

The limitations of Private International Law regarding the protection of unaccompanied migrant children in the European Union

As limitações do Direito internacional privado no tocante à proteção das crianças migrantes desacompanhadas na União Europeia

ALINE BELTRAME DE MOURA

Associate Professor of Federal University of Santa Catarina (UFSC), Brazil

Holder of a Jean Monnet Chair

Co-coordinator of a Jean Monnet Network Policy Debate “BRIDGE WATCH”, co-funded by Erasmus+ Programme of EU

Ph.D. in International Law from the Università degli Studi di Milano, Italy

ORCID ID: 000-0003-0867-3560

CARLA LERIN

Ph.D. candidate at Federal University of Santa Catarina (UFSC), Brazil

CNPQ scholarship recipient

ORCID ID: 0009-0005-8417-3949

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Abstract: This article aims to explore whether the rules of Private International Law (PIL) effectively safeguard the parental responsibility and protection of children, specifically addressing the protection of unaccompanied children migrating to the European Union (EU). The objective is to enhance the protection of the best interests of these minors. The study employs the inductive method, starting with the analysis of specific legislation and jurisprudence to derive a general premise as a conclusion. The research methodology involves bibliographic and documentary research. The findings reveal that, from a practical standpoint, PIL has limitations in its application, failing to fulfill its role in protecting the best interests of unaccompanied children in the EU.

Key Words: Private International Law, Unaccompanied children, Forced migration.

Resumo: O presente artigo tem por objetivo compreender se as normas de Direito Internacional Privado (DIPr), ao regularem a responsabilidade parental e a proteção de crianças, são capazes de garantir a tutela das crianças desacompanhadas que migram à União Europeia (UE) a fim de garantirem uma melhor proteção dos interesses superiores desses menores. Para tanto, utiliza-se o método indutivo, partindo da análise de legislações e jurisprudências específicas para obter como conclusão uma premissa geral e, quanto ao procedimento, evidencia-se a utilização da pesquisa bibliográfica e documental. Como resultado tem-se que o DIPr quando analisado do ponto de vista prático, revelou ter sua aplicação limitada, não sendo capaz de cumprir com seu papel de protetor dos interesses superiores das crianças desacompanhadas na UE.

Palavras Chave: Direito Internacional Privado, Crianças desacompanhadas, Migração forçada.

Summary: I. Introduction. II. The Hague Convention of 1996 and its application in relation to refugee and forced migrant children. 1. Parental Responsibility. 2. Protection Measures. III. European Regulation (EU) 2019/1111 and its Scope of Protecting Unaccompanied Children Seeking Asylum. 1. Parental Responsibility. 2. Protection Measures. IV. (In) Compatibilities Between the Hague and European Union Systems. 1. Unaccompanied Children External to the Common European Asylum System. V. Final Considerations.

I. Introduction

1. The increase in transnational private relations in the most diverse areas (commerce, services, movement of individuals), the globalized economy, which makes countries interdependent, and the universalization of human rights following the 1948 Universal Declaration of Human Rights, have made the Private International Law (PIL) crucial for resolving transnational conflicts. This happens because the PIL has a wide scope, as it is essentially formed by indirect rules that regulate the applicable domestic law, the competent court and the recognition of foreign decisions.

2. In practice, PIL refers to the law applicable in the specific case, which, in turn, will be applied by a local court aiming to resolve a conflict between individuals from different legal orders. This is done without ceasing to respect state sovereignty and preserving human rights, thus ensuing respect for the cultural diversity resulting from transnational relations.

3. This article, therefore, aims to comprehend whether PIL standards, by regulating parental responsibility and the protection of children, are capable of guaranteeing the protection of unaccompanied children who migrate to the European Union (EU) in order to ensure a better safeguarding of the best interests of these minors. To achieve this goal, the inductive method is employed, commencing with the analysis of specific legislation and jurisprudence to derive a general premise as a conclusion. Regarding the procedure, the use of bibliographic and documentary research is evident.

4. Therefore, the article first addresses PIL as a tool in the search for the realization of Human Rights, studying the positive and negative principles that guide the creation of connecting norms. Subsequently, the 1996 Hague Convention is analysed to comprehend which children are covered and what the main protection instruments provided therein are, capable of resolving issues related to parental responsibility and promoting protection measures concerning unaccompanied migrant children, vulnerable parties in need of protection.

5. Finally, to analyse how children who migrate from third countries to the European Union (EU) are protected, the article explores the legal relationship between the application of EU Regulations 2019/1111 and the 1996 Hague Convention, examining how this application occurs concerning unaccompanied children covered by the Common European Asylum System (CEAS) and those outside its scope.

II. The Hague Convention of 1996 and its application in relation to refugee and forced migrant children

6. Seeking the development and standardization of PIL norms, the Permanent Conference on Private International Law was established in The Hague. Through this conference, several Conventions on specific PIL contents were drawn up¹. In fact, the interest in protecting childhood was what led the Conference, after the Second World War, to approve, in 1958, the Convention Concerning the Recognition and Enforcement of Decisions Relating to Maintenance Obligations Towards Children, and in 1961,

¹ N. D. ARAUJO, "Direito Internacional Privado: Teoria e Prática Brasileira". 6º Ed., *Revolução E-Book*, Porto Alegre, 2016.

the Convention concerning the powers of authorities and the law applicable in respect of the protection of infants (1961 Hague Convention).

7. As a consequence, over the years and with the same emphasis on the protection of children, the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children was adopted in 1996 (1996 Hague Convention). The aforementioned Convention has 53 contracting States,² including members beyond the Hague Conference, demonstrating greater acceptance by the international community in comparison to the previous 1961 Hague Convention, discussed above.

8. Indeed, the 1996 Hague Convention marked significant progress, particularly by incorporating child protection within the scope of parental responsibility, aiming to introduce innovative solutions to international family law conflicts. Furthermore, the Convention innovated by not imposing any geographical limitation, in contrast to the 1961 Hague Convention, which only applied to children habitually resident in a Contracting State before the conflict occurred.³

9. Therefore, the 1996 Hague Convention recognizes all children up to 18 years old (article 2) as vulnerable parties in conflicts who, hence, deserve protection attention from the State. Moreover, its preamble emphasizes the principle of the best interests of the child as one of its main purposes, positioning it as a key concept in its text, thus demonstrating compliance with the Convention on the Rights of the Child.

10. Furthermore, these Conventions demonstrate similarities for other reasons. The Convention on the Rights of the Child mentions the necessity of creating agreements and Conventions that handle diverse scenarios involving families across borders.⁴ The 1996 Hague Convention serves as such an international instrument, introducing measures capable of enhancing the protection of these children. Consequently, the 1996 Hague Convention outlines its primary objectives in article 1, delineating the framework for its implementation.

11. The first two objectives are to determine the State in which the authorities will have jurisdiction to take protection measures regarding the child and their property, as well as determining the law applicable by these authorities in the exercise of their jurisdiction. Consequently, the aforementioned Convention only specifies the State Party in which the authorities will be competent to take protection measures, without defining the specific authority itself. This aspect is left to be regulated by the domestic law of the respective State Party.⁵

12. Additionally, the other objectives aim to “determine the law applicable to parental responsibility”, “provide for the recognition and enforcement of such measures of protection in all Contracting States” and, finally, “establish such co-operation between the authorities of the Contracting States”. Thus, it is noted that the first objective was inspired by the provision articulated in article 18 of the Convention on the Rights of the Child.⁶

² The term “Contracting States” refers to those in which the Convention has not yet entered into force, following the deposit of their instrument of ratification, accession, acceptance, or approval. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, “Status Table”. 2022. Available at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=70>.

