and (ii) the right time for it to be implemented: "*If it is not possible to determine which durable solution is in the best interests of the child, and the child has been integrated into his or her community, the temporary care arrangements should be maintained and the case reviewed as soon as possible, and within one year at the latest.*"

<sup>6</sup> In the UK, the Immigration Act 2009 imposes a statutory duty on the Secretary of State, and those acting on his or her behalf, to ensure that all decisions relating to the "immigration, asylum or nationality" of children are discharged having regard to their welfare.

<sup>7</sup> In this context, the UN Committee on the Rights of the Child drew attention to the imperative need to protect children living in inappropriate conditions in Calais in its final comments addressed to France on 23 February 2016. "Concluding observations on the fifth periodic report of France," Committee on the Rights of the Child, CRC/C/FRA/CO/5 (23 Feb 2016) available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/FRA/CO/5&Lang=En](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/FRA/CO/5&Lang=En)

<sup>8</sup> Article 24 of the Charter of Fundamental Rights of the European Union.

<sup>9</sup> See for example: Council Directive 2003/9/EC of 27 January 2003, laying down minimum standards for the reception of asylum seekers (OJ L031, 6 February 2003, pp 18–25). The UK has not opted into the revised (recast) version of this instrument, Directive 2013/33.

Regulation (EU) No 604/2013 (commonly referred to as the Dublin III Regulation, recast) of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an

specific provisions on unaccompanied children consistent with international human rights standards, particularly in respect of their rights to appropriate legal advice and representation, protection, medical attention, education, accommodation and family reunification.

10. The opinion of the European Council on Refugees and Exiles is that:

*“The legal obligations relating to the treatment of unaccompanied children under EU and international law have clearly not been met by several Member States to the point that children regularly figure at the epicentre of ever-increasing sites of squalor, destitution and detention.”<sup>10</sup>*

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application for international protection lodged in one of the Member States by a third- country national or a stateless person (recast) (OJ L180/13, 29 June 2013)

Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ L326/13, 13 December 2005). The UK has not opted into the revised (recast) version of this instrument, Directive 2013/32.

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ L251, 3 October 2003, pp 12–18). The UK has not opted into this Directive.

Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ L304/12, 30 September 2004). The UK has not opted into the revised (recast) version of this instrument, Directive 2011/95.

Council Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ L348/98, 24 December 2008)

Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (OJ L212 7 August 2001 pp 12–23). The UK has not opted into this Directive.

Council Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims and replacing Council Framework Decision 2002/629/JHA (OJ L101/1, 15 April 2011). The Commission has recently published Report from the Commission to the European Parliament and The Council on the progress made in the fight against trafficking in human beings (2016) as required under Article 20 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, COM (2016) 267 final, on the implementation of this Directive.

<sup>10</sup> Written Evidence (UME0040) to the House of Lords EU Committee (3 May 2016) available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-home-affairs-subcommittee/unaccompanied-minors-in-the-eu/written/33618.html>.

11. In 2016, among the key concerns expressed by witnesses to the British House of Lords European Union Committee in their 2016 report on unaccompanied migrant children in the EU<sup>11</sup> was the lack of any systematic, prompt and child-appropriate mechanisms for the identification and registration of unaccompanied migrant children. The Committee noted that:

*“the lack of adequate identification and registration is a direct reflection of the reluctance of national authorities to take responsibility for unaccompanied migrant children. It has far-reaching consequences, including an inability to initiate promptly child protection procedures, a lack of data and the inability to trace missing children.”*<sup>12</sup>

### **Criminalisation of Rescuers**

12. Cases to consider include:

- **Hungary “Stop Soros”** legislation -criminalises any assistance offered by any person on behalf of national, international and non-governmental organisations to people applying for asylum or for a residence permit in Hungary (*the EU Commission concluded that Hungary is failing to fulfil its obligations under the EU Treaties, EU laws and the EU Charter of Fundamental Rights*).
- **Salam Kamal-Aldeen v Greece ECtHR 2019** – prosecution of founder member of NGO Team Humanity for attempted aggravated smuggling of migrants into Greece (he was acquitted).