³ P. LAGARDE. “La nouvelle convention de La Haye sur la protection des mineurs,” *Revue critique de droit international privé*, Paris, Dalloz, 1997, n° 2, 86 Ed, pp.217-402.

⁴ O. KHAZOVA. “The Significance of the HCCH 1996 Child Protection Convention in implementing the United Nations Convention on the Rights of the Child”. HCCH Approach Global Event. 19 October 2021. Available at: <https://www.hcch.net/pt/instruments/conventions/specialised-sections/child-protection/25-anniversary-child-protection>.

⁵ HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, “The application of the 1996 Hague Child Protection Convention to unaccompanied and separated children” In *The Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention – October 2017*. Prel. Doc. N.7 of July 2017. Available at: <https://www.hcch.net/en/publications-and-studies/details4/?pid=6545&dtid=57.p.08>.

⁶ P. LAGARDE, “Explanatory Report on the 1996 Hague Child Protection Convention”, n° 36. 1996. Available at: <https://www.hcch.net/en/publications-and-studies/details4/?pid=6545&dtid=57.p.08>.

13. It is observed, therefore, that the 1996 Hague Convention is imperative when the subject is the protection of children in situations of international conflict, configuring itself as an PIL instrument capable of safeguarding and guaranteeing the human rights of these children. It is worth highlighting that they are guided by the right to be a child. In this sense, it is incumbent upon the child to grow up healthy, educated, and without worries, in an environment surrounded by love, happiness, and family care. This nurturing atmosphere allows them to freely develop their personality and exercise their social role with all the necessary support and assistance.⁷

14. Keeping this in mind, it is important to understand which children fall within the scope of the 1996 Hague Convention and who are protected by its provisions. To this end, the Practical Handbook on the Operation of the 1996 Hague Child Protection Convention states that:

The children who could benefit from an implementation of the 1996 Convention include, amongst others: • those who are the subject of international parental disputes over custody or access / contact; • those who are the subject of international abduction (including in those States which are not able to join the 1980 Hague Child Abduction Convention); • those who are placed abroad in alternative care arrangements which do not come within the definition of adoption and are therefore outside the scope of the 1993 Hague Intercountry Adoption Convention; • those who are the subject of cross-border trafficking and other forms of exploitation, including sexual abuse; • those who are refugees or unaccompanied minors; • those who relocate internationally with their families.⁸

15. Thus, this research will primarily focus on the aforementioned subjects, aiming to understand the protection offered by the Convention concerning migrant children⁹, especially those who migrate unaccompanied. In its article 6, paragraph 1, the Convention mentions “refugee children and children who, due to disturbances occurring in their country, are internationally displaced”. This does not imply that the Convention excludes children who migrate regularly, such as for study or tourism. However, these cases involve distinct procedures in selecting the competent forum and applicable law, as they are not in a situation of refuge or forced displacement - points that do not constitute the main objective of this work.

16. Given this, it is worth remembering that the protection of all children, without distinction, is guaranteed by the 1989 Convention on the Rights of the Child. In its article 3, paragraph 2, it prescribes that States are responsible for “ensuring the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her”.¹⁰ In view of this, the alignment of the 1996 Hague Convention with the Convention on the Rights of the Child, recognized as the most widely accepted Human Rights Convention globally, provides the former with significant potential for acceptance by the international community.¹⁷ Furthermore, when addressing the protection of refugee and forced migrant children, the 1996 Hague Convention contributes to the practical application of the provisions of the Convention on the Rights of the Child. This convention, in its article 22, emphasizes the need for states to adopt measures ensuring that children obtain refugee status, whether accompanied or not. It also underscores the state’s duty to provide adequate humanitarian assistance.

18. Nevertheless, the 1996 Hague Convention explicitly excludes from its scope of application “decisions on the right of asylum and on immigration” (article 4, paragraph J), which may appear confusing at first glance. However, this means that the Convention is not applicable to decisions on granting

www.hcch.net/en/publications-and-studies/details4/?pid=2943. Convention on the Rights of the Child, *United Nations*, 20 November 1989. Art.18.

⁷ Convention on the Rights of the Child, *United Nations*, 20 November 1989.

⁸ HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, “Practical Handbook on the Operation of the 1996 Hague Child Protection Convention”, The Hague, Netherlands, 2014. Available at www.hcch.net. p.11.

⁹ It is worth noting that the term “migrant” in this work is used as a generic term that encompasses refugee children and migrants, whether their movement is forced or voluntary, and whether their status is irregular or legal.

¹⁰ Convention on the Rights of the Child, *United Nations*, 20 November 1989.

asylum, as these are linked to the sovereignty of States. Nonetheless, its application remains with regard to the protection of migrant children, both accompanied or unaccompanied, even pending the decision to grant asylum,¹¹ heading in the same direction as expressed in the Convention on the Rights of the Child, guaranteeing the necessary protection for the child.

19. The same is confirmed by Lagarde, who advocates that

This last sub-paragraph of Article 4 excludes from the Convention “decisions on the right of asylum and on immigration” since these are decisions which derive from the sovereign power of States. Only decisions on these matters are excluded: in other words, the granting of asylum or of a residence permit. The protection and representation of children who are applying for asylum or for a residence permit fall, to the contrary, within the scope of the Convention.¹²

20. Hence, it is identified that the 1996 Hague Convention applies to the protection of migrant children in general, yet it delineates specific regulations for refugee and forcibly displaced children internationally. Based on this it is necessary to understand other aspects outlined by the Convention that will provide the necessary support to achieve the protection of this specific group, especially with regard to refugee and forcibly displaced children who are unaccompanied and who, due to this set of factors, are extremely vulnerable and suffer countless violations of their most basic rights. As a result, the term “parental responsibility” introduced by the Convention merits significant attention.

1. Parental Responsibility

21. Indeed, it is the responsibility of parents to provide emotional, physical, and spiritual support to their child, a role that varies depending on the culture of each people. This support constitutes something unique that cannot be easily categorized. Consequently, the child requires all this assistance and care to grow and develop in a healthy way. However, in the case of unaccompanied migrant children, this essential family environment is notably absent.

22. In instances where the nuclear family is absent, other individuals, primarily family members, are expected to assume responsibility for the child’s person and property.¹³ Nevertheless, the assumption of family responsibility by members of the same family is challenging in the context of the refuge and forced migration of unaccompanied children. Despite being a priority, the search for family reunification is not always possible. Therefore, the 1996 Hague Convention, when referring to the term “parental responsibility,” extends it to “parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child.” (article 1, paragraph 2).

23. Hence, it is noted as a broad concept, questioned by several States, even though the Convention provides clarification itself, as it involves responsibility for the child’s person and property, as well as their legal representation. However, each State, according to its domestic legislation, has different provisions on how this responsibility can be assigned, acquired, delegated, exercised, reduced or termi-

¹¹ S. CORNELOUP, B. HEIDERHOFF, C. HONORATI, F. JAULT-SESEKE, T. KRUGER, C. RUPP, H. VAN LOON, J. VERHELLEN. “Children On the Move: A Private International Law Perspective”. *European Parliament’s Committee on Legal Affairs*. 2017. Available at: [https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2017\)583158](https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2017)583158).

¹² P. LAGARDE. “Explanatory Report on the 1996 Hague Child Protection Convention”, n° 36. 1996. Available at: <https://www.hcch.net/en/publications-and-studies/details4/?pid=2943>. Convention on the Rights of the Child, *United Nations*, 20 November 1989.

¹³ HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, “The application of the 1996 Hague Child Protection Convention to unaccompanied and separated children” In *The Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention – October 2017*. Prel. Doc. N.7 of July 2017. Available at: <https://www.hcch.net/en/publications-and-studies/details4/?pid=6545&dtid=57>. p.10.

nated and the 1996 Hague Convention, in its article 3(a), incorporates all these variations, expanding its scope of application.¹⁴

24. For this reason, the Convention utilizes the criterion of the child's habitual residence to determine which State will be the one in which the authorities will have jurisdiction to resolve conflicts related to loss or acquisition of parental responsibility. Consider, for instance, a hypothetical case of international abduction, where the child habitually resides in Germany with both parents and is abducted by the mother to live in France. The child's State of habitual residence before the relocation was Germany, and thus, Germany will possess jurisdiction to decide, for example, which parent will have custody (parental responsibility) of the child.

25. Therefore, generally, when parental responsibility already existed before the child moved to another state, it must remain and cannot be lost. If the child arrives in a new state accompanied by their legal guardian, the guardian's responsibility persists. However, in case of unaccompanied children, an impasse is created since the parents or guardians are not in the same state as the child, highlighting the necessity for the child's protection. Consequently, a guardian must be appointed to them, someone who can act in their interests and provide the necessary protection.¹⁵

2. Protection Measures

26. Following the same line of reasoning, the Convention provides a series of protection measures in relation to children, categorized as either of a private nature, taken by the parents, or of a public nature, undertaken by authorities. In the case of children arriving unaccompanied in a new State, as previously discussed, the responsibility must rest with the authorities.

27. Hence, upon arriving unaccompanied in a situation of forced migration or seeking refuge, the child is required to receive some immediate protection measures, which must be undertaken by the receiving State, made feasible by the 1996 Hague Convention (articles 11 to 12). Thus, administrative or judicial authorities must assume responsibility for the care of this child, registering their nationality, education, culture, language, and ethnicity. The authorities are also required to provide accommodation, education, and a safe life, protecting the child from human trafficking, sexual abuse, and violence. Furthermore, they must ensure freedom and adequate legal treatment in cases of detention.¹⁶

28. These measures are provisional and can be implemented while pursuing a permanent solution or when a long-term solution is not possible or does not align with the child's best interests. Consequently, permanent protection measures are associated with parental responsibility, encompassing the appointment of a guardian, family reunification, and placement in a family or institution.

29. In fact, the ideal outcome in most cases is family reunification. However, for refugee and forced migrant children, family reunification might take time due to a lack of information about the location of family members or documents proving kinship. Furthermore, even when located, reunion in the country of origin may not preserve the best interests of the child, as returning might expose them once

¹⁴ HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, "Practical Handbook on the Operation of the 1996 Hague Child Protection Convention", The Hague, Netherlands, 2014. Available at www.hcch.net. p. 23-24.

¹⁵ S. CORNELOUP, B. HEIDERHOFF, C. HONORATI, F. JAULT-SESEKE, T. KRUGER, C. RUPP, H. VAN LOON, J. VERHELLEN. "Children On the Move: A Private International Law Perspective". *European Parliament's Committee on Legal Affairs*. 2017. Available at: [https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2017\)583158](https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2017)583158).

¹⁶ HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, "The application of the 1996 Hague Child Protection Convention to unaccompanied and separated children" In *The Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention – October 2017*. Prel. Doc. n.7 of July 2017. Available at: <https://www.hcch.net/en/publications-and-studies/details4/?pid=6545&dtid=57>. p.08.

again to the risks that led them to leave the country. Moreover, such an act would violate the principle of *non-refoulement*.¹⁷ In this case, the solution lies in family reunification in the host country, in accordance with articles 9 and 10 of the Convention on the Rights of the Child.¹⁸

30. If reuniting the family proves impossible despite exhausting all possibilities, local integration of the child may be pursued, involving placement with a foster family, institutional care, or care through *Kafala*.¹⁹ Nonetheless, this process is exceedingly time-consuming and complicated, underscoring the necessity of appointing a guardian for the child. The guardian responsibility is overseeing all aspects of the child's civil life interests and providing assistance throughout every stage of the asylum application. Additionally, the guardian plays a crucial role in assisting the child in locating their family, if it is deemed to be in their best interest.²⁰

31. Moreover, the 1996 Hague Convention also adopts a system of international cooperation (article 1, paragraph 1, and article 30), wherein each State defines a central authority responsible for fulfilling the Convention's duties and cooperating with the central authorities of other States Parties. Such system is fundamental, as it can assist in specific cases of unaccompanied children. Dialogue between central authorities is facilitated, and the authority of the child's country of habitual residence (the country where the child lived before seeking refuge) can provide information about local laws, existing protection services, and the location of family members.²¹

32. Consequently, with the adoption of these cooperation instruments, the 1996 Hague Convention has effectively implemented another provision of article 22 of the Convention on the Rights of the Child, which emphasizes that

[...] States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.²²

¹⁷ For more details about non-refoulement principle, see: UNHCR "The 1951 Refugee Convention". Available at: <https://www.unhcr.org/about-unhcr/who-we-are/1951-refugee-convention>. "[...] non-refoulement, which asserts that a refugee should not be returned to a country where they face serious threats to their life or freedom."

¹⁸ HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, "The application of the 1996 Hague Child Protection Convention to unaccompanied and separated children" In *The Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention – October 2017*. Prel. Doc. n.7 of July 2017. Available at: <https://www.hcch.net/en/publications-and-studies/details4/?pid=6545&dtid=57>. p.08. COMMITTEE ON THE RIGHTS OF THE CHILD. "Treatment of unaccompanied and separated children outside their country of origin." *General Comment No. 6 (2005). Thirty-ninth session 17 May – 3 June 2005*. 2005. Available at: <https://www.refworld.org/docid/42dd174b4.html>. p.21.

¹⁹ HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, "The application of the 1996 Hague Child Protection Convention to unaccompanied and separated children" In *The Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention – October 2017*. Prel. Doc. N.7 of July 2017. Available at: <https://www.hcch.net/en/publications-and-studies/details4/?pid=6545&dtid=57>. p.10. For more details about *Kafala*, see: HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW "Safeguarding children's rights in national and international *Kafala*", 2008. Available at: <https://assets.hcch.net/docs/c822ef12-cea4-454d-8b32-a880d0c3d67c.pdf>. "Generally known as a person's (kafil) commitment to voluntarily take care of the maintenance, education and protection of a child deprived of his/her family (makfoul)".

²⁰ S. CORNELIUS, B. HEIDERHOFF, C. HONORATI, F. JAULT-SESEKE, T. KRUGER, C. RUPP, H. VAN LOON, J. VERHELLEN. "Children On the Move: A Private International Law Perspective". *European Parliament's Committee on Legal Affairs*. 2017. Available at: [https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2017\)583158](https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2017)583158).

²¹ HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, "The application of the 1996 Hague Child Protection Convention to unaccompanied and separated children" In *The Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention – October 2017*. Prel. Doc. N.7 of July 2017. Available at: <https://www.hcch.net/en/publications-and-studies/details4/?pid=6545&dtid=57>. p.10.