#### *EU Legal Framework (“Stop Soros” case)*

- Criminalisation of activities in support of asylum and residence applications: criminalisation of support for asylum and residence applications and the related restraining measures curtail asylum applicants' right to communicate with and be assisted by relevant national, international and non-governmental organisations -violation of the Directive 2013/32 on common procedures for

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<sup>11</sup> “Children in crisis: unaccompanied migrant children in the EU,” House of Lords, *supra* note 4.

<sup>12</sup> *Ibid.*

granting and withdrawing international protection and Directive 2013/33 laying down standards for the reception of applicants for international protection.

- Restriction of the exercise of free movement rights of EU citizens without due regard for procedural guarantees or for the rights of the people affected -violation of arts 20 and 21(1) of the TFEU and Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States ([2004] OJ L158/77), as well as the EU Charter of Fundamental Rights.
- Non-admissibility of asylum applications: the introduction of a new non-admissibility ground for asylum applications, not provided for by EU law, is a violation of Directive 2013/32.
- EU law provides for the possibility to introduce non-admissibility grounds under the "safe third country" and the "first country of asylum" concepts, but new laws must be considered as to whether compatible Directive 2011/95 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted ([2011] OJ L337/9) and the EU Charter of Fundamental Rights.

*ECHR Legal Framework (Aldeen case)*

13. Article 3 – inhuman or degrading treatment or punishment;
14. Article 5(1)(c) – safeguard against arbitrary arrest. The competent authority must act only where there is “reasonable suspicion”.
15. Article 7 – *nullum crimen* principle. Should be construed and applied in a manner to “provide effective safeguards against arbitrary prosecution” (Kafkaris v Cyprus §137).
16. Article 8 – respect for one’s private and family life (violation considered where vessels are confiscated).

17. Article 10 – freedom of expression – is rescue also an act of political expression?

18. Article 11 – freedom of association - between NGO members.

*Duty to Rescue (relied on in Aldeen case)*

19. Art 98 UNCLOS – “[e]very State shall require the master of a ship flying its flag ....to render assistance to any person found at sea in danger of being lost n[and] to proceed ...to the rescue...if informed of their need of assistance.”

20. SOLAS Regulation V.33.1 – “information from any source” triggers the duty, regardless of nationality, status or other circumstances of the shipwrecked persons”.

*Human Trafficking*

21. Article 4 – the right not to be subjected to slavery, servitude, forced labour and human trafficking. Member states must be proactive to combat human trafficking. The procedural limb of Article 4 (requiring investigation) should prevent kneejerk criminalisation of NGOs acting in rescue. NGOs also should ensure procedures and systems are in place to minimise the exposure of workers to allegations of criminal activity.

**Achieving Best Evidence and Application of International Human Rights Law**

22. There is an urgent requirement for lawyers to assist in preparation for the first stage interview stage.

23. Lawyers and NGOs should endeavour to access specialist training in the interviewing of children and vulnerable witness in order to maximise the success of an application for

asylum/resist extradition and minimise repeat trauma for the person (see Bar Human Rights Committee of England and Wales training for UNICEF and the Nigerian Bar Association on evidence gathering techniques<sup>13</sup>).

24. Lawyers should consider the use of UN special procedure mechanisms and UN treaty bodies.

### **Practical Recommendations**

- *Protection* - Awareness raising of NGOs such as *Alarm Phone* - “hotline” which operates for boats in distress (in waters between Turkey and Greece, Spain and Morocco, and Libya, Tunisia and Italy), identifying their location and notifying their presence to the Coast Guard and to other NGOs: <https://alarmphone.org/en/> and <https://alarmphone.org/en/material/>.
- *Rights* - Distribution of information informing people in camps of their rights;
- *Implementation* – Training of lawyers on interviewing of vulnerable witnesses and also on identifying cases suitable for applications to the UN Special Procedures and/or Treaty Bodies. Training upon drafting of international human rights law applications (UN and EU).

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<sup>13</sup> This training has been led by the author in Nigeria since 2010.