²² Convention on the Rights of the Child, *United Nations*, 20 November 1989.

33. In summary, it is observed that the mechanisms of the 1996 Hague Convention are essential for the protection of unaccompanied children in migratory situations, as they implement several measures designed to provide both temporary and permanent protection. As a result, it is noteworthy that within the EU, Regulation 2019/1111 draws great inspiration from the 1996 Hague Convention, establishing a comprehensive system for defining jurisdiction in cases involving parental responsibility.²³

III. European Regulation (EU) 2019/1111 and its Scope of Protecting Unaccompanied Children Seeking Asylum

34. In fact, all EU member states are parties to the 1996 Hague Convention. However, the EU also has its own rules for the conflict of laws, known as PIL rules, addressing similar matters to those covered by the Convention, as the Regulation 2003/2201,²⁴ which was revoked as of August 1, 2022, has been replaced by Regulation 2019/1111. The latter came into force on July 22, 2019, with direct application to the provisions of articles 92, 93, and 103. These articles deal with delegated acts and information that must be communicated to the European Commission, while for the remaining articles, the new regulation only became applicable on August 1, 2022.²⁵ Regulation 2019/1111 has redefined certain aspects covered by the old regulation, introducing specific changes that are relevant to the subject of this study.

35. Therefore, there are two key updates in Regulation 2019/1111 concerning Regulation 2003/2201 that are relevant to this research due to their relation to the protection of migrant children. The first update involves specifying that the new Regulation applies to all children up to 18 years of age, aligning with the provisions of the 1996 Hague Convention. This addresses a gap left by Regulation 2003/2201, which did not impose any age limit.²⁶

36. The second change pertains to the removal of recital 10, which was present in Regulation 2003/2201. This recital stated that “This Regulation is not intended to apply to matters relating [...] to decisions on the right of asylum and on immigration”. The removal of this provision demonstrates the consonance of Regulation 2019/1111 with the 1996 Hague Convention, since both do not apply to decisions on the right to asylum and immigration, but apply with regard to the protection of children in this situation.

37. indeed, the CJEU had already stated that all children must be protected by the Regulation, even those in a migration situation. This pronouncement was made by the CJEU in the judgment of case 435/06 of 2007. In paragraph 45, the court defined that concerning parental responsibility, Regulation 2003/2201 should be applied even in cases involving public law since the objective of the Regulation, as highlighted in paragraph 47 of the decision, is the equal treatment of all children. It is noteworthy that the judgment also clarifies, in paragraph 31, recital no. 5 of Regulation 2003/2201 (currently recital 7 of Regulation 2019/1111), stating that “to guarantee equal treatment of all children, the regulation covers all decisions on parental responsibility, including child protection measures.”²⁷

²³ EUROPEAN CIVIL LAW, “Comment Brussels II Regulation”, 2003. Available at: <http://www.europeancivilaw.com/content/brusselstwo033.htm>.

²⁴ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. *Official Journal* L 338 of 23 December 2003.

²⁵ Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast). *Official Journal* L 178, of 2 July 2019. Art.100.

²⁶ A. GONÇALVES, “The Recast of the Regulation on Jurisdiction, the Recognition and Enforcement of Decisions in Matrimonial Matters and the Matters of Parental Responsibility (Brussels IIB)”. *JusGov Research Paper*. n° 4, 2022. Available at <https://ssrn.com/abstract=4027566>.

²⁷ CJUE 27 November 2007, *Case C-435/06*, ECLI:EU:C:2007:714.

38. As a result, it is clear that both the old Regulation 2003/2201 and the current Regulation 2019/1111 are instruments of PIL used in matters related to parental responsibility, even when the subject pertains to Public International Law, particularly concerning unaccompanied children migrating to the EU. Given that, the protection of all children, without distinction, is ensured by the 1989 Convention on the Rights of the Child, as outlined in article 3, paragraph 2.

States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.²⁸

39. From this, it is evident that both Regulation 2019/1111 and the 1996 Hague Convention, grounded in the principle of the best interests of the child, must be equally applied to all children, including those in displacement. Hence, it becomes imperative to examine how the Regulation addresses parental responsibility and protection measures, particularly in the context of unaccompanied children forcibly migrating to the EU.

Parental Responsibility

40. In EU Regulation 2019/1111, parental responsibility is defined in article 2, paragraph 2, point 7, which establishes for the holder a set of rights and obligations concerning the child and their property. These rights and duties, as elucidated in Recital 18, may be attributed to the holder through a judicial decision, by virtue of full law, or by agreement in force in the Member State where the child has their habitual residence or is present. It's important to note that the criterion of presence serves as an exception, as stipulated in article 11, and is specifically applied to children in a refugee situation.

41. According to article 1, n.2 of the Regulation, parental responsibility includes

(a) rights of custody and rights of access; (b) guardianship, curatorship and similar institutions; (c) the designation and functions of any person or body having charge of the person or property of a child, or representing or assisting a child; (d) the placement of a child in institutional or foster care; (e) measures for the protection of the child relating to the administration, conservation or disposal of the property of a child.²⁹

42. In view of this, it is noted that the concept of parental responsibility introduced by Regulation 2019/1111 is broad and flexible. Despite listing the situations above as matters of parental responsibility, the list is not exhaustive and may encompass other civil matters related to parental responsibility. For instance, as seen in the *Bohez Judgment*, the CJEU addressed a case revolving around a financial penalty imposed by a Belgian Court on a custodial rights holder to ensure compliance with visitation rights. Although the financial penalty was not directly classified as a matter of parental responsibility, the CJEU understood that it was related to the protection of the child and the fulfillment of access and custody rights - matters falling under parental responsibility. for this reason, it would be covered by Regulation 2019/1111.³⁰

43. Regulation 2019/1111 also applies in civil matters involving the attribution, exercise, delegation, limitation, and termination of parental responsibility, whether exercised by an individual, institu-

²⁸ Convention on the Rights of the Child, *United Nations*, 20 November 1989. Art.18.

²⁹ Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast). *Official Journal L 178*, of 2 July 2019. Art.1 n.2.

³⁰ EUROPEAN COMMISSION, DIRECTORATE-GENERAL FOR JUSTICE AND CONSUMERS, B, MUSSEVA, "Practice guide for the application of the Brussels IIb Regulation" Publications Office of the European Union, 2023. Available at: <https://data.europa.eu/doi/10.2838/426843>.

tion, or body, such as institutions dedicated to the protection of children. The term ‘civil matter’ does not have a fixed concept, its definition and scope must be autonomous in accordance with the jurisprudence of the CJEU, the principles of Regulation 2019/1111, and the principles of the national law of each Member State, as outlined in recitals 4 and 5 of the Regulation.³¹

44. Concerning unaccompanied refugee children, Regulation 2019/1111 did not introduce positive innovations, it remained consistent with the previous Regulation. In other words, it only retained the provision of the subsidiary connection criterion of presence to resolve questions about parental responsibility.³²

45. However, the Regulation introduced a limitation in its recital 25, confining its application exclusively to unaccompanied refugee children with habitual residence in a Member State before displacement. In essence, the Regulation excluded unaccompanied children in refugee situations from third countries from its scope. These children must turn to the 1996 Hague Convention to secure their right to protection.³³

46. In short, this provision does not harm children’s rights, as the Hague Convention guarantees them. Nevertheless, it underscores that the Regulation was not focused on expanding the protection offered to unaccompanied refugee children. On the contrary, regarding this specific point, the update of the Regulation proved to be innocuous and did not bring any progress in ensuring the best interests of this group of children.

Protection Measures

47. The protection measures included in the regulation fall within the scope of the term “parental responsibility”, as seen above. These measures encompass, for example, guardianship, curatorship, the designation and functions of a person or body responsible for representing or assisting the child, and placing a child in the care of an institution or a foster family, among others.

48. In fact, the protection measures mentioned above constitute the primary strategies applicable to unaccompanied refugee children. While it is recognized that preserving the family unit is in the best interest of the child, the challenge arises when dealing with unaccompanied and often undocumented migrant children. Locating their family and reuniting them with the child becomes a formidable task in such cases.

49. Therefore, upon arrival, it is crucial to promptly identify and register the status of unaccompanied children. Given their heightened vulnerability, it becomes essential to urgently appoint a guardian who can advocate for their interests and ensure their protection. To expedite this appointment process and facilitate the efficient implementation of other protection measures related to parental responsibility, both Regulation 2019/1111 and its predecessor allow for the adoption of precautionary and provisional measures (article 15 and Recitals 30 and 31 of Regulation 2019/1111).

50. In this regard, the courts of any Member State are competent to take provisional and precautionary measures if such measures are outlined in the domestic law of that Member State, and in situations

³¹ EUROPEAN COMMISSION, DIRECTORATE-GENERAL FOR JUSTICE AND CONSUMERS, B. MUSSEVA, “Practice guide for the application of the Brussels IIb Regulation” Publications Office of the European Union, 2023. Available at: <https://data.europa.eu/doi/10.2838/426843>.

³² G. BIAGIONI, L. CARPANETO, “Children under Brussels II TER Regulation” *Yearbook of Private International Law*, v. 22, (2020/2021), pp. 139-154.

³³ G. BIAGIONI, L. CARPANETO, “Children under Brussels II TER Regulation” *Yearbook of Private International Law*, v. 22, (2020/2021), pp. 139-154.

where the case demands urgent attention, regardless of whether the court has jurisdiction over the substance of the matter. Additionally, in accordance with domestic law it is conceivable that an authority specialized in child protection or social security may also possess the competence to implement provisional measures.

51. However, the CJEU³⁴ has outlined three cumulative requirements that empower the competent court to enact provisional and precautionary measures: the measure must be provisional, must be of an urgent nature, and must be taken in relation to the child who is present in the Member State that will handle the case. The last requirement establishes a territorial connection between the Member State whose court will analyse the case. There is a single exception that permits the recognition of provisional decisions in other Member States, but this pertains solely to cases of International Child Abduction (article 27, No. 5 of the Regulation and article 13 of the 1980 Hague Convention) and not to cases involving unaccompanied refugee children.

52. According to recital 30 of the Regulation, such measures are not effective in other Member States since they are linked only to the territory of the Member State that issued the decision. The measures taken must be provided by the domestic law of the Member State that conducted the proceeding, and this Member State does not have jurisdiction over the merits of the action (article 2, paragraph 1 of the Regulation). It is worth noting that these measures are temporary in nature and conclude when the competent court that will analyse the merits of the case hears it.³⁵

53. Although Member States can only take provisional and precautionary measures as provided for in their domestic law, the UN guidelines on alternative care which aim “to enhance the implementation of the Convention on the Rights of the Child and of relevant provisions of other international instruments regarding the protection and well-being of children who are deprived of parental care or who are at risk of being so”,³⁶ allows, in provisional and urgent cases, for the child to be placed in foster care, other forms of family-based or family-like care placements, and residential care, with the latter being indicated only in exceptional cases.³⁷ This is because the child needs to live in a safe family nucleus to grow healthily and with the necessary care. For this reason, the guidelines make it clear that all these measures must be taken with the child’s best interests in mind.

54. Additionally, whenever possible, the ideal is to keep the child with their relatives or families from the same community under supervision. This arrangement ensures that the child remains part of a family unit mitigating the impact of potential further separation experiences.

55. All measures must aim to meet the basic needs of children at the same standard as the community in which they live. It is worth highlighting that all provisional and precautionary measures should be taken only while the search for the child’s family is carried out, with the ultimate goal of reuniting the child with family members.³⁸

³⁴ CJUE 27 November 2007, *Case C-435/06*, ECLI:EU:C:2007:714. CJUE 9 December 2009, *Case C-403/09*, ECLI:EU:C:2009:762. CJUE 11 July 2008, *Case C-195/08*, ECLI:EU:C:2008:406. CJUE 15 July 2010, *Case C-256/09*, ECLI:EU:C:2010:437.

³⁵ Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast). *Official Journal L* 178, of 2 July 2019. Art.15. n.2.

³⁶ Resolution 64/142 adopted by the General Assembly on 18 December 2009, Guidelines for Alternative Care, *United Nations General Assembly*, 24 February 2010, p. 2.

³⁷ Resolution 64/142 adopted by the General Assembly on 18 December 2009, Guidelines for Alternative Care, *United Nations General Assembly*, 24 February 2010, p. 6. Paragraph 29. “Foster care: situations where children are placed by a competent authority for the purpose of alternative care in the domestic environment of a family other than the children’s own family that has been selected, qualified, approved and supervised for providing such care; (iii) Other forms of family-based or family-like care placements; (iv) Residential care: care provided in any non-family-based group setting, such as places of safety for emergency care, transit centres in emergency situations, and all other short- and long-term residential care facilities, including group homes;”

³⁸ Resolution 64/142 adopted by the General Assembly on 18 December 2009, Guidelines for Alternative Care, *United Nations General Assembly*, 24 February 2010, p. 6.

56. Regulation 2019/1111 aligns with this direction, and its scope also extends to any type of placement of a child with someone who is not their parent, such as in “a foster home, or in institutional care, for example in an orphanage or a children’s home”.³⁹ This implies the possibility of the court, competent to hear the merits of the action, deciding to place the child in care of another EU Member State. To do so, it is necessary to obtain the consent of the authorities of the receiving country before issuing the placement order. The court that analysed the merits of the action will make the request for consent, which must include a report on the child, the reasons for the proposed placement or provision of care, the expected duration, and information on financing. It is important to highlight whether the child has contact with parents or family members, or elucidate the reasons for absence of such contact.

57. Therefore, it is understood that the Regulation provides provisional, precautionary, as well as long-term protection mechanisms, which can be applied to guarantee the best interests of unaccompanied children in a refugee situation. However, as seen above, Regulation 2019/1111 excludes from its scope unaccompanied children with habitual residence prior to displacement in a third country, not a member of the EU, who must benefit from the protection provided by the 1996 Hague Convention. Since the scope of this work aims to analyse the protection of unaccompanied refugee children offered through the PIL, it is important to explore the interactions between the main PIL instruments studied here and the Dublin III Regulation, the primary legal tool of the EU asylum system.

IV. (In) Compatibilities Between the Hague and European Union Systems

58. With the Lisbon Treaty, the EU established the best interests of the child as a political and legislative objective. Following this objective, there are the Dublin III Regulation, Regulation 2019/1111, and the 1996 Hague Convention. However, despite being based on the same principle of best interests of the child, the legislation concerning asylum and the legislation on PIL are addressed, in practice, as distinct domains within Law, leading to limited scholarly exploration of their interaction by doctrine.⁴⁰

59. Nonetheless, the acknowledgment of documents regarding the personal status of migrants, as well as the recognition of foreign certificates and decisions, immediately brings migration within the scope of PIL. For example, the protection of unaccompanied children under immigration law depends, firstly, on the information about personal status (proof of age, identification, location of possible family members). This information is acquired through the recognition of documents, certificates, or foreign decisions, which falls under PIL and only after this recognition will the Dublin III Regulation be applied. Thus, the Dublin III Regulation defines the state competent to analyse the asylum request of these children, based on information obtained from a third state and recognized by the EU.⁴¹

60. The Dublin III Regulation will have different applications according to each scenario. In the aforementioned situation, whether the child is indeed under 18 years old and unaware of the whereabouts of their parents, they will receive protection as an unaccompanied minor, distinct from that granted to accompanied children. Consequently, unaccompanied children without knowledge of their family’s location will rely on authorities to locate them. Until this occurs, the Member State in which the child

³⁹ EUROPEAN JUSTICE, Cross-border placement of a child including foster family: A child may need a new family either because he/she is an orphan or because their parents appear unfit to care for them. Available at: https://e-justice.europa.eu/38621/EN/crossborder_placement_of_a_child_including_foster_family. 2022. Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast). *Official Journal* L 178, of 2 July 2019. Art.82. Recitals 83 and 84.

⁴⁰ S. CORNELUP, B. HEIDERHOFF, C. HONORATI, F. JAULT-SESEKE, T. KRUGER, C. RUPP, H. VAN LOON, J. VERHELLEN. “Children On the Move: A Private International Law Perspective”. *European Parliament’s Committee on Legal Affairs*. 2017. Available at: [https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2017\)583158](https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2017)583158).

⁴¹ S. CORNELUP, B. HEIDERHOFF, C. HONORATI, F. JAULT, T. KRUGER, C. RUPP, H. VAN LOON, J. VERHELLEN. “Private International Law in a Context of Increasing International Mobility: Challenges and Potential. European Parliament’s” *Committee on Legal Affairs*. 2017. Available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583157/IPOL_STU\(2017\)583157_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583157/IPOL_STU(2017)583157_EN.pdf).

submits their first asylum application (typically the Member State of entry) will be responsible for its analysis, in accordance with article 8, paragraph 4 of the Dublin III Regulation.

61. Furthermore, in the case of multiple asylum applications in different Member States, the child should not be transferred to the initially competent Member State since it would violate their best interests. Instead, the State where they are currently situated should process their asylum request.⁴² Additionally, due to the lack of parental oversight for unaccompanied children, they will require a representative to submit the asylum request and guide them throughout the procedure. This right is guaranteed by article 6, paragraph 2 of the Dublin III Regulation.

62. It is worth noting that the 1996 Hague Convention and Regulation 2019/1111 regulate parental responsibility and provide PIL mechanisms capable of filling the gap left by the absence of the parental guardianship. As a result, this legislation establishes provisions for appointing a guardian responsible for overseeing all aspects of the unaccompanied child's interests, including their rights during the asylum application and its procedure.

63. Nevertheless, Central authorities and courts should be aware that appointing a guardian to protect the rights of the child during the asylum procedure, as outlined in the Dublin III Regulation, differs from appointing a guardian for the permanent protection of the child within the scope of civil law, as specified in Regulation 2019/1111 and the 1996 Hague Convention. This latter proves to be more comprehensive, capable of better serving the child's interests, as it covers the entire civil sphere, not solely the asylum process.⁴³

64. Another interaction between the aforementioned legislations occurs concerning the presence of the child. As previously mentioned, CEAS designates as competent, in the case of multiple asylum requests, the court in child's location to handle their asylum request. Similarly, the 1996 Hague Convention (article 6, paragraph 1) and Regulation 2019/1111 (article 11, paragraph 2) confer jurisdiction to the authorities of the state where the child is present in situation of refugee or a forced migrant. Hence, both legislations acknowledge the critical importance of the unaccompanied child's presence in preserving their best interests, accentuating the proximity and protection necessary for their well-being.

65. In this context, the case *MA, BT, DA v. Secretary of State for the Home Department* demonstrates the significance attributed by the CJEU to the physical presence of the child. In this particular situation, three migrant children, named MA, BT, and DA, submitted multiple asylum applications in different EU Member States. The first two, Eritrean nationals, initiated their initial asylum requests in Italy and later relocated to the United Kingdom, then an EU member, where they sought additional international protection. The third child, of Iraqi nationality, lodged his first request in the Netherlands and his second in the United Kingdom. All three children applied for asylum as unaccompanied minors, emphasizing that they had no family members with legal residence in the EU.⁴⁴

66. In response to this scenario, the United Kingdom contended that it did not have the competence to process such requests, arguing that the first country to receive the asylum request was competent to analyse it. Nevertheless, the children appealed the decision, leading to the suspension of the process, which was then submitted to the CJEU to seek clarification on the possibility of transferring the child to the initially competent Member State.

⁴² EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, "Children in migration in 2019". Luxembourg, Publications Office of the European Union, 2020. Available at: <https://fra.europa.eu/en/publication/2020/migrant-children>. p.18.

⁴³ S. CORNELOUP, B. HEIDERHOFF, C. HONORATI, F. JAULT-SESEKE, T. KRUGER, C. RUPP, H. VAN LOON, J. VERHELLEN. "Children On the Move: A Private International Law Perspective". *European Parliament's Committee on Legal Affairs*. 2017. Available at: [https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2017\)583158](https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2017)583158).

⁴⁴ CJUE 06 June 2013, *Case C-648/11*, ECLI:EU:C:2013:367.

67. In its decision, the CJEU understood that even when children have submitted multiple asylum requests, the Member State responsible for the analysis must be the one where the child is physically situated especially considering they are unaccompanied minors without legal family present in the EU. Therefore, it is evident that the presence of the child is crucial, not only in establishing the State responsible for processing their asylum request but also as a connecting criterion to determine the jurisdiction of the court overseeing their civil protection, particularly regarding parental responsibility. In any case, for effective interaction between the CEAS and PIL standards, national authorities responsible for the civil protection of children must cooperate with asylum and migration authorities to ensure their best interests.⁴⁵

68. In addition to the aforementioned complexities, exist certain incompatibilities between the Hague system and the EU, particularly concerning unaccompanied children migrating for reasons not covered by the 1951 United Nations Convention relating to the Status of Refugees (Convention 1951) but are still considered forced migrants. This disparity arises because the CEAS is restrictive, considering only individuals protected by the 1951 Convention as eligible candidates for asylum. An illustrative example includes children leaving their home countries due to economic or climatic reasons and, therefore, not qualifying for protection under CEAS. Furthermore, there are instances where children either do not apply for international protection or do so but receive a negative response.

69. In these scenarios, the 1996 Hague Convention and Regulation 2019/1111 continue to be applicable, unlike the Dublin III Regulation, which is only relevant for children eligible to apply for asylum or those whose asylum applications have been granted. In consequence, the Member State where the child is present retains jurisdiction to implement protective measures and address matters related of parental responsibility, in accordance with article 6, paragraph 1 of the 1996 Hague Convention and article 11, paragraph 2 of Regulation 2019/1111.

70. Children outside the scope of CEAS commonly stay on EU territory as irregular immigrants, rendering them even more vulnerable and susceptible to danger, as they cannot rely on the protection provided by CEAS.⁴⁶ Hence, PIL assumes a fundamental role, enabling the civil protection of these children in such circumstances

71. Nevertheless, for a child to receive the necessary protection through PIL instruments, it is crucial for them to be registered upon entry into the EU. Unfortunately, in most cases, this registration does not occur precisely because these children fail to meet the requirements necessary to apply for asylum, thereby falling into irregular status.⁴⁷ The scarcity of data regarding the number of unaccompanied children in the EU who are not protected by CEAS serves as evidence of this situation.

72. Having said that, a significant interconnection exists between the 1996 Hague Convention, Regulation 2019/1111, and the Dublin III Regulation, as their combined application can strengthen the protection afforded to unaccompanied children. However, uncertainties remain regarding the scope of PIL in safeguarding unaccompanied children, not only those outside the purview of CEAS but also those within its protection.

⁴⁵ S. CORNELUP, B. HEIDERHOFF, C. HONORATI, F. JAULT, T. KRUGER, C. RUPP, H. VAN LOON, J. VERHELLEN. "Private International Law in a Context of Increasing International Mobility: Challenges and Potential. European Parliament's" *Committee on Legal Affairs*. 2017. Available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583157/IPOL_STU\(2017\)583157_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583157/IPOL_STU(2017)583157_EN.pdf).

⁴⁶ I. IUSMEN, "Whose Children? Protecting Unaccompanied Migrant Children in Europe: A Case of Diffused Responsibility?" In *The International Journal of Children's Rights*. n. 28. 2020. pp. 925-949. Available at https://brill.com/view/journals/chil/28/4/article-p925_925.xml?ebody=abstract%2Fexcerpt. p. 930.

⁴⁷ EUROPEAN COMMISSION. "The protection of children in migration. Communication from the Commission to the European Parliament and the Council", Brussels, 2017. Available at: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX-%3A52017DC0211>. p.06.

1. Unaccompanied Children External to the Common European Asylum System

73. Children entering the EU often refrain from applying for asylum or face denial of their applications due to not meeting the criteria set by the CEAS. Although their migration was forced, does not align with the parameters of the 1951 Convention. Instead, it is often driven by environmental factors such as drought, soil erosion, deforestation, or economic conditions like extreme poverty, leaving individuals with no alternative but to depart their home countries and seek refuge in other regions.⁴⁸

74. In reality, the 1951 Convention exclusively addresses war refugees, thereby excluding other forms of forced migration beyond its protective scope.⁴⁹ Despite the increasing influx of environmental and economic refugees, limited action has been taken by the UN and States since there are still no binding international legal norms that extend the traditional definition of refugees outlined in the 1951 Convention.⁵⁰ In these circumstances, a considerable number of migrant children residing irregularly within the EU find themselves outside the purview of Member States' legislation, devoid of institutional protection. This lack of coverage restricts their access to education, health, and security, and further complicates efforts to regularize their status.⁵¹

75. It is noteworthy that the fourth section of the ECtHR, in the case of *Abdullahi Elmi & Aweys Abubakar v. Malta*, emphasized that, concerning minors, “with more specific reference to minors, the Court has established that it is important to bear in mind that the child’s extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant”.⁵² Nonetheless, the same decision underscored the necessity for the child to express a willingness to request international protection to avail themselves of due humanitarian protection.⁵³

76. Another significant judgment illustrating the situation of irregular children, those outside CEAS, it is the case of *Khan v. France*, heard by the fifth section of the ECtHR. In this case, an eleven-year-old Afghan boy left his country to seek refuge in the United Kingdom. On his journey, he joined a group of migrants and arrived at an improvised shelter in Calais, aiming to enter in England. Unfortunately, the Calais shelter was destroyed due to inhumane living conditions, leaving everyone, including the Afghan boy, homeless. Subsequently, he found himself living in even more deplorable conditions than those experienced in Calais.⁵⁴

77. He, along with three hundred other unaccompanied children, was appointed a provisional guardian to apply for asylum on their behalf. However, the court order had no practical effect, and the minor continued to live without shelter and lacked access to essential survival resources. As a result, he resorted to entering England irregularly, where he was eventually accommodated in a hostel.

78. In this case, the Court found a violation of article 3 of the European Convention on Human Rights, as the child was subjected to inhuman and degrading treatment. However, it is evident that

⁴⁸ P. G. NOSCHANG, J. F. BICA, “Mudanças climáticas e consequências humanas: os migrantes ambientais” In A. BELTRAME DE MOURA; L. DAL RI. (Org.). *Migração e Cidadania: Uma releitura de Institutos Jurídicos Clássicos a Partir do Modelo Europeu*, Itajaí, Editora Univali, v. 1, 2018, pp. 134-148.

⁴⁹ P. G. NOSCHANG, J. F. BICA, “Mudanças climáticas e consequências humanas: os migrantes ambientais” In A. BELTRAME DE MOURA; L. DAL RI. (Org.). *Migração e Cidadania: Uma releitura de Institutos Jurídicos Clássicos a Partir do Modelo Europeu*, Itajaí, Editora Univali, v. 1, 2018, pp. 134-148.

⁵⁰ T. C. F. MONT’ ALVERNE, R. A. NOGUEIRA E FRACO, “Direito internacional dos refugiados e refugiados ambientais: uma breve análise da evolução dos direitos humanos”. *Revista de Estudos e Pesquisas Avançadas do Terceiro Setor*: Brasília, v. 3, nº 2, 2016, pp. 200-215, 2016.

⁵¹ J. BHABHA, “Child Migration and Human Rights in a Global Age”. 1Ed, Princeton: Princeton University Press, 2014. p.20.

⁵² ECtHR, *Application nos. 25794/13 & 28151/13, Abdullahi Elmi & Aweys Abubakar v. Malta*, judgement 22 November 2016, para. 103.

⁵³ For more details, see: ECtHR, *Application nos. 39472/07 and 39474/07, Mubilanzila Mayeka and Kaniki Mitunga, and Popov v. France*, judgement in 19 January 2012.

⁵⁴ ECtHR, *Application no. 12267/16, Khan v. France*, judgement 28 February 2019.

unaccompanied children face considerable difficulties in entering CEAS. As illustrated in the aforementioned case, although a child demonstrates the intention to apply for asylum and has a guardian, the necessary measures for asylum application and placement in a safe environment were not promptly executed. Therefore, it is clear that the vulnerability experienced by unaccompanied children outside CEAS is highly delicate and requires urgent attention from European authorities.

79. In instances involving unaccompanied children in irregular status, Directive No. 2008/115 applies, establishing common standards and procedures in Member States for the return of third-country nationals in irregular situation. This directive allows Member States to initiate the return of the unaccompanied child, observing protective requirements provided. These include the assistance of organizations ensuring their best interests (article 10, paragraph 1) and the return of the child to “to a member of his or her family, a nominated guardian or adequate reception facilities in the State of return” (article 10, paragraph 2).⁵⁵

80. Despite the Directive, some countries, including Belgium, Greece, Italy, Malta, Hungary, Austria, and Cyprus, have national legislation prohibiting the forced return of children due to their age.⁵⁶ Conversely, Member States such as Croatia, Finland, the Netherlands, and Sweden permit the forced return of unaccompanied children. Germany, for instance, has practiced this by transferring children to their parents or social care along the Balkan route. In contrast, France has adopted a new law that allows the return of unaccompanied children before any court decision places them under state responsibility. It is important to note, however, that many of these returns are voluntary.⁵⁷

81. According to Bhabha, the return of unaccompanied children, even when in an irregular situation in the country, could lead to ‘re-trafficking.’ since children in such circumstances often use irregular routes to migrate due to challenging conditions in their country of origin. Consequently, upon returning, they may confront the same adverse conditions that compelled them to abandon everything in pursuit of a new life. This situation may drive them to migrate once more, potentially through the same irregular routes, often controlled by migrant smugglers.⁵⁸

82. Throughout this chapter, it becomes evident that migrant children are inherently vulnerable. Unaccompanied migrant children face a double layer of vulnerability, and those who remain in the EU as irregular immigrants, without the protection of CEAS, face a triple vulnerability. This situation aligns with Bhabha’s critique of the violation of the principle of non-discrimination as stipulated in the Convention on the Rights of the Child. The EU’s differential treatment of unaccompanied children based on their coverage under CEAS could potentially violate article 2 of the Convention on the Rights of the Child.

83. Moreover, article 2 of the Convention on the Rights of the Child could also be infringed by the disparate treatment that the EU permits between national children of Member States (non-migrants) and migrant children. This distinction is evident when comparing how national children, migrant children with international protection (refugees or those with subsidiary protection), and irregular immigrant children (without international protection) are treated in terms of access to fundamental rights like education, health, and security. Additionally, another form of discriminatory practice is the potential

⁵⁵ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. *Official Journal*. L 348 of 24 of December 2008.

⁵⁶ S. CORNELOUP, B. HEIDERHOFF, C. HONORATI, F. JAULT-SESEKE, T. KRUGER, C. RUPP, H. VAN LOON, J. VERHELLEN. “Children On the Move: A Private International Law Perspective”. *European Parliament’s Committee on Legal Affairs*. 2017. Available at: [https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2017\)583158](https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2017)583158).

⁵⁷ EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, “Children in migration in 2019”. Luxembourg, Publications Office of the European Union, 2020. Available at: <https://fra.europa.eu/en/publication/2020/migrant-children>. p.20.

⁵⁸ J. BHABHA, “Legal obligations of States with regard to child migrant deaths and disappearances” In INTERNATIONAL ORGANIZATION FOR MIGRATION. (Org.). *Fatal Journeys: Missing Migrant Children*. v. 4, Switzerland, International Organization for Migration, 2019. Available at <https://publications.iom.int/books/fatal-journeys-volume-4-missing-migrant-children>. p.77. J. BHABHA, “Child Migration and Human Rights in a Global Age”. 1Ed, Princeton: Princeton University Press, 2014. p.22.

detention of migrant children, regardless of their international protection status, a measure not imposed on national children.⁵⁹

84. Thus, it becomes apparent that the EU's migration policy and asylum system harbour presents substantial deficiencies, placing the well-being of unaccompanied migrant children at considerable risk. Given the vulnerability of this group, the application of PIL standards is deemed necessary, functioning as a pivotal source of protection for these children.

85. Both the 1996 Hague Convention and Regulations 2019/1111 offer immediate and temporary protection measures, along with the provision for the appointment of a guardian vested with parental responsibility over the child. Notably, these protective measures make no differentiation between children covered by CEAS and those who are not.

86. Hence, the application of the aforementioned PIL standards emerges as a potential solution to the lack of protection faced by unaccompanied children outside CEAS. Despite their importance, the documents from humanitarian organizations and the doctrine utilized in this research failed to yield any practical cases demonstrating the application of the 1996 Hague Convention and Regulations 2019/1111 in safeguarding unaccompanied children not covered by the EU's asylum policy. This leads to the conclusion that, although the significance of PIL instruments for the protection of all unaccompanied children, exists a gap between legal provisions and their practical application by the courts, as evidenced by the absence of concrete cases in this context.

V. Final Considerations

87. In summary, it is apparent that the PIL also acts as an instrument to enforce rights, as its connection criteria, principles, and exception clauses ensure a close alignment between the individual, the applicable law, and the competent court. Furthermore, in terms of migration policy, the PIL can be applied to safeguard the civil rights of children who migrate unaccompanied and forcibly. In other words, PIL theoretically possesses the capability to complement the protection offered to unaccompanied children in refugee or irregular migration situations, extending protection regardless of the child's legal status in relation to the asylum system.

88. This is more evident in the EU, where PIL has a stronger influence. In this context, the 1996 Hague Convention and Regulation 2019/1111 present the possibility of appointing a guardian to act as a parental figure for the child. They also provide protective measures that can be promptly implemented and are of a temporary nature to address the immediate needs of children, all while referencing the applicable law and the competent court.

89. As a consequence, upon entering the EU unaccompanied, children are entitled to civil protection, extending beyond the safeguards offered by CEAS. This encompassing protection applies to all refugee and internationally displaced children affected by disturbances in their home countries, even if they are considered irregular immigrants within the EU. Such protection can be implemented through immediate, temporary actions mandated by the authorities in the child's current location, as well as through permanent measures determined based on the child's habitual residence or mere presence.

90. Indeed, permanent and temporary measures are intricately tied to the definition of parental responsibility. The competent authority must evaluate, based on its determination, whether the unac-

⁵⁹ J. BHABHA, "Legal obligations of States with regard to child migrant deaths and disappearances" In INTERNATIONAL ORGANIZATION FOR MIGRATION. (Org.). *Fatal Journeys: Missing Migrant Children*. v. 4, Switzerland, International Organization for Migration, 2019. Available at <https://publications.iom.int/books/fatal-journeys-volume-4-missing-migrant-children>. p.74.

accompanied child has a parental guardian capable of overseeing their civil interests, commonly their parents. However, the challenge emerges as children in this situation often have limited knowledge about the whereabouts of their parents, and finding a family member with legal residence in the EU, who is willing and able to assume civil responsibility for them, is a rare occurrence.

91. In such instances, in accordance with the forum's legal framework, the competent authorities typically suspend parental responsibility, previously held by a family member, and transfer it to a guardian capable of prioritizing the child's best interests. Consequently, this appointed guardian assumes the responsibility of guiding the child through the asylum application process, arranging secure shelter, providing access to education, nutritious food, physical and psychological healthcare, and aiding in the search for family members.

92. Nevertheless, as discussed throughout this article, there are numerous cases where unaccompanied children do not receive the necessary civil protection, finding themselves in shelters that fail to ensure their fundamental rights. In particular, for refugee children without a legal guardian in their company, it becomes apparent that Regulation 2019/1111 did not establish specific provisions for their protection. Instead, it delineated rules that restrict its application solely to unaccompanied children with habitual residence prior to displacement in an EU Member State. As a result, refugee children from other countries fall within the scope of the 1996 Hague Convention.

93. Hence, the overall count of children encompassed by the Regulation remains minimal, given that the majority of arrivals on EU territory are from third countries, requiring the protection offered by PIL even before establishing habitual residence in the EU. As Regulation 2019/1111 underwent recent reformulation, there was an opportunity to address the needs of unaccompanied refugee children more comprehensively. Specifically, the regulation could have included a separate chapter with specific rules for their protection, rather than persisting in categorizing them as exceptions.

94. Moreover, despite the assurance of rights for unaccompanied children from third countries under the 1996 Hague Convention, it has been observed that the practical application of this instrument is limited. In practical terms, PIL has demonstrated an inability to fulfil its role in safeguarding the best interests of children. This deficiency exposes them to more vulnerable situations, as exemplified in the case law presented throughout this article.